

**220-RICR-80-10-1**

## **TITLE 220 - DEPARTMENT OF ADMINISTRATION**

### **CHAPTER 80 - DIVERSITY, EQUITY AND OPPORTUNITY**

#### **SUBCHAPTER 10 - MINORITY BUSINESS ENTERPRISE**

PART 1 - Certification and Decertification of MBE Enterprises by the State of Rhode Island

#### **1.1 Purpose and Authority**

Pursuant to R.I. Gen. Laws § 37-14.1-7 which relates to Minority Business Enterprise and R.I. Gen. Laws § 42-35-1 relating to the Administrative Procedures Act, the Rhode Island Department of Administration has developed Rules and Regulations governing the certification and decertification of small businesses that are owned and controlled by minorities, woman or disadvantaged individuals to participate in state and federal programs administered by the State of Rhode Island. To qualify as a Minority Business Enterprise (MBE), a firm must meet eligibility standards established in §§ 1.4 through 1.9 of this Part.

#### **1.2 Definitions**

- A. “Annual update” means the information required from a certified firm prior to its anniversary date. Materials to be furnished may include, but not necessarily be limited to, most recently filed personal and business tax returns, year-end financials, personal financial statement(s) of all owners, and a no change affidavit.
- B. “Applicant” means any business that applies to the Department of Administration for certification, decertification, reconsideration or appeal.
- C. “Architect-engineer” means:
  - 1. Professional services of an architectural or engineering nature, as defined by Rhode Island State Law, if applicable, which are required to be performed or approved by a person licensed, registered, or certified to provide such services.
  - 2. Other professional services associated with research, planning, development, design, construction, alteration, or repair of real property that the contracting officer determines are of an architectural or engineering nature.

- D. "Awarding authority" means any agency or department of the federal government, the State of Rhode Island or their political subdivisions that awards contracts using public funds.
- E. "Caseworker and/or representative of D.O.A." means a D.O.A. staff member, or its designee assigned to review applications.
- F. "Certification" means that a company has met the burden of demonstrating by the preponderance of evidence, that it meets the requirements of these regulations and federal regulations concerning group membership, individual disadvantage, business size, ownership and control.
- G. "Certification period" means the length of time a firm may be certified prior to having to undergoing another full review of its eligibility and qualifications for certification.
- H. "Certification review committee" (also referred to as the C.R.C.) shall function as an appellant body. Firms that are denied certification as an MBE, WBE, or DBE may request a hearing before the C.R.C. in order to appeal said decision. The C.R.C. consists of five (5) members appointed by the Director of the Department of Administration. The Director of the Department of Administration will appoint the chairperson of this committee. The five (5) members will consist of one (1) individual from the Rhode Island Department of Transportation and four (4) individuals from the public or private sector. At least four members will represent the minority groups as defined under R.I. Gen. Laws § 37-14.1. Each member, including the chairperson, will serve at the pleasure of the Director of the Department of Administration and their term will be perpetual or until a replacement is appointed. No person involved in the original determination shall serve as a member of the CRC during an appeal.
- I. "Certified" means an applicant firm which has been reviewed by D.O.A. and found to have met the certification requirements provided in these regulations.
- J. "Construction" means construction, alteration, or repair (including dredging, excavating, and painting) of buildings, structures, or other real property.
- K. "Days" means business days not calendar days.
- L. "D.O.A." means the Rhode Island Department of Administration.
- M. "Hearings" means formal meetings held at the request of the applicant and conducted pursuant to the Administrative Procedures Act. Hearings are conducted by the C.R.C. and relate to the denial determination of an applicant or decertification of a certified firm.
- N. "Manufacturer" means a firm that operates or maintains a factory or establishment that produces on the premises the materials, or supplies, articles,

or equipment required under the contract and of the general character described by the specifications 49 C.F.R. § 26.55(e)(1)(ii)

