

# STATEMENTS OF POLICY

## Title 4—ADMINISTRATION

### DEPARTMENT OF GENERAL SERVICES

[4 PA. CODE CH. 68]

#### Internal Guidelines for MBE/WBE Certification

The Department of General Services (Department) acting under the authority conferred on it by Executive Order No. 1996-8 (4 Pa. Code §§ 1.451—1.459) and Executive Order No. 1996-1 (4 Pa. Code §§ 1.371—1.382) is amending Chapter 68 (relating to contract compliance) to read as set forth in Annex A.

#### *Purpose*

Executive Order No. 1996-8 rescinded and replaced Executive Order 1987-18. The Department is amending its statement of policy to reflect the changes which were instituted by Executive Order No. 1996-8 and to make other revisions to the Department's existing statement of policy on Internal Guidelines for MBE/WBE Certification. The amended statement of policy will:

- a. Reflect the change in the name of the Department's Office of Minority and Women Business Enterprise to the Bureau of Contract Administration and Business Development (BCABD).
- b. Add Asian-Indian Americans as a recognized minority group.
- c. Add as a requirement of eligibility that an applicant for certification must have done business for 1 year or have a reviewed 2-year business plan.
- d. Limit the cumulative period of certification and recertification as an MBE or WBE to 8 years.
- e. State that the number of employees for MBEs/WBEs shall be set at the maximum amount established by 62 Pa.C.S. § 2102 (relating to definitions). Currently the total cannot exceed 50 employees.

#### *Fiscal Impact*

The Department will continue to incur personnel and other costs in administering the MBE/WBE certification program. The estimated 2001-2002 fiscal year costs are \$168,000.

#### *Paperwork Requirements*

The amended statement of policy will require applicants for certification to provide business history information showing that the applicant has actually done business for 1 year or has a reviewed 2-year business plan.

#### *Statutory Authority*

The Department's authority for the statement of policy is contained in Executive Order No. 1996-8.

#### *Effective Date*

This amended statement of policy shall be effective upon publication.

#### *Contact Person*

For information regarding this statement of policy, contact Gary N. Lee, Director, Bureau of Contract Administration and Business Development, Department of General Services, Room 502 North Office Building, Harrisburg, PA 17125.

KELLY POWELL LOGAN,  
*Secretary*

*(Editor's Note: The regulations of the Department are amended by amending a statement of policy in §§ 68.201—68.210 to read as set forth in Annex A.)*

**Fiscal Note:** No fiscal impact; (8) recommends adoption.

#### Annex A

### TITLE 4. ADMINISTRATION

#### PART III. DEPARTMENT OF GENERAL SERVICES

#### Subpart C. CONSTRUCTION AND PROCUREMENT

#### ARTICLE III. PROCUREMENT

#### CHAPTER 68. CONTRACT COMPLIANCE

#### Subchapter C. INTERNAL GUIDELINES FOR MBE/WBE CERTIFICATION—STATEMENT OF POLICY

#### § 68.201. Policy.

(a) Executive Order No. 1987-18 established the Office of Minority and Women Business Enterprise (OMWBE) in the Department of General Services (Department). Executive Order No. 1996-8, 4 Pa. Code §§ 1.451—1.459, rescinded and replaced Executive Order No. 1987-18. The responsibilities previously assigned to OMWBE by Executive Order No. 1996-8 were transferred to the Department's BCABD. On January 30, 1996, the Executive Board approved the reorganization of the OMWBE and assigned all responsibilities to the newly-formed BCABD. That order expresses the Commonwealth's strong commitment to assisting minority and women-owned business enterprises in their efforts to compete for State government contracting and subcontracting opportunities. The BCABD will assist executive agencies and independent commissions, other than the Department of Transportation, which has a separate program, in their responsibilities. The identification of certified MBEs and WBEs can, for example, be used in deciding a bidder's responsibility in connection with a public works construction project. The identification and certification of MBEs and WBEs will have other uses in connection with Commonwealth contracts for supplies and services.

