

## DEPARTMENT OF TRANSPORTATION

### Transportation Commission

## EMERGING SMALL BUSINESS PROGRAM

### 2 CCR 604-1

*[Editor's Notes follow the text of the rules at the end of this CCR Document.]*

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## CHAPTER 1 - GENERAL PROVISIONS

### I. Statutory Authority

The statutory authority for the State of Colorado Transportation Commission ("The Commission") to adopt and amend the rules governing the Colorado Department of Transportation Emerging Small Business Program is contained in §§ 43-1-106(8)(j), (k) and (p), C.R.S. as amended.

### II. Purpose

The general purpose of the Rules is to implement §43-1-106 (8)(p), C.R.S. which authorizes the creation of the Colorado Department of Transportation (CDOT) Emerging Small Business (ESB) Program. CDOT shall use the ESB program to provide assistance to and increase opportunities for certified small businesses, including minority-owned, women-owned and disadvantaged business enterprises. The assistance and opportunities provided by the ESB Program will aim to enable emerging small businesses to gain the knowledge, experience and resources needed to participate in the competitive process for CDOT contracts, thereby aiding in the development of Colorado's small business community, increasing competition for CDOT contract awards, and lowering the cost to the public for transportation-related work.

### III. Applicability

These Rules shall govern the development and administration of the ESB Program and may be supplemented with other policies and procedures as permitted herein. In the case of a contract for which a part of the contract price is to be paid with funds from the United States Government and for which the United States Government's terms or conditions are inconsistent with provisions of the Rules, the provisions of the Rules shall not apply to such contract to the extent of such inconsistency.

## CHAPTER 2 - DEFINITIONS

The following definitions shall apply to terms used in the Rules.

- 1) **Affiliate:** Businesses are affiliates of each other if:
  - a. Directly or indirectly, either one controls or has the power to control the other;
  - b. A third party controls or has the power to control both; or
  - c. Relationships or identity of interests between or among parties exist such that affiliation may be found by a reasonable person.

Indicia of control include, but are not limited to: interlocking management or ownership, identity of interests among family members, shared facilities and equipment, and/or common use of employees.

- 2) **Area of Work:** An additional descriptor created by CDOT to identify a practice or activity within the greater industry NAICS Code.
- 3) **Bid:** The offer of a Contractor, on the prescribed bid proposal form, to perform the work and to furnish the labor and materials in conformance with the invitation for bids.
- 4) **Business:** A sole proprietorship, partnership, corporation, limited liability company, joint venture, professional association or any other legal entity authorized by law and operating for profit, that is properly licensed or registered and otherwise authorized to do business in the State of Colorado.
- 5) **Certification:** A determination by CDOT that a Business is eligible to participate in the ESB Program as an ESB, subject to continued compliance with the Rules and any other supplemental policies or regulations related to the ESB Program. While certain courses or licenses may be required for Certification, Certification neither represents nor implies that a business or individual is qualified to perform on a contract.
- 6) **CDOT:** Colorado Department of Transportation.
- 7) **Construction:** Building, altering, repairing, improving, or demolishing work as described in a CDOT project. This term includes "capital construction" and "controlled maintenance" as defined §24-30-1301, C.R.S.
- 8) **Contract:** Any CDOT contract for the performance of Professional Services, Practice of Research or Construction work.
- 9) **Contractor:** A Business qualified to perform and contracting with or intending to contract with CDOT to perform Professional Services, Practice of Research or Construction work.
- 10) **Controlling Interest:** Ownership of 51 percent or more of the Business by one person, or ownership of the largest single portion of the Business by one person if no one person holds 51 percent or more.
- 11) **CFR:** Code of Federal Regulations
- 12) **C.R.S.:** Colorado Revised Statutes, as amended.
- 13) **Emerging Small Business (ESB):** Any Business certified by CDOT to participate in the ESB Program that has not otherwise lost such Certification due to graduation or revocation.
- 14) **Emerging Small Business Program (ESB Program):** The program outlined by the Rules, which is intended to provide assistance to and increase opportunities for Emerging Small Businesses.
- 15) **Emerging Small Business (ESB) Program Guidelines:** Provisions published by CDOT that detail additional procedures and requirements pertaining to the ESB Program. The ESB Program Guidelines shall include those provisions specifically required by the Rules as well as any supplemental provisions necessary to carry out the purposes of the Rules.
- 16) **NAICS Code:** The six digit classification code assigned to the industry under the North American Industry Classification System (NAICS).
- 17) **Overall Cap:** The overall size limit for participation in the ESB Program, which shall be equal to fifty percent (50%) of the United States Department of Transportation Disadvantaged Business Enterprise (DBE) Program size limit which can be found at 49 CFR 26.65(b)(1).

