

DEPARTMENT OF TRANSPORTATION

Transportation Commission

EMERGING SMALL BUSINESS PROGRAM

2 CCR 604-1

CHAPTER 1 - GENERAL PROVISIONS

1.1. Statutory Authority **[Previously Codified in Chapter 1, Section I]**

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

1.2. Purpose **[Previously Codified in Chapter 1, Section II]**

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's (CDOT) Emerging Small Business (ESB) Program. CDOT shall use the ESB ~~program~~ ~~Program~~ to provide assistance to and increase opportunities for certified small businesses, including minority-owned, women-owned and ~~disadvantaged~~ ~~Disadvantaged business~~ ~~Business enterprises~~ ~~Enterprises~~. The assistance and opportunities provided by the ESB Program will aim to enable ~~emerging small businesses~~ ~~ESB~~ to gain the knowledge, experience and resources needed to participate in the competitive process for CDOT ~~contracts~~ ~~Contracts~~, thereby aiding in the development of Colorado's small business community, increasing competition for CDOT ~~contract~~ ~~Contract~~ awards, and lowering the cost to the public for transportation-related work.

1.3. Applicability **[Previously Codified in Chapter 1, Section III]**

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~~ ~~Contract~~ for which a part of the ~~contract~~ ~~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~~ ~~Contract~~ to the extent of such inconsistency.

CHAPTER 2 - DEFINITIONS

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

2.1. **Affiliate:** Businesses are affiliates of each other if: **[Previously Codified in Chapter 2, Paragraph 1]**

- 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.~~
- 2.2. ~~Annual Update: Annual evaluation of an ESB's continued eligibility for Certification. For ESBs that are concurrently certified in the Disadvantaged Business Enterprise (DBE) and ESB Programs, CDOT will synchronize the deadline for updating both certifications based on a mutually agreed upon date. [New Rule]~~
- 2.3. ~~Applicant: A Business that is applying for Certification as an ESB. [New Rule]~~
- 2.4. **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. **[Previously Codified in Chapter 2, Paragraph 3]**
- 2.5. **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. **[Previously Codified in Chapter 2, Paragraph 4]**
- 2.6. **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 ~~se~~ Rules and any other supplemental policies or ~~regulations-procedures~~ 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~~Contract. **[Previously Codified in Chapter 2, Paragraph 5]**
- 2.7. ~~Certification Year: The annual period when an Applicant's Certification is valid. The annual period begins on the date of an ESB's initial Certification or when the ESB's Annual Update is processed and approved, whichever is most recent. The annual period ends on the following calendar year and on the last day of the month when the initial Certification or Annual Update went into effect, whichever is most recent. For ESBs that are concurrently certified as DBEs by CDOT, this period may be shortened or extended in a given year following a mutual agreement between CDOT and the ESB to synchronize the end of its Certification Year with the deadline to update its DBE certification. For example, if an ESB is certified on August 15, 2020, that ESB's Certification Year begins on August 15, 2020, and ends on August 31, 2021. [New Rule]~~
- 6) ~~CDOT: Colorado Department of Transportation.~~
- 2.8. **Construction:** Building, altering, repairing, improving, or demolishing work as described in a CDOT project. This term includes "capital construction" and "controlled maintenance" as defined pursuant to §24-30-1301, C.R.S. **[Previously Codified in Chapter 2, Paragraph 7]**
- 2.9. **Contract:** ~~Any CDOT contract~~A written agreement with CDOT for the performance of Professional Services, Practice of Research or Construction work. **[Previously Codified in Chapter 2, Paragraph 8]**
- 2.10. **Contractor:** A Business qualified to perform and contracting with or intending to ~~contract~~Contract with CDOT to perform Professional Services, Practice of Research or Construction work. **[Previously Codified in Chapter 2, Paragraph 9]**

