

**WEST VIRGINIA
SECRETARY OF STATE
NATALIE E. TENNANT
ADMINISTRATIVE LAW DIVISION**

Form #3

Do Not Mark In This Box

FILED

2011 JUL 15 PM 3:24

OFFICE WEST VIRGINIA
SECRETARY OF STATE

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

AGENCY: Department of Administration, Purchasing Division TITLE NUMBER: 148

CITE AUTHORITY: 5A-3-59

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 22

TITLE OF RULE BEING PROPOSED: Certification for small, women and minority-owned businesses

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE FOR THEIR REVIEW.



Authorized Signature



Agency: Department of Administration
Rule Type: Legislative

Title Number: 148
Cite Authority: 5A-3-59

STATEMENT OF CIRCUMSTANCE AND BRIEF SUMMARY

The Department of Administration proposes to promulgate legislative rules in order to explain the procedures for becoming a certified small, women, or minority-owned business. The rules are being promulgated as a result of House Bill 4582 which passed during the 2010 legislative session.

Specifically, the rules provide definitions; identifies the certification process; prohibits false or misleading information; describes who is eligible; outlines the procedures for renewal of certification; allows for evaluation of local, state, private sector and federal certification programs; describes procedures for certification of business previously certified by other qualifying programs; addresses both approval and denial of certification; and describes revocation, re-application and jeopardizing of federal funds.

Agency: Department of Administration
Rule Type: Legislative

Title Number: 148
Cite Authority: 5A-3-59

BRIEF SUMMARY OF COMMENTS RECEIVED; AGENCY RESPONSE; AND AMENDMENTS

The only comments received by the Department of Administration regarding the rules were from an individual named Susan King. Our responses are as follows:

Comment 1: I would like for purchases by the State of West Virginia to be purchased from vendors who are citizens of the United States first and then if no suitable vendor meets the criteria then a vendor who is a non-citizen be used for purchases. Also, West Virginia should not do business with countries that the United States has sanctions against or is in war with.

Agency Response 1: The WV Code seeks to promote competition in the procurement of goods and services to the fullest extent possible. Only a law expressly granting a preference for U.S. citizens would allow the Purchasing Division to make a distinction between U.S. citizens and foreign entities legally working in the U.S. Such a preference does not currently exist. The Jobs for West Virginia Act does, however, grant a bidding preference to West Virginia resident vendors that meet certain residence and employment requirements.

Amendment 1: No amendment made

MEMO

To: Donna Lipscomb, Executive Coordinator
From: Susan King
Date: 6/29/11
Re: Public Comments Regarding the Certification of Small, Women, or Minority-Owned Business

Message:

Attached are my comments regarding the public comment period for the proposed legislative rule related to the certification of small, women, or minority-owned business that is now available under the NEWS tab of the Purchasing Division's website.

Please identify any areas of vagueness, technical defects, reasons the proposed rule would not have a fiscal impact, and/or any special issues not captured elsewhere on this form.

Section 2.8 states the following:

“Minority individual” means an individual who is a citizen of the United States or a noncitizen who is in full compliance with United States immigration law and who satisfied one or more of the following definitions:

As a citizen of the United States, I would like for purchases by the state of West Virginia to be purchased from vendors who are citizens of the United States, **first**, and then if no suitable vendor meets the criteria, **then and only then**, should a vendor who is a noncitizen and in full compliance with United States immigration law and who satisfies one or more of the definitions for small, women, and minority-owned businesses able to be used for purchases.

Also, if the United States is in war or has issued any sanctions against a country for whatever reasons then WV should not have anything to do with that country and if we are currently doing business with that country, **then and only then**, should all purchases or business from that country immediately halt or end until the sanctions are lifted.

My comments are in regard to Title 148-22-2.8, 148-22-2.11, and 148-22-2.13.

Citizen of the state of West Virginia,

Susan King
P.O. Box 22
Ravenswood, WV 26164

TITLE 148
DEPARTMENT OF ADMINISTRATION
SERIES 22
CERTIFICATION FOR SMALL, WOMEN AND
MINORITY-OWNED BUSINESSES

FILED
2011 JUL 15 PM 3:24
SECRETARY OF STATE

§148-2-1. General.

1.1. Scope. -- This Legislative Rule is an explanation of the small, women and minority-owned business certification program and preference established by the Department of Administration and administered by the Purchasing Division of the Department of Administration.

1.2. Authority. -- W. Va. Code 5A-3-59.

1.3. Filing Date. --

1.4. Effective Date. --

§148-2-2. Definitions.

As used in this rule, all terms have the same meaning as provided in W.Va. Code §5A-1-1 and 5A-3-59, et seq. and as follows:

2.1. "Bid" means an offer to perform contracting services or to supply commodities or printing at a specified price.