- 18) **Practice of Research:** The performance of services involving the design, data collection and data analysis of studies such as evaluation studies, usage studies, feasibility studies, environmental impact studies, polling studies and other such studies performed by a person qualified by education or training or actual performance in the field, but does not include "Professional Services".
- 19) **Principal:** A sole proprietor, a general or limited partner, a person who owns twenty-five percent (25%) or more or a controlling interest, a director, or an officer of the business.
- 20) **Professional Services:** Those services defined in § 24-30-1402(6), C.R.S., including: 1) the practice of architecture, 2) the practice of engineering, 3) the practice of professional land surveying, 4) the practice of landscape architecture, and 5) the practice of industrial hygiene.
- 21) **Program Benefits:** The benefits of the ESB Program as detailed in Chapter 4 below.
- 22) **Receipts:** "Total income" (or in the case of a sole proprietorship, "gross income") plus "cost of goods sold" as these terms are defined and reported on Internal Revenue Service (IRS) tax return forms (such as Form 1120 for corporations; Form 1120S and Schedule K for S corporations; Form 1120, Form 1065 or Form 1040 for LLCs; Form 1065 and Schedule K for partnerships; Form 1040, Schedule F for farms; Form 1040, Schedule C for other sole proprietorships). Receipts do not include net capital gains or losses; taxes collected for and remitted to a taxing authority if included in gross or total income, such as sales or other taxes collected from customers and excluding taxes levied on the concern or its employees; proceeds from transactions between a concern and its domestic or foreign affiliates; and amounts collected for another by a travel agent, real estate agent, advertising agent, conference management service provider, freight forwarder or customs broker. For size determination purposes, the only exclusions from receipts are those specifically provided for in this paragraph. All other items, such as subcontractor costs, reimbursements for purchases a contractor makes at a customer's request, and employee-based costs such as payroll taxes, may not be excluded from receipts.
- 23) **Renewal of Certification:** Annual evaluation of the status of Certification of an ESB.
- 24) **Rules:** These regulations enacted by the State of Colorado Transportation Commission to govern the administration of the Emerging Small Business Program.

## CHAPTER 3 - CERTIFICATION

### I. Certification Procedures

- 1) Certification and Renewal of Certification. CDOT shall establish reasonable procedures and methods for the Certification and Renewal of Certification of Businesses in order to effectuate the purposes of these Rules. Such procedures shall be detailed in the ESB Program Guidelines.
- 2) Application. At a minimum, all applicants will be required to complete an application to be considered for Certification. The format and contents of the application shall be determined by CDOT, provided that the contents of the application reasonably relate to the determination of Certification as described herein. The application shall include questions regarding ethnicity and gender for the purpose of reporting the diversity of race-neutral participation in the ESB Program and on CDOT contracts. CDOT may investigate the information provided in the application through reasonable means, including but not limited to interviews and on-site investigations.
- 3) Certification Codes. In its determination of Certification, CDOT shall identify the NAICS Code and Areas of Work for which the Business shall be Certified. CDOT's determination shall be based upon the Business' demonstrated ability to perform in such Areas of Work. Among other factors, CDOT may consider the following in determining the appropriate NAICS Codes and Areas of

Work for the applicant: the qualifications and knowledge of the owners, managers and key employees, the equipment and other assets of the firm, and the work history of the firm.

- a. CDOT shall only certify a Business for those NAICS Codes and Areas of Work which may reasonably be construed to be related to CDOT's transportation contracts.
  - b. CDOT shall only certify a Business for those NAICS Codes for which the Business' size, as determined in accordance with Section (3)(II)(4) below, does not exceed fifty percent (50%) of the size standard established by the United States Small Business Administration's "Table of Small Business Size Standards Matched to North American Industry Classification System Codes" as set forth in 13 CFR 121.201, or a successor of such classification system.
  - c. A Business may request a modification of the NAICS Codes and Areas of Work in accordance with the procedure set forth in the ESB Program Guidelines.
- 4) Appeal. Any applicant that is denied Certification in the program or in a particular area of work may appeal such denial in accordance with § § 24-4-104 and 105, C.R.S.
  - 5) Reapplication. Any applicant that is denied Certification must wait at least one (1) year from the date of denial in order to reapply for Certification. This waiting period shall not apply to an ESB that was denied participation in the program due to exceeding the previous applicable size standard (\$2,000,000 or \$4,500,000). All Business that were denied participation in the ESB Program for exceeding the previous size standards or fulfilling the active years of participation limit shall be eligible to reapply for Certification.

