

Proposed Rule
LSA Document #16-265

DIGEST

Amends [25 IAC 9-2-1](#) to add definitions. Amends [25 IAC 9-4-2](#), [25 IAC 9-4-3](#), and [25 IAC 9-4-4](#) to update the acronym from IVBE to IVOSB and to recognize an approval from the state program as a certification option. Adds [25 IAC 9-6](#) to set forth the steps of the state application process, to define ownership determinations, to add requirements regarding control of the IVOSB, and to explain the importance of providing a "commercially useful function". Adds [25 IAC 9-7](#) to set forth the responsibilities an IVOSB has after certification and possible consequences if not followed. Adds [25 IAC 9-8](#) to set forth how complaints are handled, and to explain when a certification can be revoked for reasons other than a complaint. Adds [25 IAC 9-9](#) to set forth the right to have denial or revocation of certification reviewed under the Administrative Orders and Procedures Act. Effective 30 days after filing with the Publisher.

[IC 4-22-2.1-5 Statement Concerning Rules Affecting Small Businesses](#)

[25 IAC 9-2-1](#); [25 IAC 9-4-2](#); [25 IAC 9-4-3](#); [25 IAC 9-4-4](#); [25 IAC 9-6](#); [25 IAC 9-7](#); [25 IAC 9-8](#); [25 IAC 9-9](#)

SECTION 1. [25 IAC 9-2-1](#) IS AMENDED TO READ AS FOLLOWS:

[25 IAC 9-2-1](#) Definitions

Authority: [IC 4-13](#); [IC 5-22-14-11](#)

Affected: [IC 4-13-1-2](#); [IC 4-13.6](#); [IC 5-22-2-13](#); [IC 5-22-14-3.5](#)

Sec. 1. The following definitions apply throughout this article:

(1) "Award" means the written determination made by the department, or its designee, of the lowest responsible and responsive bidder; or the responsible offeror whose proposal is determined in writing to be the most advantageous to the governmental body, as defined by [IC 5-22-2-13](#).

(2) "Bidder" means a person who responds to a solicitation.

(3) "Commissioner" means the commissioner of the department.

(4) "Contract" means any contract awarded by the department, or its designee, for the procurement of goods, supplies, or services, including professional services.

(5) "Contract goal" means a targeted amount of ~~IVBE~~ **IVOSB** participation contractually established between the department, or its designee, and the prime.

(6) "Contractor" means a person who contracts with a state agency to provide goods or services.

(7) "Customary discretion" means usual decisions associated with the certain area of business or profession.

(8) "Customary industry practice" mean practices inherited from the past that are accepted and respected by the members of that same business community or industry.

~~(7)~~ **(9) "Department"** means the Indiana department of administration, as created by [IC 4-13-1-2](#).

~~(8)~~ ~~"IVBE"~~ **(10) "IVOSB"** means an Indiana veteran owned small business enterprise, as described by [IC 5-22-14-3.5](#).

~~(9)~~ ~~"IVBE"~~ **(11) "IVOSB credit"** means points received during the solicitation evaluation. Each solicitation shall enumerate the ~~IVBE~~ **IVOSB** credit to be utilized.

(12) "Owned and controlled" means the following:

(A) Ownership of at least fifty-one percent (51%) of the enterprise. If the enterprise is a corporation, this includes owning fifty-one percent (51%) of both the corporate voting stock and fifty-one percent (51%) of all outstanding stock.

(B) Control over the management of and active in the day-to-day operations of the business.

(C) An interest in the capital, assets, and profits and losses of the business proportionate to the percentage of ownership.

~~(10)~~ **(13) "Prime"** means any person who enters into a contract with a governmental body.

(14) "Principal place of business" means the entity:

(A) is paying the majority of its payroll (in dollar volume) to residents of Indiana;

(B) is employing Indiana residents as a majority of its employees;

(C) is making a significant capital investment in Indiana; or

(D) has its headquarters in the state of Indiana.

~~(11) "Program" means the IVBE program, as maintained and administered by the department.~~

~~(12)~~ **(15) "Solicitation" means an invitation to submit an offer to enter into a contract with a governmental body.**

(16) "State program" means the IVOSB program, as maintained and administered by the department.