(b) This subchapter establishes guidelines which the Department will initially follow in determining which business entities are bona fide and will be certified and which business entities, previously certified, will be decertified. The Department and the BCABD possess broad statutory authority governing Commonwealth contracting as well as the authority provided and under §§ 1.451—1.459. This subchapter gives direction to the BCABD, executive agencies and others as to how that broad authority and agency discretion will be exercised. The Department and the BCABD intend to proceed with the implementation of MBE and WBE certification on a case-by-case basis. This subchapter expresses the present intention of the Department and the BCABD with respect to the implementation of the certification program. The Department and the BCABD reserve the right to depart from this subchapter in the exercise of agency discretion in an appropriate case. This subchapter constitutes guidelines to the BCABD, the executive agencies and others within this Commonwealth. This subchapter is not and does not purport to operate as a regulation and does not have or purport to have the force of law.

**§ 68.202. Definitions.**

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise:

*BCABD*—The Bureau of Contract Administration and Business Development established under §§ 1.451—1.459 (relating to minority and women business enterprise), within the Department.

*Certification*—A determination made by the BCABD that a for-profit business entity is an MBE or WBE. In the alternative, the BCABD may, by declaration, accept the certification program of other public bodies if the certification program conforms substantially to the program of the BCABD established in §§ 1.451—1.459. When the certification program of another public body has been declared to be accepted, an MBE or WBE will be deemed certified under this program if the certification remains current and if the business entity has not been decertified.

*Department*—The Department of General Services of the Commonwealth.

*MBE or Minority Business Enterprise*—A small business that is one of the following:

(i) A sole proprietorship, owned and controlled by a minority.

(ii) A partnership or joint venture controlled by minorities in which at least 51% of the beneficial ownership interest is held by minorities.

(iii) A corporation or other business entity controlled by minorities in which at least 51% of the voting interest and 51% of the beneficial ownership interest are held by minorities.

*Minority*—A person who is a citizen of the United States who is a Black American, Hispanic American, Native American, Asian-Pacific American or Asian-Indian American.

(i) *Black (African) Americans*—Persons having origins from any of the Black groups of Africa. The term includes persons having origins in any of the original peoples of the Cape Verde Islands.

(ii) *Hispanic Americans*—Persons having their origins from one or more of the Spanish-speaking peoples of Mexico, Puerto Rico, Cuba, Central or South American or the Caribbean Islands.

(iii) *Native Americans*—Persons having origins from one or more of the original peoples of North America and who are recognized as an Indian by a tribe or tribal organization.

(iv) *Asian-Pacific Americans*—Persons having origins from one or more of the original peoples of the Far East, Southeast Asia or the Pacific Islands, including China, Japan, Korea, Samoa and the Philippine Islands.

(v) *Asian-Indian Americans*—Persons whose origins are from India, Pakistan and Bangladesh.

*Secretary*—The Secretary of the Department or a designated deputy secretary of the Department.

*Small business*—A business in the United States which is independently owned, is not dominant in its field of operation and, employs no more than the maximum number of employees established by 62 Pa.C.S. § 2102 (relating to definitions).

*WBE or Women's Business Enterprise*—A small business that is one of the following:

(i) A sole proprietorship, owned and controlled by a woman.

(ii) A partnership or joint venture controlled by women in which at least 51% of the beneficial ownership is held by women.

(iii) A corporation or other entity controlled by women in which at least 51% of the voting interest and 51% of the beneficial ownership interest are held by women.

*Women*—United States citizens who are of the female gender.

**§ 68.203. Certification of eligible MBEs and WBEs.**

(a) *Purpose.* The purpose of this subchapter is to ensure that only those for-profit businesses and businesses which are owned and controlled in both form and substance by one or more minorities or women are certified.

(b) *Application form.* The BCABD will provide applications for businesses that are sole proprietors, partnerships, corporations and for other business entities. The appropriate application will be distributed to the businesses for completion. In the ordinary instance, it will be a reasonable exercise of agency discretion for the BCABD to decline to certify a business that fails to complete the application form. A distortion, false statement or nondisclosure of information that is a material misrepresentation will, in the ordinary instance, warrant denial of certification and may result in referral to other agencies for consideration of other civil or criminal actions.

