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*Effective August 3, 2006*

*Rule Amended August 29, 2007 & August 29, 2013*

**40E-7.668 Policy.**

(1) The rules under this Small Business Enterprise Contracting Program establish policies and procedures designed to help small businesses, including those owned by women and minorities, to participate in the South Florida Water Management District's ("District") procurement and contract activities.

(2) It is the purpose of the Program to spur economic development and support small businesses, including woman-owned and minority-owned businesses, to successfully expand in the marketplace.

(3) The District shall annually evaluate the progress of this Program and determine whether the specific provisions require any modification, expansion, and curtailment.

*Rulemaking Authority 373.044, 373.113 FS. Law Implemented 373.1135 FS. History—New 8-3-06.*

**40E-7.669 Definitions.**

(1) "Affiliate Business" means a business that is a subsidiary of or owned in part by another business concern. Entities are affiliates of each other when one impacts the other by sharing resources or controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists.

(2) "Applicant" an entity that is seeking District Certification or recertification.

(3) "Certification" means the process by which the District determines that a business meets the District's criteria for a Small Business Enterprise (SBE).

(4) "Commodity Code" A numeric system designed to list commodities or services by classes and sub-classes. A numeric identifier of supplies, materials, goods, merchandise, equipment or other tangible personal property (purchase or lease), including the contractual services.

(5) "Government Agency" means any state, county, regional or local government in Florida.

(6) "Gross Receipts" means the total sales for the Applicant as specified in its Federal tax return or if a new company which has not filed a Federal tax return, in its audited financial statement before deductions for returned items, allowances, and discounts.

(7) "Industry Categories" means construction, commodities and services.

(8) "Non SBE Prime" means a business not currently certified by the District as a small business enterprise which submits a bid or proposal for the purpose of being awarded a legally binding agreement as a Prime Contractor for the performance of work at a mutually agreed upon price in accordance with agreed upon terms and conditions with the District.

(9) “Prime Contractor” means any individual or contracting entity with whom the District has entered into a legally binding agreement for performance of work at a mutually agreed upon price in accordance with agreed upon terms and conditions.

(10) “Responsible” means a business that is capable in all respects of fully performing the contract requirements and which has the integrity and reliability that will assure good faith performance.

(11) “Responsive” means a business’s bid or proposal conforms in all material respects to the invitation to bid or request for proposal.

(12) “District Small Business Enterprise (SBE)” means a business certified by the District, whose three (3) year average gross receipts, including affiliates, shall not exceed \$13 million if the business provides construction, \$5 million if the business provides commodities, and \$6 million if the business provides services. Additionally, a District Small Business Enterprise is licensed to do business in the State of Florida if the business requires a license.

(13) “SBE Prime” means a business certified by the District as a small business that submits a bid or proposal for the purpose of being awarded a legally binding agreement as an SBE Prime Contractor for the performance of work at a mutually agreed upon price in accordance with agreed upon terms and conditions with the District.

*Rulemaking Authority 373.044, 373.113 FS. Law Implemented 373.1135 FS. History—New 8-3-06, Amended 8-29-07, 8-29-13.*

#### **40E-7.670 Competitive Solicitation Preferences.**

The Small Business Enterprise Contracting Rule in this part provides for three types of Competitive Solicitation Preferences designed to assist small businesses. The Bid Equalization, Sheltered Market and Subcontracting Requirements are outlined below.

(1) Bid Equalization. This process enables the District to award a contract to an SBE Prime even though the SBE Prime was not the low bidder as long as the SBE Prime's bid was within a predetermined percentage of the lowest Non-SBE Prime’s responsive, and responsible bid. Bid Equalization preferences are used only in construction solicitations.

Prior to solicitation, the District must determine whether to use the Bid Equalization preference. Should the District choose to use this preference, the District must first obtain the District engineer's estimate for the construction work being contemplated in the solicitation. Based on the estimate, the District will establish the percentage preference to apply in the solicitation.

The percentages will be applied as follows:

(a) For contracts with an estimated value of \$2,000,000 or more, the District shall implement a maximum bid adjustment of one percent (1%).

