

Chapter Comm 105

MINORITY BUSINESS CERTIFICATION PROGRAM

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Note: Chapter DOD 5 as it existed on September 30, 1987 was repealed and a new chapter DOD 5 was created effective October 1, 1987. Chapter DOD 5 was renumbered chapter Comm 105 under s. 13.93 (2m) (b) 1., Stats., and corrections made under s. 13.93 (2m) (b) 6. and 7., Stats., Register, June, 1997, No. 498.

Comm 105.01 Purpose. The purpose of this chapter is to set forth the criteria and procedures the department shall use to certify minority businesses pursuant to s. 560.036, Stats.

History: Cr. Register, September, 1987, No. 381, eff. 10-1-87.

Comm 105.02 Definitions. As used in this chapter, the following words shall have the following meanings:

(1) "Administrator" means the administrator of the division of economic development in the department of development.

(2) "Applicant" means any business that applies to the department for certification as a minority business enterprise under s. 560.036, Stats.

(3) "Application" means the forms, all requested documentation, and the report of the on-site visit, if one was conducted by the department, upon which the department will base its decision to grant or deny certification or certification renewal.

(4) "Agency" means any executive office, agency, department, board or commission of Wisconsin, another state, the federal government or local government.

(5) "Affiliate" means a company that directly or indirectly, through one or more intermediaries, is effectively controlled by another company.

(6) "Assets" means real and personal property of the business.

(7) "Authorized shares" means the shares which a corporation is authorized to issue by its articles of incorporation.

(8) "Bank signature card" means a card, issued by a financial institution, which bears the signature of the account holder and which documents the control of the business account within the financial institution.

(9) "Beneficial ownership" means ownership of the rights in a business which are the normal incidents of owning a business; such as, the right to share in the profits and losses of the business.

(10) "Bureau" means the bureau of minority business in the department.

(11) "Business" means a sole proprietorship, partnership, corporation or joint venture organized on a for profit basis.

(12) "Buyout agreement" means an agreement between or among part-owners of a business that, under stated conditions, the person withdrawing is legally obligated to sell his or her interest to the remaining part-owners.

(13) "Capital contribution" means the cash or property contributed to a business and may include a financial investment in

the business and the contribution of property, space, patents and copyrights.

(14) "Certification" means the process by which a business is determined to be a minority business for the purpose of participating in the state's minority business procurement program under s. 16.75 (3m), Stats. or other statutory minority business procurement program.

(15) "Certification renewal" means the review of a minority business enterprise to determine whether or not its certification will be renewed.

(16) "Conversion rights" means any agreement, option, scheme or documents that will create any rights which, if exercised, would result in less than 51% minority ownership of the business or less than dominant control by minority owners or both.

(17) "Corporation" means a corporation organized for profit with capital stock.

(18) "Decertification" means the process by which a minority business enterprise loses its certification.

(19) "Department" means the department of commerce.

(20) "Firm which is in a substantially similar line of business" means a company which produces a product or performs a service which has the potential to be in direct competition with the product or service of the minority business.

(21) "General partner" means a partner who participates fully in the profits, losses and management of the partnership and who is personally liable for its debts.

(22) "Interest" means a right, claim, financial or legal share in the business.

(23) "Issued shares" means the shares of a corporation which have been authorized and actually sold to subscribers. They may include treasury shares.

(24) "Joint venture" means a one-time association of 2 or more persons or businesses, the purpose of which is to carry out a time-limited single business enterprise for profit in which they combine their property, capital, efforts, skills and knowledge, and in which they exercise control and management and share in profits and losses in proportion to their contribution to the business enterprise.

(25) "Joint venture agreement" means a written agreement signed by each joint venturer specifying the terms and conditions of the joint venture.

(26) "Marital property agreement" means an agreement that complies with s. 766.58, Stats.

(27) "Marital property laws" means ch. 766, Stats.

(28) "Marital property waiver" means a form provided by the department to document separate control and management of a business under marital property laws.

(29) "Minority" means a person who is a citizen or lawfully admitted permanent resident of the United States and who is a member of one of the following groups:

(a) "American Indian" – a person who is enrolled as a member of a federally recognized American Indian tribe or band or who possesses documentation of at least one-fourth American Indian ancestry or documentation of tribal recognition as an American Indian.

(b) "Asian-Indian" – a person with ancestry originating in India, Pakistan or Bangladesh.

(c) "Asian-Pacific origin" – a person with ancestry originating in Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, the Philippines, Samoa, Guam, the U.S. Trust Territories of the Pacific or the Northern Marianas.

