

DEPARTMENT OF SMALL AND LOCAL BUSINESS DEVELOPMENT

NOTICE OF PROPOSED RULEMAKING

The Director of the Department of Small and Local Business Development (“Director”), pursuant to the authority set forth in section 2372 of the Small and Certified Business Enterprise Development and Assistance Act of 2005, effective October 20, 2005 (D.C. Law 16-33; D.C. Official Code § 2-218.72 (2016 Repl.)) (“Act”), and Mayor’s Order 2009-58, dated April 15, 2009, hereby gives notice of her intent to adopt the following amendments to Chapter 8 (Local, Small, and Disadvantaged Business Enterprises Contracting) of Title 27 (Contracts and Procurement) of the District of Columbia Municipal Regulations (“DCMR”), in not less than thirty (30) days after the publication of this notice in the *D.C. Register*.

This rulemaking, replacing the Department’s current regulations (27 DCMR § 800 et seq.), originally issued in 2009, reflects the significant changes made by the Small and Certified Business Enterprise Development and Assistance Amendment Act of 2014 (“2014 Act”), effective June 10, 2014 (D.C. Law 20-108; 61 DCR 3892). The following summarizes some of the major aspects of the Proposed Rules:

Small and Local Business Opportunity Commission

The Proposed Rules delete all references to the Commission. A business may now appeal the denial of an application for certification, the revocation or change to a previously issued certification, or an enforcement action taken pursuant to the Act directly to the Office of Administrative Hearings (OAH).

Subcontracting Requirements for Construction & Non-Construction Contracts and Subcontracting Plans

The Proposed Rules reflect changes in the 2014 Act requiring that all construction and non-construction contracts for government-assisted projects in excess of \$250,000 include at least 35% of the dollar volume of the contract be subcontracted to small business enterprises (SBEs). If there are insufficient qualified SBEs to completely fulfill the 35% subcontracting requirement, the subcontracting requirement may be satisfied by subcontracting 35% of the dollar volume to any qualified certified business enterprise (CBE), provided that all reasonable efforts shall be made to ensure that qualified SBEs are significant participants in the overall subcontracting work.

Enforcement & Penalties for Breach of Subcontracting Plan

Under the Proposed Rules, for any subcontracting plan required by law, the beneficiary shall be deemed to have breached the subcontracting plan for utilization of SBEs or CBEs in the performance of the contract if the beneficiary fails to submit subcontracting plan monitoring or compliance reports or other required subcontracting information in a reasonably timely manner, submits a monitoring or compliance report or other required subcontracting information containing a materially false statement, or fails to meet the subcontracting requirements outlined in section 2346 of the Act (D.C. Official Code § 2-218.46).

A contractor that is found to have breached a subcontracting plan for utilization of CBEs shall be subject to the imposition of penalties, including monetary fines, pursuant to section 2363 of the Act (D.C. Official Code § 2-218.63).

The Department may conduct periodic spot checks of CBEs, now defined in the Proposed Rules as an unannounced cursory, on-site inspection of a CBE headquarters to ensure continued compliance with eligibility requirements of the Act and these regulations. The Department may revoke CBE certification upon discovery of non-compliance.

The 30-day notice to cure given to non-compliant entities is eliminated and replaced by a notice of corrective action before the Department would implement any sanctions

The Department may refer a matter to the Attorney General for the District of Columbia for civil action, or the Office of Contracting and Procurement (“OCP”) for investigation and possible debarment, if it is found that a CBE, certified joint venture, or beneficiary has engaged in conduct in violation of section 2363(a)(3) of the Act (D.C. Official Code § 2-218.63(a)(3)).

Waiver of Subcontracting Requirements

The Proposed Rules require that a waiver request must come from an agency, not the beneficiary. For public-private development projects the Department may exclude acquisition costs and related financing fees from the total development budget amount when determining the 35% SBE subcontracting requirement of section 2346 of the Act (D.C. Official Code § 2-218.46).

Enforcement Mechanism Against an Agency

Under the Proposed Rules, the performance plan for each agency shall include a metric for compliance with the provisions of the Act and the performance evaluation for each agency director shall reflect the agency’s success in meeting those compliance goals.

Certification and Subsequent Certificate of Registration (Recertification) Process

The Proposed Rules extend the certification period from two (2) years to three (3) years, provide guidance on shared work spaces, define Principal Office as “The headquarters for the business”, provide guidance on demonstrating that the chief business officer and highest level managers perform functions in the Principal Office, and provide guidance on how affiliation with another business is reviewed by the Department.

Under the Proposed Rules, a CBE that has had no material change in its business status can obtain recertification by submitting a sworn affidavit attesting that the CBE has had no material change and still meets the certification requirements; and, has clean hands and is in good standing required by D.C. Official Code §§ 47-2861 and 29-102.08. “Material change” is defined as a change in a business’ ownership, address, or size (if an SBE). A CBE that meets the requirements above is deemed recertified upon the submission of the written application.

Small Business Capital Access Fund

In keeping with the 2014 Act, the Proposed Rules convert references to the Microloan Fund into references to the Small Business Capital Access Fund and delete all references to the Collateral

Support Loan Guarantee Program, which is a program run by the Department of Insurance, Securities, and Banking (DISB).

Equity and Development Participation

The Proposed Rules define the requirements for certification as a Small Investor, Disadvantaged Investor and Certified Equity Participant.

Council Review

The Proposed Rules will be submitted to the Council of the District of Columbia for a forty-five (45)-day period of review, pursuant to section 2372 of the Act (D.C. Official Code § 2-218.72), and final rulemaking action will not be taken until completion of the forty-five (45)-day review period or Council approval of the rules by resolution before the end of the review period.

Chapter 8, LOCAL, SMALL, AND DISADVANTAGED BUSINESS ENTERPRISES CONTRACTING, of Title 27 DCMR, CONTRACTS AND PROCUREMENTS, is amended to read as follows:

800 GENERAL PROVISIONS

800.1 This chapter is promulgated pursuant to the ~~Small, Local, and Disadvantaged Business Enterprise Development and Assistance Act of 2005~~ **Small and Certified Business Enterprise Development and Assistance Act of 2005** (Act), effective October 20, 2005 (D.C. Law 16-33; D.C. Official Code § 2-218.01 et seq.).

801 APPLICATION FOR CERTIFIED BUSINESS ENTERPRISE STATUS

801.1 An applicant for certification with the Department shall submit, **via the Department's website or as otherwise directed by the Department**, a completed application that is signed and sworn to by the applicant, setting forth the basis for certification as a certified business enterprise ("CBE"), accompanied by documentation requested by the Department.

801.2 An applicant for certification shall also submit the following documentation ~~that includes but is not limited to:~~

(a) Business documentation, including ~~articles of incorporation, by-laws, business licenses or authorization to operate in the District, by-laws, operating agreements, certificates of clean hands and good standing, stock voting rights, minutes of organizational meetings, profit sharing agreements,~~ partnership agreements, joint venture agreements, ~~annual reports,~~ and tax returns;

~~(b) — Stock options or other ownership options which are outstanding, evidence of loans or other debts between owners, evidence of loans or other debts~~

~~between owners and third parties which are related to the business, and identification of trusts affecting the finances or control of the business;~~

- (b) Copies of current financial or operating statements, including balance sheets, income statements, statements of retained earnings, and statements of cash flows, all of which must be current up to the ninety (90)-day period prior to the application date, along with federal and District of Columbia and applicable state tax returns, including all forms, schedules, worksheets and statements filed with the Internal Revenue Service, the District of Columbia and applicable states, for the three most recent years;
- (c) Type, quantity, and location of equipment owned, and equipment which has been transferred or donated, including the supporting documents of these transfer or donation transactions, if applicable;
- (d) Lease or ownership information for every location at which the applicant maintains an office as well as any space that the applicant has leased or purchased in the District relating to the business including, but not limited to, a warehouse, storage space, storage lots, and land; ~~or presence;~~
- ~~(e) — Bonding limit, name of bonding company, sources of letters of credit, other sources of capital and other financing, and trade references;~~
- (e) A list of all employees, including name, title, home address, and the office to which each employee reports; and
- ~~(f) — Experience of firm owners and managers in areas such as supervision; accounting, bookkeeping, and other recordkeeping; use of suppliers; and use of equipment;~~
- (f) Any other documentation the Department may require.

801.3

An applicant may also be required to demonstrate compliance with the requirements of the Act, this chapter, and other laws of the District of Columbia. In furtherance of such demonstration, the applicant shall:

- (a) Permit the Department to enter and conduct an on-site inspection of the applicant's business premises and any affiliated locations;
- (b) Provide the Department, during the on-site inspection, with immediate access to any records or area of the premises that the Department deems necessary to review to determine whether the applicant is in compliance with the Act and these regulations; and
- (c) Provide any other information the Department deems necessary to demonstrate compliance with the Act and these regulations.

801.4 An applicant currently certified as a CBE seeking to update their CBE certificate shall submit, via the Department's website or as otherwise directed by the Department, a complete application of changes requested that is signed and sworn to by the applicant and shall provide additional information and/or documentation required by the Act and this chapter, and any other information requested by the Department ~~which may include but not be limited to:~~

~~(a) A detailed resume of all individuals that the Department is to consider;~~

~~(b) Transcript from a university or other institution indicating education or training in an area related to the upgrade; and~~

~~(c) Any other information requested by the Department.~~

801.5 An applicant may withdraw an application submitted for certification, except that:

(a) An applicant that withdraws an application may not file another application for thirty (30) days from the date of withdrawal; and

(b) An applicant may not withdraw an application after the Department notifies the applicant that the Department intends to deny the application.

801.6 If the Department determines that the application submitted for certification is incomplete, the application shall be deemed deficient, and returned to the applicant until the applicant cures the deficiencies and resubmits the application.

802 LOCAL BUSINESS ENTERPRISE REQUIREMENTS

802.1 An applicant for certification as a local business enterprise must demonstrate, *inter alia*, that the principal office of the business enterprise is located in the District of Columbia. To be considered the principal office:

(a) The space must be a dedicated suite, office, or desk that the applicant owns, or that the applicant leases for a minimum of twelve (12) months;

(b) To the extent that the space is an office space that the applicant shares with other businesses:

(1) There must be a clear separation between the businesses;

(2) The applicant must have a dedicated office or desk for exclusive use of the business seeking certification;

(3) Assets and business functions of the business shall not be commingled with other businesses; and

(4) The lease or addendum to the membership agreement must identify the desk or office number the applicant is occupying; and

~~(a) To the extent the applicant owns or leases property located outside of the District of Columbia, the applicant shall have no more employees reporting to or working from any single location outside of the District than employees reporting to or working from the principal office location. The number of employees in each jurisdiction shall be determined by the number of employees for whom the applicant pays unemployment tax in each jurisdiction. If the business enterprise has been in business for less than 4 months, the number of employees in each jurisdiction shall be determined by the number of employees subject to unemployment tax in each jurisdiction; and~~

~~(b) The insignia, signs, printed material, business cards, letterhead, legal documents where the principal office or headquarters is identified, and website, if applicable, must indicate that the office located in the District of Columbia is the principal office or headquarters.~~

(c) Legal documents, and if applicable, the website, insignia, signs, printed material, business cards, and letterhead where the principal office or headquarters is identified, must indicate that the office, located in the District of Columbia, is the applicant's principal office.

802.2

In determining the principal office for the business enterprise, the Department may also consider:

- (a) The totality of the business activities in which routine and essential business functions occur such as the following:
 - (1) Bookkeeping and other recordkeeping;
 - (2) Payroll maintenance;
 - (3) Receipt of business telephone calls;
 - (4) Receipt of correspondence and bills;
 - (5) Storing of books and records; and
 - (6) Directing, controlling and coordinating activities and policies by officers, principals and managers; and
- (b) The number of vehicles owned by the applicant that are registered in jurisdictions outside of the District of Columbia in comparison to the number of such vehicles registered in the District of Columbia. [The](#)

Department reserves the right to request copies of the vehicle registrations for all company-owned vehicles.

- 802.3
- (a) An applicant for certification as a local business enterprise must also demonstrate that its chief executive officer and the highest-level managerial employees perform their managerial functions in their principal office located in the District.
 - (b) The principal office in the District must be a dedicated space with size and functionality that enables the chief executive officer and highest-level managerial employees to perform their managerial functions.