- 2.11. **Controlling Interest:** Ownership of ~~fifty-one percent (51%) percent~~ or more of the Business by one person, or ownership of the largest single portion of the Business by one (1) person if no one person holds ~~fifty-one percent 51% percent~~ or more. **[Previously Codified in Chapter 2, Paragraph 10]**
- 2.12. **C.F.R.:** Code of Federal Regulations **[Previously Codified in Chapter 2, Paragraph 11]**
- 2.13. **C.R.S.:** Colorado Revised Statutes, as amended. **[Previously Codified in Chapter 2, Paragraph 12]**
- 2.14. **Disadvantaged Business Enterprise (DBE):** A Business that is certified by the Colorado Unified Certification Program as meeting the certification requirements of the DBE Program. **[New Rule]**
- 2.15. **Disadvantaged Business Enterprise Program (DBE Program):** Federal United States Department of Transportation program governed by Title 49, Part 26 of the C.F.R. **[New Rule]**
- 2.16. **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.~~ **[Previously Codified in Chapter 2, Paragraph 13]**
- 2.17. **Emerging Small Business Program (ESB Program):** The program ~~pursuant to § 43-1-106(8)(p), C.R.S. and outlined by further set forth in these~~ Rules, which is intended to provide assistance to and increase opportunities for ~~Emerging Small Businesses~~ ESBs. **[Previously Codified in Chapter 2, Paragraph 14]**
- ~~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.~~
- 2.18. **NAICS Code:** The six digit classification code ~~and industry description (e.g. Corresponding Index Entry) assigned to the industry~~ under the North American Industry Classification System (NAICS). **[Previously Codified in Chapter 2, Paragraph 16]**
- 2.19. **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 C.F.R. 26.65(b)(4). **[Previously Codified in Chapter 2, Paragraph 17]**
- 2.20. **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". **[Previously Codified in Chapter 2, Paragraph 18]**
- 2.21. **Preponderance of the Evidence:** Proof by information that, compared with the opposing proof, leads to the conclusion that the fact at issue is more probably true than not. **[New Rule]**
- 2.22. **Principal:** A sole proprietor, ~~a general partner, or~~ limited partner, ~~director, or officer of the business, a person who owns at least twenty-five percent (25%) interest in the firm, or more of a controlling interest, a director, or an officer of the business.~~ **[Previously Codified in Chapter 2, Paragraph 19]**
- 2.23. **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.

[Previously Codified in Chapter 2, Paragraph 20]

2.24. **Program Benefits:** The benefits of the ESB Program as detailed-prescribed in Chapter 4 belowof these Rules. **[Previously Codified in Chapter 2, Paragraph 21]**

2.25. **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. All revenue of the Business as defined by the DBE Program under 49 C.F.R. § 26.65. **[Previously Codified in Chapter 2, Paragraph 22]**

23). **Renewal of Certification:** Annual evaluation of the status of Certification of an ESB.

2.26. **Rules:** ~~These~~ regulations contained in this document are enacted by the State of Colorado Transportation Commission of Colorado to govern the administration of the Emerging Small Business ESB Program. **[Previously Codified in Chapter 2, Paragraph 24]**

CHAPTER 3 - CERTIFICATION

3.1. Certification Procedures **[Previously Codified in Chapter 3, Section 1]**

- A. Certification and Annual Update~~Renewal~~ of Certification. CDOT shall establish reasonable procedures and methods for the Certification and Annual Update~~Renewal~~ of Certification of Businesses in order to effectuate the purposes of these Rules. Such procedures shall be detailed in the ESB Program Guidelines. **[Previously Codified in Chapter 3, Section 1, Paragraph 1]**
- B. Application. At a minimum, all applicants~~Applicants~~ will be required to complete an the prescribed CDOT 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~~Contracts~~. CDOT may investigate the information provided in the application through reasonable means, including, but not limited to interviews and on-site investigations. **[Previously Codified in Chapter 3, Section 1, Paragraph 2]**
- C. Requests for Information. The Applicant shall respond to all written requests for information within fifteen (15) calendar days of such request being made by CDOT, unless additional time is requested and granted. If the Applicant does not respond within the prescribed timeframe to CDOT's requests for information, CDOT may, at its sole discretion, make a determination based upon the information provided or deem the application incomplete. Incomplete applications are administratively closed. Applicants

whose applications are administratively closed may reapply for Certification at any time by submitting a new application. **[New Rule]**

