

DRAFT

SUMMARY

Directs public contracting agency to suspend right of certified disadvantaged minority, women or emerging small business enterprise to bid on or participate in public contract if certified disadvantaged minority, women or emerging small business enterprise fails to perform commercially useful function in public contract.

Becomes operative January 1, 2016.

Declares emergency, effective on passage.

A BILL FOR AN ACT

Relating to certifications of disadvantaged business enterprises; creating new provisions; amending ORS 200.055, 200.065 and 200.075; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 200.055 is amended to read:

200.055. (1) *[Any disadvantaged, minority, women or emerging small business enterprise is entitled to be certified as such upon application]* **A business enterprise may apply** to the Oregon Business Development Department **for certification as a disadvantaged, minority, women or emerging small business enterprise.** If the **business enterprise is qualified as provided in ORS 200.005 to 200.075 and the department approves the** application *[is approved by the department]*, the department shall certify the applicant as a disadvantaged, minority, women or emerging small business enterprise. *[The enterprise shall be considered so certified by any public contracting agency.]* **All public contracting agencies shall treat a business enterprise that receives a certification under this section as a disadvantaged, minority, women or emerging small business enterprise for the**

NOTE: Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in **boldfaced** type.

purposes of awarding public contracts.

(2) In consultation with the State Board of Higher Education and the Department of Transportation, and with the approval of the Advocate for Minority, Women and Emerging Small Business, the Oregon Business Development Department by rule shall adopt a uniform standard form and procedure designed to provide complete documentation that a business enterprise is certified as a disadvantaged, minority, women or emerging small business enterprise. The department shall compile and make available upon request a list of certified disadvantaged, minority, women or emerging small business enterprises.

(3) *[Any business enterprise that is refused]* **If the department denies, revokes or refuses to renew a business enterprise's** certification as a disadvantaged business enterprise *[or denied recertification as such or whose certification is revoked]*, **the business enterprise** may appeal directly to the United States Department of Transportation.

(4) *[Any business enterprise that is refused]* **If the department denies, revokes or refuses to renew a business enterprise's** certification as a minority, women or emerging small business enterprise *[or has its certification revoked]*, **the business enterprise** may request a contested case hearing as provided in ORS chapter 183.

(5) The Oregon Business Development Department *[shall be]* **is** the sole agency authorized to certify enterprises as disadvantaged, minority, women or emerging small business enterprises **that are** eligible to perform *[on]* public contracts in this state.

(6) The Oregon Business Development Department by rule may establish a fee not to exceed \$100 for a copy of the list of certified disadvantaged, minority, women and emerging small business enterprises and may assess state agencies for services under ORS 200.005 to 200.075.

(7) The Department of Transportation may collect a fee, not to exceed \$200, from a bidder upon bidder prequalifications to cover the costs of the Oregon Business Development Department in administering ORS 200.005 to

200.075. The Department of Transportation shall transfer *[such]* **the** fees to the credit of the account established under subsection (8) of this section.

(8) The Oregon Business Development Department shall establish a special account in which to deposit fees and assessments. The special account is continuously appropriated to the department to meet *[its]* **the department's** expenses in administering ORS 200.005 to 200.075.

SECTION 2. ORS 200.065 is amended to read:

200.065. (1) *[It shall be unlawful for any]* **A person may not** fraudulently *[to]* obtain or retain, *[or]* attempt to obtain or retain or *[to]* aid another person **to** fraudulently *[to]* obtain or retain or attempt to obtain or retain certification as a disadvantaged, minority, women or emerging small business enterprise.

(2) *[It shall be unlawful knowingly to]* **A person may not knowingly** make a false claim that any person is qualified for certification or is certified under ORS 200.055 for the purpose of gaining a contract or subcontract or other benefit.

