

**CITY OF ST. LOUIS
MINORITY AND WOMEN'S BUSINESS ENTERPRISE PROGRAM**

**GUIDELINES AND INTERPRETATION OF
CERTIFICATION AND COMPLIANCE RULES**

ISSUED BY THE CITY OF ST. LOUIS M/W/DBE PROGRAM OFFICE

SEPTEMBER 15, 2011

GUIDELINES AND INTERPRETATION OF CERTIFICATION AND COMPLIANCE RULES

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CITY OF ST. LOUIS
Minority/Women Business Enterprise (M/WBE) Program
Quick Reference Guide

If your firm.....

✓ **Requests status as a new DBE/ACDBE AND as a new M/WBE →**

- Fill out one Uniform Certification Application with a checkmark by DBE and/or ACDBE and a checkmark by MBE and/or WBE
- Applications are deemed “simultaneously” filed
- Application will proceed through the DBE/ACDBE and M/WBE review processes according to the DBE/ACDBE timeline

✓ **Requests status as only a new MBE and/or WBE →**

- Fill out one MBE/WBE Standard Certification Application with a checkmark by MBE and/or WBE
- Application will proceed through the M/WBE review process according to the M/WBE timeline
- Do not include Personal Net Worth or Business Size information

✓ **Is located in Illinois AND within the St. Louis Metropolitan Statistical Area (SLMSA) AND requests status as a new MBE or WBE →**

- Fill out one MBE/WBE Standard Certification Application with a checkmark by MBE and/or WBE
- Application will proceed through the M/WBE review process and timeline

✓ **Is a current DBE certified through the MRCC and requests a new MBE or WBE status →**

- Fill out one MBE/WBE Abbreviated Certification Application with a checkmark by MBE and/or WBE
- Application will proceed through the abbreviated timeline
- Applicant is responsible for submitting a complete original certification file plus an “Affidavit of No Change”

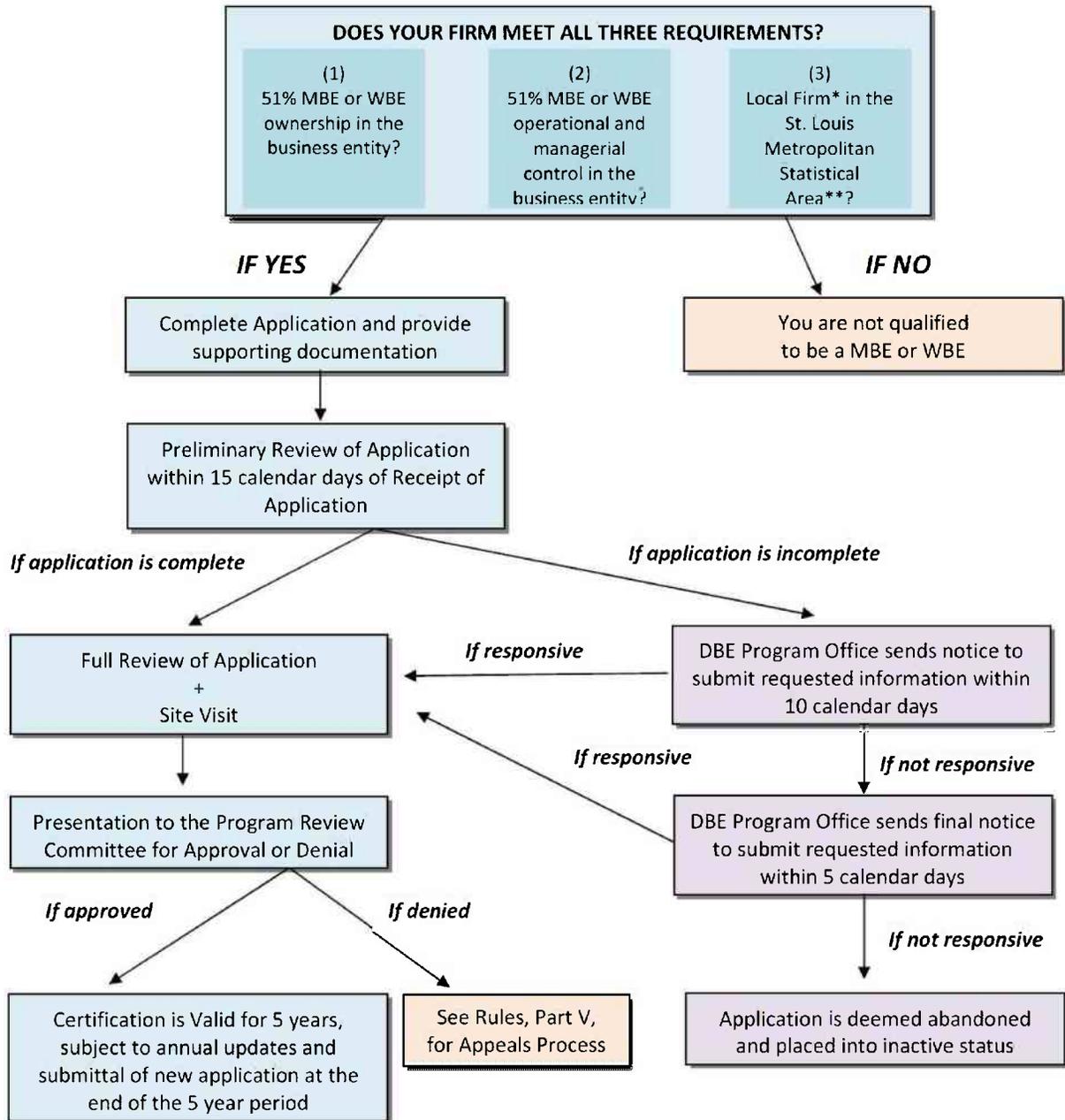
✓ **Is a current out-of-state certified DBE and/or ACDBE and requests DBE and/or ACDBE status through the MRCC →**

- Fill out one Uniform Certification Application with a checkmark by DBE and/or ACDBE
- Application will proceed through the DBE/ACDBE review process according to the federal interstate certification DBE/ACDBE timeline
- Applicant is responsible for submitting a complete original certification file plus an “Affidavit of No Change”

