

Clearinghouse Rule 06-113

ORDER OF THE DEPARTMENT OF COMMERCE

CREATING RULES

The Wisconsin Department of Commerce proposes an order to create chapter Comm 104 relating to implementing a woman-owned business certification program, and affecting small business.

Rule Summary

1. Statutes Interpreted

Sections 560.035 (1) and 227.51

2. Statutory Authority

Section 560.035 (1) (c)

3. Explanation of Agency Authority

Section 560.035 (1) (c) of the Statutes, as created by 2005 Wisconsin Act 358, requires the Department to promulgate rules for implementing a woman-owned business certification program under section 560.035 (1) of the Statutes.

4. Related Statute or Rule

Chapter Comm 105 contains the requirements for the Department's Minority Business Certification Program. Although that program does not recognize women as minorities, many of the best practices which the Department has developed in that program are extrapolative to a program for certifying woman-owned businesses.

5. Plain Language Analysis

The proposed rules primarily specify (1) which businesses are eligible for becoming certified in this program; (2) how to apply for certification and recertification; (3) how the certifications will be issued, renewed, and rescinded; and (4) how to appeal a decision by the Department. Parameters are also included for recognizing equivalent certifications that are issued by other public agencies.

6. Summary of, and Comparison With, Existing or Proposed Federal Regulations

Title 49 of the *Code of Federal Regulations*, Part 26, Subpart D, addresses certification standards for disadvantaged business enterprises that participate in federal Department of Transportation (DOT) financial assistance programs. Those enterprises include businesses that are substantially owned by women having a personal net worth which does not exceed \$750,000. Subpart E addresses the certification procedures, which include determination and issuance of the credential by corresponding State-level or multi-State Unified Certification Programs. The certification criteria in Subparts D and E are similar to the rules proposed in chapter Comm 104, in addressing the application process; documentation of majority ownership and control; acceptance of certifications by the U.S. Small Business Administration; issuance or denial of the credential; appeals; notification duty if application information changes materially; recertification; and ineligibility of not-for-profit organizations.

Title 13 of the *Code of Federal Regulations*, Part 124, Subpart B, addresses the U.S. Small Business Administration's certification of small, disadvantaged businesses, for participation in federal procurements aimed at overcoming the effects of discrimination. Some woman-owned businesses in Wisconsin are expected to be eligible for this certification. The certification criteria in Subpart B are similar to the rules proposed in Comm 104, in addressing the application process; documentation of ownership and control; issuance or denial of the credential; reconsideration; certification by other certifying entities, including the federal DOT; decertification; appeals; and recertification.

Wisconsin's statutory parameters for certifying woman-owned businesses, and the rules proposed in Comm 104, do not specify a maximum business size or maximum net worth, beyond which women owners are ineligible for certification. The rules proposed in Comm 104 also differ from the federal criteria by not accepting certifications from private-sector entities.

7. Comparison With Rules in Adjacent States

An Internet-based search of State-level rules in Minnesota, Iowa, Illinois, and Michigan revealed the following information relating to certification of woman- or female-owned businesses.

Minnesota

Minnesota offers a targeted-group procurement program to help remedy the effects of past discrimination against members of targeted groups. To be considered under the program, a business must be designated as a targeted business by the Minnesota Commissioner of Administration. As directed by section 16C.19 of the Minnesota Statutes, the criteria for these designations are promulgated as rules and are included in Minnesota Rules, Chapter 1230. This chapter addresses certification of small, targeted-group businesses that are at least 51 percent owned and operationally controlled on a day-to-day basis by either women or other socially disadvantaged persons. This chapter is also similar to the rules proposed in Comm 104 in addressing the application process; documentation of majority ownership and control; issuance or denial of the credential; and use of a statutory, contested-case hearing process for appeals.

Iowa

Chapter 54 of the rules of the Iowa Department of Economic Development establishes a targeted, small business procurement program for promoting the growth, development, and diversification

of Iowa businesses that are owned by minorities or women. Chapter 55 of the rules of that Department establishes a targeted, small business financial assistance program to assist women, minorities, persons with disabilities, and low-income individuals in establishing or expanding small business ventures in Iowa. Prior to participation in either of these two programs, a business must be certified as a targeted small business, in accordance with Chapter 25 of the rules of the Iowa Department of Inspections and Appeals. Under the definitions in that Chapter, a targeted small business (1) is 51 percent or more owned, operated, and actively managed by minorities, women, or persons with disabilities; (2) has an annual gross income of less than \$3 million; and (3) is operated for profit. The certification rules in the Chapter are similar to the rules proposed in Comm 104, in addressing the application process; documentation of majority ownership and control; issuance or denial of the credential; consideration of certification by another agency; decertification; recertification; and use of a statutory, contested-case hearing process for appeals. The rules proposed in Comm 104 differ by not limiting annual sales to \$3 million.

