

Chapter 200

1989 EDITION

Disadvantaged, Minority, Women and Emerging Small Business Enterprises

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CROSS REFERENCES

- Administrative procedures, Ch 183
- Discrimination against minority, women and emerging small business enterprises by public contractors prohibited, 279.111
- Personnel rules, Ch. 240
- State agencies generally, Ch. 182

MISCELLANEOUS MATTERS

200.005 Definitions. As used in ORS 200.005 to 200.075 and 279.059:

(1) "Disadvantaged business enterprise" means a small business concern which is at least 51 percent owned by one or more socially and economically disadvantaged individuals, or, in the case of any corporation, at least 51 percent of the stock of which is owned by one or more socially and economically disadvantaged individuals and whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

(2) "Economically disadvantaged individual" means an individual who is socially disadvantaged and whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to another in the same business area who is not socially disadvantaged.

(3) "Emerging small business" means:

(a) A business with its principal place of business located in this state;

(b) A business with average annual gross receipts over the last three years not exceeding \$2 million for construction firms and \$700,000 for nonconstruction firms;

(c) A business which has fewer than 20 employees;

(d) An independent business; and

(e) A business properly licensed and legally registered in this state.

(4) "Emerging small business" does not mean a subsidiary or parent company belonging to a group of firms which are owned and controlled by the same individuals which have aggregate annual gross receipts in excess of \$2 million for construction or \$700,000 for nonconstruction firms over the last three years.

(5) A business may be certified as an emerging small business for no more than seven years.

(6) "Minority or women business enterprise" means a small business concern which is at least 51 percent owned by one or more minorities or women, or in the case of a corporation, at least 51 percent of the stock of which is owned by one or more minorities or women, and whose management and daily business operations are controlled by one or more of such individuals.

(7) "Minority individual" means a person who is a citizen or lawful permanent resident of the United States, who is:

(a) Black who is a person having origins in any of the black racial groups of Africa;

(b) Hispanic who is a person of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin, regardless of race;

(c) Asian American who is a person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent or the Pacific Islands;

(d) Portuguese who is a person of Portuguese, Brazilian or other Portuguese culture or origin, regardless of race;

(e) American Indian or Alaskan Native who is a person having origins in any of the original peoples of North America; or

(f) Member of another group, or another individual who is socially and economically disadvantaged as determined by the Advocate for Minority, Women and Emerging Small Businesses.

(8) "Small business concern" means a small business as defined by the United States Small Business Administration per CFR 121, as amended.

(9) "Socially disadvantaged individual" means an individual who has been subjected to racial or ethnic prejudice or cultural bias, without regard to individual qualities, because of the individual's identity as a member of a group.

(10) "Woman" means a person of the female sex who is a citizen or lawful permanent resident of the United States.

(11) "Responsible bidder" means one who, in the determination of the office of the Advocate for Minority, Women and Emerging Small Businesses, has undertaken both a policy and practice of actively pursuing participation by minority and women businesses in all bids, both public and private, submitted by such bidder. [1987 c 893 §2; 1989 c.1043 §1]

200.015 Legislative findings. (1) The Legislative Assembly supports the aspirations of minorities, women and emerging small businesses to enter the mainstream of Oregon social, political and economic life.

(2) The Legislative Assembly finds:

(a) The opportunity for full participation in our free enterprise system by minorities, women and emerging small businesses is essential;

(b) Greater economic opportunity for minorities, women and emerging small businesses is essential;

(c) Review of public programs to remedy historical patterns of exclusion of and discrimination against racial or ethnic groups and women is needed;

(d) Public policies and programs to eliminate the effects of long-term, open and pervasive exclusion of and discrimination

against minorities and women from the business sector, including increased opportunities to integrate minorities and women into the full economic life of the community should be reviewed; and

(e) In cooperation with the private sector, the affected populations, interested groups and appropriate governmental entities, a program of review should be established to recommend remedies for the unfortunate effects of social, political and economic inequity that still exist.

(3) Women and minorities are rebuttably presumed to be:

(a) Economically disadvantaged.

(b) Socially disadvantaged. [1987 c.893 §3; 1989 c.1043 §2]

200.025 Advocate for Minority, Women and Emerging Small Business; duties. (1) There is created in the Office of the Governor the Advocate for Minority, Women and Emerging Small Business who shall be appointed by the Governor.