DBE: Disadvantaged Business Enterprise
ACDBE: Airport Concessions Disadvantaged Business Enterprise
MRCC: Missouri Regional Certification Committee

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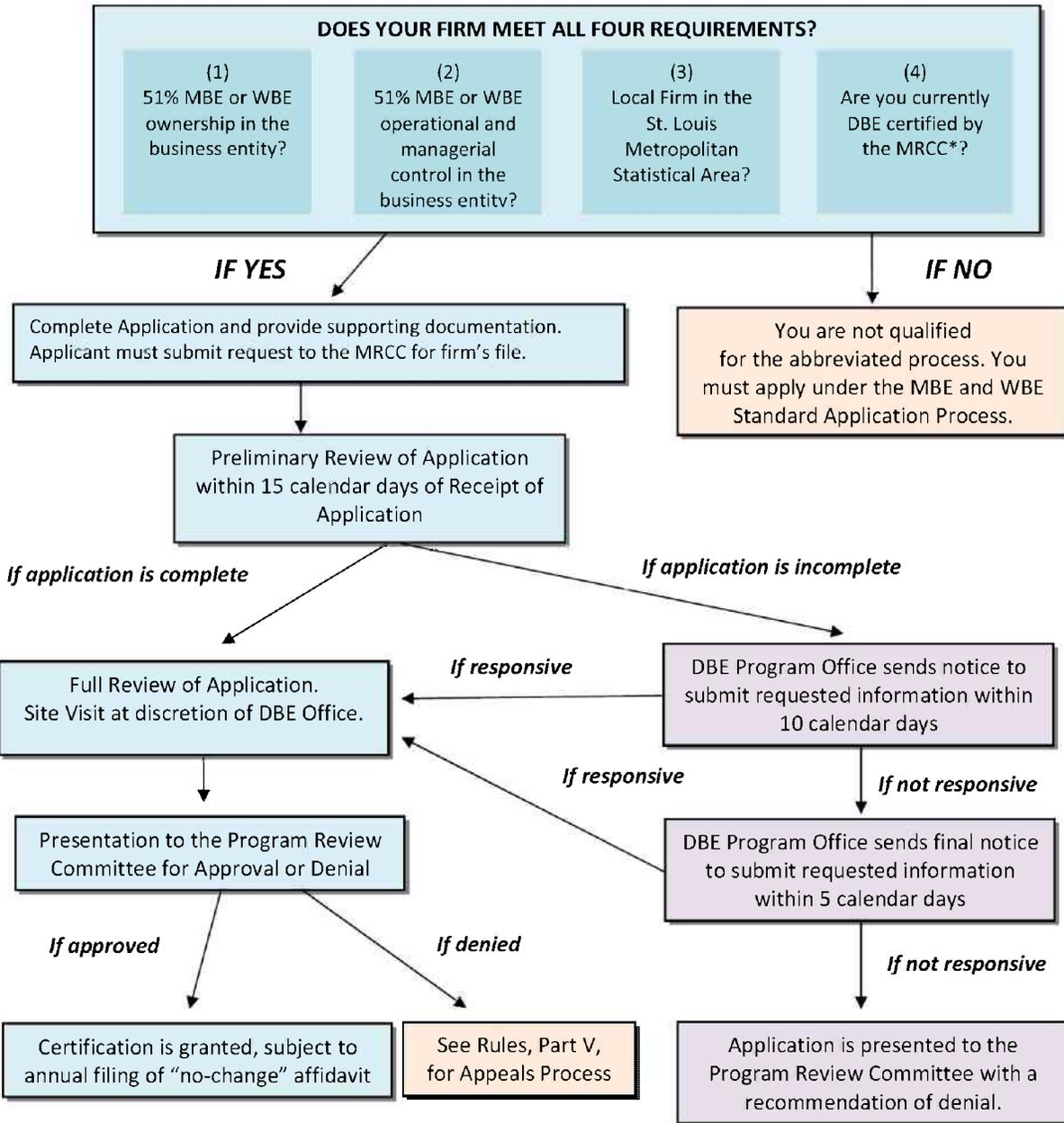
**MBE AND WBE STANDARD APPLICATION PROCESS
(60 DAY REVIEW PROCESS)**



*Local Firm: A business entity that maintains a facility within the St. Louis Metropolitan Statistical Area, with adequate personnel, equipment, materials and facilities to perform its local work in the areas of expertise and sizes(s) of contracts designated in the Utilization Plan.
 **St. Louis Metropolitan Statistical Area (SLMSA): The area comprised of the City of St. Louis, the Missouri counties of St. Louis, Jefferson, Lincoln, St. Charles, Warren, Washington, and Franklin, and the entire City of Sullivan (including the portion located in Crawford County) and the Illinois counties of Bond, Calhoun, Clinton, Jersey, Macoupin, Madison, Monroe and St. Clair.

