

**NEW JERSEY DEPARTMENT OF TRANSPORTATION
EMERGING SMALL BUSINESS ENTERPRISE
POLICY STATEMENT**

I. PURPOSE

The New Jersey Department of Transportation (NJDOT) has established an Emerging Small Business Enterprise (ESBE) certification in order to meet the maximum feasible portion of its Disadvantaged Business Enterprise (DBE) goal through race-neutral means in accordance with regulations of the U.S. Department of Transportation (USDOT), 49 CFR Parts 26.51 and 26.39.

II. IMPLEMENTATION

To ensure that the maximum feasible portion of the overall DBE goal is met by using race-neutral means, NJDOT will establish ESBE participation goals on its federally funded contracts. Prime contractors may use DBE and/or ESBE firms in order to satisfy these ESBE goals.

ESBE contracting goals for USDOT federally funded construction projects will be determined by the NJDOT Contractor Compliance Unit with the help of the NJDOT Bureau of Construction Services. The Contractor Compliance Unit and Bureau of Construction Services will review the construction firm's Engineer's Estimate, for a specific project, to identify the items typically subcontracted by a prime contractor on similar projects. This review will determine the subcontracting opportunities on that project and approximate percentage that will be subcontracted to ESBE and DBE firms.

In the case of professional services agreements, NJDOT will set ESBE goals at the same level as the overall goal. For example, if the overall goal is 15.61%, then NJDOT will set the ESBE goals on its professional services agreements at 15.61%, provided that there are subconsulting opportunities on those agreements.

NJDOT only counts DBE participation when reporting progress toward meeting DBE goals. ESBE participation is not counted. ESBE certification exists solely for the benefit of the DBE program. NJDOT will monitor the effect of ESBE certification on DBE utilization. If it is determined that ESBE certification has a negative impact on DBE utilization, then NJDOT reserves the right to limit, discontinue, or eliminate ESBE certification.

III. APPLICABILITY

This policy applies only to NJDOT construction and consultant contracts funded in whole or in part with federal financial assistance. This policy is not applicable to the award of NJDOT contracts for the purchase of commodities or on any 100 percent state-funded contracts.

Applications and questions regarding eligibility as an ESBE should be addressed to:

Disadvantaged and Small Business Programs Unit
Division of Civil Rights and Affirmative Action
New Jersey Department of Transportation
1035 Parkway Avenue
PO Box 600
Trenton, NJ 08625-0600

IV. DEFINITIONS

The NJDOT will adopt the definitions contained in 49 CFR Part 26.5 for this policy.

V. ELIGIBILITY FOR ESBE CERTIFICATION

In general, to be eligible for ESBE certification, the firm must be a small business, according to SBA size standards, and be 51% owned, and controlled by one or more economically disadvantaged individuals whose personal net worth does not exceed \$1.32 million.

Eligibility Guidelines for ESBE certification:

- a. Ownership - The business must be 51% owned by an economically disadvantaged person.
- b. Business Size Determination - The business (including its affiliates) must be a small business as defined by SBA standards. It must not have annual gross receipts over \$22.41 million in the previous three fiscal years. Under SAFETEA-LU, this threshold will be adjusted annually for inflation by the Secretary.
- c. Personal Net Worth - Only persons having a personal net worth (PNW) of less than \$1.32 million can be considered as a potential qualified ESBE. Items excluded from a person's net worth calculation include an individual's ownership interest in the applicant firm, and his or her equity in their primary residence.

- d. Independence - The business must not be tied to another firm in such a way as to compromise its independence and control.
- e. Control – An owner seeking certification must possess the power to direct or cause the direction of the management and policies of the firm. The owner must also have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the firm is engaged. 49 CFR 26.71
- f. Burden of Proof Allocation - Applicants carry the initial burden of proof regarding their eligibility and must demonstrate that they meet all requirements concerning group membership or individual disadvantage, business size, ownership, and control. 49 CFR 26.61