(d) "Black" – a person with ancestry originating in any of the black racial groups of Africa.

(e) "Eskimo" or "Aleut" – a person with ancestry in any of the original peoples of Alaska, Northern Canada, Greenland and Eastern Siberia.

(f) "Hispanic" – a person with ancestry originating in Mexico, Puerto Rico, Cuba, Central America or South America or whose culture or origin is Spanish.

(g) "Native Hawaiian" – a person with ancestry in the original peoples of Hawaii.

(30) "Minority business" means a business as defined in s. 560.036 (1) (e), Stats.

(31) "Minority business directory" means the listing, published by the department, of minority business enterprises certified to operate in Wisconsin.

(32) "Minority business enterprise" or "MBE" means a business that has been certified under s. Comm 105.14, 105.21, or 105.23.

(33) "Minority business procurement program" means a program which establishes goals, set-asides, or preferences in the purchase, lease or rental of goods and services from, or in the letting of contracts to, minority business enterprises.

(34) "Non-profit organization" means an organization as defined in s. 108.02 (19), Stats.

(35) "Non-Wisconsin business" means a business which is not incorporated under ch. 180, Stats. or which does not have its principal place of business in Wisconsin.

(36) "On-site visit" means a visit to the site of business of an applicant or minority business enterprise.

(37) "Outstanding shares" means the shares of a corporation which have been issued and are in the hands of shareholders. They do not include treasury shares.

(38) "Parent company" means a company which has at least a majority direct voting control over another company.

(39) "Partnership" means an association of 2 or more persons to carry on, as co-owners, a business for profit.

(40) "Partnership agreement" means a written agreement signed by each partner specifying the terms and conditions of the partnership.

(41) "Partnership interest" means a partner's share of the profits and losses of the partnership and the right to receive distributions of partnership assets.

(42) "Principal place of business" means the physical location at which or from which a business performs, is maintained, or operates the majority of its business.

(43) "Secretary" means the secretary of the department.

(44) "Securities" means stocks, bonds, notes, convertible debentures, warrants or other documents that represent a share in a business or a debt owed by a business.

(45) "Shares" means the units into which the proprietary interests in a corporation are divided.

(46) "Shareholder agreement" means any agreement among shareholders which spells out the rights or future interest in the corporation among the shareholders.

(47) "Sole proprietorship" means a business in which one person owns all the assets of the business and is solely liable for all the debts of the business.

(48) "Stock affirmation form" means a form provided by the department and affirmed by the business stating that the stock ownership of the corporation is as presented in the application and in which the applicant agrees to notify the department in the event that additional stock is sold.

(49) "Stock certificate" means a certificate issued by a corporation certifying that the named person is the owner of a designated number of shares of stock.

(50) "Subsidiary" means a corporation in which one other corporation owns a majority of the voting shares.

(51) "Treasury shares" means the shares which have been issued but later re-acquired by a corporation and which have not been canceled or restored to the status of authorized but unissued shares.

(52) "Unissued shares" means shares which the corporation is authorized to issue but which have not yet been distributed to shareholders or subscribers.

(53) "Useful business function" has the meaning defined in s. 560.036 (1) (h), Stats.

(54) "Voting agreement" means an agreement among shareholders regarding the voting of their shares.

(55) "Voting shares" means those shares which give the holder the right to vote for directors and other matters, in contrast to non-voting shares which simply entitle the holder to dividends, if any.

(56) "Voting trust" means a written agreement among any number of shareholders to confer upon one or more persons, as trustees(s), the right to vote or otherwise represent their shares under specified terms and conditions.

(57) "Wisconsin business" means a business which is incorporated under ch. 180, Stats., or which has its principal place of business in Wisconsin.

History: Cr. Register, September, 1987, No. 381, eff. 10-1-87.

Comm 105.03 Certification criteria. In order to be certified as a minority business enterprise, a business shall meet the following eligibility standards:

(1) Be at least 51% owned, controlled and actively managed by one or more minority group members.

(a) In a sole proprietorship, the sole proprietor shall be a minority.

(b) In a partnership, the minority owner or owners shall act as general partner, own at least 51% of the partnership interest, and exert at least 51% of the control and management of the partnership.

(c) In a corporate form of organization, the minority owner or owners shall own at least 51% of all outstanding stock, including voting stock, of the corporation. Any voting agreements, voting trusts, loan agreements, or shareholder agreements among the shareholders shall not dilute the beneficial ownership, the rights or the influence of the minority owners of the stock or classes of stock of the corporation.