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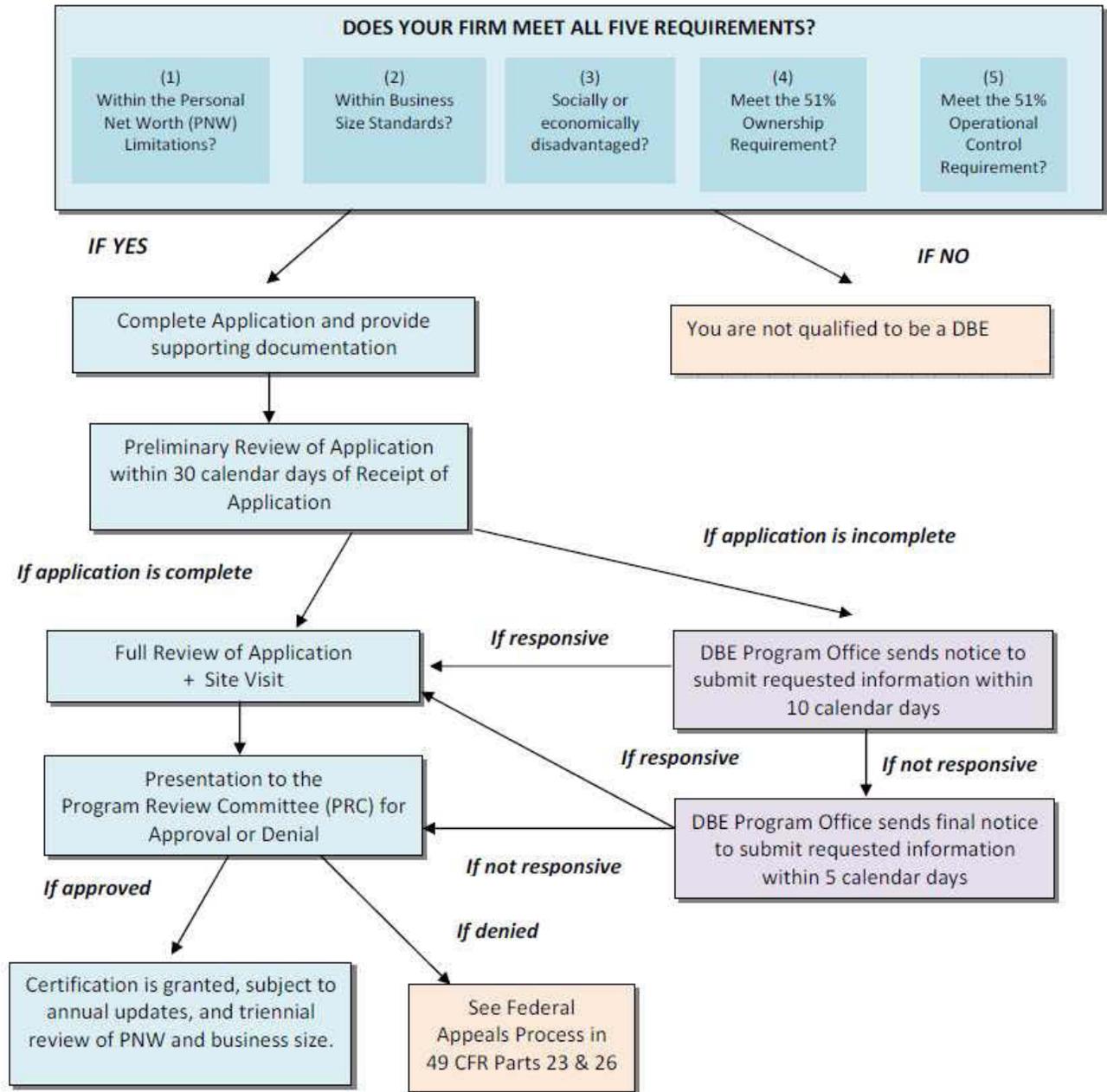
**MBE AND WBE ABBREVIATED APPLICATION PROCESS
(60 Day Review Process)**



MRCC: Missouri Regional Certification Committee, the five agencies in Missouri that receive direct U.S Department of Transportation Funds and currently operate DBE programs pursuant to the U. S. Department of Transportation DBE Program, including the Missouri Department of Transportation, Bi-State Development Agency of the Missouri-Illinois Metropolitan District (Metro), the City of St. Louis, the City of Kansas City, and the Kansas City Area Transit Authority.

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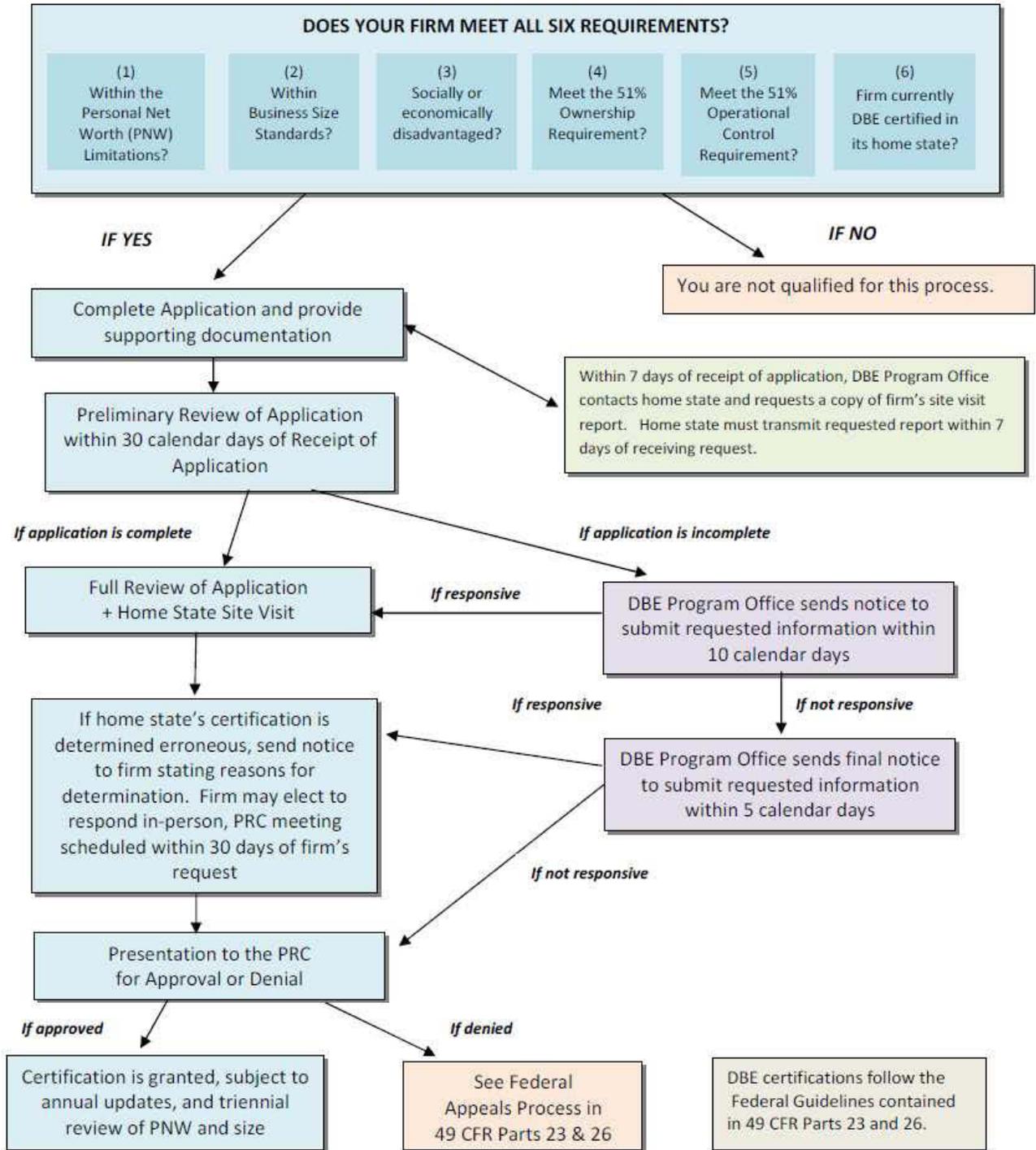
**DBE & ACDBE STANDARD APPLICATION PROCESS
(90 DAY REVIEW PROCESS)**