VI. RULES GOVERNING DETERMINATIONS OF OWNERSHIP

- a. In determining whether the economically disadvantaged participants in the firm own and control the business, all the facts in the record must be viewed as a whole.
- b. The firm's ownership by economically disadvantaged individuals must be real, substantial and continuing, going beyond the pro forma ownership as reflected in its ownership documents. The economically disadvantaged owners must enjoy the customary incidents of ownership and share in the risks and profits commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements.
- c. All securities that constitute ownership of a firm shall be held directly by economically disadvantaged individuals. Except as provided in this paragraph, no securities or assets held in trust, or by any guardian for a minor, are considered as held by economically disadvantaged persons in determining the ownership of the applicant business. However, securities or assets held in trust, or by any guardian for a minor, are considered as held by an economically disadvantaged individual for purposes of determining ownership under the following circumstances:
 - i. The beneficial owner of securities or assets held in trust is an economically disadvantaged individual, and the trustee is the same or another such individual; or
 - ii. The beneficial owner of a trust is an economically disadvantaged individual who, rather than the trustee,

exercises effective control over the management, policymaking, and daily operational activities of the applicant business. Assets held in a revocable living trust may be counted only in the situation where the same economically disadvantaged individual is the sole grantor, beneficiary, and trustee.

- d. The contributions of capital or expertise by the economically disadvantaged owners to acquire their ownership interests must be real and substantial. Examples of insufficient contributions include a promise to contribute capital, an unsecured note or mere participation in the firm's activities as an employee.
- e. The following requirements apply to situations in which expertise is relied upon as part of an economically disadvantaged owner's contribution to acquire ownership:
 - i. The owner's expertise must be:
 - 1. In a specialized field;
 - 2. Of outstanding quality;
 - 3. In areas critical to the business' operations;
 - 4. Indispensable to the business' potential success;
 - 5. Specific to the type of work the business performs; and
 - 6. Documented in the records of the business. The records must clearly show the contribution of expertise and its value to the business.
 - ii. The individual whose expertise is relied upon must have a significant financial investment in the business.
- f. For purposes of determining ownership, the Department shall deem as being held by an economically disadvantaged individual, all interests in a business or other assets obtained by the individual:
 - i. As the result of a final property settlement or court order in a divorce or legal separation, provided that no term or condition of the agreement or divorce decree is inconsistent with this section; or
 - ii. Through inheritance, or otherwise because of the death of the former owner.
- g. All interests in a business, or other assets obtained by the economically disadvantaged owner as a result of a gift or transfer without adequate consideration, from any non-economically

disadvantaged individual or non-ESBE firm will be presumed not to be held by the economically disadvantaged owner if the non-economically disadvantaged individual or non-ESBE firm is:

- i. Involved in the same business for which the individual is seeking certification, or an affiliate of the business;
 - ii. Involved in the same or similar line of business; or
 - iii. Engaged in an ongoing business relationship with the applicant business, as an affiliate of the applicant business.
- h. To overcome the presumption and permit the interests or assets to be counted, the economically disadvantaged individual must demonstrate by clear and convincing evidence, that:
- i. The gift or transfer was made for reasons other than obtaining ESBE certification, and
 - ii. The economically disadvantaged individual actually controls the management, policy and operations of the business, notwithstanding the continuing participation of the non-economically disadvantaged individual who provided the gift or transfer.
- i. The Department will apply the following rules in situations in which marital assets form a basis for ownership of the business:

When marital assets (other than the assets of the business in question) are held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by one spouse, the Department shall deem the ownership interest in the firm to have been acquired by that spouse with his or her own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled. The Department does not count a greater portion of joint or community property assets toward ownership than state law would recognize as belonging to the economically disadvantaged owner of the applicant firm.

VII. RULES GOVERNING DETERMINATIONS OF CONTROL

- a. In determining whether economically disadvantaged owners control a firm, the Department will consider all the facts of the record,

viewed as a whole.

- b. Only an independent business may be certified as an ESBE. An independent business is one the viability of which does not depend on its relationship with another firm or firms.
 - i. In determining whether a potential ESBE is an independent business, the Department will scrutinize its relationships with non-ESBE businesses in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.
 - ii. The Department will consider whether present or recent employer/employee relationships between the ESBE owner of the applicant business and non-ESBE business or persons associated with non-ESBE businesses compromise the independence of the applicant business.
 - iii. The Department will examine the applicant firm's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential ESBE.
 - iv. In considering factors related to the independence of a potential ESBE, the Department will consider the consistency of relationships between the potential ESBE firms and non-ESBE firms with normal industry practice.
- c. The firm must not be subject to any formal or informal restrictions which limit the customary discretion of the economically disadvantaged owners. There can be no restrictions through corporate charter provisions, by-law provisions, contracts or any other formal or informal devices (e.g. cumulative voting rights, voting powers attached to different classes of stock, employment contracts, requirements for concurrence by non-economically disadvantaged partners, conditions precedent or subsequent, executive agreements, voting trusts, restrictions on or assignments of voting rights) that prevent the economically disadvantaged owners, without the cooperation or vote of any non-economically disadvantaged individual, from making any business decision of the business. This paragraph does not preclude a spousal co-signature on financial, real estate or banking documents as may be required.
- d. The economically disadvantaged owners must possess the power

to direct or cause the direction of the management and policies of the business and to make day-to-day as well as long-term decisions on matters of management, policy and operations.

