**NEW DRAFT REGULATIONS**

**425 CMR 2.00: SUPPLIER DIVERSITY OFFICE CERTIFICATION**

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**2.01: Title and Applicability**

425 CMR 2.00 governs the process for certification of certain businesses owned by Eligible Principals, as defined herein or by policy established by the Supplier Diversity Office (SDO), formerly known as the State Office of Minority and Women Business Assistance (SOMWBA), of the Operational Services Division (OSD), a division of the Executive Office of Administration and Finance (A&F) of the Commonwealth of Massachusetts, pursuant to M.G.L. c. 7, §§ 57, 58, 59, and 61. 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**

Applicant Firm. A business structure or other entity owned at least 51% by one or more eligible principal(s) that submits an application to be certified as a Certified Business Enterprise by the Supplier Diversity Office.

Certification Categories. Minority Business Enterprises (MBE), Women Business Enterprises (WBE) and other categories of Certified Business Enterprises as established by applicable Massachusetts statute, executive order or SDO policy.

Certified Business Enterprises. Business enterprises certified by the SDO or other certifying entity recognized by the SDO as falling under one or more Certification Categories and meeting all other certification criteria.

Controlled. One or more eligible principal(s) possess(es) 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 the eligible principal’s decisions. Although certain items may be delegated in the normal course of business, any such delegation(s) must be revocable, and an eligible principal must remain ultimately responsible for:

1. Maintaining dominant control over management, daily operations, and en**s**uring the continued compliance of the applicant firm with all required Massachusetts state licensing statutes;
2. Possessing 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 revenue generating activities of the applicant firm such as: key determinations relating to the day-to-day work of employees and workforce involved operationally and technically; although (an) eligible principal(s) must possess managerial experience and/or expertise needed to run the firm; where a critical license is held only by a non-eligible individual with an equity interest in the applicant firm, the non-eligible individual(s) may be found to control the firm;
3. Demonstrating a thorough knowledge and ultimate control of the financial structure, policies, accounts and affairs of the applicant firm;
4. Possessing dominant control over the hiring and firing of employees, including key employees, as well as any other personnel and workforce decisions of the applicant firm;
5. The solicitation and negotiation of contracts, marketing, estimating, and the offering and acceptance or rejection of bids;
6. Possessing dominant control over the purchase of goods, equipment, business inventory and services needed in the day-to-day operation of the applicant firm; and
7. Maintaining dominant control over the applicant firm's governing body (if any):
8. For corporations, one or more eligible principal(s) must hold the highest officer position in the company (e.g., chief executive officer or president). Additionally, one or more eligible owner(s) of the same protected class must possess ultimate control over all decisions made by the corporation’s Board of Directors.
9. In a partnership, one or more eligible owner(s) of the same protected class must serve as general partner(s), with ultimate control over all partnership decisions.
10. For LLCs/LLPs, one or more eligible owner(s) of the same protected class must serve as managing member(s), with ultimate control over all LLC/LLP decisions.
11. For sole proprietorships, ownership and control must vest in an eligible principal whose social security number appears on the signed federal Form 1040 Tax Return provided in connection with the firm’s application for certification.
12. The following factors must be considered in determining dominant control, however no factor alone will result in a determination that the eligible principal(s) lacks dominant control:
13. The terms of a franchise/license agreement that relate to standardized quality, advertising or accounting format, as long as the franchisor or licensor is independent from the franchisee or licensee.
14. Differences in remuneration will be considered in the context of the duties of the individual(s) involved, the firm’s policy and practice concerning reinvestment of income, and any other explanations.
15. If it can be shown that outside employment held by the eligible principal(s) substantially interferes with the ability to control the daily operations of the applicant firm on a full-time basis, the applicant firm may not be certified.
16. Eligible principal(s) shall not be found to exercise dominant control if the applicant firm does not meet the requirements of “Independent”, as defined herein.

Certification Criteria for a For-Profit Organization. For the certification of a for-profit business, the entity must be:

1. Both at least 51 percent (%) owned and controlled by the same eligible principal(s) and free of any conversion rights;
2. Independent; and
3. Ongoing.

