

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

Form #4

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WEST VIRGINIA
SECRETARY OF STATE

NOTICE OF RULE MODIFICATION OF A PROPOSED RULE

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

CITE AUTHORITY: 5A-3-59

AMENDMENT TO AN EXISTING RULE: YES NO

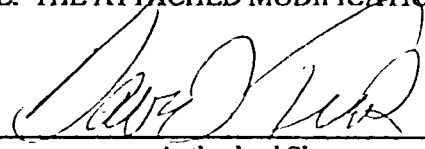
IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

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 business

THE ABOVE PROPOSED LEGISLATIVE RULES, FOLLOWING REVIEW BY THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE, IS HEREBY MODIFIED AS A RESULT OF REVIEW AND COMMENT BY THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE. THE ATTACHED MODIFICATIONS ARE FILED WITH THE SECRETARY OF STATE.


Authorized Signature



TITLE 148
DEPARTMENT OF ADMINISTRATION

SERIES 22
CERTIFICATION FOR SMALL, WOMEN AND
MINORITY OWNED BUSINESSES

2011 SEP 19 AM 11:30

CLERK OF COURTS
SECRETARY OF STATE

§148-22-1. General.

1.1. Scope. This Legislative Rule contains rules for the small, women-owned and minority owned business certification program 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.

§148-22-2. Definitions.

The following words and phrases when used in these rules shall have the meanings given to them in this section unless the context clearly indicates otherwise:

2.1. "Affiliate" means a business that is related to another business in any of the following ways: (1) a business directly or indirectly controls or has power to control another; (ii) a business is directly or indirectly controlled by or subject to the power to be controlled by another; (ii) a third party or parties controls or has the power to control two or more businesses; or (iii) such an "identity of interest" exists between or among businesses that affiliation may be presumed.

2.2. "Annual gross receipts" includes all revenue in whatever form received or accrued from whatever source. Sources of revenue include, but are not limited to the sale of products or services, interest, dividends, rents, royalties, fees, or commissions.

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

2.4. "Certification" means the process by which a business is determined to be a small, women-owned, or minority-owned business.

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

2.6. "Code" means the West Virginia Code.

2.7. "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.

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

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

2.10. "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 satisfies one or more of the following definitions:

2.10.1. "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.

2.10.2. "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.

2.10.3. "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.

2.10.4. "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.

2.11. "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.

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

2.13. "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.

2.14. "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.

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

2.16. "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.

§148-22-3. Verification of Small Business, Woman, or Minority Status

3.1. Proof of Small Business Status. Each owner of a small business applying for certification or recertification under these rules shall certify to the Director that the business is a small business as defined herein at the time the application is submitted. Upon request of the Director, the small business owner(s) shall submit documented proof of the status of the business. Such proof may include, but is not limited to, annual financial statements, federal income tax returns, state and/or local excise tax reports, employment rolls, and any other relevant information. The Director shall have sole discretion in determining whether a business is eligible to obtain small business status under these rules. The Director may

verify that the business continues to be a small business at any time.

3.2. Proof of Woman's Status. Each woman owner of a business applying for certification or recertification under these rules shall certify to the Director that she is a woman. Upon request of the Director, the woman owner must submit documented proof of her status as a woman. Such proof may include, but is not limited to, a birth certificate, valid driver's license, or other similar documentation. The Director shall have sole discretion in determining whether an applicant is eligible to obtain woman status under these rules. The Director may verify the business owner's status as a woman at any time.

3.3. Proof of Minority Status. Each minority owner of a business applying for certification or recertification under these rules shall certify to the Director that he or she is a minority. Upon request of the Director, the minority owner must submit documented proof of his or her status as a minority. Such proof may include, but is not limited to, an official government document or identification card containing the owner's photograph, birth certificate, tribal enrollment papers, or other document which shows that the owner meets the definition of "minority" as set forth in these rules. The Director shall have sole discretion in determining whether an applicant is eligible to obtain minority status under these rules. The Director may verify the business owner's status as a minority at any time.

§148-22-4. Verification of Business Ownership

4.1. Proof of Ownership. All minority, women, or small business owners seeking certification or recertification under these rules shall certify to the Director that he/she/they own the requisite percentage of the business at the time the application is submitted. Upon request of the Director, the business owner(s) must submit documented proof of ownership. Such proof may include, but is not limited to stock certificates, a notarized affidavit of stock ownership from the corporate treasurer, a partnership agreement, articles of organization, articles of incorporation, operating agreements, canceled check used to purchase ownership, or other recognized proof of ownership. The Director shall have sole discretion in determining whether an applicant has the requisite percentage ownership. The Director may verify the business ownership at any time.

4.2. Trust Ownership. In determining whether the fifty-one percent ownership requirement is met, ownership held in trust shall not be counted.

