425 CMR: SUPPLIER DIVERSITY OFFICE

425 CMR 2.00: CERTIFICATION

Section

2.01: Title and Applicability
2.02: Definitions; Certification; Certification Criteria; Certification Service/Product Category and Description; Recertification and Certification Renewal; Duty to Cooperate and Requirements to Remain in Good Standing; SDO Appeal Board

2.01: Title and Applicability

425 CMR 2.00 shall govern the process of certification of firms by the Supplier Diversity Office (SDO), formerly known as the State Office of Minority and Women Business Assistance (SOMWBA), an executive agency within the Executive Office for Administration and Finance (A&F). Such certifications shall be pursuant to M.G.L. c. 7, §§ 57 through 61, and the SDO may issue policies as required to effectuate these regulations. 425 CMR 2.00 shall be construed to secure the just, speedy and fair determination of every matter and proceeding within its scope.

2.02: Definitions; Certification; Certification Criteria; Certification Service/Product Category and Description; Recertification and Certification Renewal; Duty to Cooperate and Requirements to Remain in Good Standing; SDO Appeal Board

(1) Definitions. The following terms shall have the meanings given herein or, if such terms have been assigned meanings in M.G.L. c. 7, § 58, the following are in addition thereto:

Applicant: for-profit business enterprise or non-profit organization that applies to become a Certified Entity.

Certification Categories: Minority Business Enterprise (MBE), Minority Non-Profit Organization (MNPO), Women Business Enterprises (WBE), Women Non-Profit Organization (WNPO), Portuguese Business Enterprise (PBE), Veteran Business Enterprise (VBE), Veteran Non-Profit Organization (VNPO), Disability-Owned Business Enterprise (DOBE), Lesbian, Gay, Bisexual, and Transgender Business Enterprise (LGBTBE), Service-Disabled Veteran-Owned Business Enterprise (SDVOBE), and any other category as established by M.G.L. c. 7 § 58, other statute, or by executive order.

Certified Entity: an Applicant certified by the SDO, or an SDO approved Third-Party Certifier, pursuant to these regulations in one or more certification categories, as defined herein and in M.G.L. c. 7 § 58.

Controlled: One or more eligible principals have the legal authority to make and in fact make, all major decisions of the applicant without being subject to any agreement or document restricting control, or the approval or veto of any other person, business enterprise, or organization which by virtue of its business relationship to the applicant may be in a position to influence eligible principal's decisions; and having dominant control in the conducting of all major aspects of the business. This includes:

(a) having dominant control over management and daily operations; and
(b) having, in the specific endeavors which generate the applicant's revenues, the demonstrable background, all legally required credentials, and the technical competence necessary to weigh all advice given and to make independent and unilateral determinations relating to the activities engaged in by the applicant, including key determinations relating to the day-to-day work of employees and workforce involved operationally and technically; although an eligible principal must have managerial experience and/or expertise needed to run the business, he or she need not possess a license (unless required by a state law or regulation that a firm owner hold a required credential) to be found to control a company if he or she can demonstrate that he or she has ultimate managerial and supervisory control over those who possess the required license or technical expertise. However, where a critical license is held only by a non-eligible key employee or person having an equity interest in the applicant firm, the non-eligible person may be found to control the firm; and
(c) having a thorough knowledge of the financial structure, policies and affairs of the applicant; and
(d) having dominant control of the financial affairs and accounts of the applicant; and
(e) having dominant control over the hiring and firing of employees, including key employees, as well as any other personnel and workforce decisions of the applicant; and
(f) having dominant control over the solicitation and negotiation of contracts, marketing, estimating, and the offering and acceptance or rejection of bids; and
(g) having dominant control over the purchase of goods, equipment, business inventory and services needed in the day-to-day operation of the applicant; and
(h) having dominant control over the applicant's governing body, if any, as described below:
    1. Corporations: one or more eligible principal(s) of the same certification category must hold the highest officer position and either individually or collectively possess control over the Board of Directors.
    2. Partnerships, Limited Liability Corporations (LLCs), and Limited Liability Partnerships (LLPs): one or more eligible principal(s) of the same certification category must serve as general partner(s), managing member(s) or managing partner(s) as applicable, and possess control over all partnership, LLC, or LLP decisions.
    3. Sole Proprietorships: ultimate operational control must vest in an eligible principal whose name appears on firm documentation.
    4. For non-profit organizations, one or more eligible principal(s) must either individually or collectively hold the highest officer position in the

firm (e.g., chief executive officer or director) and eligible principal(s), of the same certification category as the highest officer position holder, must possess ultimate individual or collective control over the organization's governing body and/or Board of Directors.