- O. “Minority (MBE) Business Enterprises” means small business enterprises whose owners are rebuttably presumed to be socially and economically disadvantaged individuals, who are citizens of the United States or legal permanent residents, and who are members of a definable minority group that own and control the business.
- P. “Ongoing concern” means a business whose activity is consistent and perpetual and whose business hours are regular.
- Q. “Other minority business enterprises” means socially and economically disadvantaged firms which are owned and controlled by individuals who are citizens of the United States, or legal permanent residents whose social disadvantage must stem from an individual’s color, national origin; gender, physical handicap; long term residence in an environment isolated from the mainstream of American society; or other similar cause beyond the control of the individual, and whose economic disadvantage must stem from an inability to compete in the free enterprise system due to diminished capital and credit opportunities, as compared to others in the same or similar line of business and/or competitive market area who are not socially disadvantaged. 13 C.F.R. §§ 124.103 through 109.
- R. “Regular dealer/supplier” means a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials or supplies required for the performance of the contract are bought, kept in stock, and regularly sold to the public in the usual course of business. To be a regular dealer, the firm must engage in, as its principal business, and in its own name, the purchase and sale of the products in question. A regular dealer in such bulk items as steel, cement, gravel, stone, and petroleum products needs not keep such products in stock, if it owns or operates distribution equipment. 49 C.F.R. § 26.55(e)(2)(ii)
- S. “Regulations” means all of the provisions contained in this document or regulations established by other awarding or certifying federal authorities, including, but not necessarily limited to, 49 C.F.R. § 23, 49 C.F.R. § 26, 13 C.F.R. § 121 and 13 C.F.R. § 124.
- T. “Rhode Island Bridge Fund Minority Business Enterprise (RIBFMBE)” means a firm certified as either an MBE, WBE, or DBE by the Department of Administration, Office of Diversity, Equity and Opportunity (ODEO), MBE Compliance Office (MBECO) only for those projects covered under the Rhode Island Bridge Replacement, Reconstruction and Maintenance Fund Act of 2016 (RIBF Act) in accordance with R.I. Gen. Laws § 42-13.1-17.
- U. “Service” means a contract or firm whose primary purpose is to perform an identifiable task rather than to furnish an end item of supply.

- V. “Site visit” means a visit by a D.O.A. staff member, or its designee to an applicant’s business facility or job location.

### **1.3 Incorporated Materials**

This certifying authority is not limited to basing certification or decertification solely on the criteria outlined in these rules and regulations but may consider regulations established by other awarding and/or certifying authorities, including, but not necessarily limited to, 49 C.F.R. Part 23 (April 2009), 49 C.F.R. Part 26 (October 2014), 13 C.F.R. Part 121 (September 2017) and 13 C.F.R. Part 124 (October 2016), incorporated herein, not including later amendments or editions thereof.

### **1.4 Certification Criteria**

- A. D.O.A. will certify or recertify only those firms which meet all of the requirements as outlined below:
1. Be a small business concern as defined pursuant to Section 3 of the Federal Small Business Act (15 U.S.C. §§ 632 and 637) and implementing regulations (13 C.F.R. Part 121), and fulfill one of the definitions as defined in §§ 1.2(O) or (Q) of this Part.
  2. Owner(s) must be a member of a definable minority group, woman, and/or an individual(s), found to be both socially and economically disadvantaged (as defined in 49 C.F.R. § 26.67).
  3. Minority, Disadvantaged or Women partners/shareholders must own at least 51 percent of the business.
  4. Minority, Disadvantaged or Women owners must possess control of the business and the power to direct or cause the direction of the management and policies of the firm and to make the day-to-day as well as major decisions on management, policy and operations.
  5. Minority, Disadvantaged, or Women owners must be substantial investors in the business.
  6. The business must be an ongoing concern.
  7. The business must be in operation a minimum of six (6) months prior to applying for certification.
  8. Existing businesses whose ownership and control has been transferred to minorities or women must be in the control of the minorities/women a minimum of six (6) months prior to applying for certification.

## 1.5 Membership Requirement

A. A member of a definable minority group means a person who is a citizen or lawful permanent resident of the United States and who is:

Black	All persons having origins in any of the Black racial groups of Africa.
Hispanic	All persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race.
American Indian/ Alaskan Native	All persons having origins in any of the original peoples of North America.
Asian American	All persons having origins in any of the original peoples of the Far East, Southeast, Southeast Asia, the Indian Subcontinent, or the Pacific Islands.
Portuguese	All persons of Portuguese, Brazilian or other Portuguese culture or origin regardless of race.
Woman	Any female qualifies as a class of minority.
Disadvantaged	Members of other groups or other individuals, found to be economically and socially disadvantaged by the small Business Administration under Section 8 (a) of the Small Business Act, as amended (15 U.S.C. Chapter 637(a)).