~~If the business enterprise is owned or operated by an individual or individuals who perform other work functions outside of the business, the Department will consider the time the individual or individuals spend(s) performing duties in the office relative to time spent performing other work functions outside of the business.~~

802.4 The Department will rely on an applicant's filed District and federal taxes, among other things, to calculate the applicant's gross receipts and to determine whether the applicant meets the requirements of section 2331(2A)(C) and (D) of the Act (D.C. Official Code § 2-218.31(2A)(C) and (D)).

- (a) Pursuant to section 2331(2A)(C) of the Act (D.C. Official Code § 2-218.31(2A)(C)), in determining whether the applicant has more than fifty percent (50%) of the assets of the business enterprise located in the District, the Department will consider:
 - (1) The location of fixed assets, including property, plant, and equipment, and exclude bank accounts, accounts receivable, and intangible assets, such as goodwill, patents, copyrights, or trademarks; and
 - (2) The number of vehicles owned by the applicant and used for the business enterprise that are registered in jurisdictions inside and outside of the District of Columbia.
- (b) The Department will evaluate whether the applicant meets the local business enterprise category pursuant to section 2331(2A)(C) of the Act (D.C. Official Code § 2-218.31(2A)(C)) by relying on the following:
 - (1) The applicant's detailed list of fixed assets in the District to include:
 - (A) Type, quantity, location and value of equipment owned;

- (B) Real estate properties and corresponding recent property tax bills; and
 - (C) List of vehicles, year, make and model and Kelley Blue Book values;
- (2) The Department’s site visit(s) to verify fixed assets located in the District; and
 - (3) The Department may require an audited or certified financial statement by an independent auditor that attests to the statement’s compliance with generally accepted accounting principles.

803 SMALL BUSINESS ENTERPRISE; ADDITIONAL REQUIREMENTS

803.1 Pursuant to section 2332(a)(3)(B) of the Act (D.C. Official Code § 2-218.32(a)(3)(B)), an applicant seeking certification as a small business enterprise (“SBE”) shall, in addition to satisfying other requirements of the Act, demonstrate to the Department that the business enterprise has had averaged annualized gross receipts for the three (3) years preceding certification not exceeding the following limits:

Construction, Heavy (Street and Highways, Bridges, etc.)	\$ 23 million
Construction, Building (General Construction, etc.)	\$ 21 million
Construction, Specialty Trades	\$ 13 million
Goods and Equipment	\$ 20 million
General Services	\$ 19 million
Professional Services, Personal Services (Hotel, Beauty, Laundry, etc.)	\$ 5 million
Professional Services, Business Services	\$ 10 million
Professional Services, Health and Legal Services	\$ 10 million
Professional Services, Health Facilities Management	\$ 19 million
Manufacturing Services	\$ 10 million
Transportation and Hauling Services	\$ 13 million
Financial Institutions	\$ 300 million.

804 DISADVANTAGED BUSINESS ENTERPRISE; ADDITIONAL REQUIREMENTS

804.1 An applicant seeking certification as a disadvantaged business enterprise (“DBE”) shall demonstrate to the Department that the individuals representing more than fifty percent (50%) of those who own, operate, and control the business enterprise are:

- (a) Socially disadvantaged because those individuals **have reason to believe that they** have faced instances of prejudice or bias without regard to their qualities as individuals due to their identity as members of a group, as evidenced **by the following: by documentation that the individuals seeking socially disadvantaged status as members of a group hold themselves out as members of that group; and**
- ~~(1) — Documentation proving that the individuals seeking socially disadvantaged status as members of a group hold themselves out as members of that group;~~
- ~~(2) — Documentation proving that the individuals seeking socially disadvantaged status have been isolated from the mainstream of American society in ways not common to business persons generally; and~~
- ~~(3) — Documentation proving that the individuals seeking socially disadvantaged status have personally suffered social disadvantage through treatment they have experienced; and~~
- (b) Economically disadvantaged because of diminished opportunities (specifically, **lack of access to credit and capital as compared to others in the same line of business**) related to their status as socially disadvantaged as described in paragraph (a) of this subsection, that have precluded these individuals from successfully competing in the open marketplace, as evidenced by documentation of the following:
- (1) The personal financial statement of the individuals seeking economically disadvantaged status; and
- (2) The financial condition **of the individuals** or of business enterprises the individuals own or operate **and**;
- ~~(3) — The applicant's lack of access to credit and capital as compared to others in the same line of business.~~

804.2

An **applicant** individual seeking DBE certification **for a business enterprise** shall provide the Department with a narrative describing how the owner or owners of more than fifty percent (50%) of the business enterprise are socially and economically disadvantaged as described in this section. The individual **shall** may also provide the Department with the personal financial statement of the owner or owners claiming to be economically disadvantaged, demonstrating that the personal net worth of each owner, excluding the value of his or her primary residence and the value of his or her ownership interest in the certified business enterprise (“CBE”), is less than one million dollars (\$ 1 million).

804.3 An individual seeking DBE certification pursuant to section 2333(b) of the Act (D.C. Official Code § 2-218.33(b)) for a business enterprise must demonstrate that the business enterprise's annualized gross receipts for the tax year prior to seeking certification do not exceed the limits enumerated in § 803.1, as evidenced by District and federal tax returns filed.

805 RESIDENT-OWNED BUSINESS ENTERPRISE; ADDITIONAL REQUIREMENTS

805.1 An applicant requesting certification as a resident-owned business enterprise must provide proof of residency, including federal and District of Columbia personal income tax returns solely in the District, a deed, mortgage, or lease for his or her primary residence, a District of Columbia driver's license or identification card, and utility bills or voter registration card for the residence.

~~**805 LONG-TIME RESIDENT BUSINESS ENTERPRISE**~~

~~805.1 An applicant requesting certification as a longtime resident business enterprise must provide evidence that the business enterprise has been continuously eligible for certification as a local business enterprise, as defined in section 2331 of the Act, for 20 consecutive years, or a small business enterprise, as defined in section 2332 of the Act, for 15 consecutive years.~~

~~805.2 Evidence that the business enterprise has been continuously eligible for certification as a local business enterprise shall include information required by the Department for certification under §§ 801 and 802.~~

806 [RESERVED]

807 DEPARTMENT PROCESS FOR CERTIFIED BUSINESS ENTERPRISE STATUS

807.1 Upon receipt of an application for certification as a certified business enterprise ("CBE"), the Department will conduct a preliminary review of the submission for compliance with the requirements of the Act and this chapter and take one of the following actions:

- (a) If the application is complete, it will be accepted for review by the Department; or
- (b) If the application is incomplete or lacks the required verification, the Department shall notify the applicant of the need for additional actions or materials in order for the application to be accepted for review.

807.2 The ~~Director~~ Department may conduct site inspections and hold interviews or discussions with an applicant or applicant's representative(s) as part of the review process.

~~807.3 Upon completion of the Department's review, the Director shall determine the eligibility of the applicant and advise the applicant in writing of the determination regarding its application. The Department shall deny an application if the applicant fails to demonstrate eligibility for certification.~~

807.3 In addition to the information supplied in the application and documents accompanying the application, the ~~Director~~ Department may require an applicant to supply or provide access to additional information and documents relevant to the Department's investigation and determination of the applicant's eligibility as a CBE.

807.4 While the application is under review by the Department, an applicant shall report to the Department any material change as defined by the Act, and any other change that may affect the eligibility for certification of the applicant, within five (5) days of the change.

807.5 (a) Upon completion of the Department's review of an application for certification, the Department shall determine the eligibility of the applicant and advise the applicant in writing of the determination regarding its application.

(b) The Department shall deny an application if the applicant fails to demonstrate eligibility for certification.

~~Upon the denial of an application for certification, the Department shall not accept, review, or evaluate for a period of six (6) months from the date the applicant receives notice of the decision to deny certification:~~

~~(a) Amendments to or new information on the denied application; or~~

~~(b) A new certification application from the applicant, its agent(s), representative(s), or other members of the public on the applicant's behalf.~~

~~807 DETERMINATION OF ASSET LOCATION~~

~~807.1 In determining whether the applicant has more than fifty percent (50%) of the assets of the business enterprise located in the District, the Department shall consider the location of fixed assets, including property, plant, and equipment, and exclude bank accounts, accounts receivable, and intangible assets, such as goodwill, patents, copyrights, or trademarks.~~

~~808 UPGRADE~~

~~808.1 An applicant that has been certified by the Department as a CBE in one or more areas may expand the areas in which it is certified by submitting to the Department a completed application for an upgrade. Each application for an upgrade shall comply with the requirements of this chapter and shall be accompanied by documentation indicating the applicant's qualifications, expertise, and/or resources which justify the upgrade.~~

~~(a) With respect to each category of construction and non-construction services for which an applicant seeks certification, the applicant shall demonstrate that the applicant has the expertise, personnel, facilities, equipment, and experience to perform the services on an on-going basis.~~

~~(b) With respect to SBEs as suppliers of goods and equipment, the applicant shall submit evidence that the applicant is a manufacturer of or regular dealer in such goods.~~

~~(1) In order to qualify as a manufacturer, an applicant shall own or lease on a regular basis an establishment that produces on the premises the materials, supplies, articles or equipment of the character in which the applicant claims to be a manufacturer; but the term does not include a business which performs only minimal operations on or minimal assembly of the items being produced.~~

~~(2) In order to qualify as a regular dealer under this section, an applicant shall meet the following minimum eligibility requirements:~~

~~(A) Maintain an establishment in which materials, supplies, articles, or equipment of the character in which the applicant claims to be a regular dealer are bought, kept in stock, and sold to customers on a recurring basis in the usual course of business; and~~

~~(B) Demonstrate that its business is an established and on-going entity regularly dealing in the particular materials, supplies, articles, or equipment of the character offered in the District of Columbia.~~

~~(3) In making the determination whether the applicant is a regular dealer, the Department shall consider the following factors:~~

~~(A) Whether the applicant has performed the particular services for a client in the course of its business in the one year period prior to the application date;~~

~~(B) If the applicant is newly providing this type of service, whether the applicant has made plans and committed resources to performing the particular services for clients; or~~

~~(C) The customary practice in the industry.~~

808 SCOPE AND TERM OF CERTIFICATE OF REGISTRATION

808.1 A certificate issued to a certified business enterprise (“CBE”) shall:

- (a) Authorize the CBE to receive the benefits as outlined in the Act and this chapter on all applicable District government solicitations; and
- (b) Be effective for a period of ~~two (2)~~ **three (3)** years from the date of issuance, provided that the CBE remains in compliance with the Act and this chapter.

~~808.2 A CBE that was previously certified but the certification has expired shall not be eligible for any benefits provided under the Act or these regulations until such time as the CBE has been recertified.~~

~~808.3 A CBE shall submit an application for certification at least ninety (90) days prior to the expiration of its registration with the Department. The application shall be signed and sworn to on a form prescribed by the Department and accompanied by documentation and/or other supporting information required by the Department.~~

810 PROVISIONAL CERTIFICATION

~~810.1 An applicant seeking provisional certification shall submit the following:~~

- ~~(a) A request in writing to the Department for a provisional certification;~~
- ~~(b) A copy of the solicitation or other contract or procurement opportunity indicating the date upon which a response to the solicitation is due; and~~
- ~~(c) A completed application, including all supporting documentation.~~

~~810.2 In considering whether to certify an applicant, the Department shall examine information submitted under § 810.1(b) and (c) and preliminarily verify, based on the documentation and without conducting a site visit, that the applicant complies with the Act and these regulations.~~

~~810.3 If an applicant that receives a provisional certification is selected for a District of Columbia contract or procurement and the provisional preference points are outcome determinative, the contract or procurement official must immediately inform the Department. The Department shall complete its investigation and site~~

~~visit to confirm the applicant's qualifications for certification prior to award. The Department shall inform the District contract or procurement official regarding its final decision before the award.~~

~~810.4 A provisional certification shall be effective for forty five (45) business days or until the Department makes a decision regarding the business enterprise under § 810.3, whichever is a shorter period of time.~~

809 APPLICATION FOR JOINT VENTURES

809.1 An applicant for certification as a joint venture shall:

- (a) Submit a complete application, as prescribed by the Department, no later than fifteen (15) business days before the solicitation closes;
- (b) Submit an executed copy of the applicant's joint venture agreement which must:
 - (1) Specify in reasonable detail the purpose of the joint venture, including the specific procurement, solicitation, or project the applicant wishes to be certified to perform;
 - (2) Identify the parties to the joint venture and define their respective obligations, rights, and responsibilities, including the management structure, control of the joint venture, financial contributions, bonding requirements, service and labor contributions, revenue or fees for services or labor, and distribution of profits;
 - (3) Demonstrate that one of the joint venture members is a certified business enterprise ("CBE") or an applicant for CBE certification;
 - (4) Provide for the establishment and administration of a separate bank account in the name of the joint venture into which all funds received will be deposited and through which all expenses will be paid, and which requires all withdrawals and deposits to be approved by the CBE member of the joint venture management committee;
 - (5) Contain an itemized description of all major equipment, facilities, and other resources to be furnished by each participant in the joint venture with a detailed schedule of costs;
 - (6) Contain a provision indicating that the CBE's interest in the joint venture shall not be reduced or diluted;

