

South Florida Water Management District

RULE TITLES:	RULE NOS.:
Policy	40E-7.668
Definitions	40E-7.669
Competitive Solicitation Preferences	40E-7.670
District Implementation	40E-7.671
Compliance	40E-7.672
Certification Eligibility Small Business Enterprise	40E-7.673
Certification Review Procedures	40E-7.674
Recertification Review Procedures	40E-7.675
Decertification	40E-7.676
Reciprocity	40E-7.677
Administrative Hearings	40E-7.678

PURPOSE AND EFFECT: The Rule is being created to implement the provisions of Section 373.1135, F.S., which authorizes each water management district to establish a small business program to encourage small businesses, to participate in district procurement and contract activities. The program will spur economic development and support small businesses to successfully expand in the marketplace.

SUMMARY: The Rule provides for three types of Competitive Solicitation Preferences designed to assist small businesses certified under the District's small business program. These preferences are the bid equalization, a sheltered market and a subcontracting requirement for both bids and proposals. The bid equalization component will provide up to a 10% adjustment so

that a Small Business Enterprise (SBE) who is not the low bidder would still be awarded a contract with the District. The sheltered market will allow only SBEs to bid on designated solicitations. The subcontracting requirement for bids and proposals will allow the District to set subcontracting goals for bids and proposals.

SUMMARY OF STATEMENT OF ESTIMATED REGULATORY COST: This rule helps small businesses to participate in District procurement and contracting activities and to successfully expand in the marketplace. Up to 17,000 small businesses may be eligible for certification and all prime contractors will have to secure targeted small business subcontract participation in order to be considered responsive to District solicitations. Certification costs for each applicant are expected to be in the range of \$120 to \$160. For its part the District expects to expend slightly over \$1,000,000 each year for program implementation. Some procurements are also expected to be more expensive, especially those in the bid equalization program. The initial estimate is that the program will result in about \$30 million in additional procurements going to small businesses certified under the program

Any person who wishes to provide information regarding the statement of estimated regulatory costs, or to provide a proposal for a lower cost regulatory alternative must do so within 21 days of this notice.

SPECIFIC AUTHORITY: 373.044, 373.113, 373.171, 373.1135, F. S.

LAW IMPLEMENTED: 373.1135, F. S.

A HEARING WILL BE HELD AT THE TIME, DATE, AND PLACE SHOWN BELOW:

TIME AND DATE: April 12, 2006, at 9:00 A.M.

PLACE: Okeechobee Shrine Club, 1855 S.W. 53rd Street, Okeechobee, FL 34974

THE PERSON TO BE CONTACTED REGARDING THE PROPOSED RULE IS: Frank Hayden, South Florida Water Management District, Post Office Box 24680, Mail Stop Code 6611, West Palm Beach, FL 33416-4680, telephone 1-800-432-2045, extension 6043 or (561) 682-6043 (internet:fhayden@sfwmd.gov). Although Governing Board meetings, hearings and workshops are normally recorded, affected persons are advised that it may be necessary for them to ensure that a verbatim record of the proceeding is made, including the testimony and evidence upon which any appeal is to be based. Persons with disabilities or handicaps who need assistance may contact the Director of Governing Board and Executive Services, at (561) 682-6371 at least two business days in advance to make appropriate arrangements.

THE FULL TEXT OF THE PROPOSED RULE IS AS FOLLOWS:

40E-7.668 Policy

(1) The rules under this Small Business Enterprise Contracting Program establish policies and procedures designed to help small businesses, including those owned by women and minorities, to participate in the South Florida Water Management District's ("District") procurement and contract activities.

(2) It is the purpose of the Program to spur economic development and support small businesses, including woman-owned and minority-owned businesses, to successfully expand in the marketplace.

(3) The District shall annually evaluate the progress of this Program and determine whether the specific provisions require any modification, expansion, and curtailment.

Specific Authority 373.044, 373.113, FS. Law Implemented 373.1135, FS. History – New

40E-7.669 Definitions

(1) “Affiliate Business” means a business that is a subsidiary of or owned in part by another business concern. Entities are affiliates of each other when one impacts the other by sharing resources or controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists.