- i. The economically disadvantaged owner must hold the highest officer position in the business (e.g., chief executive officer or president).
 - ii. In a corporation, the economically disadvantaged owners must control the board of directors.
 - iii. In a partnership, one or more economically disadvantaged owners must serve as general partners, with control over all partnership decisions.
- e. Individuals who are not economically disadvantaged may be involved in the applicant business as owners, managers, stockholders, officers, and/or directors. Such individuals must not, however, possess or exercise the power to control the business, or be disproportionately responsible for the operations of the business.
- f. The economically disadvantaged owners of the business may delegate various areas of the management, policymaking, or daily operations of the business to other participants in the business, regardless of whether these participants are economically disadvantaged individuals. Such delegations of authority must be revocable, and the economically disadvantaged owners must retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the economically disadvantaged owners in the business's overall affairs must be such that the Department can reasonably conclude that the economically disadvantaged owners actually exercise control over the business' operations, management, and policies.
- g. The economically disadvantaged owners must demonstrate to the Department's satisfaction that they have an overall understanding of, and managerial and technical competence and experience directly related to the type of work or service in which they are engaged. The economically disadvantaged owners are not required to have experience or expertise in every critical area of their business' operations, or to have greater experience or expertise in a given field than managers or key employees, however, the economically disadvantaged owners must have the ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to use this

information to make independent decisions concerning the firm's daily operations, management and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the business's activities will be insufficient to demonstrate control.

- h. If state or local law requires an owner to have a particular license or other credential in order to own and/or control a certain type of business, then the economically disadvantaged person(s) who owns and controls the applicant firm must possess the required license or credential. If state or local law does not require such a person to have such a license or credential to own and/or control a business, the Department will not deny certification solely on the ground that the person lacks the license or credential. However, the Department may take into account the absence of the license or credential as one factor in determining whether the economically disadvantaged owner(s) actually control the business.
- i. The Department shall consider differences in remuneration between the economically disadvantaged owners and other participants in the firm in determining whether to certify a firm as an ESBE. Such consideration shall be in the context of the duties of the persons involved, normal industry practices, the firm's policy and practice concerning reinvestment of income, and any other explanations for the differences proffered by the business. The Department may determine that an applicant firm is controlled by its economically disadvantaged owner although that owner's remuneration is lower than that of some other participants in the business.

In a case where a non-economically disadvantaged individual formerly controlled the applicant business, and an economically disadvantaged individual now controls it, the Department may consider differences in salary of the former and current owner of the applicant firm as a factor in determining who controls the firm, particularly when the non-economically disadvantaged individual remains involved with the business and continues to receive greater compensation than the economically disadvantaged individual.

- j. In order to be viewed as controlling the business, an economically disadvantaged owner cannot engage in outside employment or have other business interests that conflict with the management of the business or prevent them from devoting sufficient time and attention to the affairs of the business to control its activities. For example, absentee ownership of a business and part-time work in a

full-time business are not viewed as constituting control. However, an individual could be viewed as controlling a part-time business that operates only on evenings and weekends, if the individual controls it all the time it is operating.

- k. An economically disadvantaged individual may control a business even though one or more of the individual's immediate family members (who themselves are not economically disadvantaged individuals) participate in the firm as a manager, employee, owner, or in another capacity. Except as otherwise provided in this paragraph, the Department shall make a judgment about the control the economically disadvantaged owner exercises vis-à-vis other persons involved in the business, as in other situations without regard to whether or not the other persons are immediate family members.
- l. If the Department cannot determine that the economically disadvantaged owners, as distinct from the family as a whole, control the firm, then the economically disadvantaged owners have failed to carry the burden of proof concerning control, even though they may participate significantly in the business's activities.
- m. Where a business was formerly owned and/or controlled by a non-economically disadvantaged individual (whether or not an immediate family member), and ownership and/or control were transferred to an economically disadvantaged individual, and the non-economically disadvantaged individual remains involved with the business in any capacity, the economically disadvantaged individual now owning the business must demonstrate to the Department, by clear and convincing evidence, that:
 - i. The transfer of ownership and/or control was made for reasons other than obtaining certification as a ESBE; and
 - ii. The economically disadvantaged individual actually controls the management, policy and operations of the business, notwithstanding the continuing participation of a non-economically disadvantaged individual who formerly owned and/or controlled the business.
- n. In determining whether a firm is controlled by its economically disadvantaged owners, the Department will consider whether the business owns the equipment necessary to perform its work. However, the Department shall not determine that a firm is not controlled by economically disadvantaged individuals solely because the business leases, rather than owns, such equipment,