(d) In a joint venture, the minority owned business shall hold at least 51% of the beneficial ownership interest in the joint ven-

ture, and shall exert at least 51% of the control and management of the joint venture. The minority owned business partner of the joint venture shall be certified or be eligible for certification as a minority business enterprise.

(e) In a subsidiary or affiliate, the parent company shall be at least 51% owned by a minority owner or owners.

(2) Be performing a useful business function.

History: Cr. Register, September, 1987, No. 381, eff. 10-1-87.

Comm 105.04 Determination of minority status. The department shall require an individual to provide evidence of ethnic or racial heritage in one or more of the minority groups defined in s. Comm 105.02 (29).

(1) When available, such evidence shall include one or more of the following:

(a) Birth certificates, American Indian tribal registrations, naturalization certificates and permanent residence certificates.

(b) Birth certificate or official record of blood parent or grandparent claimed in substantiation of the minority status of the individual.

(2) When evidence under sub. (1) is not available, the department may accept the following:

(a) Evidence that the individual is commonly recognized as a minority group member. This may include, but is not limited to, a combination of the following: driver's license, draft registration or other official records which document ethnic or racial heritage; whether the individual's birth surname is commonly recognized as a minority surname; and notarized third party statements.

(b) An individual who is visibly identifiable as a minority group member may not be required to provide documentation of his or her ethnic or racial heritage but shall be required to submit an unaltered photograph.

History: Cr. Register, September, 1987, No. 381, eff. 10-1-87.

Comm 105.05 Determination of ownership. An applicant shall meet the following standards in order to satisfy the ownership requirement:

(1) Minority persons must legitimately hold at least 51% of the beneficial ownership interests in the business.

(2) The minority ownership's interest in the firm shall be real, substantial and continuing. Such interest shall include:

(a) A risk of loss and share of profit commensurate with the proportional ownership; and,

(b) Receipt of the customary incidents of ownership, such as salary, rights to dividends, ownership of assets and ownership of intangible assets such as copyrights and patents.

(3) The contributions of capital and expertise by the minority owner or owners to acquire his or her interest in the firm shall be real and substantial. Contributions of personal or professional services alone shall not be considered real and substantial for the purposes of this section, although they shall receive consideration when given in conjunction with other tangible forms of investment.

(4) All securities and ownership interests which constitute ownership or control of the firm for the purposes of establishing it as a minority business enterprise shall be held directly by the minority owner or owners. No securities or ownership interest held in trust, or by any guardian for a minor, shall be considered as being held by the minority owner or owners in determining ownership and control of the business. The right to purchase stock in the business in the future shall not be considered as being held by the minority owner or owners in determining ownership and control of the business.

(5) An ownership interest arising in a nonapplicant nonminority spouse solely because of the operation of marital property laws shall not disqualify the applicant minority spouse from certifica-

tion if both spouses certify that only the minority spouse participates in the control and management of the business.

History: Cr. Register, September, 1987, No. 381, eff. 10-1-87.

Comm 105.06 Documentation of ownership. The department shall require documentation of the ownership of at least 51% of the business by a minority owner or owners:

(1) Documentation may include, but is not limited to, the following: current business income tax return, current business financial statement, business licenses, buy-out agreements and financial agreements.

(a) In the case of a sole proprietorship, additional documentation may include, but is not limited to, canceled checks used to purchase ownership.

(b) In the case of a partnership, additional documentation may include, but is not limited to, partnership agreements, purchase agreements, salary and profit sharing records.

(c) In the case of a corporation, additional documentation may include, but is not limited to, articles of incorporation, corporate by-laws, corporate borrowing resolution, stock certificates, stock affirmation forms, salary and profit sharing records.

Note: A stock affirmation form may be obtained, at no charge, from: The Bureau of Minority Business Development, Department of Commerce, P.O. Box 7970, Madison, WI 53707.

(d) In the case of a joint venture, additional documentation may include, but is not limited to, a joint venture agreement which is written and signed by all of the joint venturers. Each joint venture agreement shall specify:

1. The capital contribution made by each joint venturer; the control each will exercise; and the distribution of profit and loss. Each of these elements must be allocated in proportion to their contribution; and

2. The useful business function the joint venture will perform and the part of the work each joint venturer will do.

(2) The department may require documentation showing how and when the minority owner's or owners' interest in the business was acquired.

(3) In those instances when an ownership interest arises in a nonapplicant nonminority spouse because of the operation of marital property laws, the department may request a signed marital property waiver form in which both spouses certify that only the minority spouse controls and manages the business or an affidavit stating that a marital property agreement has been signed in which the nonminority spouse relinquishes control and management of the business.