DBE certifications follow the Federal Guidelines contained in 49 CFR Parts 23 and 26.
PRC: Program Review Committee

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DBE & ACDBE STANDARD APPLICATION PROCESS FOR INTERSTATE CERTIFICATION (60 DAY REVIEW PROCESS)



Flowchart #4 7/30/11

GUIDELINES AND INTERPRETATION OF CERTIFICATION AND COMPLIANCE RULES

PART I: PURPOSES AND GENERAL REQUIREMENTS

A. Purpose and Use of These Guidelines.

This document, the City of St. Louis Minority and Women's Business Enterprise Program Guidelines and Interpretation of Certification and Compliance Rules, is intended to be used in conjunction with the City of St. Louis Minority and Women's Business Enterprise Program Certification and Compliance Rules (the "Rules") and is not intended to duplicate, supersede, or replace them.

B. Objectives

(Reserved)

C. Definitions.

Terms, abbreviations and acronyms used herein shall have the meanings ascribed to such terms in the Rules.

D. Implementation

This guidance and interpretation shall be effective as of the date shown on the cover page of this document.

E. Severability

(Reserved)

F. Disclaimers—Authority Approvals.

Each Certification Approval Letter and each Utilization Plan Acceptance Letter shall contain the following disclaimer language:

"The City, SLDC, the Authority and the Program make no representations, warranties, or guarantees, including representations, warranties or guarantees to any third party, as to the quality of work to be or previously performed by any M/WBE and further makes no representations, warranties or guarantees as to the quality, experience, capabilities or qualifications of any M/WBE or any of the persons associated therewith."

In addition, each Certification Approval Letter shall also contain the following disclaimer language:

"The City, SLDC and the Program make no representations, warranties, or guarantees, whatsoever as to whether any M/WBE shall be the recipient of any part of any City Contracting Opportunities."

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G. Failure to Provide Information

All efforts at obtaining authorized information should be well documented and stored in the file.

H. Compliance with Other Laws.

(Reserved)

I. Maintenance of M/WBE Directory.

The M/WBE Directory is located at the following Internet website: <http://www.mwdbe.org>. The Authority should update the directory within five (5) days following the M/WBE's certification, recertification, or lapse or removal of Certification, concurrently with notification of such change of status to the Applicant/Business Entity. The Authority must make updates no later than the timelines required by the Rules.

J. Computation of Time

(Reserved)

K. Notice

(Reserved)

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PART II: CERTIFICATION

A. Certification Options

All applicants for Certification shall be considered “customers” of the Authority, and the Authority shall endeavor to provide quality customer service to all Applicants.

B. Abbreviated Application Procedures.

(reserved)

C. Standard/Uniform Application Procedures

1. **Document Retention.** The Certification Analyst shall retain copies of all correspondence in the file.
2. **Preliminary Application Review.**
 - a. The Authority shall advise each applicant within whether the application is complete and suitable for evaluation.
 - b. Following receipt of a complete application, a Certification Analyst shall review it to determine if the application includes all of the information and supporting documentation necessary for the application to be submitted to the Program Review Committee (PRC) within the timeframe established by the Rules. The Certification Analyst shall mail the letter to the Applicant within the timeframe established by the Rules.
 - c. If the Certification Analyst determines that the application is not complete, the Certification Analyst shall prepare a letter for the Certification Manager’s review detailing the information needed to complete the application and allowing Applicant to submit the requested information within the timeframe established by the Rules, and submit such letter and the application to the Certification Manager for review and signature. The Certification Analyst shall mail the letter to the Applicant.
 - i. If the Applicant fails to submit a timely response, the Certification Analyst shall prepare a second letter for the Certification Manager’s review in accordance with the Rules.
 - d. If the Applicant fails to respond, the Certification Analyst shall prepare a letter for the Certification Manager’s review reminding the Applicant of the information needed and allowing Applicant

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additional time, as established by the Rules, to submit the requested information, and submit such letter and the application to the Certification Manager for review. This letter shall also advise the Applicant that failure to submit the required information or otherwise respond to the letter shall result in the application being deemed “abandoned” and placed in inactive status. The Certification Analyst shall mail the letter to the Applicant.

- e. If the Applicant fails to submit a complete application after receiving notice that the application is not complete and an opportunity to submit documents necessary to complete the application, the application will be deemed abandoned but maintained on file for a period of one (1) year from the date of the letter referenced in “b” above.

3. Review of Completed Applications.

Within the timeframe established by the Rules, a Certification Analyst should complete a review of the complete Application and any supplemental information to determine whether the Applicant meets the standards established in these rules for ownership and control by Minority Group Members and/or Women, as applicable pursuant to the type of Certification sought by the Applicant. As a part of the review process, the Certification Analyst shall:

- a. Interview principal officers of the Applicant at the Applicant’s Principal Local Place of Business to determine the roles of such officers in the management and control of the Applicant;
- b. Review the resumes and/or work histories of the principal officers of the Applicant to determine such officers’ qualifications in the areas of expertise for which Certification is sought;
- c. If the Applicant is actively engaged in performing work at locations other than its Principal Local Place of Business, perform one or more visits to such locations, to determine whether the Applicant is actually performing the work, provided, however, the Program may (but is not required to) rely upon the site visit report of any other MRCC agency with respect to an Applicant;
- d. Perform an analysis of the Applicant’s ownership documents to determine the ownership of the Applicant;
- e. Perform an analysis of the financial and bonding capacities of the Applicant to determine who controls the Applicant’s finances