(2) “Applicant” an entity that is seeking District Certification or recertification.

(3) “Certification” means the process by which the District determines that a business meets the District’s criteria for a Small Business Enterprise (SBE).

(4) “Employees” means those individuals who received a W-2 from the Applicant. In determining number of employees a business has , the District shall count only those individuals who were supplied a W-2 by the Applicant. Whether employed on a full-time or part-time basis.

(5) “Gross Receipts” means the total sales for the Applicant as specified in its Federal tax return or if a new company which has not filed a Federal tax returns, in its audited financial statement before deductions for returned items, allowances, and discounts.

(6) "Industry Categories" means construction, commodities and services.

(7) “Responsible” means a business that is capable in all respects of fully performing the contract requirements and which has the integrity and reliability that will assure good faith performance.

(8) “Responsive” means a business’s bid or proposal conforms in all material respects to the invitation to bid or request for proposal.

(9) “District Small Business Enterprise (SBE)” means a business certified by the District, that including affiliates, employs 100 or fewer part and/or full time employees. Additionally, a District Small Business Enterprise is licensed to do business in the State of

Florida if the business requires a license. Finally, a District Small Business Enterprise three (3) year average gross receipts shall not exceed \$4 million if the business provides construction, \$2.5 million if the business provides commodities, and \$3 million if the business provides services. Specific Authority 373.044, 373.113, FS. Law Implemented 373.1135, FS. History – New

40E-7.670 Competitive Solicitation Preferences

The Small Business Enterprise Contracting Rule in this part provides for three types of Competitive Solicitation Preferences designed to assist small businesses. The Bid Equalization, Sheltered Market and Subcontracting Requirements as outlined below.

(1) Bid Equalization.

A process that enables the District to place SBE's on a more level playing field when bids are submitted to the District. Often large businesses are able to submit bids at a lower cost than smaller businesses. When bids are submitted SBEs may receive up to a 10% downward adjustment on its bid for evaluation purposes only. For Solicitations where it is determined by the District to use a bid equalizations the District shall implement a one percent (1%), five percent (5%), and ten percent (10%) maximum bid adjustment . This bid adjustment will increase the likelihood that certified SBE's may be awarded the contract even though they are not the low bidder so long as the difference in the amount of the bids does not exceed the bid equalization percentage see TABLE 7.6-1.

(a) The maximum Bid Equalization percent shall be determined by the estimated contract value and the dollar ranges as stated in sections b, c and d.

(b) For contracts with an estimated value of \$2,000,000 or more, the District shall implement a maximum bid adjustment of one percent (1%). If the adjusted lowest SBEs firms

bid does not exceed the lowest non SBE firms unadjusted responsive and responsible bid by one percent (1%) then the award shall be made to the lowest responsive and responsible SBE firm.

(c) For contracts with an estimated value of more than \$500,001 but less than \$2,000,000, the District shall implement a maximum bid adjustment of five percent (5%). If the adjusted lowest certified SBE’s firms bid does not exceed the lowest non SBE firms unadjusted responsive and responsible bid by five percent (5%) then the award shall be made to the lowest certified responsive and responsible SBE firm.

(d) For contracts valued at \$500,000 or less, the District shall implement a maximum bid adjustment of ten percent (10%). If the adjusted lowest certified SBE’s firms bid does not exceed the lowest non SBE firms unadjusted responsive and responsible bid by ten percent (10%) then the award shall be made to the lowest certified responsive and responsible SBE firm.

(e) The Bid Equalization does not apply to bids let under the Sheltered Market Program or when all bids received are from SBE firms.

TABLE 7.6-1
Bid Equalization Example using 10% as Incentive Bonus

<u>Bid Incentive example</u>	<u>Lowest Non-Certified Firm</u>	<u>Lowest Certified SBE Firm</u>
<u>Bid</u>	<u>\$100,000</u>	<u>\$103,000 *</u>
<u>Bid Equalization (10%)</u>	<u>-0-</u>	<u><10,300></u>
<u>Tabulation</u>	<u>\$100,000</u>	<u>\$92,700</u>
<u>Note:</u>		
<u>*In this example, the District will pay the \$103,000 award, with the difference between the 100,000 bid and the 103,000 bid, being the cost the District is willing to incur to advance the SBE Program commitment.</u>		

(2) Sheltered Market Program.