(i) In addition, the following factors must be considered in determining dominant control:

1. The eligible principal(s) shall not be found lacking dominant control solely on the basis of the terms of a franchise/license agreement that relate to standardized quality, advertising or accounting format, as long as the franchiser or licenser is independent from the franchisee or licensee.
2. The eligible principal(s) shall not be found lacking dominant control solely on the basis of his or her outside employment. However, if it can be shown that outside employment actually interferes with the individual's ability to ultimately either individually or collectively control the applicant on a full-time basis, the applicant may not be certified.
3. The eligible principal(s) shall not be found lacking dominant control solely on the basis of hers or his level of remuneration which may be lower than that of some other participants in the firm. Differences in remuneration will be considered in the context of the duties of the persons involved, the firm's policy and practice concerning reinvestment of income, and any other explanations.
4. The eligible principal(s) shall not be found having dominant control if the applicant fails the test for independence as defined in 425 CMR 2.02.
5. Where appropriate, dominant control shall be considered in the context of normal industry practices.

Credentials: Documentary evidence of an eligible principal's lawful authority; commonly in the form of letters, licenses or certificates which on their face indicate the legal authority and capacity of the bearer.

Eligible Person: An adult resident who is both (1) a United States citizen, United States permanent resident, or an individual permanently residing under color of law (PRUCOL) in the United States, and (2) a minority, veteran, person of Portuguese origin, LGBT individual, person with a disability, and/or a woman.

Eligible Principal: Eligible person represented by the applicant to be an owner of the business enterprise or in control of a non-profit organization. Assets held in trust will be examined on a case by case basis to ensure that at least 51% of the trust's beneficiary(ies) is (are), either individually or collectively, held by eligible person(s) of the same certification category, and that the operational control of the applicant by eligible principal(s) is not unduly restricted by (an) ineligible trustee(s) or beneficiaries.

Free from Conversion Rights: Neither the applicant nor the eligible principal(s) is (are) subject to any right, agreement, option, scheme or document that creates or is representative of any right, which, if exercised, would result in diluting the ownership of the eligible principal(s) in the applicant below 51% or cause the applicant to not be independent or controlled by one or more eligible principals or eligible persons.

Independent:

(a) That the applicant is not dependent upon, affiliated with, or influenced by, legally or in practice, any other person, business enterprise or organization in connection with any key elements of its day-to-day or long-term affairs, including contracts, sales, operations, technical affairs, equipment, facilities, supplies, employees, workforce, consultants, subcontracts, leases, financing, income, payroll, bookkeeping, goodwill, policies or management; and

(b) That the applicant does not rely on or regularly utilize to perform work it contracts to perform any employee or workforce who, while performing work for the applicant, is in the course of employment with or under the direct control of a person, business enterprise or organization other than the applicant, with the exception of temporary office personnel working in the normal course of the applicant's activity(ies); and

(c) The applicant does not rely on or regularly utilize to perform work it contracts to perform any management or supervisory personnel other than those persons it directly employs and controls.

(d) An applicant shall not be considered independent if it presents insufficient evidence of having the capability or capacity to perform, with its own workforce, equipment, facilities or other functional assets the work it contracts to perform.

(e) The temporary employment or direct control by another person, business enterprise or organization of an applicant's employee(s) or workforce does not by itself constitute a lack of independence if the applicant is a temporary employment service and the temporary employment or control of the employee(s) or workforce occurs in the normal source of the applicant's business.

(f) Any of the following conditions creates a rebuttable presumption that the applicant is not independent:

1. one or more eligible principals is currently an employee of a non-eligible person owned or controlled business enterprise or organization which has a direct or indirect financial or controlling interest in, or influence on, the applicant; or
2. one or more of the ownership, governing body members, officers, management officials, key employees or supervisory personnel of the applicant are substantially the same as in a non-eligible person owned or controlled business enterprise or organization which either has a direct or indirect financial or controlling interest in, or influence on the applicant, or is in the same or similar industry of the applicant; or
3. the applicant is a subsidiary or affiliate of a non-eligible person owned or controlled business enterprise or organization; or

4. one or more eligible principals, or the applicant, is a former employee, employer, affiliate or subsidiary of a person, business enterprise or organization that is in the same or related industry as the applicant and which:
    a. has a direct or indirect financial or controlling interest in, or influence on, the applicant; or
    b. assisted or assists one or more eligible principals or the applicant to obtain or utilize any of the financial or non-financial resources the applicant uses.
5. Notwithstanding the foregoing, participation in a formal mentor-protégé program, joint venture, or other program designed to assist diverse businesses shall not result in automatic failure of the test for independence.