- D. ~~Notice of Determination. CDOT will issue a written Certification decision within ninety (90) days of receipt of a complete application. CDOT may extend this time period once, for no more than an additional sixty 60 days, upon written notice to the Applicant explaining the reasons for the extension. In the event that an Applicant is denied Certification, CDOT's written Certification decision must explain the reasons for the denial.~~ **[New Rule]**

~~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.~~

E. ~~Appeal. Any applicant 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.~~ **[Previously Codified in Chapter 3, Section 1, Paragraph 4]**

F. ~~Reapplication. Any applicant 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 Applicants that were denied Certification based on a Size Limit under Rule 3.2.E. that is no longer applicable (e.g. following a change in the SBA size standards), 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 Businesses 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.~~ **[Previously Codified in Chapter 3, Section 1, Paragraph 5]**

3.2. Minimum Certification Requirements **[Previously Codified in Chapter 3, Section II]**

Only ~~applicant Applicants Businesses~~ that meet the criteria for Certification may participate in the ESB ~~program Program~~.

A. ~~Burden of Proof. The Applicant Business has the burden of demonstrating, by a Preponderance of the Evidence, proof that such Business meets the Certification criteria, as determined by CDOT.~~ **[New Rule]**

B. ~~Registration. Applicants must be authorized by the Colorado Secretary of State to transact business or conduct its activities within the state of Colorado. CDOT may require all applicant Applicants Businesses to register and maintain registration in an information~~

Commented [AJA1]: We are looking to dissociate the ESB program for the NAICS codes in order to cast a "broader net." We don't want to limit the scope of certification to specific areas of work. For purposes of priming on construction projects, there are other mechanisms, such as prequalification, intended to vet the firm's capacity to perform the work for which it is seeking to contract. This is also the case for professional services contracts.

For subcontractors/subconsultants, this will allow the firm to market themselves as a small business in various areas without being limited by the certification.

Commented [AJA2]: This change adds a one-year reapplication waiting period for denied applicants. This eases the administrative burden on the agency and potential delays in processing times for other applicants whose applications have not yet been reviewed.

Commented [AJA3]: The current language references "active subparticipation limits" which are not applicable to the ESB program.

The proposed language waives the waiting period for any firms that were previously denied based on a Program Cap that is no longer applicable

Commented [AJA4]: This change seeks to clarify the burden that an applicant must meet in order to qualify for certification. Previously, the ESB rules language only stated that the Applicant has the burden of demonstrating eligibility but did not articulate a standard.

database. ~~Any such registration requirement shall be outlined in the ESB Program Guidelines.~~ **Previously Codified in Chapter 3, Section II, Paragraph 1**

