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**Report on the Minnesota Small Business and
Small Targeted Group Business Procurement Program**

Pursuant to Minnesota Statutes § 16C.18, Subd. 2

**Activities of the Minnesota Department of
Employment and Economic Development
For the Period
July 1, 2003 to June 30, 2004**

**Report of the Commissioner of Employment and
Economic Development Pursuant to Minn. Stat. § 16C.18 Subd. 2**

Introduction

Minnesota Statutes § 16C.18 Subd. 2 requires the Commissioner of the Department of Employment and Economic Development to submit an annual report to the Governor and the Legislature on activities of the Department of Employment and Economic Development relating to the operation of Minnesota's small business and small targeted group business procurement program. The legislation directs that the report shall include the following information:

- (1) the efforts undertaken to publicize the provisions of the small business and small targeted group business procurement program during the preceding fiscal year;
- (2) the efforts undertaken to identify small targeted group businesses and the efforts undertaken to encourage participation in the targeted group purchasing program;
- (3) the efforts undertaken by the commissioner to remedy the inability of small businesses and targeted group businesses to perform on potential contract awards; and
- (4) the commissioner's recommendations for strengthening the small business and small targeted group business procurement program and delivery of services to small businesses.

Efforts to publicize provisions of the program.

The department includes in each yearly edition of *A Guide to Starting a Business in Minnesota* a section on procedures of state procurement to include the small business set aside and state procurement from small targeted group businesses. For the period of this report in excess of thirty thousand copies of the *Guide* were distributed. In addition the department includes questions on selling to the federal and state government in its set of "frequently asked questions" answered on the web sites of the department's Small Business Assistance Office [www.mnsbao.com] and Small Business Development Center [www.mnsbdc.com].

To broaden the availability and accessibility of information on selling to the government, the department utilizes the Small Business Development Centers to provide information and training on both federal and state programs. For the period of this report there were 16 such government procurement workshops in Bemidji (4), Duluth (5), Moorhead (1), Brainerd (1), Rochester (1), St. Cloud (1), Marshall (1), and the Twin Cities (2). Of these sessions 5 were devoted exclusively to Minnesota state and local government

procurement (2 in Bemidji, 1 in Duluth, 1 in Moorhead, 1 in St. Cloud). The remaining 11 sessions had content shared between federal and state procurement.

The department has distributed to all Small Business Development Centers (for the use of their clients) copies of the Minnesota Department of Administration's video on doing business with the State of Minnesota.

The department developed and maintained web site at Bizlinks.org contains information on the procurement programs and procedures of the Minnesota Department of Administration.

Efforts to identify small targeted group businesses and efforts to encourage participation in the program.

Direct counsel and assistance with procurement matters were provided to both general population and targeted populations during the period of this report by both the department's Small Business Assistance Office and the Small Business Development Centers. Of a total of 491 hours to 53 clients during this period, 60 hours of counsel and assistance were delivered to 15 clients who fit the statutory definitions of targeted businesses. The great majority of this assistance involved the self-certification procedures of the State of Minnesota to qualify as a targeted vendor.

There were 11 small businesses who approached the department with inquiries on using the new "reverse auction" procedures for state procurement. All of these businesses sought the department's advice because they had seen the reverse auction materials authored by department staff in the "Occasional Papers" section of the department's website.

The staff of the Small Business Assistance Office made 201 referrals to the Materials Management Division of the Minnesota Department of Administration for enrollment as targeted group vendors.

On October 30, 2003, the Department of Administration adopted rules [28 SR 499] relating to, *inter alia*, its interpretation of a bidder's "organizational conflict of interest" pursuant to Minn. Stat. § 16C.2 Subd. 10(a). In that rulemaking the Department of Administration receded from its original position [27 SR 995] that a bidder could acquire information constituting an organizational conflict of interest solely by virtue of past experience in state contract performance. The Department of Employment and Economic Development (then as the Department of Trade and Economic Development) had argued against such an interpretation in its comments of December 31, 2002 (copy attached). The effect of this rescission is to enable small vendors to make use of "learning effects" in seeking, securing, and performing state contracts.

Efforts to remedy the inability of small businesses and targeted group businesses to perform on potential contract awards.

By statute (Minn. Stat. § 16C.18 Subd. 2(3)) this activity is conducted with clients referred to the department by the Materials Management Division of the department of Administration. There were no such referrals in the period of this report.

Recommendations for strengthening the small business and small targeted group business procurement program and delivery of services to small businesses.