- (7) Contain a provision indicating that the CBE's financial risk is commensurate with its percentage interest in the joint venture;
 - (8) Contain a provision indicating that the joint venture agreement is the controlling agreement between the parties regarding interest, ownership, control, responsibilities, duties, and functions of the parties and the joint venture agreement shall prevail if there is any conflict between the joint venture agreement and any other agreement between the parties;
 - (9) Contain a provision that all other agreements between the joint venture parties, concerning the joint venture and the joint venture seeking certification, has been provided to the Department;
 - (10) Specify the responsibilities of the parties in at least the areas of negotiations with the owners, subcontract negotiation, contract and subcontract performance; and
 - (11) Indicate that the CBE shall perform services of the joint venture, receive profits of the joint venture, provide labor hours required of the joint venture, and perform other work for the joint venture as approved by the Department that is at a minimum equal to its percentage of ownership interest in the joint venture.
- (c) Submit additional information that must:
- (1) Inform the Department of whether the CBE has relinquished its ownership interest in any joint venture within the one (1)-year period prior to the application date; and
 - (2) Demonstrate that each participant in the joint venture has the competence and expertise necessary to perform the type of work in connection with which the joint venture wishes to be certified.
- (d) Submit all other agreements between the parties regarding the operations of the joint venture;
- (e) Submit the most current audited or certified financial statement for the non-CBE participant [by an independent auditor that attests to the statement's compliance with generally accepted accounting principles.](#)
- (f) Submit its certified payroll upon request;
- (g) [Submit, if applicable, its bonding limit and the name of its bonding company; and](#)

(h) Permit the Department to enter and conduct an onsite inspection or re-inspection of the proposed joint venture's business premises.

809.2 An application for joint venture certification may be submitted to and reviewed by the Department simultaneously with an application for certification of one or more of the individual members as a CBE.

809.3 Unless a joint venture's certification is revoked or relinquished pursuant to the Act and this chapter, a certified joint venture will retain its certification for the duration of the contract awarded through the solicitation for which it was certified, including any extension of the contract.

809.4 The Department shall deny certification of any joint venture whose joint venture agreement lacks any of the provisions in § 809.1.

809.5 The joint venture shall make its records available to the Department at any time deemed necessary by the Department.

809.6 Upon receipt of an application for certification as a joint venture, the Department will follow the process outlined in § 807.

809.7 ~~The Commission may revoke the certification of a joint venture for failure to comply with the Act and these regulations.~~

If the joint venture, having the same participants and structure, has been certified by the Department on a previous government-assisted project within the last calendar year, and submits a complete application at least seven (7) business days before the solicitation closes, the Department will make an expedited determination; provided; that.

(a) If the application is incomplete or lacks the required documentation and verification, the Department shall notify the joint venture that additional actions or materials are needed in order to complete the application; and

(b) Within three (3) calendar days of any notification from the Department requesting additional actions or materials under paragraph (a) of this subsection, the joint venture shall complete any requested actions and provide any requested materials.

809.8 Section 801.5(a) of this chapter shall not apply to applications for joint venture certifications.

810 REPORTING REQUIREMENTS FOR JOINT VENTURES

810.1 The joint venture shall notify the Department within five (5) days of the award of the contract whether the joint venture was awarded the contract.

- 810.2 The joint venture shall notify the Department within five (5) days of the solicitation being withdrawn or cancelled.
- 810.3 A joint venture shall submit to the Department quarterly reports showing all income and contract and subcontract receipts, all expenses (including fees for services and labor, salaries of the joint venture principals, and distribution of profits) no later than sixty (60) days after the end of each operating quarter of the calendar year.
- 810.4 A joint venture shall submit to the Department the information contained in § 810.3 for the final quarter and a project-end income statement no later than forty-five (45) days after completion of the contract with a statement of final profit distribution.
- 810.5 Information provided under §§ 810.3 and 810.4 could be commercial or financial information which, if disclosed, could result in substantial harm to the competitive position of the provider of the information and, accordingly, may be exempt from disclosure under section 204(a)(1) of the District of Columbia Administrative Procedure Act, effective March 25, 1977 (D.C. Law 1-96; D.C. Official Code § 2-534(a)(1)).

811 BID AND PROPOSAL PREFERENCES FOR JOINT VENTURE

- ~~813.1 Bid and proposal preferences shall be assigned by the Department upon certification of a joint venture as follows:~~
- ~~(a) For joint ventures in which all venturers are CBEs, the joint venture shall be assigned: the points allotted to the majority CBE; or if there is no majority CBE, then the managing CBE; plus up to four (4) points for any CBE whose percentage of ownership in the joint venture is greater than thirty five percent (35%) and less than or equal to fifty percent (50%); plus two (2) points for any CBE whose percentage of ownership in the joint venture is greater than twenty percent (20%) and less than or equal to thirty five percent (35%). The total number of points allotted to the joint venture shall not exceed twelve (12).~~
- ~~(b) For joint ventures in which there are non-CBE participant(s), if the percentage of ownership of the CBE(s) in the venture is:~~
- ~~(1) More than fifty percent (50%) of the joint venture and the CBE(s) has(have) more than 50% control and collectively receive more than fifty percent (50%) of the profits of the joint venture, the joint venture shall receive the points allotted to the majority CBE;~~

~~(2) Greater than or equal to thirty-five percent (35%) and less than or equal to fifty percent (50%), the joint venture shall receive up to four (4) points;~~

~~(3) Greater than or equal to twenty percent (20%) and less than or equal to thirty-five percent (35%), the joint venture shall receive two (2) points; or~~

~~(4) Less than twenty percent (20%), the joint venture shall receive zero (0) points.~~

~~(e) The percentage of ownership of each venturer shall be determined based on, but not limited to, the defined financial contribution and benefit, the work performed, the allocation of profits and fees, management control, and the labor contribution.~~

811.1 If the Department determines that a certified business enterprise (“CBE”) owns a majority interest in the joint venture, the Department shall assign bid and proposal preferences, as provided in section 2339a(h) of the Act (D.C. Official Code § 2-218.39a(h)), upon certification of the joint venture.

811.2 If the Department determines that a CBE owns a minority interest in the joint venture, the Department shall assign bid and proposal preferences if the percentage of ownership of the CBE(s) in the joint venture is as follows:

(a) Greater than or equal to thirty-five percent (35%) and less than or equal to fifty percent (50%), the joint venture shall receive up to four (4) preferences;

(b) Greater than or equal to twenty percent (20%) and less than thirty-five percent (35%), the joint venture shall receive up to two (2) preferences; or

(c) Less than twenty percent (20%), the joint venture shall receive zero (0) preferences.

811.3 Notwithstanding subsection 811.2, and pursuant to section 2339a(h)(2) of the Act (D.C. Official Code § 2-218.39a(h)(2)), in no event shall the preference exceed fifty percent (50%) of the preference that would otherwise be applicable to the CBE joint venture partner.

812 [RESERVED]

~~**812 CONTINUING ELIGIBILITY AND REPORTING REQUIREMENTS**~~

~~814.1 During the term of a certificate, a CBE shall report to the Department any change of address, change of ownership, or other change that may affect the continued eligibility of the CBE within thirty (30) days of the date of the change.~~

~~814.2 Upon learning of any changes, the Department may request documentation regarding compliance with the Act and these regulations and conduct onsite inspections.~~

813 COMPLIANCE REVIEW AND ENFORCEMENT

813.1 The ~~Commission or the~~ Department may conduct periodic compliance reviews of certified business enterprises (“CBEs”), certified joint ventures, and beneficiaries to confirm ongoing compliance with the requirements of the Act and ~~these regulations~~ this chapter, including continuing certification eligibility and confirmation that CBEs are performing a commercially useful function.

813.2 In conducting a compliance review, the ~~Commission or the~~ Department may perform spot checks and site visits, review documents, take photographs, and interview witnesses.

813.3 ~~Where a CBE is found to be non-compliant, a notice shall be issued to the CBE within 30 days which shall specify:~~

If, through a compliance review, the Department finds that a beneficiary, certified business enterprise (“CBE”), or certified joint venture has not complied with the Act and this chapter, the Department shall issue a notice which shall specify:

- (a) The nature of the non-compliance;
- (b) The corrective action that must be taken; and either
- (c) The date by which the deficiencies must be corrected; or
- (d) The Department’s intent to issue a fine and/or revoke CBE certification in accordance with the Act and this chapter if the Department determines the deficiencies cannot be corrected.

~~813.4 If the CBE fails to take corrective action within 30 days of the notice, the Department may institute revocation proceedings.~~

813.4 In the event that a CBE or certified joint venture fails to take corrective action within the timeframe specified in the notice, the Department may issue a notice to revoke the certification. The Department may also issue a fine to the CBE or certified joint venture in accordance with section 2363 of the Act (D.C. Official Code § 2-218.63).

813.5 As part of confirming compliance, CBE subcontractors must cooperate with beneficiaries in the preparation of Quarterly Reports by submitting notarized/electronic Vendor Verification Forms (VVF’s) confirming receipt of

payment; and must immediately notify the Department in writing if there is reason to suspect a breach of the subcontracting plan.

813.6 The Department shall issue and serve on the beneficiary, CBE, or joint venture alleged to have committed a violation a written notice of violation, which shall explain the violation and related penalties, as well as procedures for seeking reconsideration and appeal.

813.7 Within twenty (20) days of receiving a notice of violation of sections 2346 or 2348 of the Act, a respondent may submit a Request for Reconsideration, including any additional information that justifies modifying or rescinding the notice. Requests for Reconsideration received by the Department after twenty (20) days will not be considered. If, following receipt of the Department's response to the Request for Reconsideration, the Respondent disagrees with the Department's decision, the Respondent may submit a written appeal to the Office of Administrative Hearings, within twenty (20) days of receipt, pursuant to instructions included in the Notice.

813.8 Upon a finding that a CBE, certified joint venture, or beneficiary has engaged in conduct in violation of section 2363(a)(3) of the Act (D.C. Official Code § 2-218.63(a)(3)), the Department may refer the matter to the Attorney General for the District of Columbia for civil action, and shall refer the matter to the Office of Contracting and Procurement ("OCP") for investigation and possible debarment, as well as a possible determination that the CBE, joint venture, or beneficiary shall be ineligible to be considered for government-assisted project with the District government for up to five (5) years.

814 COMPLAINT PROCEDURE AND DEPARTMENT INTERNAL HEARING

814.1 Any person may file a complaint with the ~~Commission~~ Department, pursuant to section ~~2363(b)(1)~~ 2363(e)(1) of the Act (D.C. Official Code § 2-218.63(e)(1)), by submitting to the Department a completed written notarized complaint form, provided by the Department, ~~to the Department~~ identifying the nature of the complaint and swearing to the truth of the allegations in the complaint.

~~814.2 The Department will forward the complaint to the Commission for review. The Commission shall take up the complaint at its next scheduled meeting and determine the action to be taken as outlined in the Act.~~

~~814.3 If the Commission determines that a complaint is not frivolous or otherwise without merit, it shall instruct the Department to investigate the facts surrounding the allegations, including reviewing the file and all paperwork contained therein, interviewing witnesses, or any other reasonable action necessary given the nature of the allegations in the complaint.~~

~~814.4 Within 45 days of the Commission's determination and instruction to the Department to investigate, the Department shall provide the results of the investigation to the Commission.~~

814.2 The Department shall review the complaint and determine the action to be taken as outlined in the Act and these regulations.

814.3 (a) If the Department determines that a complaint is not frivolous or otherwise without merit, it shall investigate the facts surrounding the allegations, including reviewing the file and all paperwork contained therein, interviewing witnesses, or any other reasonable action necessary given the nature of the allegations in the complaint.

(b) Within three (3) months of the filing of the complaint, the Department shall:

(1) Conduct an internal hearing at a location and time determined by the Department if it does not determine that there was no violation of the Act or these regulations upon completing its investigation; or

(2) If the Department determines there was no violation of the Act or these regulations upon completing its investigation, to the Department shall notify the complainant and the business entity of that determination.