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(provided, however, that bonding capacity shall not be a requirement for Certification);

- f. Review the Applicant's business history, including agreements and contracts received and work completed, to determine whether the Applicant is actually operating the business and to determine whether the firm is a viable and legitimates firm with a history of work in the area of expertise for which certification is sought;
- g. Compare the Applicant's statements regarding the areas of expertise sought to the Applicant's business history to determine whether the Applicant has expertise and qualifications in the specific areas of expertise for which Certification is sought;
- h. Review the list of the equipment owned by or available to the Applicant to determine whether the Applicant has available the equipment resources necessary to perform work in the area for which Certification is sought;
- i. Review, in relation to the Applicant's business type and the area of expertise for which the Applicant seeks Certification, the licenses, if any, held by the Applicant and its staff to determine whether the Applicant has the licenses necessary to perform work in the areas for which Certification is sought;
- j. Review the overall veracity of the statements made by the Applicant in the application to determine if the Applicant has accurately represented the Applicant's business, ownership and control of that business in the application materials.

4. Report and Recommendation.

As a part of the review, the Certification Analyst shall prepare a report detailing the results of the review specified in the Rules and a recommendation as to whether the Applicant should receive Certification as an MBE or WBE, as applicable, and, if recommended for Certification, the types of work for which the Applicant should be certified.

The Authority shall recommend Certification of an Applicant for all types of work for which the Applicant has successfully served as a subcontractor and all types of work administered by the Applicant where the Applicant has served as a Prime Contractor or General Contractor.

If the applicant is not a newly formed firm, the report shall contain a description of the types of work included in the Applicant's three (3) most recently completed contracts, the Applicant's clients with respect to such

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contracts, and the amount of compensation Applicant received pursuant to such contracts. The Certification Analyst's report shall contain specific reasons for such recommendation, supported by facts elicited as a part of the review and reference to the applicable rules. The Certification Manager shall review the report and make such changes in the report as it deems appropriate. Within ten (10) days of receipt of the report from the Certification Analyst, the Authority shall submit such report to the Program Review Committee and applicant in accordance with Part IV of the Rules, together with the Authority's recommendation for approval or denial of the Application, the Application, and all supporting documentation.

5. Annual No Change Affidavit

Annual No Change Affidavit reminder notices required by the Rules should be sent by certified mail, return receipt.

6. Five-Year Renewal Required.

If an MBE and/or WBE fails to submit a renewal application and supporting documentation during the time frame specified in the reminder notice, the Program should issue a second reminder notice, sent by certified mail, return receipt.

If the MBE and/or WBE fails to submit a renewal application in response to such second reminder notice before the expiration of the five-year Certification period, the firm's certification status will be deemed to be lapsed and the Certification Manager shall update the M/WBE Directory to reflect that the firm is no longer actively certified.

7. Changes in Types of Work for which Certification Has Been Granted.

As specified in the Rules, the Authority shall entertain requests by the Applicant for additions to the types of work for which Applicant has been certified, based on additional contracts successfully completed by the Applicant and/or additional expertise acquired by the Applicant through the addition of personnel and/or additional certifications and training of existing personnel since the time of the original Application or most recent Renewal.

D. Ownership.

In order to be eligible for Certification, a minimum of 51% of an Applicant must be owned by Minority Group Member(s) or Women, as applicable. The Certification Analyst shall take the following factors and standards into account in determining whether an Applicant is so owned.

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1. Minority or Women Group Membership

- a. The Certification Analyst shall review each signed notarized statement. If the Certification Analyst determines that a well-founded reason exists to question the person's claim of membership in that group, the Certification Analyst shall present such well-founded reason to the Certification Manager, who shall determine if the individual will be required to present additional evidence that he or she is a member of the applicable group, including evidence regarding whether the person has held him/herself out to be a member of the group over a long period of time prior to application for certification and whether the person is regarded as a member of the group by the relevant community.
- b. The Certification Manager shall provide the person with a written explanation of reasons for questioning the person's group membership in a written request for additional evidence.

2. Majority of Ownership and Permitted Forms of Ownership.

- a. In the case of a sole proprietorship, if the sole proprietor is a Minority Group Member and/or Woman, the firm shall be deemed to be owned by a Minority Group Member and/or a Woman, as applicable, and such ownership must be evidenced by fictitious name registration of with the Secretary of State if required by law and by sufficient capital investments.
- b. In the case of a corporation, Minority Group Member(s) and/or Women, as applicable, must own at least 51% of each class of stock. Such ownership must be evidenced by stock certificates.
- c. In the case of a partnership, Minority Group Member(s) and/or Women, as applicable, must own at least 51% of each class of partnership interest, and such ownership must be reflected in the business entity's partnership agreement.
- d. In the case of a limited liability company, Minority Group Member(s) and/or Women, as applicable, must own at least at least 51% of each class of member interest and such ownership must be reflected in the business entity's corporate documents.

3. Real, Substantial and Continuing Ownership.

Factors to consider include the investment by the minority and/or woman applicant, whether the minority and/or woman owner has put forth

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substantial risk, obtains profit, and a comparison of stock payment to ownership and actual value of stock in relation to other non-Minority and non-Women owners.

4. Securities.

Except as provided below, no securities or assets held in trust for, or by any guardian for a minor, shall be counted as held by a Minority Group Member or Woman in determining the ownership of a firm. Notwithstanding the foregoing, securities or assets held in trust are regarded as held by a Minority and/or Woman for purposes of determining ownership of the firm, if:

- a. The beneficial owner of securities or assets held in trust is a Minority Group Member and/or Woman, as applicable, and the trustee is the same or another Minority Group Member and/or Woman, as applicable; or
- b. The beneficial owner of a trust is a Minority Group Member and/or Woman, as applicable, who, rather than the trustee, exercises effective control over the management, policy-making, and daily operational activities of the business entity. Assets held in a revocable living trust may be counted only in the situation where the same Minority Group Member and/or Woman, as applicable, is the sole grantor, beneficiary, and trustee.