Minority: a person who meets one or more of the following definitions:

(a) Indian or Indigenous Person: All persons having origins in any of the indigenous peoples of Northern Canada, Greenland, Alaska, and Eastern Siberia, and persons having origins in any of the indigenous peoples of North America and who are recognized as an Indian by a tribe or tribal organization.
(b) Asian: All persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian sub-continent, or the Pacific Islands, including, but not limited to China, Japan, Korea, Samoa, India, and the Philippine Islands.
(c) Black: All persons having origins in any of the Black racial groups of Africa, including, but not limited to, African-Americans, and all persons having origins of the original peoples of the Cape Verdean Islands.
(d) Hispanic: All persons having their origins in any of the peoples of Latin America, including Mexico, Puerto Rico, Cuba, Central or South America, including Brazil, or the Caribbean Islands.
(e) Portuguese: Portuguese persons shall only be included in the definition of minority if specifically set forth in programs funded by state transportation bond statutes, or other statutory authority, which include such persons as eligible participants. Portuguese applicants are a separate certification category from MBE.

Ongoing:

(a) In all cases, that the applicant was not formed, reformulated, changed or reorganized solely for the purpose of taking advantage of a special program developed to assist businesses or non-profit-organizations owned/controlled by eligible principal(s); and
(b) If the applicant is a business enterprise, it means being actively in business, and owning or leasing the resources that are typical for a business enterprise in its industry, that ensures applicant's ability to manufacture products or provide services in the field of requested certification without heavily relying on resources of any other person, business enterprise or organization, and having facilities that are appropriate for conducting a business of its type at the present

stage of its development, and regularly and actively seeking contracts, orders, or sales of the applicant's products or services; or

(c) If the applicant is a non-profit organization, it means regularly and actively engaging in the non-profit activities for which it was formed.

(d) Reorganization and/or ownership changes that render a firm potentially eligible for SDO certification, which occurred 12 months prior to certification application submittal shall create a rebuttable presumption that the firm was restructured solely to take advantage of certification.

(e) No applicant shall be certified if it is currently debarred by any state, local, or federal governmental body.

(f) Applicant must possess any and all licenses required by Massachusetts law or regulation for the services/products it provides.

Out-of-state Applicant: An applicant or entity whose principal place of business is other than Massachusetts.

Owned:

(a) 1. Corporation: one or more eligible principals of the same certification category(ies), either individually or collectively, have ownership of 51% or more of each type and class of outstanding stock of the corporation, including voting stock, and 51% or more of the aggregate of all types and classes of outstanding stock of the corporation.

2. Partnership, Limited Liability Company (LLC): one or more eligible principals of the same certification category(ies), either individually or collectively, have ownership of 51% or more of the total partnership (LLC or joint venture) interest, including all assets, benefits, distribution rights, tax credits, deductions and postponements, and a commensurate share of the partnership's LLC's or joint venture's) liabilities and obligations.

3. Massachusetts Business Trust (established under M.G.L. c. 182): one or more eligible principals have ownership of 51% or more of transferable certifications of participation and serve as trustee(s).

4. Sole Proprietorship: the eligible principal has sole ownership of all of the proprietorship assets, and being personally and solely at risk and obligated for all of its losses and liabilities.

5. All Businesses: The eligible principal(s) must have the right to and actually receive the level and kind of profit and benefits and enjoy customary incidents of ownership, if any, that are commensurate with the level and kind of ownership reflected in the ownership documents; the eligible principal(s) must be at risk for, and actually incur, losses, if any, of the business enterprise in the manner and to the extent which is commensurate with the level and kind of ownership reflected in the ownership documents; the eligible principal's(s') ownership must be continuing; and the certification criteria must be met in substance as well as form. Profits, dividends, salaries, debt repayments, retained earnings and distributions of any kind (including distributions upon liquidation) are included among all of the indicators which may be considered.