where leasing equipment is a normal industry practice and the lease does not involve a relationship with a prime contractor or other party that compromises the independence of the business.

- o. The Department shall grant certification to a firm only for the specific types of work in which the economically disadvantaged owners have the ability to control the firm. To become certified in an additional type of work, the firm need demonstrate to the Department that its economically disadvantaged owners are able to control the firm with respect to that type of work.
- p. A business operating under a franchise or license agreement may be certified if it meets the standards in this subpart and the franchiser or licensor is not affiliated with the franchisee or licensee. In determining whether affiliation exists, the Department may consider the restraints relating to standardized quality, advertising, accounting format, and other provisions imposed on the franchisee or licensee by the franchise agreement or license, provided that the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Alternatively, even though a franchisee or licensee may not be controlled by virtue of such provisions in the franchise agreement or license, affiliation could arise through other means, such as common management or excessive restrictions on the sale or transfer of the franchise interest or license.
- q. In order for a partnership to be controlled by an economically disadvantaged individual, any non-disadvantaged partners must not have the power, without the specific written concurrence of the economically disadvantaged partner(s), to contractually bind the partnership or subject the partnership to contract or tort liability.
- r. The economically disadvantaged individuals controlling a firm may use an employee leasing company. The use of such a company does not preclude the economically disadvantaged individuals from controlling their firm if they continue to maintain an employer-employee relationship with the leased employees. This includes being responsible for hiring, firing, training, assigning, and otherwise controlling the on-the-job activities of the employees, as well as ultimate responsibility for wage and tax obligations related to the employees.

VIII. ADDITIONAL ELIGIBILITY REQUIREMENTS

- a. Consideration of whether a firm performs a commercially useful function or is a regular dealer pertains solely to counting toward

ESBE goals the participation of firms that have already been certified as ESBEs. Except as provided in this paragraph, the Department will not consider commercially useful function issues in any way in making decisions about whether to certify a firm as a ESBE.

- b. The Department may consider, in making certification decisions, whether a firm has exhibited a pattern of conduct indicating its involvement in attempts to evade or subvert the intent or requirements of the DBE Program.
- c. The Department shall evaluate the eligibility of a firm on the basis of present circumstances. A firm will not be refused certification based on historical information indicating a lack of ownership or control of the firm by economically disadvantaged individuals at some time in the past, if the firm currently meets the ownership and control standards of this part. Nor will the Department refuse to certify a firm solely on the basis that it is a newly formed firm.
- d. ESBE firms and firms seeking ESBE certification shall cooperate fully with requests for information relevant to the certification process. Failure or refusal to provide such information is a ground for denial or removal of certification.
- e. Only firms organized for profit may be eligible for ESBE certification. Not-for-profit organizations, even though controlled by economically disadvantaged individuals, are not eligible for ESBE certification.
- f. An eligible ESBE firm must be owned by individuals who are economically disadvantaged. Except as provided in this paragraph a firm that is not owned by economically disadvantaged individuals, but instead is owned by another firm cannot be an eligible ESBE.
- g. If economically disadvantaged individuals own and control a firm through a parent or holding company, established for tax, capitalization or other purposes consistent with industry practice, and the parent or holding company in turn owns and controls an operating subsidiary, the Department may certify the subsidiary if it otherwise meets all requirements of this policy statement. In this situation, the individual owners and controllers of the parent or holding company are deemed to control the subsidiary through the parent or holding company and must be economically disadvantaged as defined under this policy.
- h. The Department may certify such a subsidiary only if there is

cumulatively 51 percent ownership of the subsidiary by economically disadvantaged individuals.

- i. Recognition of a business as a separate entity for tax or corporate purposes is not necessarily sufficient to demonstrate that a firm is an independent business, owned and controlled by economically disadvantaged individuals.
- j. The ESBE applicant will not be required to be prequalified as a condition for certification.