Certification Criteria for a Non-Profit Organization. For the certification of a non-profit organization:

1. The applicant firm must be tax-exempt under either § 501(c)(3) or § 501(c)(4) of the United States Internal Revenue Code;
2. 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 the Commonwealth of Massachusetts;
3. One or more eligible principals must constitute 51% or more of the applicant's voting membership, if any, and 51% or more of its board of directors; and
4. The applicant must be independent, and controlled by one or more eligible principal(s);
5. The applicant firm must be ongoing.

Eligibility of Ownership Held Through Trust. SDO will review the trust document to ensure that it is consistent with SDO policies and procedures such that only an eligible principal would benefit from the trust based on a totality of the circumstances.

Eligible Applicant/Eligible Principal. A Minority-Owner, Woman-Owner and/or owner of an Applicant Firm falling within one or more of the Certification Categories defined herein, and who is either a US citizen or lawful permanent resident over eighteen (18) years of age, provided that:

1. If the applicant firm is for-profit, the same eligible principal(s) must both dominantly own and control the applicant firm. The protected classes cannot be combined to satisfy the applicant firm definition.
2. If the applicant firm is a non-profit organization then (a)n eligible principal(s) must control, or is among the persons, who control the daily operations of the non-profit organization. For multiple member non-profit firms, their members must fit into the same protected class (for example, either minorities or women, not both) and the protected class as a whole must control the daily operations of the non-profit organization. The protected classes cannot be combined to satisfy the applicant firm definition.
3. If the applicant firm is a joint venture of two (2) or more business enterprises that would otherwise both be eligible for certification in the same protected class (for example, either minorities or women, not both) and who have joined together for a specific contract of limited duration, then the firm may be eligible for certification if they meet all criteria for certification.
4. Eligible Principals from different Certification Categories cannot be combined to meet the 51% threshold.

Free from Conversion Rights. Neither the applicant firm 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 Firm below 51% or cause the applicant firm to not be independent or controlled by one or more eligible principal(s).

Independent.

1. The applicant firm must not be dependent upon, affiliated with, or influenced by, legally or in practice, an ineligible 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;
2. The applicant firm must not rely on, or regularly utilize, any employee or workforce not under the direct control or supervision of an Eligible Principal in the normal course of business, with the exception of temporary office personnel working in the normal course of the applicant firm's activity(ies);
3. The applicant firm must not rely on or regularly utilize to perform work it contracts to perform any management or supervisory personnel other than those person(s) it directly employs and controls;
4. An applicant firm 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;
5. The temporary employment or direct control by another person, business enterprise or organization of an Applicants Firm’s employee(s) or workforce does not by itself constitute a lack of independence if the Applicant Firm is a temporary employment service and the temporary employment or control of the employee(s) or workforce occurs in the normal course of the Applicant Firm's business; and
6. Any one of the following conditions creates a rebuttable presumption that the Applicant Firm is not independent:
7. One or more eligible principal(s) is(are) currently an employee of a non-eligible owned or controlled business enterprise or organization which has a direct or indirect financial or controlling interest in, or influence on, the applicant firm; or
8. One or more of the governing body members, officers, management officials, key employees or supervisory personnel of the applicant firm are substantially the same as in a non-eligible owned and controlled business enterprise or organization which maintains a direct or indirect financial or controlling interest in, or influence on the applicant firm; or
9. The applicant firm operates as a subsidiary or affiliate of a business enterprise or organization, which is not owned and controlled by eligible principals; or
10. One or more eligible principal(s), or the applicant firm, is/are a former employee(s), employer(s), affiliate(s) or subsidiary(ies) of a person, business enterprise or organization that is in the same or related industry as the applicant and which:
11. maintain(s) a direct or indirect financial or controlling interest in, or influence on, the applicant firm; or
12. assisted or assists one or more eligible principal(s) or the applicant firm to obtain or use any of its financial or non-financial resources that the applicant firm uses.