(c) *Acceptance of other public jurisdictions' certification.* If the business has a current certification from a BCABD-approved public body, evidence of that certification may be obtained and relied upon by BCABD in lieu of completing a certification application. BCABD may obtain, as part of the application process, information from out-of-State businesses on current MBE/WBE certification from the business' home state governmental certifying body and from other public jurisdictions. Out-of-State businesses shall first be certified by their home state before applying for certification with the Department.

**§ 68.204. Eligibility standards.**

The following standards will be used by the BCABD in determining whether a business is owned and controlled by one or more minorities or women and therefore eligible to be certified as an MBE or WBE:

(1) *Business history.* The applicant shall have actually done business for 1 year before submission of the application, or it shall have a 2-year business plan reviewed by a Small Business Development Center.

(2) *Ownership.*

(i) Bona fide minority and women group membership may be established on the basis of the individual's claim that the individual is a member of a minority group or the individual is of the female gender. Verification of group membership may be accepted through submission of birth certificates, military records, passports or tribal cards.

(ii) An eligible MBE or WBE under this subchapter shall be an independent business. The ownership and control by minorities or women shall be real, substantial and continuing and shall go beyond the pro forma ownership of the business as reflected in its ownership documents. The minority and women owners shall enjoy the customary incidents of ownership and shall share in the risks and profits commensurate with their ownership interest as demonstrated both by an examination of the

substance and form of arrangements. Recognition of the business as a separate entity for tax or corporate purposes is not necessarily sufficient for recognition as an MBE or WBE. In determining whether a potential MBE or WBE is an independent business, the BCABD will consider all relevant factors, including the date the business was established, its resources, and the nature of the financial, and lease arrangements. The business relationship with non-MBE or WBE businesses, in areas such as personnel, facilities, equipment, financial or bonding support, or both, and other resources will also be considered. The business' relationship with prime contractors will be examined to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential MBE or WBE business.

(iii) The contributions of capital and expertise by the minority or women owners to acquire their interests in the business shall be real and substantial. Examples of insufficient contributions include a promise to contribute capital, a note payable to the business or to an owner who is not a minority or woman or the mere participation as an employee rather than as a manager.

(iv) For purposes of determining ownership, the BCABD will presume as not being held by a minority or woman all interests in a business or other assets obtained as the result of a gift, or transfer without adequate consideration, if the donor is:

(1) Involved in the same business for which the individual is seeking certification, or an affiliate of that business.

(2) Involved in the same or a similar line of business.

(3) Engaged in an ongoing business relationship with the business, or an affiliate of the business, for which the individual is seeking certification.

(v) To overcome this presumption and permit the interests or assets to be counted, the minority or women owners shall demonstrate that:

(1) The gift or transfer to the minority or women owners was made for reasons other than obtaining certification as an MBE/WBE.

(2) The minority or women owners actually control the management, policy and operations of the business, notwithstanding the continuing participation of the donor who provided the gift or transfer.

(3) *Management control.* The minority or women owners shall possess the power to direct or cause the direction of the management and policies of the business and to make the day-to-day as well as major decisions on matters of management, policy and operations. The minority or women owners shall hold the highest officer position in the company (for example, chief executive officer or president). In a corporation, the minority or women owners shall control the board of directors. The business may not be subject to formal or informal restrictions which limit the customary discretion of the minority or women owners. There may be no restrictions through, for example, by-law provisions, partnership agreements or charter requirements for cumulative voting rights or otherwise that prevent the minority or women owners, without the cooperation or vote of an owner who is not a minority or woman, from making a business decision of the business. If the actual management of the business is contracted out to, or otherwise has been placed with individuals other than the minority or women owners,

those persons who have the ultimate power to hire and fire the managers will ordinarily be considered as controlling the business.