- C. Independence. The ~~Business Applicant~~ must be an independent ~~business~~ **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. **Previously Codified in Chapter 3, Section II, Paragraph 2**
- D. Qualifying ~~Principal~~-Area of Business. ~~The Business' Applicant principal area of business must be able to provide-participate in the performance of Professional Services, Practice of Research or Construction work on CDOT's transportation contracts~~ **Contracts**, including ~~contracts~~ **Contracts** for aeronautic, transit and highway transportation. **Previously Codified in Chapter 3, Section II, Paragraph 3**
1. ~~Primary Industry Determination. All Applicants and ESBs will be assigned a primary industry using a NAICS Code. The NAICS Code will describe the primary services and/or goods provided by the Applicant or ESB as determined by CDOT. The primary industry determination will be based on a number of factors, including but not limited to, the ESB's revenue, equipment, expertise, marketing materials, and the amount of time and labor dedicated to a specific area of work as compared to other services being offered by the ESB. The primary industry determination will be the basis for categorizing the ESB as a Construction, Professional Services, or Practice of Research firm. The ESB's designation as a Construction, Professional Services, or Practice of Research firm will be listed on the CDOT's ESB directory.~~
 2. ~~Size Limit. The primary industry determination will be the basis for evaluating the Applicant's or ESB's ability to meet the ESB Program's size limit as described in Rule 3.2.E.~~
 3. ~~Notice. The Applicant or ESB shall be notified in writing by CDOT of its primary industry determination at the time of initial Certification and with each Annual Update of the ESB's Certification. The ESB's designated primary industry at the time of initial Certification will remain in effect for the duration of the ESB's participation in the ESB Program except as provided in subparagraphs (4) and (5) of this Rule.~~
 4. ~~Reevaluation. The Applicant or ESB may make a written request that CDOT reevaluate its primary industry determination at any time but may not make more than one (1) request in a given Certification Year. The reevaluation request must include all supporting information the Applicant or ESB would like for CDOT to consider as part of its request. CDOT may request additional information from the Applicant or ESB as part of its reevaluation. CDOT will notify the Applicant or ESB in writing of its determination within thirty (30) calendar days of the reevaluation request. If the request is denied, CDOT's written notice must fully and specifically explain the reasons for the denial. If approved, the new primary industry designation will remain in effect and not be modified except as provided in this subparagraph or subparagraph (5) of this Rule.~~
 5. Appeal. The Applicant may appeal a primary industry determination or the denial of a reevaluation request in accordance with §§ 24-4-104 and 105, C.R.S.
- E. Size Limit. The average annual Receipts of the ~~Business Applicant or ESB~~ for the preceding three (3) years, combined with the average annual Receipts of all Affiliates for

Commented [AJA5]: This has been modified to clarify that vendors providing goods and services would be permitted to apply and participate in the ESB program. The current version of the rules reads as if only applicants providing construction, professional services, or practice of research (as defined by the program) would be eligible for certification.

Commented [AJA6]: Including a primary industry designation to an ESB certification gives CDOT a basis for assessing whether a firm continues to be a "small business" for the program's purposes.

Also, tying the firm's primary industry to NAICS codes would provide a more functional and searchable ESB database.

Commented [AJA7]: The current language sets the size standard at half of the SBA's small business size threshold for a given industry and half of the overall cap of the DBE program. This proposed change increases the size standard by adopting the SBA's small business size industry for a given industry and the current overall cap of the DBE program. The changes are being proposed to align with the DBE program and increase participation in the ESB program.

the preceding three (3) years, shall not exceed the ~~then-current~~ Overall Cap. The applicant or ESB must also be a small business for its Primary Industry as determined by the U.S. Small Business Administration pursuant to 13 C.F.R. § 121.201, 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. **Previously Codified in Chapter 3, Section II, Paragraph 4**

1. Levels. Certified ESBs shall be divided into two categories: Level 1 and Level 2 ESBs.
 - a. Level 1. ESBs whose average annual Receipts, as defined under 13 C.F.R. 121.104(c), do not exceed fifty percent (50%) of the small business size standard for its Primary Industry, as determined by the U.S. Small Business Administration under 13 C.F.R. 121.201, will be considered a Level 1 ESB.
 - b. Level 2. ESBs whose average annual Receipts, as defined under 13 C.F.R. 121.104(c), exceed fifty percent (50%) of the small business size standard for its Primary Industry, as determined by the U.S. Small Business Administration under 13 C.F.R. 121.201, will be considered a Level 2 ESB.
2. Notice. CDOT shall notify all Applicants or ESBs of its Level in writing at the time of Certification and with each Annual Update of the ESB's Certification.
3. The assigned ESB Level will be listed on CDOT's ESB directory.

Commented [AJA8]: The proposed language changes Level 1 designation to fifty percent of the SBA small business size standard for the firm's primary industry. Level 2 designations will be assigned to firms that have exceeded fifty percent of the SBA small business size threshold for its primary industry (without exceeding it).