§148-22-5. Verification of Control

5.1. Control. To be certified under these rules, the minority, woman, or small business owners must certify to the Director that they possess and exercise managerial and operational control over the day-to-day affairs of the business. Upon request of the Director, the business owners must submit documented proof of control. The Director shall have sole discretion in determining whether an applicant has the requisite managerial and operational control over the business. The Director may verify the managerial and operational control at any time.

5.1.1. Managerial Control. The minority, woman, or small business owners have managerial control if they have the ability to make independent and unilateral business decisions needed to guide the future and direction of the firm.

5.1.2. Operational Control. The minority, woman, or small business owners have operational control if they have the ability to independently and unilaterally make basic decisions pertaining to the daily operations of the business.

5.2. Intertwinement. To be eligible for certification, a business must certify that it is not intertwined with a noncertified business. Intertwinement with a noncertified business may be grounds for denial or revocation of certification of a business. The Director may determine whether a business is intertwined with a noncertified business by considering various factors which include, but are not limited to: shared ownership; common leadership (Board of Directors, Managers, other key personnel); shared equipment, facilities, resources, or employees; overdependence on a noncertified business to obtain and perform work; and the degree to which financial, equipment, leasing, business and other relationships with noncertified businesses vary from normal industry practice.

§148-22-6. Application and Certification Process.

6.1. Certification Eligibility. Any business which meets the definition of a minority-owned business, a women-owned business, or a small business as set forth in these rules, is eligible to be certified as such by the state of West Virginia, unless:

6.1.1. the business fails to obtain all licenses, certifications, and authorizations necessary to lawfully conduct business in the state of West Virginia,

6.1.2. the business is not a resident business of West Virginia and the state in which the business has its headquarters or principal

place of business denies a like certification to a West Virginia based small, women-owned or minority-owned business, or

6.1.3. the business is not a resident business of West Virginia and the state in which the business has its headquarters or principal place of business provides a preference to small, women-owned, or minority-owned firms that is unavailable to West Virginia based businesses.

6.2. Application. Applications to be certified as a small, women-owned, or minority-owned business must be obtained from and be submitted to the West Virginia Purchasing Division. The application form may be modified by the Purchasing Division at any time. The minority, woman, or small business owner shall be responsible for ensuring that the form is complete and accurate and is properly delivered to the Director. The applicant should keep a copy of the completed form and all documents submitted with the form for its own reference. More information regarding the application process can be obtained by contacting the Purchasing Division by mail at P.O. Box 50130, Charleston, WV 25305 or visiting the Purchasing Division online at <http://www.state.wv.us/admin/purchase/default.html>.

6.3. Additional Information. As part of the determination, the Director may require minority, women, and small business owners to provide information in addition to that requested on the application forms. Failure to provide the additional information requested by the Director, or to notify the Director that such information is not available within the time specified by the Director may result in denial of certification.

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

6.5. Application Processing. The Director will process all applications as promptly as resources permit. The Director does not guarantee that any application will be processed within any certain time period and the inability to process an application by a certain time shall not subject the Director or the State of West Virginia to liability.

6.6. Duty to Cooperate. The owners shall have the duty to cooperate fully in the Director's investigation of the application, including promptly submitting any additional information requested by the Director. This duty shall continue after the business is certified. In addition to any other penalties provided by law, the submission of false or misleading information to the Director in connection with an application for certification or renewal of certification shall be

grounds for permanent or temporary denial of certification or permanent or temporary decertification. A business may seek to end a permanent denial of certification or permanent decertification by presenting a written request to the Director containing evidence sufficient to convince the Director, at his sole discretion, that the business's circumstances have changed and permanent denial of certification or permanent decertification is no longer warranted.

6.7. Decision. The Director shall notify the applicant business of the decision to grant or deny certification within fifteen working days after the decision has been made. Where the Director has denied the application, the decision shall set forth the bases for denial. Where the Director has denied certification because the business did not meet one or more of the eligibility criteria, this shall not preclude the Director from later denying the application on additional bases after further review.

§148-22-7. List of Certified Businesses; Agency Reporting.

7.1. Creation and Maintenance of Certification List. A list of all certified businesses shall be maintained by the Director.

7.1.1. The list shall include the name of the business, the certification obtained (small, woman-owned, or minority-owned), and any other information that the Director deems appropriate.

7.1.2. The list shall be updated as often as the Director deems appropriate.

7.2. Reporting. State agencies shall report, in a manner prescribed by the Director, procurement transactions in the preceding fiscal year relating to businesses certified hereunder.

§148-22-8. Expiration of Certification.

8.1. Expiration Due to Passage of Time. Any certification granted under these rules shall automatically expire without notice two years after the initial certification date, unless renewed prior to that time in accordance with these rules.

8.2. Expiration Upon Change in Ownership. Any change in ownership that would result in the business' failure to meet the eligibility criteria for certification under these rules shall result in immediate expiration of the certification without notice.