2.2. "Certification" means the process by which a business is determined to be a small, women or minority-owned business for the purpose of affording a non-resident vendor bidding on the purchase of commodities or printing a vendor preference.

2.3. "Certified" means the status accorded to an applicant upon the determination that the applicant has satisfied the requirements for certification as a small, women or minority-owned business.

2.4. "Code" means the Code of West Virginia of 1931, as amended.

2.5. "Commodities" means supplies, material, equipment, contractual services, and any other articles or things used by or furnished to a department, agency or institution of the state

government.

2.6. "Director" means the Director of the Purchasing Division of the State of West Virginia, Department of Administration, or his delegate.

2.7. "Division" means the Division of Purchasing of the State of West Virginia, Department of Administration.

2.8. "Minority individual" means an individual who is a citizen of the United States or a noncitizen who is in full compliance with United States immigration law and who satisfied one or more of the following definitions:

2.8.1. "African American" means a person having origins in any of the original peoples of Africa and who is regarded as such by the community of which this person claims to be a part.

2.8.2. "Asian American" means a person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent or the Pacific Islands, including, but not limited to, Japan, territory of the Pacific, India, Pakistan, Bangladesh or Sri Lanka and who is regarded as such by the community of which this person claims to be a part.

2.8.3. "Hispanic American" means a person having origins in any of the Spanish-speaking peoples of Mexico, South or Central America, or the Caribbean Islands or other Spanish or Portuguese cultures and who is regarded as such by the community of which this person claims to be a part.

2.8.4. "Native American" means a person having origins in any of the original peoples of North America and who is regarded as such by the community of which this person claims to be a part or who is recognized by a tribal organization.

2.9. "Minority-owned business" means a business concern that is at least fifty-one percent owned by one or more minority individuals or in the case of a corporation, partnership, or limited liability company or other entity, at least fifty-one percent of the equity ownership interest in the corporation, partnership, or limited liability company or other entity is owned by one or more minority individuals and both the management and daily business operations are controlled by one or more minority individuals.

2.10. "Printing" means printing, binding, ruling, lithographing, engraving and other similar services.

2.11. "Small business" means a business, independently owned or operated by one or more persons who are citizens of the United States or noncitizens who are in full compliance with United States immigration law, which, together with affiliates, has two hundred fifty or fewer employees, or average annual gross receipts of \$10 million or less averaged over the previous three years.

2.12. "State agency" means any authority, board, department, instrumentality, institution, agency, or other unit of state government. "State agency" does not include any county, city or town.

2.13. "Women-owned business" means a business concern that is at least fifty-one percent owned by one or more women who are citizens of the United States or noncitizens who are in full compliance with United States immigration law, or in the case of a corporation, partnership or limited liability company or other entity, at least fifty-one percent of the equity ownership interest is owned by one or more women who are citizens of the United States or noncitizens who are in full compliance with United States immigration law, and both the management and daily business operations are controlled by one or more women who are citizens of the United States or noncitizens who are in full compliance with United States immigration law.

2.14. "Vendor" means any person, whether selling at retail or otherwise, engaged in furnishing or rendering services, selling commodities or furnishing printing.

§148-2-3. Certification.

3.1. Applications to be certified as a small, women or minority-owned business are available from and must be submitted to the West Virginia Purchasing Division at its principal place of business or through the division's website, if available.

3.2. A business may withdraw its application for certification without prejudice at any time prior to the Division's determination. The request to withdraw the application must be made in writing and addressed to the Director.

3.3. A list of all certified businesses shall be maintained by the Director and shall, at all proper times, be available for inspection by the public.

§148-2-4. False or Misleading Information.

Any applicant that knowingly provides false or misleading information on its application for certification shall be denied certification and shall not be permitted to reapply for certification.

§148-2-5. Eligible Businesses.

The Division shall certify a non-resident business if:

(1) It meets the applicable eligibility standards for certification as a small, women or minority-owned business; and

(2) The state in which the business has its principal place of business does not deny a like certification to a West Virginia-based small, women or minority-owned business or provide a preference to small, women or minority-owned firms that is unavailable to West Virginia-based businesses.

§148-2-6. Exception from Resident Vendor Preference.

The vendor preferences found in West Virginia Code section 5A-3-37 shall not be applied between or among West Virginia resident vendors and non-resident small, women and minority-owned business vendors.

§148-2-7. Procedures for Renewal of Certification.

To maintain its certification, a certified business must apply to renew its certification prior to the end of a two-year certification period using the forms and procedures specified by the Division. The certification of a business that fails to apply for renewal prior to the end of the two-year certification period shall terminate automatically on the expiration of the certification. Meeting the deadline for certification renewal is the responsibility of the business applying. Should a business allow its certification to lapse, the business will be unable to claim the small, women and minority-owned preference until such time it successfully renews its certification.