The District may provide for sheltered markets for only SBE’s to bid on designated solicitations. The District shall be guided in selecting sheltered market solicitations by selecting

industries in which small businesses have usually not had an opportunity to compete for awards against larger businesses. Additionally in order to award a contract in a sheltered market the District must receive responses from at least 3 SBE's. If no bid or response is received for a contract that has been designated for the Sheltered Market, the contract shall be competed pursuant to the District's Procurement Policy.

(3) Subcontracting Requirements.

(a) Bids – The District shall set subcontracting goals for all bids in the amount of 30% of the total contract amount. Bidders may provide work to one or more District SBE's in order to meet the goal. Any bidder failing to meet the 30% goal shall be deemed nonresponsive.

(b) Proposals - For contracts awarded based on an evaluation criteria up to 20 of the total evaluation points may be awarded to Prime contractors who subcontract 30% or more of the contract dollar amount to certified SBE's. The District shall award points as reflected in Table 7.6-2.

(c) Failure to submit any of the documentation required herein shall lead to the business submitting a bid or proposal being deemed nonresponsive.

TABLE 7.6-2

EVALUATION POINT TABLE

<u>20 POINTS FOR SBE PARTICIPATION</u>	
<u>≥ 30% =</u>	<u>20 points</u>
<u>≥ 27% =</u>	<u>18 points</u>
<u>≥ 24% =</u>	<u>16 points</u>
<u>≥ 21% =</u>	<u>14 points</u>
<u>≥ 18% =</u>	<u>12 points</u>
<u>≥ 15% =</u>	<u>10 points</u>
<u>≥ 12% =</u>	<u>8 points</u>
<u>≥ 9% =</u>	<u>6 points</u>

<u>≥ 6% =</u>	<u>4 points</u>
<u>≥ 3% =</u>	<u>2 points</u>

(d) At the time of submittal of its bid or proposal the prime contractor using shall identify all SBE firms which will be utilized as subcontractors on the contract. Additionally the prime contractor must specify what specify work elements each SBE will perform. All prime contractors must submit proof of District certification of the SBEs they plan on using in the bid or proposal by providing a copy of the District certification letter. All SBE proposed tasks must be defined within the scope of work being solicited by completing these two forms: the Schedule of Subcontractor Participation Form and Statement of Intent to Perform as a Subcontractor Form. Specific Authority 373.044, 373.113, FS. Law Implemented 373.1135, FS. History – New

40E-7.671 District Implementation

The District shall ensure all small businesses have the maximum opportunity to participate in the District’s contracting and procurement processes. The following are examples of efforts to be taken by the District:

(1) Establish a Small Business Enterprise office to implement the rules established under this Part.

(2) Identify all competitive contracting opportunities within the District budget for SBE participation.

(3) Analyze SBE availability to provide the products or services identified for contracting at either the prime contract or subcontract levels.

(4) Maintain a database of all SBEs.

(5) Monitor and maintain records of steps taken and results achieved to maximize SBE participation.

(6) Evaluate the District's efforts to achieve SBE objectives.

(7) Provide training to District staff on the District's SBE Rule.

Specific Authority 373.044, 373113, FS. Law Implemented 373.1135, FS. History – New

40E-7.672 Compliance

The District shall monitor and evaluate Program performance and compliance as follows:

(1) Each District contract shall contain a provision requiring the contractor, during the term of the contract, to comply with, as to tasks and proportionate dollar amounts throughout the term of the contract, all commitments made in their bids or proposals for use of SBEs.

(2) Each District contract shall contain a provision requiring maintenance of records, and information necessary to document compliance with the rules under this Part and shall include the right of the District to inspect such records.

(3) Each District contract shall contain a provision prohibiting any agreements between a contractor and a SBE in which the SBE promises not to provide subcontracting quotations to other respondents or potential respondents.

(4) To ensure that all commitments by prime contractors under contracts awarded in which there are SBE subcontractors are met, the prime contractor's efforts to meet its commitments throughout the performance of the contract shall be reviewed. The contractor shall advise the District of any situation in which regularly scheduled progress payments are not made to SBE subcontractors.