814.4 An internal hearing conducted by the Department conducted pursuant to subsection 814.3(b)(1):

(a) Shall be open to the public;

(b) The complainant and the business entity shall be given notice to attend at least thirty (30) days before the hearing date;

(c) The complainant shall testify;

(d) The respondent shall have a right to:

(1) Be present in person;

(2) Designate a representative or representatives to appear on their behalf;

(3) Present oral and documentary evidence;

(4) Submit rebuttal evidence; and

(5) Cross-examine opposing witnesses.

(e) The Department may exclude or order the removal of any participant in an internal hearing who becomes disruptive to the internal hearing process.

814.5 The Department shall issue a decision in writing no later than thirty (30) days after the conclusion of the internal hearing.

814.6 A decision of the Department that is adverse to a business entity shall contain the following:

(a) Findings of fact;

(b) Conclusions of law;

(c) Final decision; and

(d) A statement informing the business entity that pursuant to section 2363(g) of the Act (D.C. Official Code § 2-218.63(g)), the business entity has a right to file an appeal with the Office of Administrative Hearings (“OAH”) within twenty (20) calendar days after service of the Department’s decision.

814.7 The Department shall serve a copy of the decision on the business entity, representative and counsel if any, and the complainant within ten (10) days of the date the Department issues the decision.

814.8 Upon appeal of the Department’s decision, the decision of OAH shall be the final administrative decision for judicial review in accordance with section 2363(g)(3) of the Act (D.C. Official Code § 2-218.63(g)(3)).

815 GROUND FOR REVOCATION

815.1 Upon a finding that a certified business enterprise (“CBE”) or certified joint venture engaged in conduct in violation of section 2363(a)(2) or (3) of the Act (D.C. Official Code § 2-218.63(a)(2) or (3)), the ~~Commission~~ Department may issue an intent to revoke the certificate of registration for the CBE or certified joint venture under procedures set forth in section 2363 of the Act.

815.2 In considering whether the certificate of registration ~~of a CBE~~ should be revoked, in addition to any other consideration, the ~~Commission~~ Department shall consider whether any member of the CBE or certified joint venture has been convicted of a crime that bears directly on the fitness of the CBE or certified joint venture to participate in programs established pursuant to the Act and these regulations.

815.3 Upon revocation, the Department shall not accept, or evaluate for a period of twelve (12) months from the date the CBE and certified joint venture receives notice of the decision to revoke:

- (a) Amendments to or new information on the revoked certification; or
- (b) A new certification application from the CBE and certified joint venture, their agent(s), representative(s), or other members of the public on ~~the applicant's~~ their behalf.

816 OPPORTUNITY FOR A HEARING: REVOCATION ~~AND DENIAL~~

816.1 If the Department issues an intent to revoke the certification of a certified business enterprise ("CBE") or certified joint venture, the CBE or certified joint venture may request a hearing before OAH.

~~816.1 A CBE may request a hearing in response to any action taken by the Commission to revoke its certification.~~

816.2 The procedures described in ~~§§ 818.2 through 818.6 of these regulations~~ this section shall apply to a CBE or certified joint venture when the Department issues an intent to revoke the certificate of registration ~~is revoked~~. The ~~Commission~~ Department shall give the CBE or certified joint venture written notice of an opportunity for a hearing prior to the revocation of its certificate of registration. The ~~Commission~~ Department shall serve that intent to revoke notice on the CBE or certified joint venture, and the ~~such~~ notice shall include, ~~which shall set forth the following~~:

- (a) The intended action;
- (b) The basis for the intended action in the Act or this chapter;
- (c) A brief summary of the deficiencies or factual allegations in support of the intended action; and
- (d) A statement which informs the CBE or certified joint venture that the ~~Commission's~~ Department's decision will be final unless, pursuant to section 2363(g) of the Act (D.C. Official Code § 2-218.63(g)), the CBE or certified joint venture files an appeal with OAH within twenty (20) calendar days after service of the Department's intent to revoke notice.

~~(1) Submits a written request for a hearing in the manner provided in the notice within ten (10) days after service of the notice; and~~

~~(2) Appears at the hearing.~~

- ~~816.3 — A CBE shall request a hearing in writing and serve the request on the Department within ten (10) days of the service of the notice for revocation of registration. A request for a hearing timely received by the Department shall stay the revocation of the certificate of registration until resolution of the matter.~~
- ~~816.4 — The Commission shall, within twenty (20) days following receipt of a request for a hearing by a CBE, notify the CBE in writing of the date, time, and place of the hearing as well as the rights of the CBE at the hearing. The notice shall be provided at least thirty (30) days prior to the hearing, unless the Commission, the Department, and the CBE agree to an earlier hearing date.~~
- ~~816.5 — A CBE entitled to a hearing has the following rights:~~
- ~~(a) — To be represented by an attorney;~~
 - ~~(b) — To present relevant evidence, including the testimony of witnesses and the submission of documents;~~
 - ~~(c) — To rebut all opposing evidence, including the cross-examination of all opposing witnesses on any matter relevant to the issues; and~~
 - ~~(d) — To have subpoenas issued to compel the attendance of witnesses and the production of relevant documents.~~
- ~~816.6 — If a CBE does not timely respond to a notice or appear at the scheduled hearing, the Commission's revocation action shall be final.~~
- ~~816.7 — The procedures described in §§ 818.7 through 818.11 of these regulations shall apply to an applicant for certification whose certification application has been denied. The Department shall serve written notice of the denial on the applicant, which shall include the following:~~
- ~~(a) — The basis for the denial in the Act or these regulations;~~
 - ~~(b) — A brief summary of the deficiencies or factual allegations in support of the action; and~~
 - ~~(c) — A statement which informs the applicant that he or she may appeal the Department's decision by submitting a written request to the Commission for a hearing within twenty (20) days after service of the notice, along with a written response addressing the basis for the denial.~~
- ~~816.8 — The Commission shall deny the request for the appeal if the applicant fails to timely respond to the Department's notice or fails to respond with sufficient specificity for the Commission to determine that there is a genuine issue of material fact that is in dispute or an interpretation of law that needs to be addressed by the Commission.~~

~~816.9 The Commission shall notify the applicant of his or her rights, as described in § 818.5, and of the date, time, and place of the hearing.~~

~~816.10 An applicant is entitled to the rights in § 818.5 for a hearing on the denial of certification by the Department.~~

~~816.11 Any decision issued by the Commission will be final for the purposes of judicial review in accordance with § 828.~~

816.3 If a CBE or certified joint venture does not timely appeal to OAH, the Department's intent to revoke action shall be final and the CBE's or certified joint venture's certification shall be revoked.

816.4 Pursuant to section 2363(g) of the Act (D.C. Official Code § 2-218.63(g)), the CBE or certified joint venture may appeal the final revocation action by filing a written appeal with OAH within twenty (20) calendar days after the date on which the Department's revocation is final.

816.5 The decision of OAH shall be the final administrative decision for judicial review in accordance with section 2363(g)(3) of the Act (D.C. Official Code § 2-218.63(g)(3)).

817 OPPORTUNITY FOR A HEARING: DENIAL

817.1 The procedures described in this section shall apply to an applicant for certification whose certification application has been denied. The Department shall serve written notice of the denial on the applicant, which shall include the following:

- (a) The basis for the denial in the Act or these regulations;
- (b) A brief summary of the deficiencies or factual allegations in support of the denial; and
- (c) A statement which informs the applicant that he or she may appeal the Department's denial of certification by submitting a written request to appeal, pursuant to section 2363(g) of the Act (D.C. Official Code § 2-218.63(g)), to OAH within twenty (20) days after service of the Department's notice.

817.2 The Department shall include in the denial notice the applicant's right to appeal to OAH.

817.3 Any decision issued by OAH will be the final administrative decision for the purposes of judicial review, in accordance with section 2363(g)(3) of the Act (D.C. Official Code § 2-218.63(g)(3)).

~~817~~ ~~**ADDITIONAL REQUIREMENTS FOR CERTIFICATION UPON REVOCATION**~~

~~819.1~~ ~~An applicant whose certification was revoked:~~

- ~~(a) May submit an application and all required supporting documentation as required by this chapter;~~
- ~~(b) Shall demonstrate compliance with the requirements of the Act and this chapter; and~~
- ~~(c) Shall satisfy the requirements under § 819.2.~~

~~819.2~~ ~~An applicant for certification after revocation may be required to demonstrate fitness to be issued a certificate by submitting evidence satisfactory to the Department that the applicant has the requisite business integrity, qualifications, financial responsibility and resources, competency, and knowledge of District and federal laws necessary to resume doing business with the District government as a CBE, and that the applicant's contracting with the District government will not be detrimental to the public interest or the integrity of these programs.~~

~~819.3~~ ~~In making determinations for certification after revocation, the Department shall consider, among other factors, the following:~~

- ~~(a) The nature and circumstances of the violation for which the applicant's certification was revoked;~~
- ~~(b) The conduct of the applicant and its participants since the revocation, including the steps taken to remedy the prior violation and prevent future violations; and~~
- ~~(c) The present character of the applicant or its participants.~~

818 COMPUTATION OF TIME

818.1 In computing any period of time specified in this chapter, the day of the act, event, or default shall not be counted, and the last day of the period shall be counted unless it is not a business day, in which event the time period shall continue until the next business day. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. ~~“Legal holidays” shall include those holidays as defined in section 899 of Title 27.~~

818.2 Where the Department or a respondent to an action pursuant to this chapter has the right or is required to perform some act within a specified period of time, and that act is completed by mail, three (3) days shall be added to the prescribed period.

819 SERVICE

819.1 Documentation that is required by this chapter to be served on an applicant or a respondent shall be served at the last known address of the applicant or respondent on file with the Department, or any representative thereof.

~~819.2 Service under this chapter, unless indicated otherwise, shall be effected by:~~

- ~~(a) Personal delivery;~~
- ~~(b) Use of a process server;~~
- ~~(c) Certified or registered mail, return receipt requested; or~~
- ~~(d) Electronic mail, provided, that all parties consent in writing to service in this manner.~~

819.2 Service shall be to:

- (a) The business enterprise or majority owners or any representative's mailing address as provided on the application or otherwise updated with the Department by:
 - (1) Personal delivery;
 - (2) Use of a process server;
 - (3) Certified or registered mail, return receipt requested; or
- (b) The business enterprise or majority owners or any representative's email address as provided on the application or otherwise updated with the Department. The Department will maintain an email -generated delivery receipt system.

~~822 INFORMAL DISCOVERY~~

~~822.1 The applicant or respondent shall consult with the Department, through the Office of the Attorney General, to seek informal discovery prior to requesting a subpoena. The Commission shall not accept a motion or a request for a subpoena unless the applicant or respondent certifies in writing that he has made a bona fide attempt to secure the requested documents from the Office of the Attorney~~

~~General on a voluntary basis and that the Office of the Attorney General has refused to provide the documentation.~~

~~823~~ ~~SUBPOENAS~~

~~823.1~~ ~~The Commission may upon its own motion, or upon the request of the applicant or respondent, the Department, or the Assistant Attorney General of record, issue a subpoena requiring:~~

~~(a)~~ ~~The attendance and testimony of witnesses;~~

~~(b)~~ ~~The production of evidence, including, but not limited to books, records, correspondence, or documents in the possession or under the control of the person subpoenaed; and~~

~~(c)~~ ~~Access to evidence for the purpose of examination and copying.~~

~~823.2~~ ~~The issuance and manner of service of a subpoena shall be as prescribed by the Civil Rules of the District of Columbia Superior Court.~~

~~823.3~~ ~~The form of a subpoena may be prescribed by the Commission and subscribed by the Chairperson. A subpoena shall state the name and address of its issuer; identify the evidence or person subpoenaed; the person to whom and the place, date, and time at which it is returnable; the nature of the evidence which is to be examined or copied; and the date and time when access is requested. A subpoena shall be returnable to the Chairperson of the Commission.~~

~~823.4~~ ~~Upon failure of any person to comply with a subpoena issued under this section, the Commission may seek enforcement of the subpoena through the District of Columbia Superior Court.~~

~~824~~ ~~CONDUCT OF HEARINGS~~

~~824.1~~ ~~Commission hearings shall be open to the public.~~

~~824.2~~ ~~The Commission may exclude or order the removal of any participant in a hearing who becomes disruptive to the hearing process.~~

~~824.3~~ ~~The Commission may bar a participant who has been excluded or removed from a hearing from participation in future hearings.~~

~~824.4~~ ~~The Commission may continue a hearing if an applicant or a respondent, or a representative thereof, has been excluded or removed from the hearing in order to provide the respondent with an opportunity to obtain another representative, unless the applicant or respondent expressly waives a continuance.~~

~~824.5~~ Upon the request of either party, the Commission shall sequester witnesses who may testify at the hearing.