~~(13)~~ **(17) "Subcontractor" means any person entering into a contract with a prime.**

A reference to a federal statute or regulation is a reference to the statute or regulation in effect January 1, 2013.

(Indiana Department of Administration; [25 IAC 9-2-1](#); filed Feb 28, 2014, 8:05 a.m.: [20140326-IR-025130402FRA](#))

SECTION 2. [25 IAC 9-4-2](#) IS AMENDED TO READ AS FOLLOWS:

[25 IAC 9-4-2](#) Procedure for solicitation submission

Authority: [IC 4-13](#); [IC 5-22-14-3.5](#); [IC 5-22-14-11](#)

Affected: [IC 4-13-1](#); [IC 4-13.6](#); [IC 5-22-14-3.5](#)

Sec. 2. (a) A prime ~~IVBE~~ **IVOSB** bidder must submit the following to the department, or its designee, for solicitation submission:

- (1) The name of the ~~IVBE~~ **IVOSB** enterprise.
- (2) The phone number of the ~~IVBE~~ **IVOSB**.
- (3) The name of a contact person from the ~~IVBE~~ **IVOSB**.
- (4) Work the enterprise will perform and the approximate date when the ~~IVBE's~~ **IVOSB's** work will commence.
- (5) The contract amount for services that will be performed.
- (6) Proof of principal place of business in Indiana.
- (7) A copy of the ~~IVBE's~~ **IVOSB's** eligibility verification approval letter received from the the Center of Veterans Enterprise of the United States Department of Veterans Affairs, as provided by [IC 5-22-14-3.5\(a\)\(1\)](#), **or an approval letter from the state program.**

(b) The prime bidder must submit the following to the department, or its designee, on behalf of its ~~IVBE~~ **IVOSB** subcontractors:

- (1) The name of the ~~IVBE~~ **IVOSB**.
- (2) The phone number of the ~~IVBE~~ **IVOSB**.
- (3) The name of a contact person for the ~~IVBE~~ **IVOSB**.
- (4) Work the ~~IVBE~~ **IVOSB** will perform and the approximate date when the ~~IVBE's~~ **IVOSB's** work will commence.
- (5) The contract amount for services that will be performed.
- (6) Proof of principal place of business in Indiana.
- (7) The percentage commitment form.
- (8) A copy of the ~~IVBE~~ **IVOSB** eligibility verification approval letter, as referenced in subsection (a)(7).

(c) The department reserves the right to request additional documentation for purposes of authenticating an ~~IVBE's~~ **IVOSB's** eligibility and participation.

(d) Purchases from ~~IVBE~~ **IVOSB** suppliers are allowed ~~IVBE~~ **IVOSB** credit. The maximum allowable credit will be limited to sixty percent (60%) of the total contract goal.

(Indiana Department of Administration; [25 IAC 9-4-2](#); filed Feb 28, 2014, 8:05 a.m.: [20140326-IR-025130402FRA](#))

SECTION 3. [25 IAC 9-4-3](#) IS AMENDED TO READ AS FOLLOWS:

[25 IAC 9-4-3](#) Review by the department of solicitation submissions

Authority: [IC 4-13](#); [IC 5-22-14-3.5](#); [IC 5-22-14-11](#)

Affected: [IC 4-13-1](#); [IC 4-13.6](#); [IC 5-22-14-3.5](#)

Sec. 3. (a) Upon receipt of the solicitation documents, the department shall verify the ~~IVBE's~~ **IVOSB's** status on the Vendor Information Page, the federal database of businesses eligible to participate in the Center of Veterans Enterprise of the United States Department of Veterans Affairs' Veteran-Owned Small Business Program **or the state program database maintained by the department.**

(b) **WBE IVOSB** contractors and suppliers must perform a commercially useful function. A commercially useful function is generally deemed to be when an **WBE IVOSB** contractor or supplier is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, an **WBE IVOSB** contractor or supplier must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. An **WBE IVOSB** contractor or supplier does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of **WBE IVOSB** participation.