(b) The firm's ownership by eligible principals must be real, actual, genuine and meaningful, going beyond "paper" ownership as reflected in ownership documents. The eligible owners must enjoy the customary incidents of ownership, and share in the risks and profits commensurate with their ownership interests, as demonstrated by the substance, not merely the form.

(c) The contribution of capital or expertise by the eligible persons to acquire their ownership interests must be real and substantial. Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not of themselves render a firm ineligible, even if the debtor's ownership interest is security for the loan.

(d) In addition to a significant financial investment in the firm, including but not limited to capital, equipment, contribution of property, space, patents, or copyrights, eligible principal's irreplaceable expertise may be credited towards required contribution only if it is outstanding quality, in the areas critical to the firm's operations and indispensable to the firm's potential success. Said expertise will be considered in light of the totality of all relevant circumstances and counted only if accompanied by a significant financial stake and clearly documented by the firm's records.

(e) Contribution of capital shall not be regarded as lacking "real" and "substantial" attributes solely because an eligible person acquired his or her ownership interest as a result of a gift, or transfer without adequate consideration unless there is a reason to believe that transfer in question took place for the sole purpose of certification eligibility.

A particular thorough scrutiny to the ownership and control of the firm in light of totality of the circumstances shall be conducted to ensure that it is owned and controlled, in substance as well as in form, by an eligible person as opposed to a non-eligible transferor. In addition, where an ineligible transferor (whether or not an immediate family member) remains involved with the firm in any capacity, the eligible principal(s) now owning the firm must demonstrate that the transfer of ownership and/or control to the eligible person was made for reasons other than obtaining certification.

PRUCOL. Any non-citizen permanently living in the United States when the individual is known to the Department of Homeland Security (DHS) and there is no evidence that the DHS is engaged in deportation proceedings against the noncitizen. PRUCOL includes, but is not limited to, noncitizens:

(a) with a pending application for asylum or adjustment of status or a pending relative petition;

(b) with either an approved or pending application for temporary protected status, or suspension or stay of deportation or removal;

(c) who qualify for registry status based on the presence in the U.S. prior to 1/1/72;

(d) who are granted voluntary departure;

(e) who are living under orders of supervision:

(f) who are granted deferred action status or a "U" visa; and

(g) who have either an approved or pending petition for status or relief which noncitizens are eligible for under the provisions and benefits of the Immigration and Nationality Act, Presidential Order and/or discretion of federal Departments.

Third-Party Certifiers: An entity, other than the SDO, which certifies business enterprises or non-profit organizations in one or more certification categories, or a specific industry, and is approved by the SDO to be utilized to process an applicant's inclusion into the SDO's listing of certified entities. The SDO's relationship with approved Third-Party Certifiers, and its approved utilization of their certification process, which shall be consistent with these regulations, shall be at the sole discretion of the SDO.

Veteran: A person who is a veteran, as defined in M.G.L. c. 4 s. 7.

(2) Certification. SDO shall certify and include in its listing of certified entities, whether directly or by link or reference, every applicant which meets the applicable criteria. SDO shall provide direct certification services to MBE, WBE, PBE, VBE, MNPO, WNPO, and VNPO applicants. The SDO Executive Director may implement an alternative certification process in limited instances, including, but not limited to, the processing of certifications of LGBTBEs, SDVOBEs, DOBEs, as well as MBEs, WBEs, and VBEs, and for entities in certain industries.
   (a) The SDO may, at its sole discretion, accept certifications conducted by approved Third-Party Certifiers to streamline inclusion in the SDO listing of certified entities. The burden of proof shall be on the applicant to show that it meets the certification criteria based on the applicant's current circumstances and totality of the evidence presented. SDO shall review and act upon applications submitted to the agency within 30 business days of final submission of all necessary information or as promptly as administratively feasible.
   (b) The designated SDO internal Certification Committee shall be responsible for all certification related initial determinations except if the Executive Director specifically designates an alternate certification process for qualified firms, such as the use of approved Third-Party Certifiers. An entity's certification shall last for a period to be determined by the SDO Executive Director or until the entity is recertified, has its certification renewed or is decertified. No cause of action shall lie against the Commonwealth, or any employee or agent thereof, for failure to meet any projected time line.
   (c) An out-of-state applicant or certified entity must be certified in its home-state or by a home-state Third-Party Certifier for the certification category(ies) sought and provide a copy of a home-state site visit report, telephone review report, and/or other documentation as determined by the SDO, to become and remain eligible for SDO certification.