Note: A marital property waiver form may be obtained, at no charge, from: The Bureau of Minority Business Development, Department of Commerce, P.O. Box 7970, Madison, WI 53707.

History: Cr. Register, September, 1987, No. 381, eff. 10-1-87.

Comm 105.07 Determination of control. (1) Factors which shall be considered in determining whether the applicant meets the control requirement include, but are not limited to, the following:

(a) Authority and restrictions as indicated in the articles of incorporation, by-laws, minutes of corporate meetings, bank signature cards, partnership and joint venture agreements and other business agreements and documents.

(b) Membership of minority persons on the board of directors.

(c) Holdings by minority persons of the voting interests in the firm.

(d) The managerial experience, knowledge and expertise of the minority owner or owners in such areas as finance, budgeting, personnel, production, marketing and research.

(e) Whether the minority owner or owners have the authority to make policy decisions in such areas as finance, budgeting, personnel, production, marketing and research.

(f) The existence of working agreements with nonminority firms.

(g) The existence of restrictive financing agreements with nonminority firms or financial institutions which impose undue limitations on the minority firm.

(2) Absentee ownership or titular ownership by an individual who does not take an active role in controlling the business is not consistent with the eligibility criteria for certification as a minority business enterprise.

History: Cr. Register, September, 1987, No. 381, eff. 10-1-87.

Comm 105.08 Documentation of control. The department shall require evidence that the minority owner or owners have at least 51% control over the business. Such evidence may include, but is not limited to, the following:

(1) Documentation that the minority owner or owners have the authority to:

- (a) Solicit, negotiate and sign bids and contracts.
- (b) Incur liabilities for the firm.
- (c) Make final staffing decisions.
- (d) Control savings, checking and other financial accounts.

(2) Documentation, such as a resume, that the minority owner or owners have managerial experience, knowledge and expertise in such areas as finance, budgeting, personnel, production, marketing and research.

(3) Documentation that the minority owner's or owners' authority to control the business is not restricted in any way.

History: Cr. Register, September, 1987, No. 381, eff. 10-1-87.

Comm 105.09 Determination of active management. (1) Factors which shall be considered in determining whether the applicant meets the active management requirement include, but are not limited to, the following:

(a) Whether the minority owner or owners are responsible for making business decisions affecting the day-to-day operations of the firm, such as the purchase of goods, equipment, business inventory and services.

(b) Whether the minority owner or owners have the responsibility for the supervision of the firm's employees.

(c) Whether the minority owner or owners have a working knowledge of the technical requirements of the business.

(2) Where the actual day-to-day management is delegated to a nonminority individual, the minority management requirement may be met if the minority owner or owners have the ultimate power to hire and fire the manager.

History: Cr. Register, September, 1987, No. 381, eff. 10-1-87.

Comm 105.10 Documentation of active management. (1) The department shall require evidence that the minority owner or owners actively manage the business. Such evidence may include, but is not limited to, the following:

(a) Signed purchase orders, invoices and contracts.

(b) Evidence that the minority owner or owners have delegated work assignments to the firm's employees.

(c) Documentation, such as a resume, that the minority owner or owners have the education or work experience in the skill areas required to produce the product or service provided by the business.

(2) Where the actual day-to-day management is delegated to a nonminority individual, documentation, such as a signed contract, that the minority owner or owners have the ultimate power to hire and fire the manager.

History: Cr. Register, September, 1987, No. 381, eff. 10-1-87.

Comm 105.11 Determination of performance of a useful business function. Factors which shall be considered

in determining whether the applicant is performing a useful business function include, but are not limited to, the following:

(1) The degree to which the business has customers other than the state.

(2) The adequacy of the business' resources to carry out its business functions.

(3) The degree to which the business is independent of control or substantial influence by another business. Business relationships which tend to defeat the useful business function include, but are not limited to, shared space, equipment, employees or other resources and financing agreements.

(4) Whether the business acts as a conduit to transfer funds to a nonminority business, unless doing so is a normal industry practice.

Note: Brokering arrangements are an example of the type of business activity which might be considered to be acting as a conduit. However, if such brokering arrangements are prevalent within the industry, such as in the oil distribution industry, the department would not consider the business to be acting as a conduit.

History: Cr. Register, September, 1987, No. 381, eff. 10-1-87.