~~825~~ **EVIDENCE AT HEARINGS**

~~825.1~~ In a proceeding before the Commission under this chapter, each party shall have the right to:

- ~~(a)~~ Present in person, or by counsel, that party's case or defense, including oral and documentary evidence;
- ~~(b)~~ Submit rebuttal evidence; and
- ~~(c)~~ Cross-examine opposing witnesses.

~~825.2~~ For documentary evidence to be admitted at a proceeding before the Commission, it shall be submitted to the Commission at least five (5) days prior to the hearing, unless otherwise allowed by the Commission.

~~825.3~~ Testimonial evidence received at Commission hearings shall be under oath or affirmation.

~~825.4~~ The Commission shall exclude irrelevant, immaterial, or unduly repetitious evidence.

~~825.5~~ The Commission may take official notice of the following:

- ~~(a)~~ The laws of the District of Columbia, the United States, and any state or jurisdiction of the United States; or
- ~~(b)~~ Any fact that is not subject to reasonable dispute because it is generally known within the District of Columbia or is capable of accurate and ready determination by resorting to reliable sources.

~~825.6~~ In an appeal of the Department's decision to deny an applicant for certification, the burden of proof is on the applicant to establish that he or she is eligible for certification by a preponderance of the evidence.

~~825.7~~ In an action to revoke the respondent's certificate of registration, the burden of proof is on the Department to establish by a preponderance of the evidence the basis for the revocation.

~~826~~ **DECISIONS**

~~826.1~~ The Commission shall issue a decision in writing no later than ninety (90) days after a hearing record is closed.

~~826.2 — A decision of the Commission that is adverse to an applicant or respondent shall contain the following:~~

- ~~(a) — Findings of fact;~~
- ~~(b) — Conclusions of law;~~
- ~~(c) — An order; and~~
- ~~(d) — A statement informing the applicant or respondent of the right to have the decision reviewed by the District of Columbia Court of Appeals and the time within which a petition for judicial review is required to be submitted by the rules of that Court.~~

~~826.3 — The Commission shall serve a copy of the decision on the applicant or respondent and the Assistant Attorney General of record in the matter within ten (10) days of the date the Commission issues the decision.~~

~~826.4 — If a Commission decision is wholly or partially based on official notice of a material fact that is not on the record, the applicant or respondent and the Assistant Attorney General of record in the matter may oppose the taking of official notice in a motion for reconsideration submitted to the Commission.~~

~~826.5 — The Commission's decision may modify the period of time which bars a submission of an application or respondent for certification.~~

~~826.6 — A respondent who has been denied the renewal of a certificate or whose certificate has been revoked shall not be eligible to receive any preferences for being a CBE or be awarded any SBE set aside contracts.~~

~~827 — REOPENING AND RECONSIDERATION~~

~~827.1 — An applicant or respondent may file a motion for reconsideration with the Commission, based on new evidence, misapplication of law, or misstatement of a material fact within ten (10) days after the date on which the applicant or respondent was served with the Commission's decision.~~

~~827.2 — The motion for reconsideration shall be in writing and shall state the following:~~

- ~~— (a) — The matters of record alleged to have been erroneously decided;~~
- ~~— (b) — The grounds relied upon; and~~
- ~~— (c) — The relief sought.~~

~~827.3 — If a motion under this section is based wholly or partially on new evidence, the new evidence or arguments shall be set forth in an affidavit which verifies that the~~

~~petitioner could not with due diligence have become aware of the new evidence prior to the Commission hearing.~~

~~827.4 The government may file a response to a motion to reconsider and the Commission may decide a motion to reconsider without a hearing.~~

~~827.5 The Commission may reopen a hearing where an applicant or respondent has failed to appear at a scheduled hearing, provided that the applicant or respondent submits a motion in writing setting forth good cause for the applicant's or respondent's failure to appear. The failure to report a change of address pursuant to this chapter does not constitute good cause.~~

~~827.6 A motion to reopen a hearing shall be filed within ten (10) days of the date of the hearing.~~

~~827.7 Neither the submission nor the granting of a motion under this section shall operate as a stay of a decision unless so ordered by the Commission.~~

~~827.8 The failure of the Commission to issue an order in response to a motion under this section within thirty (30) days of the submission of the motion shall constitute a denial of the motion.~~

820 JUDICIAL REVIEW

~~820.1 A respondent aggrieved by a final decision of the Commission after a hearing on the matter~~ A party suffering a legal wrong or adversely affected or aggrieved by a final decision of the OAH may seek review of the decision by the District of Columbia Court of Appeals pursuant to section 19(c)-(e) of the Office of Administrative Hearings Establishment Act of 2001, effective March 6, 2002 (D.C. Law 14-76; D.C. Official Code § 2-1831.16(c)-(e))~~11 of the District of Columbia Administrative Procedure Act, approved October 21, 1968 (82 Stat. 1209; D.C. Official Code § 2-510).~~

821 LIST OF CERTIFIED BUSINESS ENTERPRISES

821.1 The Department shall establish and maintain a centralized list of certified business enterprises ("CBEs").

821.2 The Department's centralized list of CBEs shall set forth the name of each CBE, contact information for each CBE, the CBE's business certification categories (e.g., Small Business Enterprise, Resident Owned Business), ~~the procurement categories along with the names of the CBEs certified in each procurement category,~~ and the expiration date of the CBE's registration.

~~**822 AGENCY EXPENDABLE BUDGETS; SMALL BUSINESS ENTERPRISE EXPENDITURE**~~

- ~~830.1 The expendable budget of each agency, including an agency that contracts or procures in whole or in part through the Office of Contracting and Procurement, as defined in section 2302 of the Act, shall include the total budget of the agency, reduced by funding sources, object classes, objects, and other items identified by the agency and approved by the Director of the Department of Small and Local Business Development.~~
- ~~830.2 Sixty (60) days prior to the beginning of each fiscal year, the Department shall provide each agency with a list of the comptroller object codes that shall be excluded from the agency's appropriated budget.~~
- ~~830.3 No later than thirty (30) days prior to the beginning of each fiscal year, each agency shall provide the dollar amount in each comptroller object code along with the amount of the total appropriated budget.~~
- ~~830.4 No later than thirty (30) days prior to the beginning of each fiscal year, each agency may request special exceptions under other comptroller object codes not included in the list provided by the Department for exclusion from the amount of the total appropriated budget for the agency. If so requested, the agency must provide the comptroller source group, comptroller object code, a specific description of the expenditure, vendor name, and the dollar amount in each other comptroller object code.~~
- ~~830.5 If an agency receives unanticipated funding, experiences a reduction in funding, or experiences any other change in circumstances that affects its expendable budget or special exceptions, then the agency shall communicate that change to the Department in writing and the Department shall adjust accordingly the expendable budget or special exceptions of the agency.~~
- ~~830.6 The Department shall approve the special exceptions under subsection 830.4 if no Small Business Enterprises can provide the required goods or services, the expenditure cannot be made to Small Business Enterprises because the goods or services are proprietary, the line item is not for goods or services, there are federal or other restrictions on how the funds may be expended, or the goods or services must be provided by an organization not certified by the Department.~~
- ~~830.7 Only budget items approved by the Department as special exceptions shall be excluded from the agency's expendable budget.~~
- ~~830.8 The Department shall inform each agency of the agency's projected expendable budget and its projected goal under section 2341 of the Act and provide to Council information on each agency's total budget, exclusion from the agency's total budget by comptroller object code, each agency's expendable budget, and the projected goal for each agency under section 2341 of the Act.~~

822 AGENCY EXPENDABLE BUDGETS; SMALL BUSINESS ENTERPRISE EXPENDITURE

- 822.1 No later than one hundred twenty (120) days (June 1st) prior to the beginning of each fiscal year, the Department shall meet and confer with the Office of the Chief Financial Officer (“OCFO”), the Office of Contracting and Procurement (“OCP”), the Office of the City Administrator (“OCA”), and independent agencies regarding the total appropriated budget, comptroller object codes to be excluded from agencies’ expendable budgets, and anticipated requests for special exceptions.
- 822.2 No later than eighty-five (85) days prior to the beginning of each fiscal year, the Department shall review the appropriated budget data received from OCFO and update the list of the comptroller object codes that shall be excluded from the agency's expendable budget.
- 822.3 No later than eighty (80) days prior to the beginning of each fiscal year, each agency shall itemize its total appropriated budget as prescribed by the Department.
- 822.4 (a) No later than sixty (60) days (August 1st) prior to the beginning of each fiscal year, each agency may request special exceptions not included in the list provided by the Department for exclusion from the amount of the expendable budget for the agency.
- (b) Any requests for special exceptions shall be submitted in a manner prescribed by the Department and must include supporting documentation.
- 822.5 The Department shall approve a special exception requested under subsection 822.4 if:
- (a) No small business enterprises (“SBEs”) or certified business enterprises (“CBEs”) can provide the required goods or services;
- (b) The expenditure cannot be made to an SBE or CBE because the goods or services are proprietary;
- (c) The line item is not for goods or services;
- (d) There are federal or other restrictions on how the funds may be expended;
or
- (e) The goods or services must be provided by an organization not certified by the Department.

- 822.6 Prior to the beginning of each fiscal year, the Department will make a determination on each request for special exception timely submitted by an agency.
- 822.7 Only budget items listed in sections 822.1, and either excluded under 822.2 or approved for exclusion under 822.6, shall be excluded from the agency's expendable budget.
- 822.8 If an agency receives unanticipated funding or funding transferred from another agency, experiences a reduction in funding, or experiences any other change in circumstances that affects its expendable budget, such changes shall be included in the proceeding quarterly updated appropriated budget data provided by OCFO to the Department. Quarterly, each agency shall make any additional special exception requests based on changes to the agency's expendable budget. The Department will process additional special exceptions requested by an agency.
- 822.9 The Department shall inform each agency of the agency's projected expendable budget and its projected goals under section 2341 of the Act (D.C. Official Code § 2-218.41); and, make available to Council information on each agency's total appropriated budget, exclusions from the agency's total appropriated budget by comptroller object code, list of exclusions in sections 822.1 and 822.2, approved special exceptions, each agency's expendable budget, and the projected goal for each agency under section 2341 of the Act.
- 822.10 Pursuant to section 2341(a-3)(2) of the Act (D.C. Official Code § 2-218.41(a-3)(2)), each agency shall complete the annual allocation process at least one (1) month prior to the beginning of each fiscal year by submitting in the District Enterprise System (DES) an allocation confirmation that details the following:
- (a) The name of the agency;
 - (b) The fiscal year;
 - (c) The budget of the agency approved by the Council for the fiscal year;
 - (d) The expendable budget of the agency for the fiscal year, as approved by the Department; and
 - (e) The agency's projected small business enterprise ("SBE") expenditure goal for the fiscal year.

823 [RESERVED]

824 AGENCY ~~PROCUREMENT~~ SPENDING PLAN

~~824.1 One month prior to the beginning of each fiscal year, each agency shall submit to the Department the agency's procurement plan as described in section 832.5 for the fiscal year, on a form designated by the Department.~~

~~824.2 Failure of an agency to submit, timely or otherwise, a procurement plan for the fiscal year shall:~~

~~(a) Be reported to the City Administrator within 30 days after the start of the fiscal year; and~~

~~(b) Require the agency to request written authorization from the Department to place any solicitation, including but not limited to, Requests for Proposals ("RFPs"), Invitations for Bids ("IFBs"), Requests for Qualifications ("RFQs"), and Calls for Expressions of Interest, on the open market until the plan is filed.~~

~~824.3 The report of the failure of an agency to submit a procurement plan for the fiscal year, an increase in the agency's set-aside, or the failure of the Department to provide an agency allocation letter shall not eliminate the requirement for the agency to submit a procurement plan to the Department.~~

824.1 No later than fourteen (14) days prior to the beginning of each fiscal year, each agency shall submit its spending plan as described in section 824.5 for the fiscal year, in a manner designated by the Department. Spending plans for agencies that contract or procure via the Office of Contracting and Procurement ("OCP") shall be submitted via the Procurement Automated Support System Acquisition Planning Tool.