## **II. Minimum Certification Requirements**

Only applicant Businesses that meet the criteria for Certification may participate in the ESB program. The applicant Business has the burden of proof that such Business meets the Certification criteria.

- 1) Registration. CDOT may require all applicant Businesses to register and maintain registration in an information database. Any such registration requirement shall be outlined in the ESB Program Guidelines.
- 2) Independence. The Business must be an independent business. To be independent, the Business must demonstrate that its viability does not depend upon a relationship with another Business or Businesses. In determining whether a Business is independent, CDOT may consider, but is not limited to, evaluating the quality and consistency of relationships with other Businesses and individuals in comparison to normal industry practices.
- 3) Qualifying Principal Area of Business. The Business' principal area of business must be to provide Professional Services, Practice of Research or Construction work that could reasonably be construed to be related to CDOT's transportation contracts, including contracts for aeronautic, transit and highway transportation.
- 4) Size Limit. The average annual Receipts of the Business for the preceding three years, combined with the average annual Receipts of all Affiliates for the preceding three years, shall not exceed the then-current Overall Cap or the size standards for all of the NAICS Codes for which CDOT has determined the Business is eligible for Certification. The calculation of average annual Receipts of the Business and any Affiliates shall be made in accordance with the provisions governing the size calculation of a Business for the DBE Program; provided however that CDOT may accept calculations of other organizations or attestations of size in lieu of self-performing the size calculations. The procedure used by CDOT to determine the size of a Business shall be set forth in the ESB Program Guidelines.

- 5) Training and Development. CDOT may establish minimum training and business development criteria for Certification and Renewal of Certification, including but not limited to CDOT-facilitated courses, financial or business courses, milestones demonstrating business development and management, and/or any other requirement related to the ability to successfully perform on CDOT contracts. All training and development requirements shall be detailed in the ESB Program Guidelines.
- 6) Debarment and Conviction. The Business or any Principal thereof shall not have been debarred or convicted of bid-related crimes or violations within the past six years in any state or federal jurisdiction, or be under notice of intent to debar in any jurisdiction.
- 7) Truth and Honesty. The Business or any Principal thereof shall not have provided false, deceptive, or fraudulent statements in the application for ESB Certification or in any other information, statements, or documents submitted to CDOT.
- 8) Cooperation and Complete Disclosure. The Business must respond timely to and fully comply with all requests for information that are made by CDOT regarding participation in the ESB Program. If the Business fails to cooperate or to fully disclose any information relevant to participation in the ESB Program, CDOT shall have the right to deny or revoke the Business' Certification.
- 9) Additional Requirements. In addition to the minimum eligibility requirements listed above, CDOT may implement additional requirements for Certification in accordance with the purpose of these Rules. Such additional requirements shall be detailed in the ESB Program Guidelines.

### **III. Graduation and Revocation of ESB Certification**

- 1) Graduation. An ESB shall be deemed to have graduated from the ESB Program if the size of the ESB, as determined in accordance with Section (3)(II)(4), exceeds the then-current Overall Cap or exceeds the size standard for all NAICS Codes for which the ESB had been Certified.
  - a. Reapplication. If an ESB graduates from the ESB Program due to exceeding the Overall Cap neither it nor any Affiliate thereof shall be eligible for recertification.
  - b. Graduation shall only occur upon the Renewal of Certification unless, due to mistake or other non-fraudulent activity, the determination of CDOT is called into question.
  - c. Notice. CDOT shall provide the ESB with written notice that it has exceeded the size limits and the ESB shall have the opportunity to contest such determination.
  - d. Effect on Participation. Graduation shall not affect the ESB's status for Contracts that were bid for or awarded prior to the ESB's graduation from the ESB Program.
- 2) Revocation.
  - a. Reasons for Revocation. CDOT shall revoke the Certification of an ESB if:
    - i. The ESB fails to comply with the procedures for Renewal of Certification or any other procedures set forth in the ESB Program Guidelines or ESB project specifications;
    - ii. The ESB continuously fails to cooperate with CDOT;
    - iii. The ESB or any Principal thereof is reasonably believed to have made false, deceptive or fraudulent statements on its application for ESB Certification, in the