Comm 105.12 Documentation of performance of a useful business function. The department shall require evidence that the business is performing a useful business function. Such evidence may include, but is not limited to, the following:

(1) Contracts, purchase orders, invoices and other documents demonstrating that the business has customers other than the state.

(2) Evidence that the quantity, type and condition of the business' equipment and inventory are adequate to carry out its business functions.

(3) Loan and other financing agreements, leases, employee contracts, payroll records and other documents demonstrating that the business relationships with a nonminority business do not preclude it from performing a useful business function.

(4) Contracts, purchase orders, invoices and other documents showing that the business has a diversity of suppliers and is not acting as a conduit for a single supplier.

History: Cr. Register, September, 1987, No. 381, eff. 10-1-87.

Comm 105.13 Special circumstances. Any one of the following circumstances creates a presumption that the minority business does not satisfy the eligibility standards for certification as a minority business enterprise. In such instances, the applicant has the burden of establishing to the department's satisfaction that the minority owner or owners meet the eligibility standards despite the existence of one or more of the following factors:

(1) Firms formed within one year prior to an application for certification.

(2) Firms whose ownership or control has changed within one year prior to an application for certification.

(3) Transfers of shares of stock from nonminorities to minorities that occur within one year prior to an application for certification.

(4) Firms with authorized but unissued shares which, if issued, could result in less than 51% minority ownership of the business or in less than dominant control by minority owners.

(5) Firms subject to conversion rights which, if exercised, would result in less than 51% minority ownership of the business or in less than dominant control by minority owners.

(6) Firms in which one or more of the minority owners is a former or current employe of a nonminority person or business firm which has an ownership interest in or a business relationship with the applicant firm, particularly if the nonminority person or firm is in a substantially similar line of business.

(7) Firms whose directors, management or both, are substantially the same as those of a nonminority firm which has an ownership interest in, an investment in, or a business relationship with

the applicant firm, particularly if the nonminority firm is in a substantially similar line of business.

(8) Firms which share indistinguishable facilities, such as office space, production, distribution or storage facilities, machinery and equipment or employes with a nonminority firm.

History: Cr. Register, September, 1987, No. 381, eff. 10-1-87.

Comm 105.14 Certification procedure for Wisconsin businesses. (1) **CERTIFICATION PROCEDURE.** (a) Any business that meets the standards for certification may file an official application with the department.

Note: Application forms are available from and should be submitted to: Bureau of Minority Business Development, Department of Commerce, P.O. Box 7970, Madison, WI 53707. Telephone: 608/267-9550.

(b) Upon receipt of the application, the department shall review the application for completeness and for compliance with the requirements of s. 560.036, Stats. and s. Comm 105.03.

(c) The department may request applicants to provide additional information or documentation to provide clarification and substantiation of or to resolve any ambiguities or inconsistencies in their application form.

(d) The department may impose a time limit of not less than 30 days in which the applicant must provide the requested information. A reasonable extension may be given by the department for good cause shown by the applicant. Requests for time extensions should be made to the bureau and should specify the length of time for which the extension is being requested and the reasons for the request.

(e) The department may conduct an on-site visit of the applicant's operations. The on-site visit may be scheduled or unannounced. The visit may include, but is not limited to, the following:

1. A discussion of business operations with the owners;
2. An examination of the applicant's physical plant, inventory, machinery and equipment, financial records, customer accounts, and legal records.
3. A review of the business organizational structure, management responsibilities and labor force characteristics.

(f) After reviewing and evaluating the entire application, the department shall issue either a notice of certification or a notice of intent to deny certification stating the reasons for denial and offering the applicant the opportunity for an informal hearing under s. Comm 105.18.

(g) Applicants shall have 30 days from the date of the department's notification of intent to deny certification to submit a written request for an informal hearing. If no request for an informal hearing is made, the determination to deny certification shall become final and a final notice of denial shall be sent to the applicant within 30 days. The notice shall state the reason for denial and notify the applicant of its appeal rights under ch. 227, Stats. and s. Comm 105.19.

(h) Each applicant denied certification may reapply for certification no earlier than 12 months from the date of the final notice of denial of certification.

(2) **DENIAL OF CERTIFICATION.** The department shall deny certification for any of the following reasons:

(a) The department determines that the applicant fails to meet the eligibility standards for certification.

(b) The applicant fails to furnish the department with requested information within the allotted time period.

(c) The applicant knowingly provides false or misleading information to the department.

(d) The applicant shares indistinguishable facilities, such as office space, production, distribution or storage facilities, machinery and equipment, or employes with a nonminority firm which is in a substantially similar line of business.