(b) For contracts with an estimated value of more than \$500,001 but less than \$2,000,000, the District shall implement a maximum bid adjustment of five percent (5%).

(c) For contracts valued at \$500,000 or less, the District shall implement a maximum bid adjustment of ten percent (10%).

(d) The solicitation language shall clearly state that based on the District's estimate, a certain percentage preference will be applied to an SBE Prime, if the SBE Prime meets all of the requirements for the preference. For example, if the District engineer's estimate for a construction project is \$100,000, the District shall establish a 10% preference for an SBE Prime. If a Non-SBE Prime is the lowest responsive and responsible bidder at \$100,000 and the next lowest responsive and responsible bid is by an SBE Prime at \$103,000, the SBE would be provided the ten percent preference and be awarded the contract at \$103,000. The SBE Prime's bid was only \$3,000 greater than the Non-SBE Prime. Therefore the SBE Prime was 3% over and well within 10% of the lowest Non-SBE Prime's responsive and responsible bid and able to take advantage of the preference to obtain the contract award.

(e) The Bid Equalization does not apply to bids let under the Sheltered Market Program or when all bids received are from SBE Primes.

(2) Sheltered Market Program. The District may provide for sheltered markets to allow only SBE's to bid on designated solicitations. In order to designate a sheltered market the District must identify at least 3 SBEs available to perform work within the industry identified in the solicitation.

### (3) Subcontracting Requirements.

(a) Bids – The District shall set subcontracting goals for all bids based on availability of vendors registered with the District, including SBE firms able to perform work within specific commodity codes. The goals shall be applied as a percentage of the total contract value to be assigned to SBE firms.

The maximum goal that will be applied to any solicitation will be 25%. When an SBE goal is set bidders shall provide work to one or more SBEs in order to meet the goal. At the time of submittal of its bid, the bidder shall identify all SBE firms which will be utilized as subcontractors, by using Form No. 0956, "Small Business Enterprise Subcontractor Participation Schedule" effective (August 29, 2013) (<http://www.flrules.org/Gateway/reference.asp?No=Ref-03065>). All bids submitted where SBE participation is required, shall include Form No. 0957, "Statement of Intent to Perform as a Small Business Enterprise Subcontractor" effective (August 29, 2013) (<http://www.flrules.org/Gateway/reference.asp?No=Ref-03066>). This form shall be signed by the SBE subcontractor, Form Nos. 0956 and 0957, together called the SBE Subcontractor Utilization Plan, must reflect the parties' intent to establish a business relationship as well as the type of work and percentage of work that the SBE subcontractor will perform. Failure to submit any of the information as required herein shall lead to the bid being deemed non-responsive. Form Nos. 0956 and 0957 are incorporated by reference herein and are available at no cost by contacting the South Florida Water Management District Clerk's Office, South Florida Water Management District, 3301 Gun Club Road, West Palm Beach, FL 33406, (800) 432-2045, ext. 6436, or (561) 682-6436.

Any bidder failing to meet the established goal shall be deemed nonresponsive. If an SBE Prime intends to subcontract work to an SBE subcontractor, the SBE Prime must submit the

aforementioned forms at the time of submitting its bid or be deemed non-responsive. If the SBE Prime intends to perform 100% of the work, the SBE Prime does not have to submit the aforementioned forms.

(b) Standard Proposals – For solicitations where a contract is awarded based on an evaluation criteria, and where the scope of work is clearly defined the District shall determine subcontracting goals for each solicitation based on availability of SBE firms as stated above in Section 3(a). The maximum goal that will be applied to any solicitation will be 25%. The goals shall be applied as a percentage of the total contract value to be assigned to SBE firms. At the time the proposal is submitted the proposer shall identify all SBE firms (if any) which will be utilized as subcontractors, by using Form No. 0956, “Small Business Enterprise Subcontractor Participation Schedule,” incorporated by reference in paragraph (3)(a) herein. All proposals with SBE subcontractor participation shall include Form No. 0957, “Statement of Intent to Perform as an Small Business Enterprise Subcontractor, also incorporated by reference in paragraph (3)(a) herein. This form shall be signed by the SBE subcontractor. Form Nos. 0956 and 0957 together called the SBE Subcontractor Utilization Plan must reflect the parties’ intent to establish a business relationship as well as the type of work and percentage of work that the SBE subcontractor will perform. If an SBE Prime intends to subcontract work to an SBE subcontractor, the SBE Prime must submit the aforementioned forms at the time of submitting its proposal. Any non SBE Prime contractor who fails to meet the established goal shall be deemed non-responsive.