- F. Training and Development. CDOT may establish minimum training and business development criteria for Certification and Annual Update~~Renewal~~ of Certification, including but not limited to CDOT-facilitated courses, financial or business courses, milestones demonstrating business development and management, and/or or any other requirement related to the ability to successfully perform on CDOT contracts. All training and development requirements shall be detailed in the Certification application. All training and development requirements shall be detailed in the ESB Program Guidelines. **Previously Codified in Chapter 3, Section II, Paragraph 5**
- G. Debarment and Conviction. The Business Applicant or ESB or any Principal thereof shall not have been debarred or convicted of bid-related crimes or violations within the past six (6) years in any state or federal jurisdiction, or be under notice of intent to debar in any jurisdiction. **Previously Codified in Chapter 3, Section II, Paragraph 6**
- H. Truth and Honesty. The Business Applicant or ESB 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. **Previously Codified in Chapter 3, Section II, Paragraph 7**
- I. Cooperation and Complete Disclosure. The Business Applicants must respond timely to and fully comply with all requests for information that are made by CDOT regarding participation and/or Certification 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. **Previously Codified in Chapter 3, Section II, Paragraph 8**

- J. Lawful Presence. Each individual owner of the Applicant must be lawfully residing in the United States. **New Rule**
- K. Additional RequirementsInformation. In addition to the minimum eligibility requirements listed above, CDOT may implement request additional requirements information for Certification in accordance with the purpose of these Rules. Such additional requirements shall be detailed in the ESB Program Guidelines. **Previously Codified in Chapter 3, Section II, Paragraph 9**

Commented [AJA9]: This is not a requirement under the current rules. The change is being proposed to align with the permanent residence requirements of the DBE program.

3.3. Annual Update of ESB Certification **New Rule**

- A. Each ESB must annually update its ESB Certification with CDOT by submitting an affidavit sworn to by the ESB's owners before a person who is authorized by state law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States prior to the end of the ESB's -Certification Year. This affidavit must affirm that there have been no changes in the ESB's firm's circumstances affecting its continued ability to meet the eligibility requirements of the ESB pProgram.
- B. Responsibility of ESB. The ESB is responsible for submitting Annual Update information to CDOT before the end of its Certification Year. CDOT will send a notice regarding the Annual Update approximately forty-five (45) days in advance, but it is the ESB's responsibility to ensure that all materials are submitted before the end of the Certification Year. If the ESB does not timely submit its Annual Update information, CDOT will initiate revocation procedures in accordance with Rule 3.4.B.
- C. Additional Investigation. If CDOT has reason to believe that an ESB may no longer be eligible for Certification or that a substantial change has occurred in the ownership or operation of the bBusiness, it may further investigate the circumstances of the ESB and its owners.
- D. Extensions. At its discretion, CDOT may provide an extension to the ESB for submitting Annual Update information of no more than one (1) month past the end of the Certification Year. Such extension is only valid if requested by the ESB and confirmed by CDOT in writing. A request for an extension will only be granted when the ESB has demonstrated extenuating circumstances requiring an extension.

3.4. Graduation and Revocation of ESB Certification **Previously Codified in Chapter 3, Section III**

- A. 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), average annual Receipts of the ESB (including its affiliates), as defined under 13 C.F.R. 121.104(c), exceeds the small business size standard established by the U.S. Small Business Administration for its Primary Industry or if the ESB's average annual gross receipts, as defined under 13 C.F.R. 121.104(a), for the three most recent fiscal years exceeds the then-current Overall Cap, or exceeds the size standard for all NAICS Codes for which the ESB had been Certified. **Previously Codified in Chapter 3, Section III, Paragraph 11**

Commented [AJA10]: Ties Graduation directly with Overall Cap and Primary Industry.

- 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.