(4) *Operational control.* The minority or women owners shall demonstrate through the application sufficient experience, knowledge and expertise to operate that particular business. The minority or women owners shall have an overall understanding of and technical competence directly related to the type of business in which the business is engaged. The minority and women owners are not required to have experience or expertise in every critical area of the business' operations, or to have greater experience or expertise in a given field than managers or key employees. The minority and women owners shall have the ability to intelligently and critically evaluate information presented by other participants in the business' activities and to use this information to make independent decisions concerning the business' daily operations, management and policymaking. Generally, expertise limited to office management, administration or bookkeeping functions unrelated to the principal business activities of the business is insufficient to demonstrate control. If State or local law requires the business to have a particular license or other credentials to own or control, or both, a certain type of business, the minority or women owners who own and control that type of business shall possess the required license or credentials. Additionally, if the owners of the business who are not minorities or women are disproportionately responsible for the operation of the business—to include possessing any required licensing for the business—the business will ordinarily be considered as not being controlled by minorities or women and not qualifying as an MBE or WBE.

(i) Securities which constitute ownership or control, or both, of a corporation for business purposes of establishing it as an MBE or WBE shall be held directly by minorities or women. Securities held in trust, or by a guardian for a minor, may not be considered as held by minority or women in determining the ownership or control of a corporation.

(ii) Complete information regarding a change in ownership, control or financial condition shall be provided to the BCABD, which may consider a business' failure to provide promptly relevant information in decertification decisions.

(5) *Circumstances for special review.* In addition to the standards in paragraphs (1)—(4), the BCABD will ordinarily give special consideration to the following circumstances in determining eligibility under this subchapter:

(i) Newly formed businesses whose ownership or control, or both, has recently changed will be closely scrutinized to determine the reasons for the change in the business.

(ii) A previous or continuing, or both, employer-employee relationship between or among present owners will be carefully reviewed to ensure that the employee-owner has management responsibilities, requisite knowledge and expertise to direct and operate the business.

(iii) A relationship between an MBE or WBE and a business which is not an MBE or WBE, which has an interest financially or otherwise in the MBE or WBE, will be carefully reviewed to determine if the interest of the non-MBE or WBE conflicts with the ownership and control requirements of this subchapter.

#### § 68.205. Joint venture.

(a) The BCABD will ordinarily find a joint venture eligible under this subchapter if the MBE or WBE

partner of the joint venture meets the other certification criteria. The MBE or WBE partner shall be responsible for a clearly defined portion of the work to be performed, and the MBE or WBE shall maintain majority ownership and control in management responsibilities, risks and profits of the joint venture.

(b) The BCABD will ordinarily obtain from a business seeking certification as a joint venture MBE or WBE additional information needed to make a determination.

**§ 68.206. Approved certification.**

(a) If the BCABD determines that the applicant meets the criteria to be certified as an MBE or WBE, the applicant will be issued a certification number in recognition of its status.

(b) An MBE or WBE certification notice, unless revoked by decertification, will provide for automatic expiration 24 months from the date of issuance. If there is a change in ownership or control of the business, the MBE or WBE shall forward information within 2 weeks of the change to update the original application. Failure to update may be cause for decertification.

(c) Applicants will be certified in the areas applied for, consistent with the field of expertise demonstrated through the application. Additional endeavors engaged in by the business shall be documented and submitted to the BCABD prior to approval of certification in those additional areas.

(d) A recertification of a previously certified MBE or WBE will ordinarily be treated as a new applicant for certification. The requirements of this subchapter will be applied to the recertification applicant, and no benefits or rights will be given to the recertification applicant because of its previous certification. Applicants may be recertified for an additional 24 months. The cumulative period of certification and recertification as an MBE or WBE may not exceed 8 years.

(e) An application which upon its face does not claim ownership or control by a minority or women as defined by this subchapter shall ordinarily be denied.

**§ 68.207. Certification denial.**

(a) The denial of certification by the BCABD will not ordinarily be reconsidered, except under subsection (b). The BCABD may accept reapplications for certification, and information and documentation correcting technical deficiencies in the MBE/WBE certification application at any time. The BCABD will reject reapplications when the reason for the denial was substantive unless deficiencies in ownership and control have been corrected and unless a sufficient period of time, usually 1 year, has passed with the new provisions on ownership and control in place. The BCABD will exercise care to ensure that directors, officers and employees of businesses that have been denied certification are not reapplying under new business names in an attempt to frustrate the BCABD's review.