(3) *[The]* **An affected** public contracting agency may withhold payment, may suspend or terminate *[the]* **a public** contract and may impose on any person a civil penalty not to exceed 10 percent of the contract or subcontract price or \$5,000, whichever is less, for each violation of subsection (1) or (2) of this section. *[The penalty shall be paid to the Office for Minority, Women and Emerging Small Business.]*

(4) The Oregon Business Development Department or an affected public contracting agency shall investigate any complaint that a person has violated subsection (1) or (2) of this section. In investigating *[such]* a complaint, the department or an affected public contracting agency may require any additional information, administer oaths, take depositions and issue subpoenas to compel *[the attendance of]* witnesses *[and the production of]* **to attend and to produce** books, papers, records, memoranda or other information necessary to carry out *[its]* **the department's or the affected public contracting agency's** duties. If *[any]* a person fails to comply with any

subpoena *[issued]* **the department or the affected public contracting agency issues** under this subsection or refuses to testify on any matter on which a person may lawfully be interrogated, the **department or the affected public contracting agency shall follow the** procedure provided in ORS 183.440 *[shall be followed]* to compel compliance.

(5) **The department or** an affected public contracting agency *[or the department]* may disqualify any person *[found to have violated]* **that under oath during the course of an investigation admits to violating** subsection (1) or (2) of this section *[or who admits to such violation under oath during the course of an investigation from bidding or participating in any public contract for a period of time specified by the agency or department, not to exceed three years]*, **or that the department or the affected public contracting agency finds to have violated subsection (1) or (2) of this section, from submitting a bid or proposal for, or receiving an award of, a public contract for a period of not more than three years.** Any public contracting agency that has notice of the finding of the fraudulent certification may also disqualify the person from bidding on or participating in any public contract.

SECTION 3. ORS 200.075 is amended to read:

200.075. (1) **An affected public contracting agency shall suspend** any *[bidder or contractor or subcontractor on]* **bidder's, proposer's, contractor's or subcontractor's right to submit a bid or proposal for, or receive an award of, a public contract** *[that]* **if the bidder, proposer, contractor or subcontractor** knowingly commits any of the acts listed in paragraphs (a) to *[(c)]* **(d)** of this subsection *[shall have its right to bid on or participate in any public contract suspended]*. The **affected public contracting agency shall suspend the right** *[suspension shall occur]* only after **providing** notice and opportunity for hearing in *[such]* a manner *[as]* **that** the affected public contracting agency~~*[, by rule, shall provide]*~~ **provides by rule.** The *[suspension shall be for]* **affected public contracting agency shall specify a time for the suspension that is up to** *[90 days]* **one year** for a first violation,

up to *[one year]* **three years** for a second violation and up to five years for a third violation. Each violation *[shall]* **must** remain on record for five years. After five years the **affected public contracting agency may not consider the** violation *[shall no longer be considered]* in reviewing future violations. *[The following acts are prohibited]* **A bidder, proposer, contractor or subcontractor may not:**

(a) *[Entering]* **Enter** into any agreement *[representing]* **to represent** that a disadvantaged, minority, women or emerging small business enterprise certified pursuant to ORS 200.055 will *[be performing work or supplying materials]* **perform a public contract or subcontract or supply material** under *[the]* **a** public improvement contract without the knowledge and consent of the disadvantaged, minority, women or emerging small business enterprise.

(b) *[Exercising]* **Exercise or permit another bidder, proposer, contractor or subcontractor to exercise** management and decision making control over the internal operations of *[any]* **a** certified disadvantaged, minority, women or emerging small business enterprise **other than the bidder's, proposer's, contractor's or subcontractor's own business enterprise.** As used in this paragraph, "internal operations" does not include normal scheduling, coordination, execution or performance as a subcontractor on a public contract.

(c) *[Using]* **Use** a disadvantaged, minority, women or emerging small business enterprise to perform a **public contract or** subcontract or **to** supply material under a public improvement contract to meet an established goal or requirement *[when]* **if** the disadvantaged, minority, women or emerging small business enterprise does not perform a commercially useful function in carrying out *[its]* responsibilities and obligations under the contract.