1. ~~Timing.~~ Graduation shall only occur upon the ~~Renewal-Annual Update~~ of Certification. ~~unless, due to mistake or other non-fraudulent activity, the determination of CDOT is called into question.~~ **[Previously Codified in Chapter 3, Section III, Paragraph 1, Subparagraph b]**
 2. Notice. CDOT shall provide the ESB with written notice that ~~the ESB has graduated from the ESB pProgram and has exceeded the size limits and the ESB shall have the opportunity to contest such determination, state the specific reasons why CDOT believes the ESB is no longer eligible for the ESB pProgram.~~ **[Previously Codified in Chapter 3, Section III, Paragraph 1, Subparagraph c]**
 3. ~~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. ~~Upon graduation, the Business will be removed from the ESB Program and ESB directory.~~ **[Previously Codified in Chapter 3, Section III, Paragraph 1, Subparagraph d]**
- B. Revocation. **[Previously Codified in Chapter 3, Section III, Paragraph 2]**
1. Reasons for Revocation. CDOT shall revoke the Certification of an ESB if: **[Previously Codified in Chapter 3, Section III, Paragraph 2, Subparagraph a]**
 - a. The ESB fails to comply with the procedures for ~~Renewal-Annual Update~~ of Certification ~~or any other requirements for continued ESB Program participation or any other procedures set forth in the ESB Program Guidelines or ESB project specifications;~~
 - b. The ESB continuously fails to cooperate with CDOT;
 - c. 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;
 - d. The Business or any Principal ~~thereof~~ commits any action or omission which evidences a lack of integrity or honesty in performing public projects; or
 - e. CDOT has reasonable grounds to believe that the public health, welfare, or safety imperatively requires immediate suspension of Certification.
 2. ~~Timing and Notice.~~ Revocation may occur at any time. Except as provided in ~~subsection-subparagraph (e3) below of this Rule,~~ CDOT shall provide written notice to ~~a Business-the ESB that its Certification is pending revocation. CDOT is revoking the Business from the ESB Program and state the specific reasons why CDOT believes the Business is no longer eligible for the ESB Program.~~ **[Previously Codified in Chapter 3, Section III, Paragraph 2, Subparagraph b]**
 3. ~~Effect on Participation.~~ Revocation shall not affect the ESB's status for Contracts that were bid for or awarded prior to the ESB's revocation from the ESB Program. ~~Upon revocation, the Business will be removed from the ESB Program and ESB directory.~~ **[New Rule]**

- 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.~~
- B. ~~Reapplication. If its previous ESB eCertification is revoked, the Business must wait a period of twelve (12) months from the date of revocation before reapplying for certification. If an ESB graduates from the ESB Program, neither the Business, nor any Affiliate thereof, shall be eligible for recertification.~~ **[New Rule]**
- C. 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. **[Previously Codified in Chapter 3, Section III, Paragraph 3]**

Commented [AJA11]: Aligns with the DBE program; lessens administrative burden for CDOT; incentive for maintaining certification.

CHAPTER 4 - PROGRAM BENEFITS

4.1. Objectives and Priorities **[Previously Codified in Chapter 4, Section I]**

The programs and incentives outlined in this section shall aim to assist ~~emerging small businesses~~ **ESB** 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.

4.2. Limitations **[Previously Codified in Chapter 4, Section II]**

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

4.3. Development Assistance Tools **[Previously Codified in Chapter 4, Section III]**

- A. 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 including, but not limited to, 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 Business** in accordance with the purpose of these Rules. **[Previously Codified in Chapter 4, Section III, Paragraph 1]**
- B. 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. .
[Previously Codified in Chapter 4, Section III, Paragraph 2]

- C. 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. .
[Previously Codified in Chapter 4, Section III, Paragraph 3]
- D. Cooperation. At any time, CDOT may modify or terminate technical 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.~~ .
[Previously Codified in Chapter 4, Section III, Paragraph 4]