5. Capitalization Required.

Examples of insufficient contributions of capital include a promise to contribute capital, an unsecured note payable to the firm or to an owner who is not a Minority Group Member and/or Woman, as applicable, or mere participation in a firm's activities as an employee. Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan. Contributions of capital may be in the form of money, other items of value, or expertise, provided that standards for such contributions as outlined below are met. The following interpretation shall apply to determine whether contributions are real and substantial:

a. Capitalization via Expertise.

If the Applicant shows any portion of the Minority Group Member's and/or Woman's, as applicable, capitalization requirement to be in the form of expertise, the following standards shall be applied to determine if such capitalization will be counted towards required capitalization.

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- i. The Minority Group Member and/or Woman must submit records clearly showing the contribution of an area of expertise and its value to the firm. Such area of expertise must be:
 - A) in a specialized field;
 - B) in areas critical to the firm's operations;
 - C) indispensable to the firm's potential success;
 - D) specific to the type of work the firm performs; and
 - E) documented in the records of the firm. These records must clearly show the contribution of expertise and its value to the firm.
- ii. In addition, the Minority Group Member and/or Woman, as applicable, contributing such expertise must also have provided significant monetary capitalization to the business entity, although such monetary capitalization need not equal the Minority Group Member's and/or Woman's, as applicable, percentage of ownership.

b. **Capitalization by Divorce, Separation or Inheritance.**

For purposes of determining ownership, the following interests in a business or other assets obtained by a Minority Group Member and/or Woman, as applicable, shall be deemed to have been contributed by such individuals:

- i. Interests obtained 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. Interests obtained through inheritance or otherwise due to the death of the former owner.

c. **Interests Not Qualifying as Capitalization/Ownership.**

The following analysis applies if the Minority Group Member and/or Woman, as applicable, obtains an interest in an applicant firm via a gift or transfer.

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- i. For purposes of determining ownership, all interests in a business or other assets obtained by a Minority Group Member and/or Woman, as applicable, will not be counted towards such individual's ownership requirements if the interest is the result of a gift or transfer without adequate consideration from any non-Minority Group Member and/or non-Woman, as applicable, who is:
 - A) Involved in the same firm as the Applicant, or is involved in an affiliate of the Applicant;
 - B) Involved in the same or a similar line of business as the Applicant; or
 - C) Engaged in an ongoing business relationship with the Applicant, or an affiliate of the Applicant.
 - ii. However, all interests in a business or other assets obtained by a Minority Group Member and/or Woman, as applicable, shall be counted if the Minority Group Member and/or Woman, as applicable, demonstrates, by clear and convincing evidence, that:
 - A) The gift or transfer to the Minority Group Member and/or Woman, as applicable, was made for reasons other than obtaining Certification; and
 - B) The Minority Group Member and/or Woman, as applicable, actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-qualifying individual who provided the gift or transfer.
- d. **Capitalization via Marital Assets.**

The following rules apply to situations in which marital assets form the Applicant's basis for a Minority Group Member's and/or Woman's, as applicable, capitalization of a firm:

- i. When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by one spouse, the ownership interest in the firm will be deemed to have been acquired by that spouse with his or her own individual resources, if the other spouse has irrevocably renounced and transferred all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the Applicant is domiciled. A greater portion of joint or community property assets shall not be counted toward ownership than state law would

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recognize as belonging to the Minority Group Member and/or Woman, as applicable, owner of the business entity.

- ii. A copy of the legal document transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the firm must be included as part of the Applicant's Certification application.

e. **Applicant Not To Be Denied Due To Individual Factors Alone.**

A contribution of capital shall not be regarded as failing to be real and substantial, and an Applicant shall not be found ineligible, solely due to:

- i. The acquisition of a Minority and/or Woman's ownership interest as the result of a gift or transfer without adequate consideration, unless the gift or transfer is of a type set forth in paragraphs 5.b. of this section;
- ii. A provision for the co-signature of a spouse who is not a Minority Group Member and/or Woman, as applicable, on financing agreements, contracts for the purchase or sale of real or personal property, bank signature cards, or other documents; or
- iii. The transfer of a firm's ownership or assets for adequate consideration from a spouse who is not a Minority Group Member and/or Woman, as applicable, to a spouse who is such an individual, provided that the Certification Analyst determines that the business entity is owned and controlled, in substance as well as in form, by the Minority Group Member and/or Woman, as applicable.

E. Control. The Certification Analyst shall take the following factors and standards into account in determining whether an Applicant is so controlled.

1. **Independence.**

The Certification Analyst shall examine the following aspects of the Applicant's operations and the extent of such aspects to determine whether the Applicant is an independent business entity:

- a. Whether relationships with non-M/WBE firms in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources compromise the Applicant's independence;

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- b. Whether present or recent employer/employee relationships between the Minority Group Member and/or Woman, as applicable, of the Applicant and non-M/WBE firms or persons associated with non-M/WBE firms compromise the independence of the Applicant;
 - c. Whether the Applicant's relationships with general contractors exhibit a pattern of exclusive or primary dealings with a general contractor that compromises the independence of the Applicant; and
 - d. Whether consistency of relationships between the potential M/WBE and non-M/WBE firms is within normal industry practice.
- 2. Restrictions on Decision-Making Authority.**

An Applicant shall not be subject to any formal or informal restrictions that limit the customary discretion of a business entity. Prohibited restrictions include restrictions through corporate charter provisions, restrictions through by-law provisions, restrictions by 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 partners who are not Minority Group Members and/or Women, as applicable, conditions precedent or subsequent, and executory agreements, voting trusts, restrictions on or assignments of voting rights that prevent the Minority Group Members and/or Women, as applicable, from making any business decision of the firm without the cooperation or vote of any non-minority and/or woman individual. Prohibited restrictions do not include a spousal co-signature on documents as described in Section C.5.e.ii. above.

3. Management Authority.

The Certification Analyst shall examine the following aspects of the Applicant's operations to determine whether Minority Group Members and/or Women, as applicable, control the Applicant:

- a. In a corporation, the Minority Group Members and/or Women, as applicable, must control the board of directors.
- b. In a limited liability corporation, Minority Group Members and/or Women, as applicable, must serve as the managing member or as a majority of the managing members if there is more than one managing member.
- c. In a partnership, one or more Minority Group Members and/or Women owners, as applicable, must serve as a general partner (or as a majority of the general partners if there is more than one general

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partner), with control over all partnership decisions. Any non-Minority Group Members and/or non-Women partners must not have the power, without the specific written concurrence of the Minority Group Members and/or Women partner(s), to contractually bind the partnership or subject the partnership to contract or tort liability.