Upon a change of ownership, a person authorized to act on behalf of the business shall notify the Director in writing of the ownership

change and its impact on the certification obtained under these rules.

8.3. Expiration Upon Death or Disability of Owner. Upon the death or long term disability of an owner of a minority-owned business, a women-owned business, or a small business, the certification obtained hereunder shall automatically expire without notice. Any remaining owners may resubmit an application for certification at the time the remaining owners deem such action appropriate.

Upon death or commencement of long-term disability of the minority, woman, or small business owner of a certified business, the guardian of the disabled owner, the executor of the owner's estate, or other person authorized to act on behalf of the business shall notify the Director in writing of the death or documented disability.

For purposes of this section, "long-term disability" shall mean the permanent inability to exercise managerial control or operational control of the business for a period of 90 days or more.

8.4. Expiration Due to Other Change. Any certification granted under these rules shall expire immediately without notice upon the occurrence of any change in the status of the business or the owner that would cause the business to be ineligible for certification.

§148-22-9. Certification Applied to Vendor Preference.

9.1. Vendor Preference. In accordance with West Virginia Code §5A-3-37(a)(7), any non-resident vendor certified as a small, women-owned, or minority-owned business under these rules shall be provided the same preference made available to any resident vendor.

9.1.1. A non-resident business certified under these rules will receive the highest preference made available to a resident vendor in the solicitation for which the certified business has submitted a bid. In the event that no preference is made available to a resident vendor, then the non-resident business certified under these rules will not receive a preference for certification.

9.1.2. Any non-resident small, women-owned, or minority-owned business must identify itself as such in writing, must submit that writing to the Purchasing Division with its bid, and must be properly certified under these rules to receive the preferences made available to resident vendors.

9.2. The vendor preferences found in West Virginia Code §5A-3-37 shall not be applied between or among West Virginia resident vendors

and non resident businesses certified as small, women-owned, or minority-owned businesses under these rules.

§148-22-10. Procedures for Renewal of Certification.

10.1. To maintain its certification without lapse, a certified business shall apply to renew its certification at least 60 days prior to the end of its two year certification period. A business may submit a renewal application later than 60 days prior to the end of the two-year certification period, but such submissions may not be processed in time to avoid a certification lapse. Recertification forms may be obtained from the West Virginia Purchasing Division and should be submitted in the same manner that an application for certification is submitted. Meeting the deadline for certification renewal is the responsibility of the business applying. Renewal of certification requests shall be governed by the same procedure and requirements that govern original certification.

§148-22-11. Evaluation of Local, State, Private Sector and Federal Certification Programs; Procedures for Certification of Business Previously Certified by Other Qualifying Programs.

11.1. Evaluation of Local, State, Private Sector, and Federal Programs. The Purchasing 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-owned and minority-owned businesses as set forth in the Code and these rules.

11.2. Granting Certification on Basis of Evaluated Program. Should the Purchasing 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 rules, that business shall be certified as a small, women-owned or minority-owned business in West Virginia, upon presentation to the Purchasing Division of documentation that it has received such certification and that the certification has not expired.

§148-22-12. Denial of Certification.

12.1. Grounds for Denial. The Director may deny an application for certification for any of the following reasons:

12.1.1. The Purchasing Division determines that the applicant fails to meet the standards for certification;

12.1.2. The applicant fails to furnish the Purchasing Division with requested information within the allotted time;

12.1.3. The applicant knowingly provides false or misleading information to the Purchasing Division;

12.1.4. The applicant has been debarred from participating in any government procurement process; or

12.1.5. The applicant has been suspended from participating in any government procurement process.

12.2. Notice of Denial. The Director 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 Director.

§148-22-13. Revocation.

13.1. Grounds for Revocation. Certification under these rules may be revoked if:

13.1.1. the Director finds that any of the grounds for denial of certification exist,

13.1.2. the Director determines that the certified business is no longer a going concern, or

13.1.3. the certified business has expressed, in writing, a desire to end its certification under these rules.

13.2. Notice of Revocation. The Director shall notify the business of the revocation of its certification no later than fifteen working days from the date of the decision made by the Director.

§148-22-14. Reapplication.

14.1. A business whose application for certification has been denied or revoked may not reapply for certification under these rules until 12 months after the date on which the decision of denial or revocation is made. A business that withdraws its certification application may reapply for certification one additional time within 12 months of filing the initial application without being subject to the 12 month reapplication waiting period. If the business withdraws its certification application a second time, or is denied

certification, that business must wait 12 months from the date of withdraw or denial before it can resubmit an application for certification under these rules.

§148-22-15. Jeopardizing Federal Funds.

15.1. If any of the requirements or provisions set forth in these rules jeopardize the receipt of federal funds, then the requirements or provisions are void and of no force and effect for that specific project.