(b) The BCABD will permit reconsideration of the denial of certification if the submittal is made in writing within 30 days of the denial letter. The BCABD will forward to the the Secretary or a designee the information submitted in support of reconsideration. A decision on reconsideration will be made by the Secretary.

(c) A person who knowingly makes or causes to be made, a false, deceptive or fraudulent statement on the application will be denied certification by the BCABD.

The BCABD will ordinarily refer the statements to the appropriate authorities for possible further criminal or civil action.

**§ 68.208. Decertification.**

(a) The BCABD will ordinarily decertify businesses for reasons relating to the considerations in this subchapter including the following:

(1) The business is no longer owned or controlled by minority or women.

(2) The business received certification by knowingly submitting false and misleading information.

(3) The business knowingly allowed the misuse of its certification status.

(4) The business failed to respond, cooperate or otherwise comply with a request for information from the BCABD or another Commonwealth department, agency, commission, board, office, official or other representative.

(5) There are other causes affecting the businesses' status or responsibility, or both, as may be determined by the BCABD to warrant decertification.

(b) The BCABD will send a business a Notice of Proposal to Decertify by certified mail. The notice will:

(1) Specify the reasons for the proposed decertification in terms sufficient to put the business on notice of the conduct or transactions upon which the notice is based.

(2) State the causes relied upon under subsection (a) for proposing decertification.

(3) Advise that, within 20 days after receipt of the notice, the business may submit, in person, in writing or through a representative, information in opposition to the proposed decertification, including information that raises a genuine dispute over the material facts.

(4) State the potential effect of the proposed decertification.

(5) Advise that the Director of the BCABD will make this decision.

(c) The decision letter informing the business that it has been decertified will also inform the decertified business of rights of review it has.

(d) If the actions of the business appear to be flagrant criminal conduct, the BCABD may, upon the filing of an indictment, information or other charge, temporarily suspend the certification until the determination is made to decertify or to reinstate. A review of this temporary suspension may be made by the Secretary.

**§ 68.209. Review of decertifications.**

(a) The Secretary or a designee will ordinarily require that requests for review of decertifications be made in writing and that the request recite the grounds upon which the request is based.

(b) The Secretary or a designee may reject requests that are untimely or insufficient. Ordinarily, requests made more than 30 days after the date of the decertification letter will be considered untimely. Further, requests that do not raise issues suggesting that the decertification is in error will be denied as insufficient.

(c) In the exercise of discretion, the Secretary may direct that a hearing be conducted under § 68.210 (relating to hearing).

**§ 68.210. Hearing.**

(a) *Scope.* This hearing procedure applies only to requests for review of the decertification decision. The Secretary may delegate to a designee, usually a hearing officer, the responsibility for conducting a fact-finding hearing and for making a report and recommendation. Fact-finding hearings will only be held when the business requests a review under § 68.209 (relating to review of decertifications).

(b) *Purpose.* The fact-finding hearing will be held to determine the operative and relevant facts forming the basis for the decertification action as delineated in the written notice of decertification action provided to the business. The hearing will also determine the sufficiency of the grounds for the review as delineated in the writing. The results of proceedings before the BCABD will also be considered. The fact-finding hearing affords the business

which has been decertified an additional opportunity to demonstrate that the facts upon which the decertification is based are insufficient, incorrect, misleading or otherwise do not warrant the decertification. In addition to presenting material relevant to disputed facts, the business may present other information and arguments in accordance with the grounds stated in the request for review showing why it should not be decertified. Other information may be used by the designee in making a recommendation to the Secretary.

(c) *Conduct of hearing.* If a hearing is warranted, it will be conducted under 2 Pa.C.S. §§ 502—508 and 701—704 (relating to Administrative Agency Law). If the BCABD takes the action, it has the burden of proof.

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