Minority. Is an eligible principal(s) that is socially or economically disadvantaged. Eligible principals who fall within the following categories are presumptively included in this definition:

1. American Indian or Native American: All persons having origins in any of the original peoples of North America and who are recognized as an Indian by a tribe or tribal organization.
2. 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.
3. 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 in any of the original peoples of the Cape Verdean Islands.
4. Eskimo or Aleut: All persons having origins in any of the peoples of Northern Canada, Greenland, Alaska, and Eastern Siberia.
5. Hispanic: All persons having origins in any of the peoples of Mexico, Puerto Rico, Cuba, Dominican Republic, Central or South America, the Caribbean Islands, or other Spanish or Portuguese culture or origin.
6. Other socially or economically disadvantaged groups allowed by applicable Massachusetts statute, regulation, executive order or SDO policy.

Ongoing.

1. In all cases, the applicant firm was not formed, reformulated, changed or reorganized within the last twelve (12) months solely to take advantage of a special program developed to assist businesses owned and controlled by eligible principal(s).
2. The SDO will consider, when making certification decisions, whether a firm has exhibited a pattern of conduct indicating its involvement in attempts to evade or subvert the intent or requirements of supplier diversity program(s). Evidence may include but is not limited to debarment orders, or indictments issued by a state or federal certification agency or a similar order issued by a court of competent jurisdiction.
3. If the applicant firm is a business enterprise, it must be actively in business, and owning or leasing the resources that are typical for a business enterprise in its industry, that ensures Applicant Firm’s ability to manufacture products or provide services in the field of requested certification without heavily relying on resources of any other ineligible individual, 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.
4. If the applicant firm is a non-profit organization, it must be regularly and actively engaging in the non-profit activities for which it was formed.

Out-of-State Applicant or Out-of-State Applicant Entity. An applicant or entity whose principal place of business is other than Massachusetts. An out-of-state Applicant that has been certified in its home state must provide SDO, as part of its application, with a current certification letter from the home state, or other certification authority as allowed by SDO policy, and a copy of its most recent site visit report. An application that does not include this documentation will be rejected as incomplete.

Owner and Owned.

1. By business type:
2. Corporation: one or more eligible principal(s) maintain(s) 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.
3. Partnership, Limited Liability Company (LLC): one or more eligible principal(s) maintain(s) 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.
4. Massachusetts Business Trust (established under M.G.L. c. 182): one or more eligible principal(s) maintain(s) ownership of 51% or more of transferable certificates of participation and serve as trustee(s).
5. Sole Proprietorship: the eligible principal maintains sole ownership of all of the proprietorship assets, and being personally and solely at risk and obligated for all of its losses and liabilities.
6. All Businesses: The eligible principal(s) must possess 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.
7. The firm’s ownership by eligible principal(s) must be real, actual, genuine and meaningful, going beyond “paper” ownership as reflected in ownership documents. The eligible principal(s) must enjoy the customary incidents of ownership, and share in risks and profits commensurate with their ownership interests, as demonstrated by the substance, not merely the form.
8. The contribution of capital or expertise by the eligible principal(s) to acquire their ownership interest(s) must be real and substantial. The co-signature of an ineligible principal does not solely render a firm ineligible. The SDO reserves the right to request supporting documentation on an as-needed basis.
9. Contribution of capital shall not be regarded as lacking “real” and “substantial” attributes solely because a(an) eligible principal(s) acquired a controlling ownership interest(s) in the applicant firm as a result of a gift, or transfer without adequate consideration unless there is a reason to believe that the transfer in question took place for the sole purpose of certification eligibility.
10. A particularly thorough scrutiny of 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 principal 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 individual was made for reasons other than obtaining certification.
11. 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 of 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.

**2.03: Certification**

SDO shall certify and maintain a directory of Certified Business Enterprises which meet the applicable Certification Criteria.