(Indiana Department of Administration; [25 IAC 9-4-3](#); filed Feb 28, 2014, 8:05 a.m.: [20140326-IR-025130402FRA](#))

SECTION 4. [25 IAC 9-4-4](#) IS AMENDED TO READ AS FOLLOWS:

[25 IAC 9-4-4](#) Rules affecting an enterprise's responsibility after solicitation submission

Authority: [IC 4-13](#); [IC 5-22-14-3.5](#); [IC 5-22-14-11](#)

Affected: [IC 4-13-1](#); [IC 4-13.6](#); [IC 5-22-14-3.5](#)

Sec. 4. (a) The prime and subcontractors shall report all **WBE IVOSB** participation in the state's standard subcontractor compliance tool, commonly known as the state pay audit system, on at least a monthly basis.

(b) **WBE IVOSB** must notify the department, in writing, within thirty (30) days of any change affecting its qualifying membership, ownership, or control requirements, and of any other material change to the information provided in the application to **either** the Center of Veterans Enterprise of the United States Department of Veterans Affairs **or the state program**.

(c) On the two (2) year renewal for eligibility, the **WBE IVOSB** must provide the department a copy of the Center of Veterans Enterprise of the United States Department of Veterans Affairs' renewal letter. **If certified through the state program, the IVOSB must provide a letter verifying continued eligibility from the state program.**

(d) The responsibility to acquire and supply the information to the department required in this section remains with the prime.

(e) Failure to comply with the provisions of this section may result in noncompliance or removal from the program.

(Indiana Department of Administration; [25 IAC 9-4-4](#); filed Feb 28, 2014, 8:05 a.m.: [20140326-IR-025130402FRA](#))

SECTION 5. [25 IAC 9-6](#) IS ADDED TO READ AS FOLLOWS:

Rule 6. Application Process; Requirements

[25 IAC 9-6-1](#) Application for certification as an IVOSB through the state program

Authority: [IC 4-13](#); [IC 5-22-14-3.5](#); [IC 5-22-14-11](#)

Affected: [IC 4-13-1](#); [IC 4-13.6](#); [IC 5-14-3](#); [IC 5-22-14-3.5](#)

Sec. 1. (a) The enterprise seeking certification shall submit its application on the form or forms approved by the department, accompanied by all requested documentation. The application must be signed and sworn under the penalty of perjury by the applicant.

(b) An enterprise seeking certification has the burden of demonstrating that it meets the requirements of this rule concerning ownership and control by qualifying members or members.

(c) An enterprise seeking certification shall cooperate fully with the department's requests for

information and documentation relevant to the certification process. Failure to cooperate fully may result in denial of certification.

(d) An enterprise seeking certification has an affirmative obligation to disclose all material and relevant information affecting that enterprise's eligibility for certification. Any material misrepresentation or omission may be grounds for denial of certification.

(e) All documents submitted in connection with an application for certification are subject to the Indiana Access to Public Records Act, [IC 5-14-3](#). The department will maintain as confidential:

- (1) any tax returns;
 - (2) any financial information;
 - (3) any trade secret information; and
 - (4) all documents listed in [IC 5-22-14-3.5](#);
- as authorized under [IC 5-14-3-4\(a\)](#).

(f) If the department is not able to make a determination based on the application and documentation presented, the department may elect to conduct on-site visits during normal business hours. The site visit will be at the headquarters, if located in Indiana. If the headquarters are not in Indiana, then a location that the department deems to be the best representation of the work done by the IVOSB will be the location of the on-site visit.

(g) The department will make a determination on applications for certification within ninety (90) days of the receipt of the completed application, including all relevant documentation. Failure by the department to make a determination by the applicable deadline under this subsection may be deemed, by the applicant, a constructive denial of the application, and the basis on which the enterprise may petition for review under [25 IAC 9-8-1](#).

(Indiana Department of Administration; [25 IAC 9-6-1](#))

[25 IAC 9-6-2](#) Ownership determinations

Authority: [IC 4-13](#); [IC 5-22-14-3.5](#); [IC 5-22-14-11](#)

Affected: [IC 4-13-1](#); [IC 4-13.6](#); [IC 5-22-14-3.5](#)

Sec. 2. In determining whether a qualifying member owns an enterprise, the department shall consider all the facts in the record, viewed as a whole to determine if the qualifying member owns the enterprise as defined by [25 IAC 9-2-1\(12\)](#).