(2) The Advocate for Minority, Women and Emerging Small Business shall:

(a) Advise the Governor on activities and initiatives that may promote the economic integration of minorities, women and emerging small businesses into the business sector;

(b) Provide assistance and information to minority, women and emerging small businesses;

(c) Assist in the development and implementation of an aggressive strategy for this state, based on research and monitoring, that encourages participation of minorities, women and emerging small businesses in the state's economy;

(d) Make recommendations to the Governor on the research, development and implementation of the plan for the involvement of disadvantaged and minority groups and emerging small businesses in all state programs;

(e) Maintain, in cooperation with the Executive Department, an Oregon Opportunity Register and Clearinghouse for information on public agency and other contract solicitations for professional services, supplies and services and other bid opportunities, in consultation with the State Board of Higher Education, the Departments of Transportation and General Services and other entities;

(f) Monitor the certification and compliance program for disadvantaged, minority, women and emerging small businesses under ORS 279.059;

(g) Investigate, in cooperation with the Executive Department, complaints and possible abuses of the certification program;

(h) Assist in the promotion and coordination of plans, programs and operations of state government that strengthen minority and women participation in the economic life of this state;

(i) Prepare an annual report to the Governor and Legislative Assembly on the status of minorities and women in the marketplace, accomplishments and resolutions of issues of concern to minority and women enterprises, and recommendations for executive and legislative actions; and

(j) Carry out other duties that may be assigned by the Governor. [1987 c.893 §4, 1989 c.1043 §3]

Note: The amendment to 200.025 by section 7, chapter 1057, Oregon Laws 1989, is repealed on June 30, 1991. See section 10, chapter 1057, Oregon Laws 1989. 200.025, as amended, is set forth for the user's convenience.

200.025. (1) There is created in the Office of the Governor the Advocate for Minority, Women and Emerging Small Business who shall be appointed by the Governor.

(2) The Advocate for Minority, Women and Emerging Small Business shall:

(a) Advise the Governor on activities and initiatives that may promote the economic integration of minorities, women and emerging small businesses into the business sector;

(b) Provide assistance and information to minority and women businesses;

(c) Assist in the development and implementation of an aggressive strategy for this state, based on research and monitoring, that encourages participation of minorities, women and emerging small businesses in the state's economy;

(d) Make recommendations to the Governor on the research, development and implementation of the plan for the involvement of disadvantaged and minority groups and emerging small businesses in all state programs;

(e) Maintain, in cooperation with the Executive Department, an Oregon Opportunity Register and Clearinghouse for information on public agency and other contract solicitations for professional services, supplies and services and other bid opportunities, in consultation with the State Board of Higher Education, the Departments of Transportation and General Services and other entities;

(f) Monitor the certification and compliance program for disadvantaged, minority, women and emerging small businesses under ORS 279.059;

(g) Investigate, in cooperation with the Executive Department, complaints and possible abuses of the certification program;

(h) Assist in the promotion and coordination of plans, programs and operations of state government that strengthen minority and women participation in the economic life of this state;

(i) Prepare an annual report to the Governor and Legislative Assembly on the status of minorities and women in the marketplace, accomplishments and resolutions of issues of concern to minority and women enterprises, and recommendations for executive and legislative actions,

(j) Encourage the private sector to provide assistance to emerging small businesses in overcoming barriers to participation in state public improvement projects; and

(k) Carry out other duties that may be assigned by the Governor.

200.035 When state agency to notify advocate of solicitations. All state agencies shall provide timely notice of all contract and bid request solicitations in excess of \$1,000 to the Advocate for Minority, Women and Emerging Small Business and the Executive Department for the Oregon Opportunity Register and Clearinghouse. [1987 c 893 §5]

200.045 Standards for good faith efforts to meet contract requirements; standards for establishing bidder's responsibility. (1) To determine whether a bidder that has failed to meet emerging small business enterprise contract requirements, as described in ORS 279.059, may be awarded the contract, the public contracting agency must decide whether the bidder's efforts to obtain participation by emerging small business enterprises were good faith efforts to meet the requirements.

(2) Performing all of the following actions by a bidder constitutes a rebuttable presumption that the bidder has made a good faith effort to satisfy the subcontracting requirement for emerging small businesses. It shall be a rebuttable presumption that the bidder has not made a good faith effort if the bidder has not acted consistently with such actions. Efforts that are merely superficial are not good faith efforts:

(a) The bidder attended any presolicitation or prebid meetings that were scheduled by the contracting agency to inform emerging small business enterprises of contracting and subcontracting or material supply opportunities available on the project;

(b) The bidder identified and selected specific economically feasible units of the project to be performed by emerging small business enterprises in order to increase the likelihood of participation by such enterprises;

(c) The bidder advertised in general circulation, trade association, minority and trade oriented, women-focus publications, if any, concerning the subcontracting or material supply opportunities;

(d) The bidder provided written notice to a reasonable number of specific emerging small business enterprises, identified from a list of certified emerging small business enterprises provided or maintained by the Executive Department for the selected subcontracting or material supply work, in sufficient time to allow the enterprises to participate effectively;