(d) **Fail to perform a commercially useful function in performing a public contract or subcontract or in supplying material to a contractor or subcontractor that is performing a public contract if the bidder, proposer, contractor or subcontractor is presented as a certified dis-**

1 **advantaged, minority, women or emerging small business enterprise**
 2 **to meet an established goal or requirement.**

3 (2) [Any] **The Oregon Business Development Department shall sus-**
 4 **pend a business enterprise's certification under ORS 200.055 as a dis-**
 5 **advantaged, minority, women or emerging small business enterprise [certified**
 6 **under ORS 200.055 that], if after conducting an investigation in a man-**
 7 **ner similar to the manner provided in ORS 200.065 (4) for investigating**
 8 **a violation of ORS 200.065 (1) or (2), the department finds that the**
 9 **business enterprise** allows or commits any of the acts listed in paragraphs
 10 (a) to (c) of this subsection [*shall have its certification suspended*]. **The de-**
 11 **partment shall suspend the certification** for up to 90 days for the first
 12 violation, up to one year for a second violation and up to five years for a
 13 third violation. Each violation [*shall*] **must** remain on record for five years.
 14 After five years the **department may not consider the** violation [*shall no*
 15 *longer be considered*] in reviewing future violations. [*The following acts are*
 16 *prohibited*] **A disadvantaged, minority, women or emerging small busi-**
 17 **ness enterprise may not:**

18 (a) Use [*of the firm's*] **the business enterprise's** name to meet a disad-
 19 vantaged, minority, women or emerging small business enterprise goal or
 20 requirement on a public contract [*when the firm*] **or subcontract if the**
 21 **business enterprise** does not in fact intend to or does not actually perform
 22 the work under the **public contract or** subcontract or **does not intend to**
 23 **or does not** purchase and supply material [*to the project*] under a **public**
 24 **contract or subcontract to supply** material [*supply contract*].

25 (b) Use [*of any*] personnel of an uncertified business **enterprise** to oper-
 26 ate, manage or otherwise control the disadvantaged, minority, women or
 27 emerging small business enterprise.

28 (c) [*Failure*] **Fail** to perform a commercially useful function in [*carrying*
 29 *out its functions under a*] **performing a public contract or** subcontract or
 30 [*a*] **supplying** material [*supply contract entered into with*] **to** a contractor or
 31 subcontractor on a public contract [*when*] **if the business enterprise is re-**

presented as a certified **disadvantaged, minority, women or emerging small business enterprise** to meet an established goal or requirement.

(3)(a) For the purpose of this section, “commercially useful function” means *[the actual performance of]* a function or service *[by the business]*:

(A) **That the business enterprise actually performs;**

(B) For which there is a demand in the marketplace[,]; and

(C) For which the business **enterprise** receives payment *[not disproportionate]* **that is proportionate** to the work *[performed or in conformance]* **that the business enterprise performs or that conforms** with industry standards.

(b) **“Commercially useful function” does not include** acting as a broker to provide for *[the performance of work by]* others **to perform work.** *[does not constitute a “commercially useful function.”]*

SECTION 4. The amendments to ORS 200.055, 200.065 and 200.075 by sections 1 to 3 of this 2015 Act apply to:

(1) **Public contracts that a public contracting agency advertises or solicits or, if the public contracting agency does not advertise or otherwise solicit the public contract, a public contract into which the public contracting agency enters on or after the operative date specified in section 5 of this 2015 Act;**

(2) **Decisions that the Oregon Business Development Department makes on and after the operative date specified in section 5 of this 2015 Act to approve, deny, revoke, suspend or refuse to renew a certification as a disadvantaged, minority, women or emerging small business enterprise;**

(3) **Investigations that the department or a public contracting agency conducts on or after the operative date specified in section 5 of this 2015 Act; and**

(4) **A public contracting agency’s decision on or after the operative date specified in section 5 of this 2015 Act to suspend a business enterprise’s right to submit a bid or proposal for a public contract.**

1 **SECTION 5.** (1) The amendments to ORS 200.055, 200.065 and 200.075
2 by sections 1 to 3 of this 2015 Act become operative on January 1, 2016.

3 (2) The Director of the Oregon Business Development Department
4 and a public contracting agency that adopts rules under ORS 279A.065
5 may take any action before the operative date specified in subsection
6 (1) of this section that is necessary to enable the director or the public
7 contracting agency to exercise, on and after the operative date speci-
8 fied in subsection (1) of this section, all of the duties, functions and
9 powers conferred on the director or the public contracting agency by
10 the amendments to ORS 200.055, 200.065 and 200.075 by sections 1 to 3
11 of this 2015 Act.

12 **SECTION 6.** This 2015 Act being necessary for the immediate pres-
13 ervation of the public peace, health and safety, an emergency is de-
14 clared to exist, and this 2015 Act takes effect on its passage.