(c) Work Order Proposals – For solicitations where a contract is awarded based on evaluation criteria and where the scope of work is not clearly defined resulting in work order contracts, will not contain a goal, but shall require proposers to commit to goals assigned to individual work orders issued throughout the term of the contract. The goal for individual work orders will be based on availability of SBE firms as stated above in paragraph (3)(a). The maximum goal that will be applied to any work order will be 25%. At the time the proposal is submitted, the proposer shall identify all proposed SBE firms that will be utilized as subcontractors.

At the time a work order with an SBE goal is assigned, the Prime Contractor shall submit a cost proposal, and identify all SBE subcontractors and the percentage of work that the SBE subcontractor(s) will perform by using Form No. 0956, “Small Business Enterprise Subcontractor Participation Schedule,” incorporated by reference in paragraph (3)(a) herein. All cost proposals shall also include Form No. 0957, “Statement of Intent to Perform as a Small Business Enterprise Subcontractor,” also incorporated by reference in paragraph (3)(a) herein. This form shall be signed by the SBE subcontractor. A work order will not be executed with a Prime Contractor whose cost proposal does not meet the established goal for that work order. In addition, failure to meet the goal set by the District for an executed work order will result in a breach of contract by the Prime Contractor.

*Rulemaking Authority 373.044, 373.113 FS. Law Implemented 373.1135 FS. History–New 8-3-06, Amended 8-29-07, 8-29-13.*

#### **40E-7.671 District Implementation.**

The District shall ensure all small businesses have the maximum opportunity to participate in the District's contracting and procurement processes. The following are examples of efforts to be taken by the District:

(1) Establish a Small Business Enterprise program to implement the rules established under this Part.

(2) Identify all competitive contracting opportunities within the District budget for SBE participation.

(3) Analyze SBE availability to provide the products or services identified for contracting at either the prime contract or subcontract levels.

(4) Maintain a database of all SBEs.

(5) Monitor and maintain records of steps taken and results achieved to maximize SBE participation.

(6) Monitor the District's efforts to achieve SBE objectives.

(7) Provide training to District staff on the District's SBE Rule.

*Rulemaking Authority 373.044, 373.113 FS. Law Implemented 373.1135 FS. History—New 8-3-06, Amended 8-29-13.*

#### **40E-7.672 Compliance.**

The District shall monitor and evaluate Program performance and compliance as follows:

(1) Each District contract shall contain a provision requiring the contractor, during the term of the contract, to comply with, as to tasks and proportionate dollar amounts throughout the term of the contract, all commitments made in their bids or proposals for use of SBEs.

(2) Each District contract shall contain a provision requiring maintenance of records, and information necessary to document compliance with the rules under this Part and shall include the right of the District to inspect such records.

(3) Each District contract shall contain a provision prohibiting any agreements between a contractor and a SBE in which the SBE promises not to provide subcontracting quotations to other respondents or potential respondents.

(4) Prime Contractors must notify the District when the need to add or replace an SBE subcontractor arises and shall provide a completed Form No. 1373, "Small Business Enterprise Subcontractor Revised Participation Schedule" effective (August 29, 2013) (<http://www.flrules.org/Gateway/reference.asp?No=Ref-03067>), which contains an explanation of the addition or replacement of the SBE subcontractor. Form 1373 is incorporated by reference herein and a copy can be obtained at no cost by contacting the South Florida Water Management District Clerk's Office, South Florida Water Management District, 3301 Gun Club Road, West

Palm Beach, FL 33406, (800) 432-2045, ext. 6436, or (561)682-6436. In addition, a completed Form No. 0957, "Statement of Intent to Perform as a Small Business Enterprise Subcontractor," incorporated by reference in paragraph 40E-7.670(3)(a), F.A.C., must be submitted if applicable.