4. Delegation.

The managerial role of the Minority Group Member and/or Woman owner(s), as applicable, in the business entity's overall affairs must be such that the Certification Analyst can reasonably conclude that Minority Group Members and/or Women owner(s) actually exercise control over the firm's operations, management, and policy.

5. Immediate Family Members.

If a determination cannot be made that the Minority Group Member and/or Woman, as applicable, owner(s), as distinct from the family as a whole, control the business entity, then the Minority Group Member and/or Woman, as applicable, owner(s) shall be deemed to have failed to demonstrate control, even though they may participate significantly in the business entity's activities.

6. Managerial Expertise and Competence.

Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the business entity is insufficient to demonstrate control.

7. Licensing.

If a license is not necessary to own and/or control the firm, an applicant shall not be denied certification merely because the minority and/or woman as applicable, who owns and controls the Applicant, lacks a license necessary to perform the tasks associated with the area of expertise the Applicant seeks. Any recommendation to deny certification based on lack of a particular license must include a citation to the applicable state, local or federal law requiring a person to have a particular license or other credential to own and/or control the Applicant.

8. Remuneration.

The Certification Analyst shall examine disparities in remuneration between the Minority Group Member and/or Woman, as applicable, and other participants in the business entity in the context of the duties of the persons involved, normal industry practices, the business entity's policy

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and practice concerning reinvestment of income. The Certification Analyst shall also consider explanations for the differences proffered by the business entity in determining whether to grant Certification. Differences in remuneration shall not be considered in a vacuum in determining whether or not to grant Certification. For example, a firm may be controlled by its Minority Group Member and/or Woman, as applicable, owner although that owner's remuneration is lower than that of some other participants in the firm. However, in a case where a non-minority and/or woman individual formerly controlled the business entity and a Minority Group Member and/or Woman, as applicable, individual now controls it, consideration may be given to the difference between the remuneration of the former and current controller of the business entity as a factor in determining who actually controls the business entity, particularly when the non-minority and/or male individual remains involved with the business entity and continues to receive greater compensation than Minority Group Member and/or Woman, as applicable.

9. Other Employment.

Absentee ownership of the Applicant and lack of availability, ability, and opportunity for continued control during the hours of normal business operations of the Applicant together with other work in another business entity will not ordinarily demonstrate control of the Applicant by Minority Group Member and/or Woman individuals, as applicable.

10. Equipment and Other Resources.

In determining whether a business entity is controlled by its Minority Group Member and/or Woman, as applicable, the Certification Analyst shall consider whether the Applicant owns the equipment necessary to perform its work. However, the Certification Analyst shall not make a determination that the Applicant is not controlled by Minority Group Members and/or Women, as applicable, solely because the applicant firm leases, rather than owns, such equipment, when leasing equipment is a normal industry practice and the lease does not involve a relationship with a general contractor or other party that compromises the independence of the Applicant.

11. Experience and Capacity in the Area of Expertise for which Certification Is Requested.

The Certification Analyst shall recommend certification in the specific area(s) of expertise for which the Minority Group Member and/or Woman, as applicable, owners have demonstrated the experience, capacity, and ability to control the firm's work in the particular area(s) of expertise. Each Certification Approval Letter shall specify the area(s) of expertise for

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which the Applicant is deemed certified. The Directory shall list the certified entity's address, telephone number, contact person name, telephone number and e-mail address, website (if known), and the area(s) of expertise in which the firm has been certified to perform as a M/WBE.

12. **Affiliation.** An Applicant determined to be an Affiliate shall not be eligible for Certification except as provided herein.
 - a. **In General.** Control may be affirmative or negative. Negative control includes, but is not limited to, instances where one or more shareholders who do not own a majority of the business entity have the ability, under the concern's charter, by-laws, or shareholder's agreement, to prevent a quorum or otherwise block action by the board of directors or other shareholders. Affiliation may also be found where an individual, concern, or entity exercises control indirectly through a third party.
 - b. **Affiliation Based on Leased Employees.** The use of an employee leasing company shall not preclude Minority Group Members and/or Women, as applicable, from being deemed to control an Applicant if the Minority Group Member(s) and/or Women, as applicable, maintain an employer-employee relationship with the leased employees, which relationship must include 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.
 - c. **Affiliation Based on Mentor-Protégé Relationships.** A protégé business entity shall not be deemed an affiliate of a mentor business entity solely because the protégé business entity receives assistance from the mentor business entity or program.
 - d. **Affiliation Based on Control Based on Future Events.** The following will be considered to have a present day effect on the power to control a business entity: stock options, convertible securities, and agreements to merge (including agreements in principle). Such options, convertible securities, and agreements will be treated as though the rights granted have been exercised. Notwithstanding the foregoing, agreements to open or continue negotiations towards the possibility of a merger or a sale of stock at some later date are not considered "agreements in principle" and options, convertible securities, and agreements that are subject to conditions precedent which are incapable of fulfillment, speculative, conjectural, or unenforceable under state or Federal law, or where the probability of the transaction (or exercise of the rights) occurring is shown to be

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extremely remote, will not be considered to have a present day effect on the power to control a business entity, provided, however, that options, convertible securities, or agreements to divest ownership cannot be used to appear to terminate control before such control is actually terminated.