course of any determination or hearing associated with ESB Certification, or in any documents or any other information submitted to CDOT;

iv. The Business or any Principal thereof commits any action or omission which evidences a lack of integrity or honesty in performing public projects; or

v. CDOT has reasonable grounds to believe that the public health, welfare, or safety imperatively requires immediate suspension of Certification.

b. Timing and Notice. Revocation may occur at any time. Except as provided in subsection (c) below, CDOT shall provide written notice to a Business that its Certification is pending revocation.

c. Automatic Revocation. If an ESB or any Principal thereof is debarred or convicted of bid-related crimes or violations such ESB's Certification shall be automatically revoked without notice from CDOT.

3) Appeals. The procedures contained in §§24-4-104 and 24-4-105, C.R.S. shall apply to any graduation from or revocation of ESB Certification.

## **CHAPTER 4 - PROGRAM BENEFITS**

### **I. Objectives and Priorities**

The programs and incentives outlined in this section shall aim to assist emerging small businesses in competing for CDOT contracting opportunities. To such end, CDOT may develop provisions within the ESB Program Guidelines which tailor the ESB Program Benefits to:

- a. Increase ESB prime contracting opportunities;
- b. Promote and assist smaller ESBs;
- c. Promote and assist ESBs that have no or little previous CDOT experience;
- d. Increase diversity in the work areas performed by DBEs and ESBs; and
- e. Incentivize ESBs to grow in subcontracting areas needing participation.

### **II. Limitations**

The ESB Program Benefits shall only be enacted to the extent allowed by all applicable federal and state laws, rules and regulations.

### **III. Development Assistance Tools**

1) Technical Assistance. Based upon CDOT's evaluation of an ESB and its business needs, CDOT may, alone or in collaboration with other organizations, provide individualized technical assistance to an ESB in the following areas: Construction management; Time management and project work scheduling; Project financing requirements, including insurance; Personnel management; Bidding, estimating, job costing, and contract administration procedures; Evaluation and use of project plans; CDOT contracting procedures and specifications; Marketing; and Construction, Professional Services and Practice of Research techniques and industry standards. CDOT may also authorize technical assistance in other areas if it is determined that such assistance reasonably relates to the development of a business in accordance with the purpose of these Rules.

- 2) **Additional Training and Resources.** CDOT, alone or in collaboration with other organizations, may also provide additional training and business development resources for ESBs. Such training and resources may include, but shall not be limited to, CDOT administered courses, mentor-protégé programs, online bidding access, and financial assistance to participate in industry activities and business development courses.
- 3) **Discretionary Distribution of Assistance.** CDOT shall have discretion to determine which ESBs shall receive the development assistance tools. Among other criteria, CDOT may consider the availability of funds, potential and need of the ESB, areas of need by CDOT, applicability of assistance to CDOT Contracts, past performance and assistance, and availability of resources from CDOT or other organizations to meet the needs of the ESB.
- 4) **Cooperation.** At any time, CDOT may modify or terminate assistance to an ESB. Failure of an ESB to cooperate with CDOT or to follow the ESB Program Guidelines while receiving technical assistance may result in revocation of Certification.