(e) The bidder followed up initial solicitations of interest by contacting the enterprises to determine with certainty whether the enterprises were interested;

(f) The bidder provided interested emerging small business enterprises with adequate information about the plans, specifications and requirements for the selected subcontracting or material supply work;

(g) The bidder negotiated in good faith with the enterprises, and did not without justifiable reason reject as unsatisfactory bids prepared by any emerging small business enterprises;

(h) Where applicable, the bidder advised and made efforts to assist interested emerging small business enterprises in obtaining bonding, lines of credit or insurance required by the contracting agency or contractor;

(i) The bidder's efforts to obtain emerging small business enterprise participation were reasonably expected to produce a level of participation sufficient to meet the goals or requirement of the public contracting agency; and

(j) The bidder used the services of minority community organizations, minority contractor groups, local, state and federal minority business assistance offices and other organizations identified by the Advocate for Minority, Women and Emerging Small Business that provide assistance in the recruitment and placement of emerging small business enterprises.

(3) To determine whether a bidder is a responsible bidder, the performance of all the following actions constitutes a rebuttable presumption that the bidder is responsible. It shall be a rebuttable presumption that the bidder is not responsible if the bidder has not acted consistently with the actions described in this subsection. Efforts that are merely superficial are not good faith efforts.

(a) The bidder attended any presolicitation or prebid meetings that were scheduled by the contracting agency to inform minority or women business enterprises of contracting and subcontracting or material supply opportunities available on the project;

(b) The bidder identified and selected specific economically feasible units of the project to be performed by minority or women business enterprises in order to increase the likelihood of participation by such enterprises;

(c) The bidder advertised in general circulation, trade association, minority and trade oriented, women-focus publications, if any, concerning the subcontracting or material supply opportunities;

(d) The bidder provided written notice to a reasonable number of specific minority or women business enterprises, identified from a list of certified minority or women business enterprises provided or maintained by the Executive Department for the selected subcontracting or material supply work, in sufficient time to allow the enterprises to participate effectively;

(e) The bidder followed up initial solicitations of interest by contacting the enterprises to determine with certainty whether the enterprises were interested;

(f) The bidder provided interested minority or women business enterprises with adequate information about the plans, specifications and requirements for the selected subcontracting or material supply work;

(g) The bidder negotiated in good faith with interested, capable and competitive minority or women business enterprises submitting bids;

(h) Where applicable, the bidder advised and made efforts to assist interested minority or women business enterprises in obtaining bonding, lines of credit or insurance required by the contracting agency or contractor;

(i) The bidder's efforts to obtain minority or women business enterprise participation were reasonably expected to produce a level of participation sufficient to meet the goals of the public contracting agency; and

(j) The bidder used the services of minority community organizations, minority contractor groups, local, state and federal minority business assistance offices and other organizations identified by the Advocate for Minority, Women and Emerging Small Business that provide assistance in the recruitment and placement of disadvantaged, minority or women business enterprises. (1987 c.893 §7; 1989 c.1043 §8)

200.055 Certification of disadvantaged, minority, women or emerging small business enterprises; review; appeal. (1) Any disadvantaged, minority, women or emerging small business enterprise is entitled to be certified as such upon application to the Executive Department. If the application is approved by the department, the department shall certify the applicant as a disadvantaged, minority, women or emerging small business enterprise. The enterprise shall be considered so certified by any public contracting agency.

(2) In consultation with the State Board of Higher Education, the Departments of General Services and Transportation, and with the approval of the Advocate for Minority, Women and Emerging Small Business, the Executive Department by rule shall

adopt a uniform standard form and procedure designed to provide complete documentation that a business enterprise is certified as a disadvantaged, minority, women or emerging small business enterprise. The Executive Department shall compile and make available upon request a list of certified disadvantaged, minority, women or emerging small business enterprises.

(3) Any business enterprise that is refused certification as a disadvantaged business enterprise or denied recertification as such or whose certification is revoked may request an informal review by a multimember panel appointed by the Director of the Executive Department. Appeal of the decision of the panel may be made to the United States Department of Transportation.

(4) Any business enterprise that is refused certification as a minority, women or emerging small business enterprise or has its certification revoked may request a contested case hearing as provided in ORS 183.310 to 183.550.

(5) The Executive Department shall be the sole agency authorized to certify enterprises as disadvantaged, minority, women or emerging small business enterprises eligible to perform on public contracts in this state.

(6) The Executive Department by rule may establish a fee not to exceed \$100 for a copy of the list of certified disadvantaged, minority, women and emerging small business enterprises and may assess state agencies for services under ORS 200.005 to 200.085 and 279.059.

(7) The Department of Transportation may collect a fee, not to exceed \$200, from a bidder upon bidder prequalifications to cover the costs of the Executive Department in administering ORS 200.005 to 200.085 and 279.059. The Department of Transportation shall transfer such fees to the credit of the account established under subsection (8) of this section.