(5) Prime contractors must notify the District when the need to replace a SBE subcontractor arises. When a SBE substitution is requested, the Contract Specialist will request a letter from the contractor explaining why substitution is needed. The prime contractor shall attach a revised participation plan to the letter.

(a) Failure of the Prime Contractor to honor the SBE requirements of an awarded contract shall be a material breach of the contract which may result in suspension or debarment of the firms pursuant to Rule 40E-7, Part II F.A.C.

(6) Each District contract awarded with SBE participation shall contain a provision incorporating the rules under this Part by reference and a statement that failure to comply with the requirements of the bid or proposal submitted to the District by a contractor shall be considered a material breach of contract which may result in suspension or debarment of the firms or individuals involved pursuant to Rule 40E-7, Part II F.A.C.

Specific Authority 373.044, 373113, FS. Law Implemented 373.1135, FS. History – New

40E-7.673 Certification Eligibility – Small Business Enterprise

District staff shall have the authority to accept, review, approve, certify, decertify and deny applications for SBE certification. An applicant business must be registered with the District as a vendor prior to submitting an application for certification.

(1) Applicant businesses shall submit applications for SBE certification using Form No. 1231, “SBE Certification Application”, which is hereby incorporated by reference and which can be obtained from the District upon request. Mailing addresses must include the number, name of the street, suite number, if any, city and correct zip code. A post office box will not be acceptable absent a street address.

(2) To establish that it is a small business , the applicant shall:

(a) provide documentation to demonstrate that the three (3) year average gross receipts of the business concern, together with its affiliates, does not exceed \$4 million for Construction, \$2.5 million for Commodities, and \$3 million for Services. In determining the gross receipts of the business and its affiliates, the District shall consider the three (3) most recent federal tax returns, or if the business has not filed three (3) federal income tax returns for the three (3) years immediately preceding their application, the most recent audited financial statements for the business shall be considered.

(b) provide documentation to demonstrate that it employs one hundred (100) or fewer Employees. In determining whether the applicant meets the criteria for a small business, the District shall consider the following documentation:

1. Latest Florida Quarterly Unemployment Reports.

2. Annual Federal Unemployment Report.

3. Most Current Payroll Ledgers.

ii. The applicant must demonstrate that it is licensed to do business in the State of Florida if the business requires a license.

(c) The Applicant may only have one (1) business certified with the South Florida Water Management District.

Specific Authority 373.044, 373.113, FS. Law Implemented 373.1135, FS. History – New_____.

40E-7.674 Certification Review Procedures

(1) Upon receipt by the District, all applications for SBE certification shall be screened to ensure appropriate signature and completeness. The application must be signed by

the individual with the authority to bind the applicant. If the application is submitted by means of a facsimile machine, the signature page of the application, with the original signature of the owner, must be submitted to the District within thirty (30) days of facsimile submission.

(2) Within sixty (60) days following receipt of the application, the District will request the applicant business to furnish omitted items or additional information, if any. If all requested information is not received by the District within thirty (30) days from the date of the request, the District will return the unprocessed application to the applicant business.

(3) An on-site verification review may be conducted by the District upon receipt of the completed application. Failure to cooperate with the scheduling of the on-site review or during the on-site review shall result in the denial of the application.

(4) Applicants determined eligible shall receive certification as an SBE from District staff. This document will state the length of time for which the business will be certified and the areas of business it is certified in. Once certified, an applicant shall remain certified for a period of three (3) years unless the applicant fails to follow this rule and is sanctioned pursuant to the Rule. The District retains the right to re-evaluate the certification of any business at any time.

(5) Applicants determined ineligible shall receive a notification from District staff. Applicants receiving this notification of ineligibility shall not be eligible to submit new applications until 180 days after the date of the notice denying certification.

Specific Authority 373.044, 373.113, FS. Law Implemented 373.1135, FS. History – New

40E-7.675 Recertification Review Procedures

(1) Applications for recertification shall be submitted using Form No., 1232 “SBE Application for Recertification”, which is hereby incorporated by reference and available from the District upon request.

