

**1230.1605 OPERATING CONTROL.**

A. In determining whether qualifying owners control a business, all the facts in the record will be considered and viewed as a whole.

B. Only an independent business may be certified as a socially and economically disadvantaged, economically disadvantaged area, or veteran-owned small business. An independent business is one in which the viability does not depend on its relationship with another business or businesses.

(1) In determining whether a potential socially and economically disadvantaged, economically disadvantaged area, or veteran-owned small business is an independent business, the relationships with nonqualifying businesses in areas as personnel, facilities, equipment, financial and bonding support, and other resources, shall be scrutinized.

(2) Present or recent employer-employee relationships between the qualifying owner or owners of the potential socially and economically disadvantaged, economically disadvantaged area, or veteran-owned small business and nonqualifying businesses or persons associated with nonqualifying businesses may be considered in determining whether these relationships compromise the independence of the potential socially and economically disadvantaged, economically disadvantaged area, or veteran-owned small business.

(3) The business's relationships with prime contractors shall be examined to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential socially and economically disadvantaged, economically disadvantaged area, or veteran-owned small business.

(4) In considering factors related to the independence of a potential socially and economically disadvantaged, economically disadvantaged area, or veteran-owned small business, the consistency of relationships between the potential socially and economically disadvantaged, economically disadvantaged area, or veteran-owned small business and nonqualifying businesses with normal industry practice shall be considered.

C. A socially and economically disadvantaged, economically disadvantaged area, or veteran-owned small business must not be subject to any formal or informal restrictions that limit the customary discretion of qualifying owners. There must not be any restrictions through corporate charter provisions, bylaw provisions, contracts, or any other formal or informal devices including cumulative voting rights, voting powers attached to different classes of stock, employment contracts, requirements for concurrence by nonqualifying partners, conditions precedent or subsequent, executory agreements, voting trusts, or restrictions on or assignments of voting rights, that prevent qualifying owners, without the cooperation or vote of any nonqualifying individual, from making any business decision of the business. This item does not preclude a spousal cosignature on documents as provided for in part 1230.1604, subpart 10, item B.

D. The qualifying 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.

(1) A qualifying owner must hold the chief executive officer, president, or highest-ranking officer position in the company.

(2) In a corporation, qualifying owners must control the board of directors.

(3) In a partnership, one or more qualifying owners must serve as general partners, with control over all partnership decisions.

E. Nonqualifying individuals or immediate family members may be involved in a socially and economically disadvantaged, economically disadvantaged area, or veteran-owned small business as owners, managers, employees, stockholders, officers, and directors. These individuals must not possess or exercise the power to control the business or be disproportionately responsible for the operation of the business.

F. The qualifying owners of the business may delegate various areas of management and policy making or daily operations of the business to other participants in the business, regardless of whether these participants are qualifying individuals. These delegations of authority must be revocable, and the qualifying owners must retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the qualifying owners in the business's overall affairs must be such that it can be reasonably concluded that the qualifying owners actually exercise control over the business's operations, management, and policy.

G. The qualifying owners must have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the business is engaged and the business's operations. The qualifying owners are not required to have experience or expertise in every critical area of the business's operations, or to have greater experience or expertise in a given field than managers or key employees. The qualifying owners must have the ability to intelligently and critically evaluate information presented by other participants in the business's activities and to use this information to make independent decisions concerning the business's daily operations, management, and policy making. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the business is insufficient to demonstrate control.

H. If Minnesota or local law requires the owners to have a particular license or other credential in order to own or control a certain type of business, then the qualifying individuals who own and control a potential socially and economically disadvantaged or veteran-owned small business of that type must possess the required license or credential. If Minnesota or local law does not require a license or credential to own or control a business, certification will not be denied solely on the grounds that the owner lacks the license or credential. However, the division may take into account the absence of the license or credential as one factor in determining whether the qualifying owners actually control the business.