(8) The Executive Department shall establish a special account in which to deposit fees and assessments. The special account is continuously appropriated to the Executive Department to meet its expenses in administering ORS 200.005 to 200.085 and 279.059. (1987 c.893 §8, 1989 c.1043 §4)

200.065 Fraudulent conduct prohibited; sanctions. (1) It shall be unlawful for any person fraudulently to obtain or retain or attempt to obtain or retain or to aid another person fraudulently to obtain or retain or attempt to obtain or retain certification as a disadvantaged, minority, women or emerging small business enterprise.

(2) It shall be unlawful knowingly to make a false claim that any person is quali-

fied for certification or is certified under ORS 200.055 for the purpose of gaining a contract or subcontract or other benefit.

(3) The public contracting agency may withhold payment, suspend or terminate the contract and may impose on any person a civil penalty not to exceed 10 percent of the contract or subcontract price or \$5,000, whichever is less, for each violation of subsection (1) or (2) of this section. The penalty shall be paid to the office of the Advocate for Minority, Women and Emerging Small Business.

(4) The Executive Department or an affected public contracting agency shall investigate any complaint that a person has violated subsection (1) or (2) of this section. In investigating such a complaint, the Executive Department or an affected public contracting agency may require any additional information, administer oaths, take depositions and issue subpoenas to compel the attendance of witnesses and the production of books, papers, records, memoranda or other information necessary to carry out its duties. If any person fails to comply with any subpoena issued under this subsection or refuses to testify on any matter on which a person may lawfully be interrogated, the procedure provided in ORS 183.440 shall be followed to compel compliance.

(5) An affected public contracting agency or the Executive Department may disqualify any person found to have violated subsection (1) or (2) of this section or who admits to such violation under oath during the course of an investigation from bidding or participating in any public contract for a period of time specified by the agency or department, not to exceed three years. Any contracting agency that has notice of the finding of the fraudulent certification may also disqualify the person from bidding on or participating in any public contract. [1987 c.893 §9, 1989 c.1043 §5]

200.075 Prohibited conduct; suspension of certificate. (1) Any bidder or contractor or subcontractor on a public contract that knowingly commits any of the following acts, after notice and opportunity for hearing under ORS 279.043, shall have its right to bid on or participate in any public contract suspended for up to 90 days for a first violation and up to one year for a subsequent violation:

(a) Enters into any agreement representing that a disadvantaged, minority, women or emerging small business enterprise certified pursuant to ORS 200.055 will be performing work or supplying materials under the public improvement contract without the knowledge and consent of the disadvantaged,

minority, women or emerging small business enterprise.

(b) Exercises management and decision making control over the internal operations of any certified disadvantaged, minority, women or emerging small business enterprise. As used in this paragraph, "internal operations" does not include normal scheduling, coordination, execution or performance as a subcontractor on a public contract.

(c) Uses a disadvantaged, minority, women or emerging small business enterprise to perform a subcontract or supply material under a public improvement contract to meet an established goal or requirement when the disadvantaged, minority, women or emerging small business enterprise does not perform a commercially useful function in carrying out its responsibilities and obligations under the contract.

(2) Any disadvantaged, minority, women or emerging small business enterprise certified under ORS 200.055 that allows or commits any of the following acts shall have its certification suspended for up to 90 days for the first violation or up to one year for a subsequent violation:

(a) Use of the firm's name to meet a disadvantaged, minority, women or emerging small business enterprise goal or requirement on a public contract when the firm does not in fact intend to or does not actually perform the work under the subcontract or purchase and supply material to the project under a material supply contract.

(b) Use of any personnel of an uncertified business to operate, manage or otherwise control the disadvantaged, minority, women or emerging small business enterprise.

(c) Failure to perform a commercially useful function in carrying out its functions under a subcontract or a material supply contract entered into with a contractor or subcontractor on a public contract when represented as a certified business to meet an established goal or requirement.

(3) For the purpose of this section "commercially useful function" means the actual performance of a function or service by the business for which there is a demand in the marketplace, and for which the business receives payment not disproportionate to the work performed or in conformance with industry standards. Acting as a broker to provide for the performance of work by others does not constitute a "commercially useful function." [1987 c.893 §11; 1989 c.1043 §6]

200.085 [1987 c.893 §1; repealed by 1989 c.1043 §14]

200.090 Public agencies to pursue policy of providing opportunities. Public agencies shall aggressively pursue a policy

of providing opportunities for available contracts to emerging small businesses and shall cooperate with the Advocate for Minority, Women and Emerging Small Business to de-

termine the best means by which to make such opportunities available. [1989 c.1043 §10]