4.4. Means to Increase Contracting Opportunities [Previously Codified in Chapter 4, Section IV]

- A. Incentives. CDOT may provide the following incentives to prime ~~contractors~~ 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: [Previously Codified in Chapter 4, Section IV, Paragraph 1]
 - 1. Evaluation points in point-based selection;
 - 2. ~~Bid preference in competitive price selection;~~
 - 3. Financial incentives in cost-based selection;
 - 4. Mentor-~~p~~Protégé ~~p~~Programs;
 - 5. ~~Bond Assistance Program;~~ and
 - 6. Other innovative incentives provided such incentives further the purpose of the ESB ~~program~~Program.
- B. 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. [Previously Codified in Chapter 4, Section IV, Paragraph 2]
- C. 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 ~~may 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.~~ [Previously Codified in Chapter 4, Section IV, Paragraph 3]
- D. 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.~~ [Previously Codified in Chapter 4, Section IV, Paragraph 4]

- E. 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~~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~~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. **Previously Codified in Chapter 4, Section IV, Paragraph 5**
 - F. 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. **Previously Codified in Chapter 4, Section IV, Paragraph 6**
- 4.5. Prompt Payment **Previously Codified in Chapter 4, Section V**
- A. State Law. In accordance with § 24-91-103state-law, C.R.S., every prime Contractor shall pay the subcontractor within seven (7) calendar days of receipt of the payment from CDOT, or within any shorter time provided in the contract between the prime ~~contractor~~Contractor and CDOT. **Previously Codified in Chapter 4, Section V, Paragraph 1**
 - B. ESB Program Requirements. In addition, CDOT may develop additional prompt payment requirements for projects involving ESB prime Contractors and ESB subcontractors on CDOT projects. **Previously Codified in Chapter 4, Section V, Paragraph 2**

CHAPTER 5 - PROGRAM ADMINISTRATION

- 5.1. Enforcement. **Previously Codified in Chapter 5, Section I**
- A. 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. **Previously Codified in Chapter 5, Section I, Paragraph 1**
 - B. 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. **Previously Codified in Chapter 5, Section I, Paragraph 2**
 - C. Contract Provisions. CDOT shall develop compliance requirements and ~~contract~~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~~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. **Previously Codified in Chapter 5, Section I, Paragraph 3**
- 5.2. Directory. **Previously Codified in Chapter 5, Section II**
- All ~~certified~~ESBs shall be listed in an ESB ~~d~~Directory that shall be available to the public.
- 5.3. Outreach. **Previously Codified in Chapter 5, Section III**
- ~~CDOT, at its sole discretion, may send communications to ESB certified firms regarding program changes, support services, project opportunities, and other information related to ESB program participation. CDOT may publicize the ESB Program via internet, events and other forms of outreach.~~

5.4. Reporting. **[Previously Codified in Chapter 5, Section IV]**

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.~~

5.5. Program Evaluation. **[Previously Codified in Chapter 5, Section V]**

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

6.1. Severability. **[Previously Codified in Chapter 6, Section I]**

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

CHAPTER 7 – INCORPORATION BY REFERENCE **[New Chapter]**

7.1. ~~The Rules are intended to be consistent with and not be a replacement for the federal requirements set forth in 13 C.F.R. Part 121, in effect as of February 10, 2020, and 49 C.F.R. Part 26, in effect as of October 2, 2014, which are hereby incorporated into these Rules by reference, and do not include any later amendments.~~

7.2. ~~All referenced laws and regulations shall be available for copying for a reasonable charge or for public inspection during regular business hours from the Office of Policy and Government Relations, Colorado Department of Transportation, 2829 W. Howard Pl., Denver, Colorado 80204.~~

7.3. ~~Copies of the referenced Code of Federal Regulations may be obtained from the following address:~~

~~U.S. Government Publishing Office
732 North Capitol Street, N.W.~~

Washington, DC 20401
(202) 512-1800

Available online at: <https://www.ecfr.gov/cji-bin/ECFR>

CHAPTER 8 – DECLARATORY ORDER **New Chapter**

- 8.1. CDOT may entertain, at its sound discretion, petitions for declaratory orders pursuant to § 24-4-105(11), C.R.S.