(2) The District will notify SBEs no later than sixty (60) days before the end of the certification period that the SBE’s certification is about to expire. If the SBE is unable to use the recertification document because of changes to the applicant’s business, the SBE shall notify the District in writing of the changes to its company. The District shall determine if the company still complies with the certification criteria. Recertification requests must be filed with the District no later than the last effective date of the current certification period.

(3) Upon receipt, all recertification requests shall be given an initial screening to ensure appropriate signature and completeness. Within sixty (60) days following initial receipt of the applicant’s recertification request, the District may request the applicant to furnish omitted or additional information. If the requested information or items are not received by the District within thirty (30) days from the date of the request, the District will deny the application for recertification.

(4) An on-site verification review may be conducted by the District upon receipt and review of the recertification request. Failure to cooperate with the scheduling of the on-site review or during the on-site review shall result in the denial of recertification.

(5) Recertification shall be granted when the applicant has complied with this rule and substantiates continued eligibility for SBE status.

(6) Applicants deemed eligible shall receive a recertification letter stating the length of time for which the business has been re-certified and the specialty areas of the business. Once recertified, an applicant shall remain certified for a period of three (3) years unless the District

determines that the applicant no longer meets the eligibility requirement of this Rule. The District retains the right to reevaluate the certification of any business at any time.

(7) Applicants determined ineligible for recertification shall receive a letter citing the applicable rules and shall not be eligible to submit new applications until 180 days after the date of the notice or the District's final agency order denying recertification.

(8) If an application for recertification is timely submitted, an SBE shall remain certified until the District has made a determination concerning eligibility.

Specific Authority 373.044, 373.113, FS. Law Implemented 373.1135, FS. History – New

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40E-7.676 Decertification

Decertification is the process by which the District shall take steps to retract a business's certification as an SBE. The decertification of an SBE shall occur when the District determines that an SBE no longer complies with the District's certification criteria. The District will also decertify a SBE if the District learns that the SBE submitted false information in order to obtain SBE certification

(1) District staff shall inform the SBE in writing by certified mail, return receipt requested, of the facts or conduct which formed the basis for decertification.

(2) The decertification notice issued by the District shall contain:

(a) the statutory provisions(s) or rules(s) of the Florida Administrative Code which the District alleges that the SBE violated; and

(b) the specific facts or conduct relied upon to justify the decertification; and

(c) a statement that the firm has the right to file a request for an administrative hearing pursuant to Sections 120.569 and 120.57, Florida Statutes, within 21 days of receipt of the decertification notice; and

(d) a statement that the decertification shall become conclusive and final agency action if no request for a hearing is filed with the District Clerk's office within 21 days from receipt of the decertification notice.

(3) If the firm fails to file a request for a hearing within 21 days after receipt of the notice, the decertification shall become conclusive and final agency action.

(4) If the SBE files a request for an administrative hearing, the firm shall remain certified unless and until a Final Order is issued by the District decertifying the firm after an administrative hearing

Specific Authority 373.044, 373.113, FS. Law Implemented 373.1135, FS. History – New

40E-7.677 Reciprocity

Reciprocal application shall be granted to applicant businesses which have been certified by other jurisdictions that meet the District certification standards as outlined in this Rule.

Specific Authority 373.044, 373.113, FS. Law Implemented 373.1135, FS. History – New

40E-7.678 Administrative Hearings

If an applicant business believes it has been wrongly denied certification, or recertification or that it has been inappropriately decertified as an SBE, it may file a request for hearing pursuant to Sections 120.569 and 120.57, F.S. by submitting a petition in accordance with Chapter 28-

106, F.A.C., within 21 days of receipt of Notice of Denial of certification or recertification or Notice of Decertification as a District SBE.

Specific Authority 373.044, 373.113, FS. Law Implemented 373.1135, FS. History – New

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NAME OF PERSON ORIGINATING THE PROPOSED RULE: Frank Hayden, Director of Government Affairs

NAME OF SUPERVISOR OR PERSON WHO APPROVED RULE: Governing Board of the South Florida Water Management District

DATE PROPOSED RULE APPROVED BY AGENCY HEAD: February 8, 2006

DATE NOTICE OF PROPOSED RULE DEVELOPMENT PUBLISHED IN FAW: October 28, 2005