I. (1) Differences in remuneration between the qualifying owners and other participants in the business may be considered in determining whether to certify a business as a socially and economically disadvantaged or veteran-owned small business. Such consideration shall be in the context of the duties of the persons involved, normal industry practices, the business's policy and practice concerning reinvestment of income, and any other explanations from the business for the

differences. It may be determined that a business is controlled by its qualifying owner although that owner's remuneration is lower than that of some other participants in the business.

(2) In a case where a nonqualifying individual formerly controlled the business, and a qualifying individual now controls it, a difference between the remuneration of the former and current controller of the business may be considered as a factor in determining who controls the business, particularly when the nonqualifying individual remains involved with the business and continues to receive greater compensation than the qualifying individual.

J. In order to be viewed as controlling a business, a qualifying individual cannot engage in outside employment or other business interests that conflict with the management of the business or prevent the individual from devoting sufficient time and attention to the affairs of the business to control its activities. Absentee ownership of a business and part-time work in a full-time business are not viewed as constituting control. 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. (1) A qualifying individual may control a business even though one or more of the individual's immediate family members who are nonqualifying individuals participate in the business as a manager, employee, or owner, or in another capacity. Except as otherwise provided in this item, a judgment about the control the qualifying owner must exercise in relation to other persons involved in the business must be made without regard as to whether or not the other persons are immediate family members.

(2) If the qualifying owners, as distinct from the family as a whole, cannot be determined to control the business, then the qualifying owners have failed to establish their burden of proof concerning control, even though they may participate significantly in the business's activities.

L. When a nonqualifying individual who may or may not be an immediate family member transfers ownership and control of a business to a qualifying individual, and the nonqualifying individual remains involved with the business in any capacity, there is a rebuttable presumption of control by the nonqualifying individual unless the qualifying individual now owning the business demonstrates, by clear and convincing evidence, that:

(1) the transfer of ownership and control of the business to the qualifying individual was made for reasons other than obtaining certification as a socially and economically disadvantaged or veteran-owned small business; and

(2) the qualifying individual actually controls the management, policy, and operations of the business, notwithstanding the continuing participation of a nonqualifying individual who formerly owned and controlled the business.

M. In determining whether a business is controlled by qualifying owners, whether the business owns equipment necessary to perform its work will be considered. 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, the business may be determined to be controlled by qualifying individuals.

N. A business shall be granted certifications only for specific types of work in which qualifying owners have the ability to control the business. To become certified in an additional type of work, the business must demonstrate that its qualifying owners are able to control the business with respect to that type of work. The qualifying owner's control of the business in the additional type of work must be verified.

(1) The types of work a business can perform, whether on initial certification or when a new type of work is added, must be described in terms of the most specific available NAICS code for that type of work. Multiple NAICS codes may be assigned where appropriate. The plain meaning of NAICS code descriptions will be used in determining the scope of a business's certification.

(2) Businesses must carefully check to make sure that the NAICS codes cited in a certification are kept up to date and accurately reflect work that the business's owners can control. The business bears the burden of providing detailed company information to make an appropriate NAICS code designation.

(3) If a business believes that there is not a NAICS code that fully or clearly describes the types of work in which it is seeking to be certified, the business may request that the division, in the business's certification documentation, supplement the assigned NAICS codes with a clear, specific, and detailed narrative description of the type of work in which the business is certified.

O. A business operating under a franchise or license agreement may be certified if it meets the standards in this part and the franchiser or licensor is not affiliated with the franchisee or licensee. In determining whether affiliation exists, restraints relating to standardized quality, advertising, accounting format, and other provisions imposed on the franchisee or licensee by the franchise agreement or license should not be considered, 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.

P. In order for a partnership to be controlled by qualifying individuals, any nonqualifying partners must not have the power without the specific written concurrence of the qualifying partner or partners to contractually bind the partnership or subject the partnership to contract or tort liability.

Q. The qualifying individuals controlling a business may use an employee leasing company. The use of such a company does not preclude the qualifying individuals from controlling their businesses 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.

**Statutory Authority:** *MS s 16C.19*

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