IX. CERTIFICATION PROCEDURES FOR EMERGING SMALL BUSINESS ENTERPRISES

- a. A business may apply to the Department at any time to be certified as an Emerging Small Business Enterprise. Such application must be made on the application form supplied by the Department. All firms wishing to participate on projects with ESBE goals must be certified in accordance with this policy.
- b. If a business is to be counted as an Emerging Small Business Enterprise for the purpose of meeting the ESBE goals for a specific contract, the business must be certified by the Department. In the event a business is not certified by the Department, the complete certification application must be received by the Division of Civil Rights and Affirmative Action in accordance with the following schedule:
 - i. A business that wants to be counted as an Emerging Small Business Enterprise for the purpose of meeting the established ESBE contract goals for a specific contract at the time of the award of that contract, shall submit its completed application at least 15 calendar days prior to the date for the receipt of bids for that contract.
 - ii. A business that wants to be considered as an Emerging Small Business Enterprise for the purpose of meeting established ESBE contract goals for a specific contract, either as an additional or replacement subcontractor after work on the contract has commenced, shall submit its completed application at least 15 calendar days prior to submitting a request for Approval to Sublet (Form DC-18) to the Department.
 - iii. Failure by an uncertified business to submit a completed application for certification for a specific contract in

accordance with this subsection shall result in the applicant firm not being considered for certification for that contract.

- c. All applications must be completed in their entirety before they will be considered by the Department. If an applicant knowingly supplies false or inaccurate information, the applicant shall be disqualified, and may be subject to further penalties as provided by law.
- d. The business, or any principal owner of the business, must not have been debarred or convicted of bid-related crimes or violations within the past six years in any state or federal jurisdiction, or be under notice of intent to debar in any jurisdiction.

X. APPROVAL OR DENIAL OF CERTIFICATION AS AN EMERGING SMALL BUSINESS ENTERPRISE

- a. When an applicant is approved by the Department as an Emerging Small Business Enterprise, the business will be notified in writing of such certification. The certification shall be effective as of the date of approval and shall be valid for a three year period unless revoked by the Department. ESBE firms shall be required to provide update information and complete a "No Change Affidavit" each year, if applicable, for renewal of their Emerging Small Business Enterprise certification.
- b. When an applicant is denied certification as an Emerging Small Business Enterprise, it shall be notified in writing of the reasons for that decision. The applicant may request an informal hearing by writing to the Department within 20 State business days of receipt of said denial notice. The burden of proof of eligibility shall be upon the applicant in any such proceeding. The applicant is not prohibited from contracting with the Department during the pendency of its appeal; however, it will be unable to participate on any contract as an ESBE.
- c. If an applicant requests an informal hearing on the denial of its application the Department shall schedule an informal meeting at which time the applicant may present additional information to contest the cited deficiencies and further support its application. The Commissioner, or his or her designee, shall review this additional information and the applicant shall be advised of the Department's final decision within 30 business days of the informal meeting.
- d. When the Department intends to decertify an Emerging Small

Business Enterprise for failure to meet the requirements of this policy, or as the result of a third-party challenge, the business shall be notified in writing of the department's intent to decertify and the reasons why. An investigation may be conducted by the Division of Civil Rights and Affirmative Action to determine the validity of any third-party allegations. If a preliminary determination is made to decertify the firm, the firm will be given an opportunity to appeal the findings either in person at an informal hearing, and/or in writing. The business may request an informal hearing by writing to the Department within 20 business days of receipt of said notice of Intent to Decertify. The ESBE firm will be notified of the Department's decision within 30 business days following the informal hearing. The business shall be eligible to participate as an Emerging Small Business Enterprise in the ESBE goal program during the pendency of its appeal to the Department.

- e. If a firm's ESBE certification is denied or revoked by the Department, the applicant may not reapply for ESBE certification for a period of one (1) year from the final date of the denial or decertification decision letter by the NJDOT.

XI. SEVERABILITY

If any section, subsection, provision, clause or portion of this Policy is adjudged unconstitutional or invalid by a court of competent jurisdiction, the remainder of this Policy shall not be affected thereby.

XII. REVIEW

The operation of the program contained in this Policy and the need for its continuation shall be reviewed by the Commissioner annually.

XIII. AUTHORITY

49 CFR 26.51, 49 CFR 26.39, 49 CFR 26.23