The Department of Employment and Economic Development has no recommendations at this time. It will however closely follow – as a possible model for future state action – possible federal action to raise the number of employees allowed under the definition of “small business” and to expand the number of businesses eligible. [See the notice at 69FR54, 13130 (March 19, 2004) and 69FR126, 39874 (July 1, 2004)].

**Minnesota Department of Trade
and Economic Development**

Small Business Assistance Office

In the Matter of)
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Minnesota Department of Administration)
Materials Management Division)
Proposed Amendments to Rules)
Governing State Contracting,)
Minnesota Rules, Chapter 1230)
_____)

Notice of Intent to Adopt Rules
Without a Public Hearing
27 State Register 995
30 December 2002

Interest of the Department

The Minnesota Department of Trade and Economic Development (DTED), through its Small Business Assistance Office, here offers comments on two sections of the above referenced proposed amendments relating to "Organizational Conflicts of Interest" [new *Minn. Rules* 1230.0750] and "General Terms and Conditions" [amended *Minn. Rules* 1230.1900]. These comments are in response to the Notice of Intent to Adopt Rules Without a Public Hearing published by the Department of Administration, Materials Management Division at *27 State Register* 995 (30 December 2002) and are in furtherance of DTED's procurement-related responsibilities under *Minn. Stat.* 16C.17 Subd. 1, 16C.18 Subd. 2, and 116J.68 Subd.2(f).

Comments

RE: Proposed New *Minn. Rules* 1230.0750 ORGANIZATIONAL CONFLICTS OF INTEREST

Minn. Stat. 16C.02 Subd. 10a defines "organizational conflict of interest" to be a situation where "...[B]ecause of existing or planned activities or because of relationships with other persons:

(1).....;

(2).....;

(3) the vendor has an unfair advantage."

The December 18, 2002 Statement of Need and Reasonableness prepared by the Department of Administration for the proposed amendments indicates (page 13 under Subpart 2. Cooperation Required) that the reach of the proposed rule, including its remedy of contract cancellation for conflicts identified after a contract has become effective, extends to situations where "In other instances, a vendor may be found to have a conflict of interest *as a result of knowledge obtained through prior work with the State that is not known to other competing vendors* (emphasis added) thus giving them an unfair competitive advantage." DTED repeats here the substance of its comments made in September 2001 in response to the Department of Administration's notice of possible rulemaking relating to organizational conflicts of interest which resulted in the adoption not of rules but of the Department of Administration's Policy & Procedure Admin 01-13 (November 1, 2001). Specifically DTED believes that no "unfair advantage" should result

from operation of any rule when a vendor or respondent has competitive advantages arising from market presence, reputation, experience with past projects or state agency contracting, or the ability to search out and use in responses or proposals information on the subject of the contract. The acquisition of such competitive advantages can be merely the result of good business practices and success in capably performing earlier state contracts.

Any rule adopted regarding organizational conflicts of interest should recognize, in language and in operation, that the ability to acquire and use information from a variety of sources is a legitimate competitive advantage. Clearly any rule should not create an unfair advantage situation when a vendor or respondent acquires experience and knowledge via successful prior work. Likewise, any rule should not create an unfair advantage situation when a vendor or respondent obtains state government information available to the public under the Minnesota Government Data Practices Act, regardless of whether that availability was generally known to the public, advertised by the agency, or accessed by other vendors or respondents. That is, it should never be an unfair advantage for a vendor or respondent to do its homework on state projects, procedures, contracts or contractors using publicly available information.

In the same way, any rule should not create an unfair advantage situation when a vendor or respondent acquires, free or for a fee, information from another private party (including consultants) about the state contracting process, the details of a project, the background of any project, the experience of any party on the same, related or similar projects, or the experience of any party with a given contracting agency. Absent application of the antitrust laws, the state

should not seek to limit the ability of private vendors to secure competitive information by legal means , nor seek to limit their ability to contract with others to provide such information.

RE: Proposed Amendment to *Minn. Rules* 1230.1900 GENERAL TERMS AND CONDITIONS

DTED agrees that the phrase "for reasons beyond its control" can appropriately be removed from the first sentence of *Minn. Rules* 1230.1900 Subpart 1 for the reasons stated in the Department of Administration's December 18, 2002 Statement of Need and Reasonableness.

DTED further suggests that the phrase "beyond its control" also be deleted from the last sentence of that Subpart to be consistent with the intent stated in the Statement of Need and Reasonableness.

Submitted: December 31, 2002

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Small Business Assistance Office
Minnesota Department of Trade
and Economic Development