824.2 Failure of an agency to timely submit spending plan for the fiscal year shall be reported to the City Administrator no later than thirty (30) days after the start of the fiscal year; and

824.3 A report to the City Administrator under section 824.2, an agency's failure to report an increase in its agency's set-aside, or the Department's failure to provide an agency allocation letter shall not eliminate the requirement for the agency to submit a spending plan to the Department.

824.4 The Department may consider the quarterly reports submitted by the agency for the previous fiscal year in determining the set-aside for the agency.

824.5 An agency spending plan shall specifically set forth the following information for the fiscal year covered by the spending plan:

(a) Contracts or procurements that the agency intends to award, and the source funding for each contract and procurement;

- (b) Contracts or procurements that the agency has set aside for **small business enterprises** (“SBEs”);
- (c) A description of the contract or procurement;
- (d) Whether the contract or procurement is a new or existing contract or procurement;
- (e) The anticipated start and end date for each procurement; and
- (f) Particular dollar amounts relating to the procurements specified in each of the above paragraphs of this subsection.

824.6 If an agency cannot include with its **procurement spending** plan all of the information required by this section, it shall submit with its **spending** plan a statement and supporting documentation which establishes good cause for the failure, as well as a request for an extension of time for submission of the required information.

824.7 If an agency fails to meet the goals set forth in section 2341 of the Act (D.C. Official Code § 2-218.41), the Department may, pursuant to section 2352(a) of the Act (D.C. Official Code § 2-218.52(a)), require that a portion of the agency’s contracts and procurements be made part of a set-aside program for SBEs.

~~824.7 If an agency's procurement plan sets forth SBE expenditures pursuant to paragraphs 832.5(f) and (g) that are below the required program goals set forth in section 2341 of the Act, the agency shall submit with its plan a request for an adjustment of program goals and supporting documentation which establishes good cause for the requested adjustment.~~

~~824.8 The Department shall notify an agency in writing of its approval or rejection of an agency's procurement plan within two months of its receipt of the plan.~~

~~824.9 The Department shall include in any notification of rejection of an agency's procurement plan the following:~~

- ~~(a) Deficiencies in the plan and a requirement that the deficiencies be remedied within a stated time period;~~
- ~~(b) Information that the failure of the agency to comply with the notice may result in Department enforcement action pursuant to section 2352 of the Act;~~
- ~~(c) Requirements that the agency submit supporting documentation relating to the required elements of the plan as appropriate; and~~

~~(d) — Recommendations for correcting the deficiencies in the plan, including attendance at meetings with the Department.~~

825 AGENCY PROGRAM REPORTS

- 825.1 Quarterly reporting periods are as follows: October 1 through December 31, January 1 through March 31, April 1 through June 30, and July 1 through September 30.
- 825.2 An agency shall provide the Department with a quarterly program report, containing information provided by the Office of Contracting and Procurement (“OCP”) and the Office of the Chief Financial Officer (“OCFO”), within thirty (30) days after the end of each quarter. Agencies with independent contracting authority shall submit quarterly reports from their financial system. Each quarterly report submitted pursuant to this subsection must:
- (a) Include funding source, vendor name, description of the expenditure, proof of payment, the identities of active SBEs, and the dollar amount; and
 - (b) Be submitted within thirty (30) days after the end of each quarter, except in the case of the fourth (4th) quarter report, which shall be submitted along with the annual report.
- 825.3 The Department shall notify the agency in writing of any discrepancies in the agency’s quarterly report within fifteen (15) days of its receipt of the report.
- 825.4 If an agency's quarterly report indicates that the agency is not currently meeting its SBE contracting and procuring requirements under section 2341 of the Act (D.C. Official Code § 2-218.41) and its spending plan, the agency may submit to the Department:
- (a) An explanation for the projected shortfall;
 - (b) The specific steps the agency will take to remedy the shortfall, along with supporting documentation; and
 - (c) Evidence of compliance with section 2341(a-2) of the Act.
- 825.5 The Department will reply to an agency’s submission in response to a section 825.3 notification within fifteen (15) days of its receipt of the response. The Department’s reply may include recommendations concerning how best to remedy the discrepancies identified in the report, including a scheduled meeting with the OCFO and the Department.

- ~~825.1 Quarterly reporting periods are as follows: October 1 through December 31, January 1 through March 31, April 1 through June 30, and July 1 through September 30.~~
- ~~825.2 Each agency shall submit quarterly reports on Department forms within thirty (30) days after the end of each quarter.~~
- ~~825.3 If an agency cannot include with a quarterly report all the information required by the Act, it shall submit with the report a statement and supporting documentation which establishes good cause for the failure as well as the manner and time in which the agency will submit the required information.~~
- ~~825.4 If an agency's quarterly report indicates that the agency is not currently meeting its SBE contracting and procuring requirements under section 2341 of the Act and its procurement plan, the agency shall submit with its report:~~
- ~~(a) The explanation for the contracting shortfall; and~~
 - ~~(b) The specific steps it will take to remedy the shortfall, along with supporting documentation.~~
- ~~825.5 The Department shall notify an agency in writing of any deficiencies in the agency's quarterly report within thirty (30) days of its receipt of the report.~~
- ~~825.6 If an agency's quarterly report contains deficiencies, the Department's notification under § 825.5:~~
- ~~(a) Shall identify the deficiencies in the report and require that the deficiencies be remedied within a stated time period;~~
 - ~~(b) May require that the agency submit supporting documentation relating to the required elements of the report; and~~
 - ~~(c) May include recommendations concerning how best to remedy the deficiencies in the report, including attendance at meetings with the Department.~~

826 AGENCY SET-ASIDE AND PREFERENCE PROGRAM IMPLEMENTATION

- 826.1 When an entire solicitation has been placed in the [small business enterprise](#) (“SBE”) set-aside program pursuant to [sections 2344 and 2345 of the Act \(D.C. Official Code §§ 2-218.44 and 2-218.45\)](#), the solicitation shall:
- (a) State that it is a set-aside for SBE and certified business enterprise (“CBE”) offerors under the provisions of the Act; and

- (b) Require that responses include a copy of the certification letter/email issued by the Department.

826.2

- (a) Once a solicitation has been placed in the SBE set-aside program as required by sections 2344, 2345 and 2345a of the Act (D.C. Official Code §§ 2-218.44, 2-218.45, and 2-218.45a), the agency shall not remove it from the set-aside program unless:

~~(1) — At least one attempt to solicit bids or proposals for the procurement in the SBE set-aside market has failed to produce a responsive bid or proposal;~~

- (1) There are no SBEs that qualify for the procurement;
- (2) The prices of the bids or proposals from SBEs are 12% or more above the likely price on the open market; or
- (3) The removal is otherwise authorized by law.

- (b) Each solicitation removed from the SBE set-aside program shall be posted on the Department’s website.

- (c) Pursuant to section 2345a of the Act (D.C. Official Code § 2-218.45a), a follow-on and renewable acquisition must obtain the Director’s approval to waive the SBE set-aside requirements.

826.3

Each agency shall provide to the Department, if requested, the following types of procurement records:

- (a) Small purchase sources;
- (b) Term contracts;
- (c) Blanket purchases orders;
- (d) Repetitive or recurring procurement; and
- (e) GSA Schedule procurement.

826.4

If an agency with independent contracting authority, or the Office of Contracting and Procurement (“OCP”), intends to place a solicitation covered under sections 2344, 2345 and 2345a of the Act (D.C. Official Code §§ 2-218.44, 2-218.45, and 2-218.45a) on the open market ~~for a contract or procurement of \$100,000 or less,~~ the agency or OCP shall provide a written notice to the Department as soon as practicable that the agency intends to exclude the contract or procurement from its

SBE set-aside program. The written notice shall be posted on the Department's website and include, at a minimum, a description of:

- (a) The steps taken to identify SBEs and CBEs that may be able to provide the goods or services;
- (b) A list of all SBEs and CBEs that were contacted by the agency;
- (c) The information contained in the written determination(s) required under sections 2344 and 2345, if applicable; and
- (d) If applicable, the agency's request to the Director pursuant to section 2345a to waive the SBE set-aside requirement for follow-on and renewable acquisitions.

827

**GOVERNMENT-ASSISTED PROJECT CERTIFIED BUSINESS
ENTERPRISE SUBCONTRACTING ~~AGENCY CERTIFIED BUSINESS
ENTERPRISES SUBCONTRACTING~~**

~~827.1 When determining whether a prime contractor has willfully breached a subcontracting plan under section 2348 of the Act, the Department shall consider:~~

- ~~(a) Notification of the Department by the prime contractor prior to the breach;~~
- ~~(b) The prime contractor's efforts at replacing the subcontractor with another subcontractor certified by the Department in the same categories;~~
- ~~(c) Changes in the business operation or certification of the subcontractor;~~
- ~~(d) Changes in economic conditions from the time the plan was developed; and~~
- ~~(e) The extent of the breach.~~

~~827.2 Notwithstanding § 835.2, failure to achieve at least ninety percent (90%) of the identified subcontracting expenditure shall create a rebuttable presumption of a willful breach.~~

~~827.3 Contracting officers seeking a waiver or modification of the subcontracting requirements of sections 2346 and 2350 of the Act shall submit to the Director a written request detailing the reasons that support waiver or modification, including the efforts of the contracting officer to secure CBE involvement, particularly SBEs. Such a request shall be submitted prior to the acceptance of bids or proposals.~~

- 827.1 Pursuant to section 2346(a)(3) of the Act (D.C. Official Code § 2-218.46(a)(3)), a small business enterprise (“SBE”), local business enterprise (“LBE”), or disadvantaged business enterprise (“DBE”) shall not be required to comply with the requirements set forth in section 2346(a)(1) and (2) of the Act (D.C. Official Code § 2-218.46(a)(1) and (2)).
- 827.2 Pursuant to section 2346(d)(3) of the Act (D.C. Official Code § 2-218.46(d)(3)), the subcontracting plan required by section 2346(d)(2) of the Act shall, to the extent consistent with section 2346(d-1), be provided before the District accepts the submission of the bid or proposal for all government-assisted projects as defined in section 2302(9A)(A) of the Act (D.C. Official Code § 2-218.02(9A)(A)).
- 827.3 When determining enforcement and penalties following a beneficiary’s breach of a subcontracting plan under section 2348 of the Act (D.C. Official Code § 2-218.48), the Department shall consider:
- (a) Whether the beneficiary notified the Department prior to the breach;
 - (b) The beneficiary's efforts at replacing the CBE subcontractor with another subcontractor certified by the Department in the same categories;
 - (c) Changes in the business operation or certification of the CBE subcontractor; and
 - (d) Changes in economic conditions from the time the subcontracting plan was developed.
- 827.4
- (a) An agency seeking a waiver of the subcontracting requirements of section 2346 of the Act (D.C. Official Code § 2-218.46) under section 2351 of the Act (D.C. Official Code § 2-218.51), for government-assisted projects described in section 2302(9A)(A) of the Act (D.C. Official Code § 2-218.02(9A)(A)), including contracts executed by an agency on behalf of the District, shall submit a waiver request to the Department no less than twenty (20) days prior to issuance of a solicitation or the exercise of an option.
 - (b) If a bid or proposal requires a small business enterprise (“SBE”) subcontracting plan, and no SBE subcontracting plans are submitted, that bid or proposal shall, pursuant to section 2346(d)(1) of the Act (D.C. Official Code § 2-218.46(d)(1)), be deemed nonresponsive and be rejected. However, an agency may seek a waiver of the subcontracting requirements, and if a waiver is approved, the solicitation shall be revised and reissued or extended to allow for new responses to be submitted by the public in accordance with that waiver.

- 827.5 (a) Pursuant to section 2341(c) of the Act (D.C. Official Code § 2-218.41(c)), the following types of contracts for government-assisted projects identified in section 2302(9A)(A) of the Act (D.C. Official Code § 2-218.02(9A)(A)), are not required to seek a waiver and will be exempted from the 35% SBE subcontracting requirement of section 2346 of the Act (D.C. Official Code § 2-218.46):
- (1) Direct travel purchases, including airline tickets, train tickets, metro tickets, bus tickets, taxi fares, and accommodation costs while on travel;
 - (2) Human Care Agreements that require consumer/client choice without any input, manipulation, or selection by the awarding agency. The exemption excludes those instances where the awarding agency selects the entities that are able to participate in the pool from which the consumer/client chooses;
 - (3) Contracts in which the District is a tenant and pays costs to a landlord for use of private property, which may include paying for rent or lease, taxes, parking, paying the costs of existing building service contracts, paying operating costs, or paying information technology and other costs;
 - (4) Contracts for proprietary goods and services procured by an agency from a documented patent/copyright/license holder; and
 - (5) Contracts for projects with federal restrictions on how the funds may be expended, as documented by the agency and confirmed by the Department.
- (b) An agency seeking specific exemptions pursuant to this subsection shall submit to the Department a determination and finding, or similar justification memo, in a manner prescribed by the Department. Any determination and finding or justification memo received by the Department shall be posted on the Department's website.