(3) **LENGTH OF CERTIFICATION.** Once certified, an applicant shall remain certified until the designated expiration date, unless certification is revoked as provided for under s. Comm 105.17.

History: Cr. Register, September, 1987, No. 381, eff. 10-1-87.

Comm 105.15 Procedure for certification renewal. (1) To maintain its minority business enterprise status, a business must renew its certification prior to the designated expiration date. Failure to do so shall result in decertification.

Note: The purpose of the certification renewal process is to review a business' circumstances, organization, ownership, control and management to ensure that it continues to satisfy the eligibility requirements for certification as a minority business enterprise.

(2) The department shall send the business a certification renewal application form at least 60 days prior to the expiration date of its certification.

(3) The completed renewal application form must be returned to the department within 30 days of receipt. A reasonable extension may be given by the department for good cause shown by the business. Requests for time extensions should be made to the bureau and should specify the length of time for which the extension is being requested and the reason for the request.

(4) The certification procedures described in s. Comm 105.14 shall be followed for processing renewal applications.

History: Cr. Register, September, 1987, No. 381, eff. 10-1-87.

Comm 105.16 Decertification criteria. (1) The department may decertify a business which it finds no longer qualifies as a minority business enterprise under s. Comm 105.03. Sufficient reasons for decertification include the following:

(a) The status of the minority business has changed to the extent that it no longer satisfies the requirement of ownership, control and active management of the business or the requirement of performance of a useful business function.

(b) The minority business fails to submit an application for certification renewal within the allotted time period.

(c) The minority business fails to comply with a reasonable request from the department for records or information within the allotted time period.

(d) The minority business knowingly provides false or misleading information in support of its renewal application or in response to the department's request for records or information.

(2) A decertified business may reapply for certification no earlier than 12 months from the date of the final notice of decertification. A new application and appropriate documentation shall be submitted to the department as if the business were requesting initial certification. The previous decertification shall be noted in the application.

History: Cr. Register, September, 1987, No. 381, eff. 10-1-87.

Comm 105.17 Decertification procedure. (1) **INITIATION OF DECERTIFICATION PROCESS.** (a) The department may, at the request of any state agency or at its own discretion, examine any certified minority business enterprise to verify that it qualifies for certification.

(b) Any individual or firm who believes that a business certified as a minority business enterprise does not qualify under the standards of eligibility for certification may request a decertification investigation by the department. Such requests must be written and signed and must contain specific identification of the affected business, and the basis for the belief that it does not meet the eligibility standards. After reviewing the request, the department shall decide either to conduct a review of the minority business enterprise or to allow the certification to stand. The department's decision may not be appealed by a third party.

Note: Written requests for decertification investigations should be sent to: Bureau of Minority Business Development, Department of Commerce, P.O. Box 7970, Madison, WI 53707.

(2) **INVESTIGATION PROCEDURE.** (a) The department may notify the business, in writing, that it is the subject of a decertifica-

tion investigation, explaining the basis for its belief that the business does not meet the eligibility standards for certification.

(b) The department may request records or other documentation from the business, may conduct an on-site visit of the business facilities and may question other parties in its investigation.

(c) The department may impose a time limit of not less than 15 days in which the business must respond to a request for records or other documentation. A reasonable extension may be given by the department for good cause shown by the business. Requests for time extensions should be made to the bureau and should specify the length of time for which the extension is being requested and the reason for the request. If the business fails to provide the information in the time requested, the department shall issue a notice of intent to decertify.

(d) Upon completion of the investigation, a written report shall be prepared which shall include:

1. A statement of the facts leading to the investigation,
2. Steps taken in the investigation,
3. Findings of the investigation, and
4. A conclusion which contains a recommendation for disposition of the matter.

(3) **NOTICE OF INTENT TO DECERTIFY.** (a) If the department determines that the business does not qualify as a minority business, it shall issue a notice of intent to decertify stating the reasons for decertification and offering the business the opportunity for an informal hearing under s. Comm 105.18.

(b) The business shall have 30 days from the date of the department's notification to submit a written request for an informal hearing.

(c) If no request for an informal hearing is made, the administrator shall issue a final notice of decertification, stating the factual and legal grounds therefore and notifying the business of its appeal rights under ch. 227, Stats. and s. Comm 105.19.

(d) The department shall send a copy of the notice of intent to decertify and a copy of the final notice of decertification to the affected business and to the departments of administration and transportation.

History: Cr. Register, September, 1987, No. 381, eff. 10-1-87; correction in (3) (d) made under s. 13.93 (2m) (b) 7., Stats., Register, November, 1994, No. 467.