## 1.6 Ownership Requirements

A. An applicant must satisfy either of §§ 1.6(A)(1) and (2) or (3) of this Part, as well as §§ 1.6(A)(4) through (6) of this Part below in order to be considered 51 percent owned by members of a definable minority group:

1. In a corporate form of organization, the Minority, Disadvantaged or Women shareholders of the corporation must own at least 51 percent of

each and every class of stock, including 51 percent of all voting stock in the corporation; or

2. In a partnership form of organization, the Minority, Disadvantaged or Women partners must own at least 51 percent of the partnership; or
3. In any other form of organization, the Minority, Disadvantaged, or Women owners must own at least 51 percent of the business interest of the organization including but not limited to 51 percent of the ownership of assets, dividends, and intangible assets such as copyrights and patents; and
4. The Minority, Disadvantaged or Women owners must demonstrate that they are entitled to receive profits from the business firm and that they are entitled to share in any other benefit which accrues to all owners of the business firm; and
5. The Minority, Disadvantaged or Women owners must substantially share in all the risks assumed by the business firm, and
6. The business firm cannot at any time enter into any agreement, option, scheme, or create any rights of conversion, which if exercised, would result in less than 51 percent minority, disadvantaged or women ownership of the business firm.

## **1.7 Control Requirements**

- A. To prove that the minority, disadvantaged or women owners possess control over the business, an applicant must satisfy all the requirements of §§ 1.7(A)(1) through (3) of this Part below:
  1. The Minority, Disadvantaged or Women owners must demonstrate that they have control over:
    - a. The day-to-day management of the business, and
    - b. The policy-making mechanism of the business.
      - (1) The ownership and control by the Minority, Disadvantaged or Women owners must be real, substantial, and continuing and shall go beyond the pro forma ownership of the firm as reflected in its ownership document.
      - (2) The Minority, Disadvantaged or Women owners must establish their control by providing substantial evidence that they possess the power to direct or cause the direction of the management of the firm and to make day-to-day as well as

major decisions on matters of management, policy, and operations by establishing the following:

- c. Have the power to direct or cause the directions of the purchase of goods, equipment, business inventory and services needed in the day-to-day operation of the business.
  - d. Have the authority to hire and fire employees, including those to whom management authority is delegated.
  - e. Be an authorized signature on all corporate accounts-checking, savings, and other financial accounts.
  - f. Have a thorough knowledge of the financial structure of the business and authority to determine all financial affairs.
  - g. Have the capability, knowledge and experience required to make decisions regarding the particular type of work engaged in by the MBE.
  - h. Have displayed independence and initiative in seeking and negotiating contracts, accepting and rejecting bids and in conducting all major aspects of the business.
2. Any of the following conditions creates an irrefutable presumption that the owners do not have control of the business that is applying for certification.
- a. If the Minority, Disadvantaged or Women owners are current employees of a non-minority business corporation, or individual, or partnership which has a significant ownership interest in the business firm applying for certification.
  - b. If the directors and/or management of the applicant firm is substantially the same as the affiliated non-minority firm.
  - c. If the applicant is a wholly-owned subsidiary of a non-minority firm.
  - d. If the applicant has an extremely dependent relationship on a non-minority firm or individual.
3. Any agreement, option, right of conversion, scheme or other restraint, which, if exercised, would result in less than dominant control by the minority owners is prohibited.

## **1.8 Substantial Investment in Business Requirement**

- A. The Minority, Disadvantaged or Women owners must demonstrate that they have substantial personal investment in the Business. Proof of such substantial investment must be established by producing evidence of the following:
1. A substantial amount of money invested in the business, or
  2. Investment in the form of capital, equipment, contribution of property, space, patents and copyrights.
    - a. Contributions of personal or professional services alone will not be considered substantial investment” for the purpose of this section. However, a contribution of such services will receive consideration when given in conjunction with other tangible forms of investment.
    - b. There will be an irrefutable presumption that the Minority, Disadvantaged or Women owners have not made a substantial investment in the business if a significant portion of the applicant’s equity is financed by a loan or gift from a non-minority corporation, partnership or individual that has a significant interest in the applicant.