- e. **Affiliation Based on Common Management.** Control based on common management arises where one or more non-minority and/or male officer(s), director(s), managing member(s), or partner(s) control the board of directors and/or management of the Applicant and also control the board of directors or management of one or more other concerns.
- f. **Affiliation Based on Identity of Interest.** Control of the Applicant may arise among two or more persons with an identity of interest. Individuals or firms that have identical or substantially identical business or economic interests (such as family members, individuals or firms with common investments, or firms that are economically dependent through contractual or other relationships) may be treated as one party with such interests aggregated. Where a determination has been made that the interests of an Applicant and another business entity are aggregated as a matter of substance and such aggregation would result in a lack of ownership or control by Minority Group Members or Women, as applicable, an Applicant may rebut that determination with evidence showing that the interests deemed to be one are in fact separate.
- g. **Affiliation Based on the Newly Organized Concern Rule.** Control may arise in this manner where former officers, directors, principal stockholders, managing members, or key employees of one business entity organize a new business entity in the same or related industry or field of operation, and serve as the new concern's officers, directors, principal stockholders, managing members, or key employees, and the one business entity is furnishing or will furnish the new business entity with contracts, financial or technical assistance, indemnification on bid or performance bonds, and/or other facilities, whether for a fee or otherwise. When a determination has been made that the Applicant has been organized in the foregoing manner for the sole purpose of obtaining Certification, and such determination involves a finding of lack of control by Minority Group Members or Women, as applicable, the Applicant may rebut such determination by demonstrating a clear line of fracture between the two business entities. A "key employee" is an employee who, because of his/her position in the business entity, has a critical influence in or substantive control over the operations or management of the business entity.

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h. Affiliation Based on Joint Ventures.

- i. A joint venture arranged in accordance with this provision shall not be deemed an affiliate. A joint venture is an association of individuals and/or business entities with interests in any degree or proportion by way of contract, express or implied, consorting to engage in and carry out no more than three specific or limited-purpose business ventures for joint profit over a two year period, for which purpose they combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for the general conduct of business. A joint venture may or may not be in the form of a separate legal entity. The joint venture is viewed as a business entity in determining power to control its management. Joint Ventures shall not be approved for long-term inclusion in the Directory. Joint Ventures shall, instead, be approved in conjunction with a compliance review for a particular City Contracting Opportunity, and such approval shall be applicable only for the duration of the particular City Contracting Opportunity.
- ii. Joint ventures arranged in any manner other than that described in Rule III.H. will be deemed affiliates.

F. Additional Rules Affecting Certification.

1. **Eligibility Based on Present Circumstances.** Except as otherwise provided in the Rules, (e.g., Part II.D.1.b, Part II.E.7, and Part II.F.5) the eligibility of an Applicant for Certification must be evaluated on the basis of present circumstances. Except as provided in Part II.F.1, an Applicant will not be denied certification solely on the basis that it is a newly formed business entity.
2. **Subsidiaries.**

Cumulative ownership by Minority Group Members or Women, as applicable, in the subsidiary must be at least 51%, calculated as follows: Minority Group Members or Women, as applicable, percentage of ownership in prime entity x Minority Group Members or Women, as applicable, percentage of ownership in subsidiary entity = 51% or more— e.g., 80% ownership in primary entity x 80% ownership in subsidiary entity = 64% cumulative ownership = eligible for Certification; 60% ownership in primary entity x 60% ownership in subsidiary entity = 36% cumulative ownership = not eligible for Certification.

Notwithstanding the foregoing, recognition of a business entity as a separate entity for tax or corporate purposes is not necessarily sufficient to demonstrate that Applicant is owned and controlled by Minority Group

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Members or Women, as applicable. Further notwithstanding the foregoing, a firm that is owned by a Native American group rather than a Native American individual may be eligible for certification. Such a firm must be controlled by minorities and/or women as provided in above.

G. Third Party Complaints

(Reserved)

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PART III: COMPLIANCE

A-G.

(reserved)

H. Joint Ventures.

1. Joint Venture Review.

The program shall review the joint venture agreement and supporting documents submitted by a joint venture entity to determine whether, in fact, the arrangement meets all the requirements of these Rules, and what portion(s), if any, is eligible to be counted towards M/WBE participation. The joint venture should operate in accordance with a written agreement. The written agreement should identify:

- a. **Participants in the Joint Venture.** The joint venture participants must be firms, including sole proprietorships, not individuals. In addition, the M/WBE participant must be certified as an M/WBE in the area of expertise operated by the joint venture in order for the participation to count towards M/WBE goals;
- b. The single, for-profit business enterprise to be undertaken by the joint venture;
- c. The term of the joint venture agreement and factors effecting the term;
- d. Amount of capital to be contributed by each joint venture participant;
- e. Accounting methods and distribution of profits/losses;
- f. Management of the joint venture's business, including overall management and day-to-day management responsibilities;
- g. Administrative matters, including joint venture office locations, recordkeeping requirements, identification of an auditor, fiscal year, addresses for notices, transfer of interests, etc;
- h. Dissolution, including events/conditions upon which the joint venture may be dissolved and terminated, and assets distributed; and
- i. The agreement shall not mandate that the M/WBE participant or joint venture purchase inventory, supplies, or services from the non-M/WBE participant.

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I-J.

(reserved)

K. Compliance Review During Contract Performance.

All site visits by the Program should be minimally intrusive.

L-N.

(reserved)

PART IV. PROGRAM REVIEW COMMITTEE PROCEEDINGS

A. Program Review Committee Purpose.

(Reserved)

B. Authority Action and Recommendation to PRC.

The Authority need not submit the entire file to the PRC. Only documents necessary to support the Authority's recommendation need be submitted.

C. Program Review Committee Composition.

(Reserved)

D. Program Review Committee Procedures.

1. Meeting Scheduling & Notices.

(Reserved)

2. Ex Parte Communication with the PRC Prohibited.

(Reserved)

3. Conduct of PRC Meetings.

Upon completion of PRC proceedings, all exhibits, evidence, and decisions shall be forwarded to the Authority for storage in the applicable file.

E. Certification Decisions.

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If the PRC votes to overturn the recommendation for denial of Certification, the Certification Manager shall issue the Certification Approval Letter to the Applicant and update the online Directory to include the Applicant in the same manner as if Certification were recommended by the Certification Manager.

If the PRC upholds the recommendation for denial of Certification, the Certification Manager shall, within ten (10) days following such decision, provide notice to the Applicant of Applicant's appeal rights, together with a copy of the minutes of the PRC meeting at which such denial recommendation was upheld unless Applicant appeals such denial as provided below.

F. Willful Noncompliance in General-- Penalties and Sanctions

(Reserved)

G. Removal of Eligibility.

If the PRC approves the Authority's recommendation to revoke or suspend certification, the Authority shall remove the firm from the M/WBE directory as soon as practicable after receiving the PRC's decision, but no later than the time required by the Rules.

PART V: APPEALS

(Reserved)