Comm 105.18 Informal hearing procedure. (1) Any business which has received a notice of intent to deny certification, to deny renewal of certification or to decertify, may submit a written request for an informal hearing. The request shall be received by the department within 30 days of the mailing date of the notification. The request shall set forth the grounds on which the business believes the decision is in error including any additional information which the business has to offer. The written request for an informal hearing shall be submitted to: Administrator, Division of Economic Development, Department of Commerce, P.O. Box 7970, Madison, WI 53707. A copy of the request shall be filed simultaneously with the bureau.

(2) The department shall schedule an informal hearing within 30 days of receipt of the request. Written notice of the scheduled hearing date shall be sent to all interested parties at least 10 days prior to the hearing date and shall specify the date, time and location of the hearing. Interested parties shall include all persons who signed the application for certification or certification renewal.

(3) The hearing shall be conducted on an informal basis.

(4) Within 30 days of receiving the request for a hearing, the administrator shall notify the business in writing of his or her final decision.

(5) If the final decision is to grant certification, the department shall immediately certify the business. If the final decision is to deny certification or certification renewal, or to decertify, the business shall be notified of the final decision and the reasons

therefore. It shall also be notified of its appeal rights under ch. 227, Stats. and s. Comm 105.19.

(6) Once the department has made a final decision on certification, recertification or decertification, that determination goes into effect immediately. If a business that has been denied certification or recertification or has been decertified appeals the department's decision, the department's decision remains in effect until the decision is reversed as a result of the appeals process.

History: Cr. Register, September, 1987, No. 381, eff. 10-1-87.

Comm 105.19 Appeal procedure. (1) Any business which has been denied certification or certification renewal or which has been decertified may submit a written request for a formal hearing under ch. 227, Stats. The request shall be received by the department within 30 days of the mailing date of the administrator's notification. The request shall set forth the grounds on which the business believes the decision is in error including any additional information which the business has to offer. The written request for a formal hearing shall be submitted to: Office of the Secretary, Department of Commerce, P.O. Box 7970, Madison, WI 53707. A copy of the request shall be filed simultaneously with the bureau.

(2) The department shall schedule the formal hearing. Written notice of the scheduled hearing shall be sent to all interested parties at least 10 days prior to the hearing date, and shall specify the date, time and location of the hearing. Interested parties shall include all persons who signed the application for certification or certification renewal.

(3) The hearing shall be conducted pursuant to ch. 227, Stats. Both the business and the department shall have the right to present evidence, subpoena witnesses and records, and cross-examine witnesses. The firm and the department may be represented by counsel.

(4) At the conclusion of the hearing, the department shall issue a decision based on findings of fact and conclusions of law.

(5) The secretary may delegate the authority to make the final decision to the hearing examiner of another state agency. When this authority is delegated, the hearing examiner's decision shall be the final administrative decision of the department.

(6) The department shall notify the affected business and the departments of administration and transportation of the final decision regarding renewal of certification or decertification.

History: Cr. Register, September, 1987, No. 381, eff. 10-1-87.

Comm 105.20 Notification of changes in application information. (1) A business must notify the bureau in writing of any change in the information contained in an application for certification or certification renewal within 30 days of the change or before bidding on a state contract, whichever is earlier.

(2) The department shall, within 15 days, send the business a written notification of its determination that either:

(a) The change is not material and the certification of the business continues; or

(b) The change is material and warrants a review of the status of the business.

(3) If the change warrants a review of the business' status, the department shall conduct the review following the decertification procedures described in s. Comm 105.17.

(4) Failure by a business to notify the department of a change which would reduce minority ownership, control or management or change the business function performed may result in decertification and may result in the department forwarding pertinent information to the appropriate law enforcement authority for investigation and possible prosecution.

History: Cr. Register, September, 1987, No. 381, eff. 10-1-87.

Comm 105.21 Certification of a minority business by another public agency or a private business. (1) In

this section, "private business" means a for-profit business or a non-profit organization.

(2) The department may waive some or all of the certification application requirements and procedures under s. Comm 105.14 for an applicant who is already certified by a state, federal or local agency or a private business if the department determines that the agency's or business's certification procedure is substantially equivalent to its own.

(3) In determining whether an agency's or a private business's certification procedure is substantially equivalent to its own, the department shall consider factors which include, but are not limited to, the following:

- (a) The documentation the applicant is required to provide;
- (b) Whether an on-site visit is performed; and
- (c) The length of time for which certification is effective.