#### **IV. Means to Increase Contracting Opportunities**

- 1) **Incentives.** CDOT may provide the following incentives to prime contractors that are ESBs, commit to or demonstrate use of an ESB as a subcontractor, or agree to assist in the professional development of an ESB:
  - a. Evaluation points in point-based selection;
  - b. Financial incentives in cost-based selection;
  - c. Mentor-Protégé Programs; and
  - d. Other innovative incentives provided such incentives further the purpose of the ESB program.
- 2) **Participation as a Condition of Contract.** CDOT may make attainment of a certain level of ESB participation, or good faith effort to achieve such participation, a condition of Contract award. The procedures for evaluating such participation and good faith efforts shall be set forth in the advertisement for the Contract.
- 3) **Restricted Contracts.** CDOT may restrict the award of Contracts to ESB Contractors, joint ventures of which ESBs are a participant, and participants in CDOT's mentor-protégé program. CDOT shall evaluate the need for restricted contracts upon review and calculation of the DBE Overall Goal. At such time, CDOT shall establish objectives for restricted projects for the corresponding period. Additional criteria and processes for determining whether to restrict a project shall be set forth in the ESB Program Guidelines.
- 4) **Restricted Contract Items.** CDOT may identify items within a contract that shall be completed only by ESBs. Additional criteria and processes for determining whether to restrict a project shall be set forth in the ESB Program Guidelines.
- 5) **Increase Smaller Projects.** CDOT may increase the number of smaller-sized transportation Contracts in order to increase the opportunities for ESBs to participate on such projects as prime contractors. At a minimum, CDOT shall not unnecessarily or unjustifiably bundle CDOT work and shall take all reasonable steps to facilitate competition by small businesses on Contracts. CDOT shall evaluate its ability to unbundle projects upon review and calculation of the DBE Overall Goal. At such time, CDOT shall establish objectives for unbundling projects for the corresponding period.

- 6) Advertisement. For each Contract, the applicable incentives shall be detailed in the request for proposals, bidding advertisement, or other applicable advertising documents published by CDOT.

#### **V. Prompt Payment**

- 1) State Law. In accordance with state law, every prime Contractor shall pay the subcontractor within seven calendar days of receipt of the payment from CDOT, or within any shorter time provided in the contract between the prime contractor and CDOT.
- 2) ESB Program Requirements. In addition, CDOT may develop additional prompt payment requirements for projects involving ESB prime Contractors and ESB subcontractors on CDOT projects.

### **CHAPTER 5 - PROGRAM ADMINISTRATION**

#### **I. Enforcement.**

- 1) Burden. Any Business that participates in or utilizes the benefits of the ESB Program shall have the burden of proving its compliance with the requirements of the Rules.
- 2) Monitoring and Investigations. CDOT shall monitor all Businesses that utilize the benefits of the ESB Program in order to assure compliance with the Rules. CDOT may also receive and investigate complaints and allegations and initiate its own investigations regarding compliance.
- 3) Contract Provisions. CDOT shall develop compliance requirements and contract provisions related to the utilization of the ESB Program Benefits. On any Contract for which a Business has received or is to receive ESB Program Benefits the failure to meet the obligations of the Contract with respect to ESB participation or assistance shall constitute a material breach of contract. Additionally, if a Business is found to be in violation of the provisions of the Contract CDOT may exercise any or all of its rights, including but not limited to withholding funds from the Contractor.

#### **II. Directory.**

All certified ESBs shall be listed in an ESB Directory that shall be available to the public.

#### **III. Outreach.**

CDOT may publicize the ESB Program via internet, events and other forms of outreach.

#### **IV. Reporting.**

At a minimum, on an annual basis, CDOT shall report the progress of the ESB Program to the Transportation Commission. If necessary, the Transportation Commission may request additional periodic reports regarding the progress of and participation in the ESB Program. Detailed requirements for such reporting shall be outlined in the ESB Program Guidelines.

#### **V. Program Evaluation.**

CDOT will utilize various methods to obtain feedback, evaluation, and advice concerning the operation and content of the ESB Program. These methods may include forums, surveys, and annual meetings to assess the effectiveness of the program and make recommendations for improving the program.

#### **VI. Guidelines.**

CDOT shall have the power and authority to adopt additional regulations or guidelines to effectuate the purpose, procedures and operations of these Rules.

- 1) Adoption. The first version of the ESB Program Guidelines shall be adopted by the Transportation Commission DBE Committee.
- 2) Modifications. The ESB Program Guidelines shall not be modified more than once in a six month period. All changes to the ESB Program Guidelines shall be available for public comment at least one month prior to implementation. CDOT shall send electronic notification to all ESBs of pending changes to the ESB Program Guidelines and the changes shall be approved the Transportation Commission DBE Committee.

## **CHAPTER 6 – MISCELLANEOUS**

### **I. Severability.**

If any provision of these rules or their application is held invalid or unenforceable, such invalidity or unenforceability shall not affect other provisions or applications of these rules which can be given effect without the invalid provisions or application. The remaining provisions are to remain in full force and effect.

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### **Editor's Notes**

### **History**

Entire rule eff. 09/01/2011.