1. SDO shall review and act upon applications submitted to the agency as promptly as administratively feasible. The Certification Committee within SDO shall be responsible for all certification related initial determinations except if the Executive Director of the SDO specifically designates an alternate certification process for qualified firms. An entity’s certification shall last for two (2) years or until the entity is renewed, recertified or decertified. No cause of action shall lie against the Commonwealth, or any employee or agent thereof, for failure to meet any projected time line.
2. SDO will assign certified entities a business description denoting the primary activity(ies) in which the firm engages. A firm may request to modify its business description in writing at any time. However, the SDO reserves the right to request additional documentation and to conduct an updated site visit as needed to verify that the firm is ready, willing and able to perform work in its new requested description.
3. Every firm must have its certification renewed and undergo a substantive recertification review according to the certification renewal and recertification processes and timelines established by the SDO. Certification renewal requires the submission of specified updated information. SDO retains the discretion to conduct a recertification, or full substantive review, if circumstances dictate.
4. 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 may be removed or suspended according to SDO policy. Failure to supply all requested information needed for certification renewal and/or recertification within given deadlines shall be prima facie evidence of a firm’s desire to no longer participate in the certification program.

**2.04: Reciprocal Certification**

The SDO may issue policies and procedures for recognizing and accepting certifications conducted and issued by other respected certification organizations. Such policies and procedures shall be construed consistent with these regulations.

**2.05: Duty to Cooperate; Requirements to Remain in Good Standing; Disqualification; Grounds for Removal of Certification; Burden of Proof**

Cooperation. Applicants and certified entities shall cooperate fully with the SDO and provide accurate and complete information in relation to its application or certification status. The failure of an applicant or certified entity to cooperate with an investigation, site visit, request for information or other certification-related matter or proceeding shall constitute grounds for denial of certification or decertification. SDO may request an applicant or certified entity to provide additional information when SDO deems it necessary for a certification-related determination.

Requirements to Remain in Good Standing. If the SDO forms a reasonable belief that a currently certified firm’s ability to satisfy any of the Certification Criteria identified above is compromised, based on newly discovered evidence, including, but not limited to, allegations or evidence of fraud, material misrepresentation or a change in circumstances, then the SDO may monitor, investigate and conduct random spot checks or audits of any such certified firm. 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. SDO may bar from the certification program for a period of up to five (5) 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. SDO may bar from the certification program for a period of up to one (1) year any entity which is decertified for failure to meet the substantive requirements for certification. Any entity that is denied certification or decertified may take corrective action to meet the applicable certification criteria.

Disqualification. The SDO may disqualify a firm from certification if it is currently subject to any state or federal debarment order or determination. The term of the disqualification may be coterminous with the term of the debarment.

Grounds for Removal of Certification (Decertification): Any action to remove certification of a currently certified firm may be triggered by one or more of the following events:

1. Changes in a firm’s circumstances since its original SDO certification which render a firm currently unable to meet any Certification Criteria or other guidelines issued by the SDO;
2. Information or evidence not available to SDO at the time the firm was certified;
3. Information that was concealed or misrepresented by a firm in previous SDO certification actions;
4. A change in the certification standards or requirements by SDO since the firm was originally certified;
5. A documented finding that SDO’s initial determination to certify the firm was factually erroneous; or
6. Failure to cooperate by the certified firm.

Burden of Proof. A firm seeking initial certification or a currently certified firm that the SDO seeks to decertify has the burden of demonstrating to SDO, by a preponderance of the evidence, that it meets the Certification Criteria requirements, as defined herein.

**2.06: Appeal Rights**

If the SDO initiates either an initial certification eligibility review, which results in a denial, or subsequently attempts to remove certification from a firm that it initially certified, then eligible principal(s) have a right to file a written appeal request with the SDO within ten (10) business days of receipt of the denial or removal notice. An informal file review will be conducted between the SDO and the Applicant Firm and, if the Applicant Firm remains aggrieved, a subsequent hearing may occur. Hearings will be conducted consistent with the Informal Fair Hearing Rules codified at 801 CMR §§ 1.02. 1.03, as well as the applicable sections of MGL c. 30A and the SDO’s related policies and procedures. Firms which did not receive their initial certification from the SDO shall have appeal rights consistent with the policies and procedures of the SDO and/or the other respective certifying entity.

**2.07: Severability**

If any provision of 425 CMR § 2.00 is declared or found to be illegal, unenforceable or void, then Applicant Firms shall be relieved of all obligations under that provision only, and all other provisions of 425 CMR § 2.00 shall remain in full force and effect.

REGULATORY AUTHORITY

425 CMR § 2.00: M.G.L. c. 7, §§ 57, 58, 58A, 59, 61.