(Indiana Department of Administration; [25 IAC 9-6-2](#))

[25 IAC 9-6-3](#) Control determinations

Authority: [IC 4-13](#); [IC 5-22-14-3.5](#); [IC 5-22-14-11](#)

Affected: [IC 4-13-1](#); [IC 4-13.6](#); [IC 5-22-14-3.5](#)

Sec. 3. (a) In determining whether qualifying members control an enterprise, the department will consider all the facts in the record, viewed as a whole.

(b) Only an independent business may be certified. An independent business is one, the viability of which does not depend on its relationship with another enterprise or enterprises.

(c) An IVOSB must not be subject to any formal restrictions, including, but not limited to, corporate charters, bylaws, or contracts; or informal restrictions that limit the customary discretion of the qualifying members.

(d) The qualifying members must possess the power to direct or cause the direction of the management and policies of the enterprise and possess the power to make day-to-day as well as long

term decisions on matters of management, policy, and operations.

(e) The qualifying members of the enterprise may delegate various areas of the management, policymaking, or daily operations to other participants in the enterprise, regardless of whether these participants are qualifying members. Such delegations of authority must be revocable, and the qualifying members must retain the power to hire and terminate any person to whom the authority is delegated. The managerial role of the qualifying members in the enterprise's overall affairs must be such that the department can reasonably conclude that the qualifying members actually exercise control over the enterprise's operations, management, and policy.

(Indiana Department of Administration; [25 IAC 9-6-3](#))

[25 IAC 9-6-4](#) Another factor considered for certification

Authority: [IC 4-13](#); [IC 5-22-14-3.5](#); [IC 5-22-14-11](#)

Affected: [IC 4-13-1](#); [IC 4-13.6](#); [IC 5-22-14-3.5](#)

Sec. 4. Only enterprises that perform a commercially useful function, as set forth in [25 IAC 9-4-3\(b\)](#), will be considered for certification.

(Indiana Department of Administration; [25 IAC 9-6-4](#))

SECTION 6. [25 IAC 9-7](#) IS ADDED TO READ AS FOLLOWS:

Rule 7. Responsibilities; Certification

[25 IAC 9-7-1](#) Enterprise's responsibility after being certified as an IVOSB

Authority: [IC 4-13](#); [IC 5-22-14-3.5](#); [IC 5-22-14-11](#)

Affected: [IC 4-13-1](#); [IC 4-13.6](#); [IC 5-22-14-3.5](#)

Sec. 1. (a) Each certified enterprise must notify the department in writing within thirty (30) days of any change affecting the certified enterprise's qualifying membership, ownership, or control requirements, and of any other material change to the information provided in the application form such as the following:

(1) Changes in contact information including address, telephone number, and personnel.

(2) Changes to management responsibility among members of a limited liability company.

The notice must be given by completing and signing the state form "Notice of Material Change to a Certified IVOSB". All relevant supporting documentation must be attached. Failure to do so could lead to revocation of the certification.

(b) Annually, on the anniversary of the date of its certification, an IVOSB certified enterprise must complete and submit the state form "Affidavit of Continued Eligibility". Failure to do so could lead to revocation of the certification.

(c) Once the department has certified the enterprise, it shall remain certified for a period of two (2) years unless its certification has been revoked. The department may not require firms to reapply for certification as a condition of continuing to participate in the program during this two (2) year period unless the factual basis on which the certification was made changes.

(Indiana Department of Administration; [25 IAC 9-7-1](#))

SECTION 7. [25 IAC 9-8](#) IS ADDED TO READ AS FOLLOWS:

Rule 8. Complaints; Revocation

[25 IAC 9-8-1](#) Complaints and revocation of an enterprise's certification

Authority: [IC 4-13](#); [IC 5-22-14-3.5](#); [IC 5-22-14-11](#)

Affected: [IC 4-13-1](#); [IC 4-13.6](#); [IC 5-22-14-3.5](#)

Sec. 1. (a) Requirements for ineligibility complaints are as follows:

(1) Any person may file with the department a written complaint:

- (A) alleging that a currently certified enterprise is ineligible; and**
- (B) specifying the alleged reasons why the enterprise is ineligible.**

(2) The department is not required to accept a general allegation that an enterprise is ineligible or an anonymous complaint.