828-837 [RESERVED]

838 EQUITY AND DEVELOPMENT PARTICIPATION

~~838.1 Local, Small, and Disadvantaged Business Enterprises (“LSDBEs”) shall receive a minimum of 20% Equity Participation and a minimum of 20% Development Participation in any Covered Project.~~

~~838.2 For the LSDBE to be a Development Participant, an entity, including a special purpose entity, must be certified by the Department under the Act as an LSDBE.~~

~~838.3 For the LSDBE to be an Equity Participant, an entity, including a special purpose entity, must be certified by the Department under the Act as an LSDBE.~~

~~838.4 As appropriate, the Director may provide guidance to District agencies, business enterprises, and interested members of the public regarding the equity and development participation requirements.~~

~~838.5 An Agency considering a solicitation for a Covered Project may contact the Department as needed to coordinate outreach efforts to Equity Participants and Development Participants and provide the Department with the specific details regarding the Covered Project.~~

~~838.6 With respect to solicitations, including but not limited to Requests for Proposals (“RFPs”), Invitations for Bids (“IFBs”), Requests for Qualifications (“RFQs”), and Calls for Expressions of Interest, issued by District agencies in connection with Covered Projects. The solicitation shall include the following:~~

~~(a) The Equity Participation and Development Participation requirements and an agreement that the party responding to the solicitation agrees to satisfy the Equity Participation and Development Participation requirements;~~

~~(b) A statement that the District is interested in Component Development by Development Participant(s) where feasible and consistent with the District’s goals with respect to the project for which the solicitation is issued; and~~

~~(c) A statement that the Equity Participation and Development Participation requirements are only minimum levels, and the District is interested in Covered Projects that exceed these minimum requirements.~~

~~838.7 The Director, or the Director’s designee, may review responses to solicitations for all Covered Projects to ensure that the responses are consistent with the equity and development participation requirements.~~

~~838.8 At least three (3) business days prior to the issuance of any request for proposals, request for qualifications, calls for expressions of interest or other similar documents relating to any Covered Project, the District agency involved shall notify the Director of its intent to issue such a document and prior to issuance provide the Director with an electronic copy of the document. The Department may advertise such EDP Program opportunities on its website after the solicitation is issued.~~

838.1 Small investors, disadvantaged investors, or certified equity participants shall receive a minimum of 20% Equity Participation in any Covered Project.

(a) Small investor as defined by section 2302 of the Act (D.C. Official Code §

2-218.02) means:

- (1) An SBE pursuant to section 2332 of the Act; or
 - (2) A District-domiciled individual with a personal net worth that does not exceed five (5) million dollars, excluding the value of his or her primary residence.
- (b) (1) To be a District-domiciled individual:
- (A) The District of Columbia must be the present fixed place of residence of the individual to which he or she returns following temporary absences and at which he or she intends to reside indefinitely; and
 - (B) The District of Columbia must be the individual's only domicile.
- (2) For an individual to establish that he or she is domiciled in the District, the individual must submit sufficient evidence to the Department, including providing the following:
- (A) Copies of a District of Columbia deed or lease in the District of Columbia covering the twelve (12) consecutive months preceding the Department's evaluation for premises at which the individual resides;
 - (B) Copies of utility bills for utility services provided in the District of Columbia residence covering the twelve (12) consecutive months preceding the Department's evaluation;
 - (C) Copies of earnings and leave statements (i.e., pay stubs) that show residency in the District of Columbia and the withholding of District of Columbia income tax covering the twelve (12) consecutive months preceding the Department's evaluation;
 - (D) Certified copies of District of Columbia and federal income tax returns for the tax year preceding the Department's evaluation;
 - (E) Copies of voter registration, motor vehicle registration, driver's license, and non-driver's identification; and

- (F) Copies of any other documents required by the Department that demonstrate that the District is the domicile of the individual.
- (c) (1) Disadvantaged investor as defined by section 2302 of the Act (D.C. Official Code § 2-218.02) means:
 - (A) A disadvantaged business enterprise (“DBE”) pursuant to section 2333 of the Act (D.C. Official Code § 2-218.33); or
 - (B) A District-domiciled economically disadvantaged individual.
- (2) To be a District-domiciled economically disadvantaged individual, an individual must be:
 - (A) A District-domiciled individual, as defined by § 838.1(b); and
 - (B) Economically disadvantaged, as defined by § 804.1(b).
- (d) (1) Certified equity participant as defined by section 2302 of the Act means a single-purpose legal entity created to participate in real estate development projects and includes members that are small investors or disadvantaged investors.
- (2) The Department shall verify that each single-purpose legal entity meets the definition of certified equity participant to be designated as such.
- (e) The Department will determine the manner in which the documents required in this section shall be submitted.
- (f) The documents required to prove District domicile under this section must be submitted to the Department in a single submission.
- (g) Each year throughout the duration of the Covered Project, each small investor and disadvantaged investor shall provide the Department in a single submission updated documents proving District-domicile status. These updated documents shall be submitted by the end of the same month as the initial submission required by § 838.1(f) (*e.g.*, if the initial submission was in February, by the end of each February thereafter).
- (h) A certified equity participant, small investor, or disadvantaged investor will retain its designation for the duration of the Covered Project in which it is an Equity Participant, as required by section 2349a of the Act (D.C.

Official Code § 2-218.49a) and this chapter, provided the entity or individual remains in compliance with the Act and this chapter.

- 838.2 As appropriate, the Department may provide guidance to District agencies, business enterprises, and interested members of the public regarding the equity and development participation requirements.
- 838.3 An agency considering a solicitation for a Covered Project may contact the Department as needed to coordinate outreach efforts to Equity Participants and Development Participants and provide the Department with the specific details regarding the Covered Project.
- 838.4 With respect to public and private development (PPD) related solicitations, including Requests for Proposals ("RFPs"), Invitations for Bids ("IFBs"), Requests for Qualifications ("RFQs"), and Calls for Expressions of Interest, issued by District agencies in connection with Covered Projects, to the extent required by the Act and these rules, the solicitation shall include the Equity Participation and Development Participation requirements and a requirement that the party responding to the solicitation agrees to comply with the Equity Participation and Development Participation requirements, including submission to the Department of a separate "Service Agreement" detailing the specifics of the terms, conditions and financial requirements of the equity involvement.
- 838.5 Not more than one (1) business day after the issuance of any request for proposals, request for qualifications, call for expressions of interest or other similar document relating to any Covered Project, the District agency involved shall provide the Department with an electronic copy of the document, which the Department shall post on the Department's website.

839 EQUITY AND DEVELOPMENT PARTICIPATION REQUIREMENTS

- 839.1 The Equity Participant(s) shall receive a return on investment in a Covered Project that is pari passu with all other sources of Sponsor Equity.
- 839.2 The Equity Participation shall be maintained for the duration of the Covered Project. Completion of the Covered Project shall be measured by the issuance of one or more certificates of occupancy, certifications of completion, or other documents evidencing completion as determined by the Department.
- ~~839.3 The Equity Participant(s) shall not bear financial or execution requirements that are disproportionate with its equity position in the Covered Project.~~
- ~~839.4 The Equity Participant(s) and/or Development Participant(s) shall have management control and approval rights in line with their equity position(s).~~

~~839.5 The Equity Participant(s) and/or Development Participant(s) shall be consistently included in representing the entity to the public (e.g., through joint naming, advertising, branding, and etc.).~~

839.3 Pursuant to section 2349a(b) of the Act (D.C. Official Code § 2-218.49a(b)), the Department shall measure the Development Participation in addition to the general SBE subcontracting requirements of section 2346 of the Act (D.C. Official Code § 2-218.46). The Development Participation shall not be used to satisfy the general SBE subcontracting requirements of section 2346 of the Act.

839.4 The Department may require a beneficiary of a development project that is subject to section 2349a(b) of the Act to submit a form, provided by the Department, to calculate and track the Development Participation.

840 EVALUATION OF EQUITY AND DEVELOPMENT PARTICIPATION

840.1 When evaluating the percentage of Equity Participation by an Equity Participant in a Covered Project, the Department will take the following into account:

- (a) The financing plan for the Covered Project;
- (b) The amount and nature of leverage in the form of debt or other sources incurred by the Sponsor Entity;
- (c) The amount of institutional equity being provided for the benefit of the Sponsor Entity;
- (d) The amount of mezzanine financing being provided for the benefit of the Sponsor Entity, including the roles and rights of the mezzanine financier;
- (e) The total amount of equity required from the Sponsor Entity;
- (f) The percentage of the Sponsor Entity's equity being provided by an Equity Participant and the terms thereof;
- (g) The percentage of institutional equity being provided by an Equity Participant;
- (h) Provisions in funding documents related to the sale, dilution, or conversion of equity interests prior to project completion that may result in a change in the amount of the Equity Participant's Equity Participation and ownership;
- (i) Whether Equity Participants are treated similarly, with respect to the determination of returns, as compared to other entities with similar risk profiles on a Covered Project; and

- (j) The amount of sweat equity and the categories in which the Equity Participant(s) is (are) certified.

~~840.2 When evaluating the percentage of Development Participation by a Development Participant in a Covered Project, the Department shall take the following into account:~~

- ~~(a) The overall project scope and total development cost;~~
- ~~(b) Whether development fees are shared and if so, what percentage is shared with the Development Participant and how that percentage is calculated; and~~
- ~~(c) Whether development services have been divided among members of the development team and, if so, what services are being provided by the Development Participant and what percentage of the development work is represented by that division.~~

841 [RESERVED]

842 CHANGES IN EQUITY AND DEVELOPMENT PARTICIPATION

842.1 Once the selection of an Equity Participant or a Development Participant to participate in a Covered Project has been approved by the Department, there can be no change in the Equity Participant or Development Participant and no dilution of a participant's Equity Participation without the express written consent of the Director.

~~842.2 Once the Department has approved the determination of returns for Equity Participants in a Covered Project, the determination of returns for Equity Participants shall not be materially altered or adjusted from that previously presented to the Department without the Director's express written consent.~~

843 CLOSING REQUIREMENTS REGARDING EQUITY PARTICIPATION

843.1 The closing documents executed in connection with any Covered Project shall contain provisions indicating there can be no change of the Equity ~~Participant or Development Participant~~ and no dilution of a participant's Equity Participation ~~and no material alteration of the determination of returns for the Equity Participant~~ without the Director's express written consent.

843.2 The closing documents shall expressly covenant and agree that the Department shall have third-party beneficiary rights to enforce the provisions, for and in its own right.

843.3 The agreements and covenants in the closing documents shall expressly run in favor of the Department for the entire period during which the agreements and covenants shall be in force and effect, without regard to whether the District was or is an owner of any land or interest therein or in favor of which the agreements and covenants relate.

843.4 ~~The closing documents shall expressly covenant and agree that~~ the Department shall have the right, in the event of a breach of the agreement or covenant in the closing documents, to exercise all the rights and remedies – and to maintain any actions or suits, at law or in equity, or other proceedings to enforce the curing of the breach of agreement or covenant – to which it may be entitled.

844 EQUITY AND DEVELOPMENT PARTICIPATION RESTRICTIVE COVENANT

844.1 If there is a transfer of title to any District-owned land that will become part of a Covered Project, the Department may require that a restrictive covenant be filed on that land requiring compliance with the Equity Participation and Development Participation requirements of the Act, if applicable.

844.2 A restrictive covenant requiring compliance with the Equity Participation and Development Participation requirements of the Act shall run with the land and otherwise remain in effect until released by the Department following the completion of construction of and the issuance of certificates of occupancy for the Covered Project. A release of the restrictive covenant shall be executed by the Department only after either the developer and the Equity and Development Participants submit a sworn certification together with documentation demonstrating to the satisfaction of the Department that, or the Department otherwise determines that:

- (a) The Development Participants received at least 20% of the non-construction development goods and services for the Covered Project, in addition to the general SBE subcontracting requirements of section 2346 of the Act; and
- (b) The Equity Participant has maintained at least a 20% ownership interest in the Sponsor Entity in the Covered Project throughout its development.