(5) Failure of the Prime Contractor to meet its SBE requirements in a District contract will be a factor considered by the District when the District makes its responsibility determinations for future District contract awards and when the District considers whether to place a contractor on the Temporary or Permanent Suspension List under Rule 40E-7.218, F.A.C.

(6) Each District contract awarded with SBE participation shall contain a provision incorporating the rules under this Part by reference and a statement that failure to comply with the requirements of the bid or proposal submitted to the District by a contractor shall be considered a material breach of contract which may result in suspension or debarment of the firms or individuals involved pursuant to Chapter 40E-7, F.A.C.

*Rulemaking Authority 373.044, 373.113 FS. Law Implemented 373.1135 FS. History—New 8-3-06, Amended 8-29-13.*

#### **40E-7.673 Certification Eligibility – Small Business Enterprise.**

District staff shall have the authority to accept, review, approve, certify, decertify and deny applications for SBE certification. An applicant business must be registered with the District as a vendor prior to submitting an application for certification.

(1) Applicant businesses shall submit applications for SBE certification using Form No. 1231, "SBE Certification Application", effective August 3, 2006, which is hereby incorporated by reference and which can be obtained from the District upon request. Mailing addresses must include the number, name of the street, suite number, if any, city and correct zip code. A post office box will not be acceptable absent a street address.

(2) To establish that it is a small business, the applicant shall:

(a) Provide documentation to demonstrate that the three (3) year average gross receipts of the business concern, together with its affiliates, does not exceed \$13 million for Construction, \$5 million for Commodities, and \$6 million for Services. In determining the gross receipts of the business and its affiliates, the District shall consider the three (3) federal tax returns filed by the Applicant for the three (3) years immediately preceding their application. If the Applicant has not filed three (3) federal income tax returns for the three (3) years immediately preceding their application, then the Applicant must submit a financial statement, for any of the three (3) years immediately preceding the application in which the Applicant did not file a federal income tax return(s). The financial statement must be prepared by a Certified Public Accountant as defined by Section 473.301, F.S., not employed by the Applicant but retained for the purpose of preparing financial statements for the Applicant. Applicants in business less than one (1) year are to submit an opening balance sheet and income statement for the months in which they were in business.

(b) The applicant must demonstrate that it is licensed to do business in the State of Florida if the business requires a license.

(c) The Applicant may only have one (1) business certified with the South Florida Water Management District.

*Rulemaking Authority 373.044, 373.113 FS. Law Implemented 373.1135 FS. History–New 8-3-06.*

#### **40E-7.674 Certification Review Procedures.**

(1) Upon receipt by the District, all applications for SBE certification shall be screened to ensure appropriate signature and completeness. The application must be signed by the individual with the authority to bind the applicant.

(2) Within sixty (60) days following receipt of the application, the District will request that the applicant business to furnish omitted items or additional information, if any. All requested information must be received by the District within sixty (60) days from the date of the request or the applicant will be deemed ineligible for certification. Applicants may re-apply.

(3) Applicants determined eligible shall receive certification as an SBE from District staff. Once certified, an applicant shall remain certified for a period of three (3) years unless the applicant fails to follow this rule and is sanctioned pursuant to the rule. The District retains the right to re-evaluate the certification of any business at any time.

(4) Applicants determined ineligible shall receive a notification from the District. Applicants receiving this notification of ineligibility shall not be eligible to submit new applications until 180 days after the date of the notice denying certification.

*Rulemaking Authority 373.044, 373.113 FS. Law Implemented 373.1135 FS. History–New 8-3-06, Amended 8-29-07, 8-29-13.*

#### **40E-7.675 Recertification Review Procedures.**

(1) Applications for recertification shall be submitted using Form No., 1232 “SBE Application for Recertification”, effective August 3, 2006, which is hereby incorporated by reference and available from the District upon request.