## **1.9 Continuing Operational Requirement**

The applicant must be an ongoing business concern; it must demonstrate to the satisfaction of the Department of Administration that it was not established solely for the purpose of competing for MBE programs.

## **1.10 Applications**

Applicants must complete the application supplied by the Rhode Island Department of Administration, supply all the information requested therein, agree to supply any additional information requested by D.O.A. and agree to be bound by all the provisions and regulations governing the certification and recertification process as detailed by these regulations.

## **1.11 Intake and Evaluation Procedures**

- A. The caseworker and/or representative of D.O.A. will review each application to determine if the applicant has submitted a complete application.
- B. If the applicant has failed to submit all requested information, the applicant will be notified via mail or by email at the address furnished by the applicant by the caseworker and/or representative of D.O.A. detailing what required information is missing from their application.



- C. Any application for which all requested information is not received within a 30 calendar day period from the date of the notification will either be withdrawn and the applicant cannot reapply earlier than 60 days from the expiration of the 30 day period, or the application may be denied.
- D. The caseworker and/or representative of D.O.A. will evaluate the completed application and may conduct a site visit and complete a site visit report if it felt that further investigation of the applicant firm is warranted to determine whether the applicant meets the requirements for certification as an MBE. This evaluation will be completed within a reasonable time after receipt of the completed application, which shall not exceed ninety (90) days.
  - 1. While the office is awaiting additional information from the applicant, the ninety (90) day period for processing an application is suspended until all additional information requested from the applicant has been received.
- E. D.O.A. may, in its discretion, grant or request an interview with the applicant firm, if it feels an interview is essential to complete the application review process.
- F. After review and verification of each application a case evaluation and/or site visit report will form the basis of the report prepared by the caseworker and/or representative of D.O.A. to the Assistant Administrator – MBE within the Office of Diversity, Equity and Opportunity (ODEO).
- G. No requests for withdrawal of an application will be considered once the report has been prepared by the caseworker and/or representative of D.O.A. for the Assistant Administrator – MBE.
- H. The Assistant Administrator – MBE and the Associate Director of the Office of Diversity, Equity and Opportunity will meet to review the application and reports of the caseworker and/or representative of D.O.A. to determine the certification of the applicant.
  - 1. If the Assistant Administrator – MBE and the Associate Director of the Office of Diversity, Equity and Opportunity, jointly, determine that an applicant meets the criteria for certification as an MBE pursuant to these regulations, D.O.A. shall certify the applicant.
  - 2. If the Assistant Administrator – MBE and the Associate Director of the Office of Diversity, Equity and Opportunity, jointly, determine that an applicant firm does not meet the criteria for certification as an MBE pursuant to these regulations, D.O.A. shall notify the applicant firm by certified mail of the denial determination.
    - a. The denial determination shall include the basis for the denial including a reference to the specific sections of these rules that the applicant has failed to comply with.

- b. The applicant will also be notified that the applicant has the right to request an appeal hearing before the Certification Review Committee.
- c. If certification is denied the applicant may reapply no earlier than one year after the date of the decision of the D.O.A.

## **1.12 Appeal Procedures**

- A. Appeal hearings before the C.R.C. shall be conducted pursuant to R.I. Gen. Laws §§ 42-35-9 through 16.
- B. Applicant firms seeking an appeal hearing before the C.R.C. must notify D.O.A. in writing of its intention to appeal within ten (10) days of the receipt of the denial determination.
- C. At the hearing, the C.R.C. will consider evidence and matters officially noticed.
- D. Conduct at the Hearing
  - 1. The applicant and all parties present at the hearing shall conduct themselves in a manner consistent with the standards of judicial decorum accepted by the courts of Rhode Island. Where such decorum is not observed, the Chairperson of the CRC or his or her designee will have the authority to take appropriate action, including ejection or adjournment, if necessary.
- E. Stipulations
  - 1. Both the CRC and the applicant may enter written stipulations if they are signed by the parties sought to be bound thereby.
  - 2. Oral stipulation may be made on the record, at the discretion of the Chairperson, during the course of the hearing.
- F. The Hearing Record
  - 1. The Chairperson shall direct that a recording be made by electronic recording equipment of each proceeding. At the request of an applicant, the Chairperson shall allow a stenographer to record the proceedings, provided, however, that copies of the hearing transcript must be provided to the CRC and the MBECO at no cost within thirty (30) days of the conclusion of the hearing.
  - 2. If any party chooses to appeal a final CRC decision to Superior Court or to appeal a decision otherwise provided by law and the Superior Court (or another Court) requires a transcript of the hearing and there is only an electronic recording of the hearing, the party seeking appeal shall be

responsible for having the transcript prepared by an independent person or company at the Applicant's expense within twenty (20) days of filing the appeal.