845 [RESERVED]

846 DEPARTMENT ASSISTANCE FOR COVERED PROJECTS

846.1 If a District agency receives no response ~~from prospective Equity Participants or Development Participants to develop a Covered Project, to develop a Covered Project from a Qualified Responder,~~ it may contact the Department for further assistance. The Department may:

- (a) Post on its website notices of Equity and Development Participation opportunities for Covered Projects; and
- (b) Assist the District agency in identifying qualified Equity Participants and Development Participants by hosting outreach sessions.
- ~~(a) Assist the District agency to restructure the Covered Project to increase the likelihood of finding Qualified Responders (for example, determining whether the Covered Project could be separated into components such that one or more portions could be developed by a Development Participant as a Component Developer);~~
- ~~(b) Assist the District agency and its respondents who were not Qualified Respondents in identifying qualified Equity Participants and Development Participants; or~~
- ~~(c) Evaluate a request by the District agency for a modification of some or all of the EDP Program requirements.~~

847 EQUITY OR DEVELOPMENT PARTICIPANT LOSS OF CERTIFICATION

847.1 If an Equity Participant or Development Participant loses its certified business enterprise (“CBE”) certification, or an individual no longer qualifies to be an Equity Participant, during the course of a Covered Project, and the loss of certification or qualification results in the Covered Project failing to meet the minimum Equity Participation or Development Participation requirements under section 2349a of the Act (D.C. Official Code § 2-218.49a), the Department will evaluate whether another Equity Participant or Development Participant can participate in the Covered Project without causing any detriment to the overall project or the lead developer, so that the 20% Equity Participation and 20% Development Participation requirements are met.

- ~~847.1 If an Equity Participant or Development Participant loses its LSDBE certification during the course of a Covered Project resulting in less than the minimum Equity Participation or Development Participation requirement under Section 2349a of the Act, the Department shall evaluate on a case-by-case basis whether:~~
- ~~(a) Another Equity Participant or Development Participant can participate in the Covered Project without causing any detriment to the overall project or the Master Developer, so that the 20% Equity Participation and 20% Development Participation requirements are met;~~
 - ~~(b) To modify or waive some or all of the EDP Program requirements for the Covered Project; or~~

~~(e) After assessing~~

848 EQUITY AND DEVELOPMENT REPORTS

848.1 **Beneficiaries** ~~Developers~~ must submit quarterly reports to the Department regarding the fulfillment of the Equity Participation and Development Participation Program requirements on such forms as determined by the Department. The reports shall include, at a minimum, information regarding:

- (a) Changes in ownership interest of the owners/partners;
- (b) Additions or deletions of an owner/partner;
- (c) Changes in the legal status of an existing owner/partner;
- (d) Changes in the percentage of revenue distribution to an owner/partner; and

~~(e) A description of team member activities; and~~

(e) Each Development Participant, their certified business enterprise (“CBE”) certification number, a description and dates of the non-construction development good and service they provided, the contract amount, a copy of the executed contract, and any other information required by the Department.

~~(f) The amount of development fees paid to each team member, participant, partner, or owner.~~

848.2 Information provided under § 848.1(a)-(d) ~~may~~ **shall** be considered commercial or financial information which could result in substantial harm if disclosed to the competitive position of the provider of the information, and ~~may~~ **shall** be exempt from disclosure under section 204(a)(1) of the District of Columbia Administrative Procedure Act, effective March 25, 1977 (D.C. Law 1-96; D.C. Official Code § 2-534(a)(1)) ~~D.C. Official Code § 2-534(a)(1).~~

849 [RESERVED]

850 [RESERVED]

851 SMALL BUSINESS CAPITAL ACCESS FUND

851.1 The Department shall implement and administer the Small Business Capital Access Fund ("Fund") established pursuant to section 2375 of the Act (D.C. Official Code § 2-218.75). The Fund is a financing tool designed to sustain and/or increase the level of business activity, job creation and retention, and provide

access to capital for the sustainability and expansion of designated categories of certified business enterprises (“CBEs”).

851.2 Monies issued from the Fund may be structured as a grant, loan loss reserve funding, senior or subordinated secured or unsecured loan, loan guarantee, collateral, surety, or any other financial assistance, and any issuance of monies from the Fund shall serve a public purpose identified by the Department. The Department may, in its discretion, issue grants to assist qualified businesses with credit facility origination or the provision of financial-based professional services (*e.g.*, grants to assist with hiring a certified public accountant, bookkeeper, escrow agent, bonding agent, qualified non-profit organization, financial institution, or professional service provider).

851.3 To be eligible for funding from the Fund a recipient must:

- (a) Be certified or eligible to be certified, pursuant to the Act as a small business enterprise (“SBE”) or disadvantaged business enterprise (“DBE”);
- (b) Be independently owned, operated, and controlled;
- (c) Be in good standing with the Department of Consumer and Regulatory Affairs; and
- (d) Have a Certificate of Clean Hands from the Office of Tax and Revenue.

851.4 The following business enterprises are ineligible to receive funding from the Fund: consumer and marketing cooperatives; dealers of rare coins and stamps; enterprises engaged in gambling; enterprises engaged in illegal activity; lending firms and loan packaging firms; enterprises engaged in multi-sales distribution; nonprofits; enterprises engaged in pyramid schemes or multi-level marketing schemes; real estate investment firms; non-profit institutions; and businesses engaged in speculation.

851.5 To the extent consistent with the grant agreement or other agreement between the Department and an eligible recipient, the recipient may use proceeds from the Fund for the following purposes:

- (a) Working capital;
- (b) Inventory;
- (c) Acquisition or repair of furniture, fixtures, machinery, or equipment;
- (d) Ecologically efficient improvements;

- (e) Purchase or implementation of financial management systems (e.g., point of sale, upgrades to meet prime contractor standards);
- (f) Leasehold improvements;
- (g) Property renovation; or
- (h) Financial and/or Procurement-based professional services.

851.6 The Department will develop underwriting criteria and rates and terms for funding from the Fund. Such criteria will include, at minimum, the maximum funding amount(s), interest rate(s) and any applicable deferral periods, term limits, security or collateral requirements and fees and costs. The Department will include the underwriting criteria with the application and/or publish the underwriting criteria on its website. The Department may modify the underwriting criteria as necessary to account for changes in budgeted amounts of the Fund or changing needs of the local business community. The Department may work with a qualified non-profit organization or financial institution to develop or modify, as necessary, the underwriting criteria.

851.7 An eligible recipient seeking funding from the Fund shall submit a written application to the Department or to a qualified non-profit organization and/or financial institution designated by the Department on such form or forms as may be prescribed or approved by the Department. The application shall include, at a minimum, submission of the following documents and information:

- (a) Current CBE Certification and evidence that the applicant is certified as an SBE or DBE or evidence that the applicant is eligible to be certified as a SBE or DBE;
- (b) Clean Hands Certification from the Office of Tax and Revenue;
- (c) Certificate of Good Standing from the Department of Consumer and Regulatory Affairs;
- (d) Financial status of the applicant, including current and past tax returns, balance sheet(s) and profit and loss statements;
- (e) Amount of funding from the Fund requested by the applicant;
- (f) Reason for requesting funding from the Fund; and
- (g) Any other information or documents the Department may require in order to assess the applicant's eligibility and/or credit worthiness.

851.8 Within sixty (60) days of receipt of a complete application, the Department or its non-profit or financial institution partner shall notify the applicant whether the funding request has been approved, denied, or if additional information is needed to make a determination. If an application is denied, the Department or its non-profit/financial institution partner shall provide the applicant an explanation of the underwriting determination.

851.9 The Department may, in its discretion, require the potential borrower or borrower to participate in targeted training, technical assistance, and/or periodic monitoring to help strengthen business operations as a condition of funding from the Fund or as a pre-condition for future funding.

899 DEFINITIONS

899.1 The definitions set forth in the Act are incorporated by reference into this chapter. As used in this chapter, the following words and phrases shall have the meanings ascribed:

Act - the Small and Certified Business Enterprise Development and Assistance Act of 2005, effective October 20, 2005 (D.C. Law 16-33; D.C. Official Code § 2-218.01).

Application date - the date on which the Department receives an application.

Certificate - a letter issued by the Department indicating that a firm is a business enterprise or joint venture certified pursuant to Part D of the Act (D.C. Official Code § 2-218.31 et seq.).

Contractor - any natural person or business organization, such as a corporation, partnership, joint venture, limited liability company, or similar enterprise that enters into a contract with the District, a public employee, or private developer to provide goods or services.

Construction - the building, alteration, repair, or improvement of real property. This term does not include the operation or routine maintenance of real property.

Covered Project - any development project conducted pursuant to a disposition under section 1 of An Act Authorizing the sale of certain real estate in the District of Columbia no longer required for public purposes, approved August 5, 1939 (53 Stat. 1211; D.C. Official Code § 10-801).

Day - a calendar day.

Development Participant - a small business enterprise (“SBE”) or certified business enterprise (“CBE”) that participates in one or more phases of project

development in a Covered Project in accordance with section 2349a(b) of the Act (D.C. Official Code § 2-218.49a(b)).

Development Participation - participation on a Covered Project performed by a small business enterprise (“SBE”) or certified business enterprise (“CBE”) in accordance with section 2349a(b) of the Act (D.C. Official Code § 2-218.49a(b)).

Development Project -

- (a) Means a government-assisted project involving either:
 - (1) The private development or redevelopment of real property improvements conducted pursuant to a disposition under section 1 of An Act Authorizing the sale of certain real estate in the District of Columbia no longer required for public purposes, approved August 5, 1939 (53 Stat. 1211; D.C. Official Code § 10-801); or
 - (2) Private development or redevelopment of real property improvements to which the District has contributed through a grant at least 15% of the development costs or \$500,000, whichever is less.
- (b) Shall not include improvements on real property where the owner will occupy at least 25% of the real property and the development budget is \$ 500,000 or less.

Eligible Recipient - a business enterprise as defined in section 2375(a)(1) of the Act (D.C. Official Code § 2-218.75(a)(1)).

Entity - an organization, including a corporation, partnership, limited liability company, sole proprietor, or trust.

Equity Participant - a small investor, disadvantaged investor or certified equity participant that, in accordance with the Act, provides capital or other monetarily valued services in exchange for an ownership interest in a Covered Project.

Equity Participation - an ownership interest acquired by an Equity Participant in a Covered Project.

Fiscal year - October 1 of each year through September 30 of the following year.

Fixed Assets - any long-term item of economic value owned by an individual or corporation, especially that which could be converted to cash, that the owner does not expect to convert into cash in less than one year. Examples are buildings, office equipment (not supplies), vehicles, computers, and other property.

Good Faith Efforts - a bidder/offeror's unsuccessful actions to meet established goals, including all necessary and reasonable steps taken, such as conducting market research, strategic outreach, advertisements, and contacting the Department's Business Opportunities Division for assistance.

Grant - a public subsidy for which the District does not anticipate repayment, such as a cash contribution, tax increment financing, payment in lieu of taxes, or similar programs or agreements. A grant shall not include a public contribution for which the District anticipates repayment, such as a loan.

Legal Holiday - a public holiday observed by the District of Columbia, on which the District of Columbia government is closed.

Principal Office - a business's corporate headquarters where the central operational, financial and recordkeeping functions of the business occur.

Respondent - an applicant for or holder of a certificate against whom a denial or adverse action is proposed or taken.

Site Visit - an announced or unannounced, on-site, comprehensive review of a business operation to determine compliance or continued eligibility for certification as a local business enterprise.

Sponsor Equity - the equity that is intended to be contributed by the non-institutional investors or by the private developer, excluding debt financing, mezzanine financing, or other equity contributions by limited or institutional investors.

Sponsor Entity - an individual or an entity with the day-to-day responsibilities for a development project (e.g., a Managing Member, or a General Partner).

Spot Check - an unannounced cursory, on-site inspection of a certified business enterprise ("CBE") headquarters to ensure continued compliance with eligibility requirements of the Act and these regulations.

Persons wishing to comment on these rules should submit their comments in writing to Kristi C. Whitfield, Director, Department of Small and Local Business Development, 441 4th Street, NW, Suite 850N, Washington, D.C. 20001, Attn: Robert "Bobby" Dorsey, Legislative Analyst or via email to robert.dorsey1@dc.gov. All comments must be received by the Department of Small and Local Business Development not later than thirty (30) days after publication of this notice in the *D.C. Register*. Copies of this rulemaking and related information may be obtained on the DSLBD website at dslbd.dc.gov, by writing to the above address, or by calling the Department of Small and Local Business Development at (202) 727-3900.