(2) The District will notify SBEs no later than sixty (60) days before the end of the certification period that the SBE’s certification is about to expire. If the SBE is unable to use the recertification document because of changes to the applicant’s business, the SBE shall notify the District in writing of the changes to its company. The District shall determine if the company still complies with the certification criteria set forth in Rule 40E-7.673, F.A.C. Recertification requests must be filed with the District no later than the last effective date of the current certification period.

(3) Upon receipt, all recertification requests shall be given an initial screening to ensure appropriate signature and completeness. Within sixty (60) days following initial receipt of the applicant’s recertification request, the District will request the applicant to furnish omitted or additional information. If the requested information or items are not received by the District within sixty (60) days from the date of the request, the District will deny the application for recertification.



(4) Recertification shall be granted when the applicant has complied with this rule and substantiates continued eligibility for SBE status.

(5) Applicants deemed eligible shall receive a recertification letter stating the length of time for which the business has been re-certified and the specialty areas of the business. Once recertified, an applicant shall remain certified for a period of three (3) years unless the District determines that the applicant no longer meets the eligibility requirement of this Rule. The District retains the right to reevaluate the certification of any business at any time.

(6) Applicants determined ineligible for recertification shall receive a letter citing the specific criteria of subsection 40E-7.673(2), F.A.C., that they failed to meet and advising that they shall not be eligible to submit new applications until 180 days after the date of the notice or the District's final agency order denying recertification.

(7) If an application for recertification is timely submitted, an SBE shall remain certified until the District has made a determination concerning eligibility.

*Rulemaking Authority 373.044, 373.113 FS. Law Implemented 373.1135 FS. History—New 8-3-06, Amended 8-29-13.*

#### **40E-7.676 Decertification.**

Decertification is the process by which the District shall take steps to retract a business's certification as an SBE. The decertification of an SBE shall occur when the District determines that an SBE no longer complies with the District's certification criteria. The District will also decertify an SBE if the District learns that the SBE submitted false information in order to obtain SBE certification.

(1) District staff shall inform the SBE in writing by certified mail, return receipt requested, of the facts or conduct which formed the basis for decertification.

(2) The decertification notice issued by the District shall contain:

(a) The statutory provisions(s) or rules(s) of the Florida Administrative Code which the District alleges that the SBE violated; and

(b) The specific facts or conduct relied upon to justify the decertification; and

(c) A statement that the firm has the right to file a request for an administrative hearing pursuant to Sections 120.569 and 120.57, F.S., within 21 days of receipt of the decertification notice; and

(d) A statement that the decertification shall become conclusive and final agency action if no request for a hearing is filed with the District Clerk's office within 21 days from receipt of the decertification notice.

(3) If the firm fails to file a request for a hearing within 21 days after receipt of the notice, the decertification shall become conclusive and final agency action.

(4) If the SBE files a request for an administrative hearing, the firm shall remain certified unless and until a Final Order is issued by the District decertifying the firm after an administrative hearing.

*Rulemaking Authority 373.044, 373.113 FS. Law Implemented 373.1135 FS. History–New 8-3-06.*

**40E-7.677 Reciprocity.**

Reciprocal certification shall be granted to applicant businesses which are certified by other Florida Government Agencies provided that the agency has a small business program and that the applicant business is certified as a small business by that agency. Applicant shall provide the District with documentation that provides the certification and expiration dates. The District reserves the right to request any additional documentation to verify or clarify the authentication of the information provided.

*Rulemaking Authority 373.044, 373.113 FS. Law Implemented 373.1135 FS. History–New 8-3-06, Amended 8-29-13.*

**40E-7.678 Administrative Hearings.**

If an applicant business believes it has been wrongly denied certification, or recertification or that it has been inappropriately decertified as an SBE, it may file a request for hearing pursuant to Sections 120.569 and 120.57, F.S., by submitting a petition in accordance with Chapter 28-106, F.A.C., within 21 days of receipt of Notice of Denial of certification or recertification or Notice of Decertification as a District SBE.

*Rulemaking Authority 373.044, 373.113 FS. Law Implemented 373.1135 FS. History–New 8-3-06.*