(4) The department shall maintain a list of certification agencies and private businesses whose certification procedures meet the department's standards.

History: Cr. Register, September, 1987, No. 381, eff. 10-1-87.

Comm 105.22 Certification criteria for non-Wisconsin businesses. (1) The department may certify a non-Wisconsin business if it meets the eligibility standards under s. Comm 105.03, and if it meets either of the following 2 conditions:

(a) *Substantially equivalent program condition.* The state in which the business is incorporated or has its principal place of business has a statutory minority business procurement program; Wisconsin minority firms would be allowed to participate in that program; and the business qualifies for participation in that program under a certification procedure which the department determines is substantially equivalent to its own certification procedure; or

(b) *Business capability condition.* The department determines that, with respect to a particular product or service, there are not enough Wisconsin minority businesses to enable the state to meet the goals of its minority business procurement program.

(2) In determining whether an applicant meets the substantially equivalent program condition described in sub. (1) (a), the department shall consider:

(a) Whether the state's statutory minority business procurement program establishes specific goals, set-asides or preference criteria; whether it establishes a system for monitoring the program's performance; and whether Wisconsin minority firms would be allowed to participate in the program; and

(b) Whether the state's minority business certification program meets the department's standards and is included in the department's list of certification agencies as described in s. Comm 105.21 (4). Applicants certified by states not on the list bear the burden of establishing to the department's satisfaction that the agency's certification procedures meet the department's standards.

(3) In determining whether an applicant meets the business capability condition described in sub. (1) (b), the department shall consider:

(a) The number of certified minority business enterprises which provide the specified supply, material, equipment or service and which are listed in the department's Minority Business Directory.

(b) The number of minority businesses which provide the specified supply, material, equipment or service and which are certified by another agency or a private business that is included on the department's list of certification agencies and businesses as described in s. Comm 105.21 (4).

(c) The assessment by the department of administration and other appropriate agencies of the capability of the existing certified minority businesses to achieve the state's minority business procurement goals.

(4) The department may consult with minority associations, community organizations and other appropriate officials and organizations concerning the availability of minority businesses in the state and the potential to increase their participation in the state's minority business procurement program.

History: Cr. Register, September, 1987, No. 381, eff. 10-1-87.

Comm 105.23 Certification procedure for non-Wisconsin businesses. (1) For applicants certified by a state which the department determines meets the substantially equivalent program condition in s. Comm 105.22 (1) (a), the department may require the applicant to submit the following documentation:

(a) A copy of the letter of certification from the state in which the applicant is incorporated or has its principal place of business;

(b) A copy of the most recent application and supporting documentation the applicant submitted to its certifying state in support of its certification or certification renewal;

(c) Documentation that the minority owner or owners meet the definition of minority as defined in s. Comm 105.02 (29).

(d) The department may request the applicant to furnish additional information or documentation. The department may also request information from the certifying state, including a copy of the on-site visit report.

(2) For applicants who meet the business capability condition described in s. Comm 105.22 (1) (b), the department shall follow the certification procedures for Wisconsin businesses as described in s. Comm 105.14.

(3) An applicant who has received a notice of intent to deny certification shall be given the opportunity for an informal hearing under s. Comm 105.18 and shall have the right to appeal the final decision under ch. 227, Stats., and s. Comm 105.19.

(4) The department may charge the applicant a fee to cover departmental expenses in making the certification determination.

History: Cr. Register, September, 1987, No. 381, eff. 10-1-87.

Comm 105.24 Certification criteria for for-profit corporations owned by a non-profit organization.

(1) The department may certify a for-profit corporation owned by a non-profit organization if the department determines that the non-profit organization is minority-controlled and managed. Factors which the department may consider in reaching this determination include, but are not limited to, the following:

(a) At least 51% of the members who may elect the board of directors or trustees and who are entitled to vote on a dissolution of the non-profit organization are minorities;

(b) At least 51% of the board of directors or trustees of the non-profit organization are minorities;

(c) The minutes of the organization's meetings document the active control and participation of the minority members of the board in such areas as setting and monitoring financial policy, personnel policy, and program policy;

(d) The non-profit organization is independent of control or substantial influence by a nonminority non-profit or for-profit organization. The non-profit minority organization shall be rebuttably presumed to be dependent on a nonminority organization if it shares office space, staff, equipment or other resources with a nonminority for-profit or non-profit organization or receives the majority of its funding from a single nonminority organization.

(2) The department shall follow the certification procedures described in s. Comm 105.14.

History: Cr. Register, September, 1987, No. 381, eff. 10-1-87.