(3) Upon receiving a complaint that fits the criteria in subdivisions (1) and (2), the department must review the complaint and the department's file of the entity listed in the complaint. The department may request additional information from the enterprise or conduct any other investigation deemed necessary.

(b) If the department determines, based on this review, that there is reasonable cause to believe that the enterprise is ineligible, the department must:

- (1) provide written notice to the enterprise that it finds reasonable cause that the entity is ineligible, setting forth the reasons for the determination the certification is to be revoked; and**
- (2) provide notice of appeal rights.**

(c) If the department determines that such reasonable cause does not exist, the department must notify the complainant and the enterprise in writing of this determination and the reasons for the determination.

(Indiana Department of Administration; [25 IAC 9-8-1](#))

[25 IAC 9-8-2](#) Revocation not due to a complaint

Authority: [IC 4-13](#); [IC 5-22-14-3.5](#); [IC 5-22-14-11](#)

Affected: [IC 4-13-1](#); [IC 4-13.6](#); [IC 5-22-14-3.5](#)

Sec. 2. (a) If, based on notification by the enterprise of a change in its circumstances, or other information that comes to the attention of the department, there is reasonable cause to believe that a currently certified enterprise is ineligible, the department must provide written notice in the form of an order to show cause to the enterprise that it proposes to find the enterprise ineligible and certification will be revoked, including:

- (1) the reasons for the proposed determination; and**
- (2) that the statement of reasons for the finding of reasonable cause must specifically reference the evidence in the record on which each reason is based.**

(b) The department may base a decision to revoke certification only on one (1) or more of the following:

- (1) Changes in the enterprise's circumstances since the certification of the enterprise by the department that render the enterprise unable to meet the eligibility standards of this rule.**
- (2) Information or evidence not available to the department at the time the enterprise was certified.**
- (3) Information that was concealed or misrepresented by the enterprise in previous certification actions by the department.**
- (4) A change in the certification standards or requirements since the enterprise was certified.**
- (5) A documented finding that the department's initial determination to certify the enterprise was clearly erroneous.**

(c) During the pendency of a proceeding to determine if an enterprise's IVOSB should be revoked or suspended, the enterprise shall retain its certification until a final order revoking certification is issued.

(d) When an enterprise's certification as an IVOSB has been revoked and is no longer subject to judicial review, the department will take the following action relative to prime contractors who have relied in good faith upon the certification of the disqualified entity:

- (1) When a prime contractor has made a commitment to use the disqualified enterprise, or there has**

been a commitment to use the enterprise as a prime contractor, but a subcontract or contract has not been executed before the order to show cause provided for in subsection (a) has been issued, the ineligible enterprise does not count toward the contract goal or overall goal. The prime contractor must:

- (A) meet the contract goal with an eligible enterprise; or
 - (B) demonstrate that it has made a good faith effort to do so.
- (2) If a prime contractor has executed a subcontract with the enterprise before the department has issued a notice to show cause, the prime contractor may continue to:
- (A) use the enterprise on the contract; and
 - (B) receive credit toward its goal for the enterprise's work.

(e) The remaining portion of the decertified enterprise's performance of the contract shall not count toward the state of Indiana's overall annual goal of IVOSB participation.

(Indiana Department of Administration; [25 IAC 9-8-2](#))

SECTION 8. [25 IAC 9-9](#) IS ADDED TO READ AS FOLLOWS:

Rule 9. Review; Certification as an IVOSB

[25 IAC 9-9-1](#) Review of determinations by the department regarding certification as an IVOSB

Authority: [IC 4-13](#); [IC 5-22-14-3.5](#); [IC 5-22-14-11](#)

Affected: [IC 4-13-1](#); [IC 4-13.6](#); [IC 4-21.5](#); [IC 5-22-14-3.5](#)

Sec. 1. (a) An enterprise whose application for certification has been denied or revoked shall be given notice of such action and shall be entitled to petition for review under the Indiana Administrative Orders and Procedures Act, [IC 4-21.5](#), et seq.

(b) The administrative law judge or judges appointed to hear any matter arising under this rule shall have had no prior involvement in the review or preliminary determination of the matter heard.

(c) The ultimate authority under this article is the commissioner of the Indiana department of administration.

(Indiana Department of Administration; [25 IAC 9-9-1](#))

[Notice of Public Hearing](#)

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