Illinois

Title 44, Part 10 of the Illinois Administrative Code implements the Business Enterprise for Minorities, Females, and Persons with Disabilities Act [30 ILCS 575]. This Act establishes a goal that at least 12 percent of contracts awarded by State agencies subject to the Act be awarded to businesses which are owned and controlled by minorities, females, or persons with disabilities. Of that 12 percent, 5 percent must be female-owned businesses; and these businesses cannot have annual gross sales of \$27 million or more, including sales from any affiliates. The Act also authorizes development and use of a procedure to certify firms eligible for the benefits of the Act; allows for certain special treatment in contracting with certified businesses; and establishes a Council, Secretary, and, in the Department of Central Management Services, a program function to implement and oversee the Act. Section 10.30 of Part 10, Title 44, addresses the roles of the State agencies and the Council in achieving compliance with the contract-awarding goals. Under Section 10.50, only certified businesses are eligible for the benefits of the Business Enterprise program, and State agencies can count only those expenditures with a certified vendor, or subcontractor, toward meeting the contract-awarding goals. The certification rules in Sections 10.50 to 10.72 are similar to the rules proposed in Comm 104, in addressing the application process; documentation of majority ownership and control; issuance or denial of the credential; consideration of certification by another entity; reconsideration; decertification; appeals; and recertification. The rules proposed in Comm 104 differ by not limiting annual sales to \$27 million, and by not accepting certifications from private-sector entities.

Several other rules in other portions of the Illinois Administrative Code require or encourage targeting of various opportunities to women-owned businesses, but do not link this targeting to certification.

Michigan

No information was found relating to certification of women- or female-owned businesses.

8. Summary of Factual Data and Analytical Methodologies

The data and methodology for developing these proposed rules were derived from and consisted of incorporating the criteria in section 560.035 (1) of the Statutes; incorporating many

of the best practices the Department has developed in its current, similar program for certifying minority-owned businesses; soliciting and utilizing input from representatives of the stakeholders who are expected to participate in this program; and reviewing Internet-based sources of related federal, state, and private-sector information.

9. Analysis and Supporting Documents Used to Determine Effect on Small Business or in Preparation of an Economic Impact Report

The primary document that was used to determine the effect of the proposed rules on small business was 2005 Wisconsin Act 358. This Act requires the Department to implement a program for certifying woman-owned businesses, and requires the Department to promulgate rules for administering the program. However, this Act does not require these businesses to become certified, and does not create preferences in governmental procurement for these businesses. Consequently, the proposed rules do not require this certification, and do not create procurement preferences.

10. Effect on Small Business

The proposed rules are not expected to impose a negative effect on small business, because the rules only address applying for, receiving, and maintaining voluntary credentials. This rule does have the potential to enable woman-owned businesses to benefit from additional business opportunities. In recognizing this positive impact, the Department took steps to reduce possible barriers for woman-owned, small businesses as defined in section 227.114 (1) of the Statutes, by requesting external participation in the draft rule development. The Department organized and solicited the comments from organizations that represent the interests of woman-owned small businesses, and from those who represented supplier-diversification programs. The rule advisory group included the following members and organizations:

Kathy Doyle – Advocap
Renee Walz – Western Dairyland Community Action
Jennifer Ring Mellberg – Wisconsin Women’s Business Initiative Corporation
Bill Smith – National Federation of Independent Businesses
Mary Stoltz – Madison Chapter of National Association of Women Business Owners
Beth Nemecek – AmeriPrint Graphics, Inc
Laurie Benson – Inacom, Inc.
Lisa Kleiner – Wood, McNally, Maloney & Peterson, S.C.
Jerry Fulmer – WE Energies
Mary Trimmier – U.S. Small Business Administration
Mildred Hyde Demoze – Milwaukee County Office of Community Business
Development Partners

The rule-advisory group had the opportunity to review the rule drafts and provide input through two meetings held at the Department, on July 27 and August 16, 2006.

Small businesses’ access to information about the woman-owned business enterprise (WBE) certification program will determine the level of participation by the woman-owned businesses that meet the small business definition contained in section 227.114 (1) of the Statutes. The Department plans to issue a statewide press release announcing the availability of the WBE certification, so that small businesses which are not members of associations or business-related organizations will be aware of the new WBE certification program. The

Department also plans to promote the availability of the woman-owned business certification through the Department's network of entrepreneurial business-assistance partners, numerous business affiliations and industries, and Department-sponsored events that cater to small business. A user-friendly WBE fact sheet is expected to be available through a Department WBE certification Web site, and training sessions may be offered, to assist small businesses in understanding the requirements and the application process.

11. Agency Contact Information

Ruby Brooks, Wisconsin Department of Commerce, Bureau of Minority Business Development, P.O. Box 7970, Madison, WI, 53707-7970; telephone (608) 266-8380; e-mail rbrooks@commerce.state.wi.us.

File Reference: Comm 104/rules analysis LR