§148-2-8. Evaluation of Local, State, Private Sector and Federal Certification Programs; Procedures for Certification of Business Previously Certified by Other Qualifying Programs.

8.1. The Division may, at its discretion, evaluate any local, state, private sector or federal certification program to determine whether it meets the minimum requirements for certification of small, women and minority-owned businesses as set forth in the Code and these regulations.

8.2. Should the Division determine that a non-resident vendor is certified by a local, state, private sector or federal certification program, and that such certification program meets with the requirements established in the Code and these regulations, that business shall be certified as a small, women or minority-owned business in West Virginia, without additional paperwork, upon presentation to the Division of documentation that it has received such certification and that the certification has not expired.

§148-2-9. Approval of Certification.

The Division shall notify the applicant if its application for certification is approved no later than fifteen working days from the date of the decision made by the Division.

§148-2-10. Denial of Certification.

8.1. The Division may deny an application for certification for any of the following reasons:

(1) The Division determines that the applicant fails to meet the standards for certification;

(2) The applicant fails to furnish the Division with requested information within the allotted time; or

(3) The applicant knowingly provides false or misleading information to the Division.

8.2. The Division shall notify the applicant of the denial of its application for certification no later than fifteen working days from the date of the decision made by the Division.

§148-2-11. Revocation.

If Director shall investigate applications for certification when any portion of an application is questioned. If it is determined that a business fails to meet a requirement for the requested certification, the Secretary, or the Director at the direction of

the Secretary may revoke the certification of that business if it is found that the business no longer qualifies as a small, women or minority-owned business.

§148-2-12. Reapplication.

A business whose application for certification has been denied may reapply for the same category of certification twelve (12) months after the date on which the business receives the notice of denial. An applicant denied certification as a women or minority-owned business may reapply for certification as a small business without delay if otherwise eligible.

§148-2-13. Jeopardizing Federal Funds.

If any portion of these regulations jeopardizes the receipt of federal funds, then such portion shall be waived as being void and of no force and effect as such regulation pertains to the project.

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Title 148, Series 2

Type of Rule: X Legislative Interpretive Procedural

Agency: Department of Administration

Address: 1900 Kanawha Boulevard, East
Capitol Complex, Room E-119
Charleston, WV 25305

Phone Number: 304- 558-3392 Email: donna.m.lipscomb@wv.gov

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

There should be no fiscal impact as a result of this rule. House bill 4582 passed during the 2010 legislative session which established the program. The rules are being promulgated as a result of the bill and would not have any fiscal impact to the State of West Virginia.

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	2010 Increase/Decrease (use "--")	2011 Increase/Decrease (use "--")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost			0
Personal Services			0
Current Expenses			0
Repairs & Alterations			0
Assets			0
Equipment			0
Other			0
2. Estimated Total Revenues			0

Rule Title: Certification for small, women and minority-owned businesses

3. **Explanation of above estimates (including long-range effect):**
Please include any increase or decrease in fees in your estimated total revenues.

There should be no fiscal impact to the State of West Virginia as a result of the passage of these legislative rules.

MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule **would not** have a fiscal impact, and/or any special issues **not** captured elsewhere on this form.

Date: 7/15/11

Signature of Agency Head or Authorized Representative

QUESTIONNAIRE

DATE: July 15, 2011

TO: Legislative Rule-Making Review Committee

FROM: Donna Lipscomb, Executive Coordinator
Department of Administration
1900 Kanawha Boulevard, East
Room E-119
Charleston, WV 25305
304-558-3392

LEGISLATIVE RULE TITLE: 148, Series 22, Purchasing Division

1. Authorizing statute(s) citation 5A-3-59

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:

May 31, 2011

b. What other notice, including advertising, did you give of the hearing?

E-mailing a letter to all Purchasing Coordinators for all State Agencies and related entities and posting the proposed rule modifications on the Purchasing web site.

c. Date of Public Hearing(s) or Public Comment Period Ended:

July 1, 2011

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached X No comments received

e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

July 18, 2011

f. Name, title, address and phone/fax/e-mail numbers of agency person(s) to receive all written correspondence regarding this rule: (please type)

Donna Lipscomb, Executive Coordinator

Department of Administration

1900 Kanawha Boulevard, East

State Capitol, Room E-119

Charleston, WV 25305

304-558-3392 donna.m.lipscomb@wv.gov

g. IF DIFFERENT FROM ITEM "f", please give Name, title, address and phone number(s) of agency person(s) who wrote and/or has responsibility for the contents of this rule: (please type)

David Tincher, Director of Purchasing

2019 Washington Street, East

Charleston, WV 25301

304-558- 2538

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

N/A

b. Date of hearing or comment period:

May 31, 2011, through July 1, 2011

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

N/A

d. Attach findings and determinations and reasons:

Attached N/A