- G. After C.R.C. has conducted its hearing it shall notify the applicant by certified mail, in writing of its decision, which shall include findings of fact and conclusions of law.

### **1.13 Decertification**

D.O.A. may, at any time after it has certified an MBE withdraw certification if the status of that firm's ownership, control, or management make such action necessary, or if it fails to maintain its status as an ongoing business, or it has violated the guidelines of an awarding authority or no longer qualifies as a small business concern. A firm may be decertified by the D.O.A. after being provided with an opportunity to be heard by the MBE Compliance Office. Firms decertified by the D.O.A. may seek an appeal of the decertification determination before the C.R.C.

### **1.14 Grounds for Complaint**

- A. Any person, including a D.O.A. staff member or a representative of an awarding authority, can, in writing, make a complaint to D.O.A. against any MBE if that person believes that the MBE is abusing its certified status or failing to conduct itself as a bona fide MBE. D.O.A. reserves the right to investigate any and all complaints.
- B. If, after its investigation, D.O.A. finds that an MBE:
  - 1. submitted inaccurate or false information to D.O.A. during the certification or recertification process; or
  - 2. has violated the guidelines of an awarding authority; or
  - 3. has changed its ownership, control, or management without notifying D.O.A. within thirty (30) days of such change; or
  - 4. has failed to conduct itself as a bona fide MBE or to maintain its status as an ongoing concern, it may seek an informal resolution to the problem, hold a hearing, or immediately decertify the MBE.

### **1.15 Informal Resolution**

- A. If D.O.A. chooses to seek an informal resolution to the problem, it will:
  - 1. advise the enterprise of the allegations made against it, and

2. inform the enterprise of the findings of the representative who investigated its case, and
  3. request that the MBE/WBE take voluntary action to correct the problem within thirty (30) days of notification.
- B. When D.O.A. in its judgement concludes that a MBE has failed to take corrective action within thirty (30) days of notification, it will issue a decertification determination. Firms decertified by the D.O.A. may seek an appeal of the decertification determination before the C.R.C.

### **1.16 Annual Update**

- A. The Rhode Island Department of Administration requires that all certified firms update their business information on an annual basis. Failure to furnish requested information may result in loss of certification, after being provided with the opportunity to be heard by the MBE Compliance Office.
- B. D.O.A. shall issue a Notice Of Pending Expiration of Certification to each MBE or WBE approximately sixty (60) days before the expiration of the certification period—however, failure of D.O.A. to issue the notice or failure of the certified MBE or WBE to receive the notice shall not extend the existing certification period nor relieve the MBE or WBE of the obligation to submit a timely application for recertification in accordance with this section.
- C. The application for Renewal of Certification shall be submitted to D.O.A. not less than thirty (30) days before the date of expiration of the existing certification.
- D. Applications for recertification shall meet all of the requirements for application for certification set forth in §§ 1.4 through § 1.9 of this Part with all information, and documents, updated to the date of the application for renewal.
- E. Failure of a certified firm to recertify in a timely manner will result in this firm not being recertified by D.O.A. A firm that fails to provide all information required for recertification must submit a new certification application, with all accompanying documents and this application will be processed as prescribed in § 1.11 of this Part.

### **1.17 Effect of Prior MBE or WBE Certification by Another State or Federal Agency**

Prior MBE or WBE certification of the applicant by another state or federal agency or a Unified Certification Program (UCP) shall be considered by the D.O.A., but in no case shall this prior certification be considered conclusive proof that the applicant is eligible for certification.

## **1.18 Judicial Review**

An applicant may seek judicial review of any final administrative decision of the D.O.A. and/or the C.R.C. in accordance with R.I. Gen. Laws Chapter 42-35.

## **1.19 Severability**

The provisions of this document are severable, and if any of the provisions shall be held to be unconstitutional by any court of competent jurisdiction, the decision of such court shall not affect or impair any of the remaining provisions.