(3) Business Enterprise Certification Criteria. For the certification of a business enterprise, the entity must:
   (a) Be both owned and controlled by eligible principal(s) of the same certification category(ies); and

(b) Be free of any conversion rights; and
(c) Be independent; and
(d) Be ongoing.

(4) Criteria for the Certification of a Non-Profit Organization. For the certification of a non-profit organization:
(a) The applicant must be tax-exempt under either § 501(c)(3) or § 501(c)(4) of the United States Internal Revenue Code, and
(b) The applicant must be in compliance with, and in good standing legally under, the laws of its governing jurisdiction and any filing requirements of the Public Charities Division of the Office of the Attorney General of Massachusetts, and
(c) One or more eligible persons must constitute 51% or more of the applicant's voting membership, if any, and 51% or more of its board of directors, and
(d) The applicant must be independent, and controlled by one or more eligible principals of the same certification category(ies), if multiple categories exist in a non-profit organization's controlling body. and
(e) The applicant must be ongoing.

(5) Certification Service/Product Category and Description. SDO will assign to certified entities a business description and service/product category(ies) denoting the activity(ies) in which the entity is engaged. An entity may obtain an expansion or change of its business description and/or service/product category(ies) provided it meets all relevant certification criteria for the new category of endeavor as well as the criteria for the company overall. Category listings, and SDO certification in general, are not intended to reflect the level of competency of any business, non-profit organization or join venture to perform the activity(ies) in which it engages.

(6) Recertification and Certification Renewal. To remain in good standing, every firm must have its certification renewed pursuant to the timeframe set by the SDO Executive Director, and every firm must be renewed pursuant to the timeframe determined by the SDO Executive Director. Certified firms may be required to undergo a recertification pursuant to timeframe set by SDO Executive Director.. The SDO may set different renewal time frames consistent with approved Third-Party Certifiers.
(a) Certification renewal requires the submission of specified update information and does not ordinarily entail a full substantive review. Recertification requires submission and review of a full new application. Recertification and Renewal shall be granted based on the applicant's current circumstances and totality of the evidence presented, demonstrating the firm continues to meet certification criteria. SDO retains the discretion to conduct such a review if circumstances dictate. If an entity is due for recertification or certification renewal and fails to submit the requested recertification or certification renewal information within the allotted time period after reasonable notice has been provided, that entity's certification automatically shall expire.
(b) An entity which is the subject of an investigation or show-cause proceeding may not be recertified or have its certification renewed while the investigation

or proceeding is ongoing and until the entity is determined to continue to meet the certification requirements.

(7) Duty to Cooperate and Requirements to Remain in Good Standing. Applicants and certified entities shall cooperate fully with the certification program and provide accurate, complete and non-misleading information in relation to its application, renewal, or recertification or certification status. The failure of an applicant or certified entity to maintain compliance with certification criteria, cooperate with an investigation, site visit, request for information or other certification-related matter or proceeding constitutes grounds for denial of certification or decertification.

(a) SDO may request an applicant or certified entity to provide additional information when SDO deems it necessary for a certification-related determination.

(b) SDO may monitor, investigate and do random spot checks of any certified entity. If an entity fails to continue to meet the requirements for certification, SDO may issue the entity notice to show cause why it should not be decertified and, after an opportunity for a hearing, SDO may decertify the entity.

(c) SDO may bar from the certification program for a period of up to five years any entity that is denied certification or is decertified for failure to cooperate or for the submission of false, materially incomplete or misleading information.

(d) SDO may bar from the certification program for a period of up to one year any entity which is decertified for failure to meet the substantive requirements for certification.

(8) SDO Appeal Board. If an applicant or certified entity receives a determination of denial of a certification application or a determination to show cause it may appeal the determination by filing within ten business days of the receipt of the aforementioned determination a request for an administrative appeal hearing before an SDO designated Appeal Board. Hearings shall be held in accordance with 801 CMR 1.02, 801 CMR 1.03, and the applicable sections of M.G.L. c. 30A. Appeals are not available to determinations made by the SDO regarding certifications conducted through Third-Party Certifiers, nor shall they be available for denial or removal of certification due to debarment.

REGULATORY AUTHORITY

425 CMR 2.00: M.G.L. c. 7, §§ 57 through 61; Executive Order No. 237 and Executive Order No. 599.