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**TITLE 25 INDIANA DEPARTMENT OF
ADMINISTRATION**

LSA Document #02-150(F)

DIGEST

Adds 25 IAC 5 concerning minority and women's business enterprises. Repeals 25 IAC 2-19 and 25 IAC 2-20. Effective 30 days after filing with the secretary of state.

25 IAC 2-19

25 IAC 2-20

25 IAC 5

SECTION 1. 25 IAC 5 IS ADDED TO READ AS FOLLOWS:

ARTICLE 5. MINORITY AND WOMEN'S BUSINESS ENTERPRISES

Rule 1. Scope of Activities

25 IAC 5-1-1 Duties of minority and women's business enterprises division

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13-16.5-1; IC 4-13-16.5-2; IC 4-13.6; IC 5-22

Sec. 1. The duties of the minority and women's business enterprises division, hereinafter referred to as the "division", shall be as defined in IC 4-13-16.5-2(f). (Indiana Department of Administration; 25 IAC 5-1-1; filed May 30, 2003, 11:00 a.m.: 26 IR 3296)

25 IAC 5-1-2 Duties of the deputy commissioner, minority and women's business enterprises

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13-16.5-3; IC 4-13.5-1; IC 4-13.6; IC 4-13-16.5-3; IC 5-22

Sec. 2. The duties of the deputy commissioner of the division shall be as defined in IC 4-13-16.5-3. (Indiana Department of Administration; 25 IAC 5-1-2; filed May 30, 2003, 11:00 a.m.: 26 IR 3296)

25 IAC 5-1-3 Policy statement

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 3. (a) It is the policy of the state to provide an equal opportunity for existing and operating minority business enterprises and women's business enterprises to receive and participate in the state's procurement and contracting process. The department shall act on behalf of the state to actively promote, monitor, and enforce its MBE/WBE program.

(b) The deputy commissioner of the department, through the minority and women's business enterprises section of the department, and in concert with the governor's commission on minority and women's business enterprises, shall be the final authority on all matters pertaining to the maintenance and administration of the MBE/WBE program and compliance thereto. (Indiana Department of Administration; 25 IAC 5-1-3; filed May 30, 2003, 11:00 a.m.: 26 IR 3296)

Rule 2. Definitions

25 IAC 5-2-1 Definitions

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1-2; IC 4-13-16.5-1; IC 4-13.5-1; IC 4-13.6; IC 4-33-14; IC 5-22

Sec. 1. (a) The following definitions apply throughout this article:

(1) “Application for MBE/WBE program waiver” or “waiver application” means the document(s) submitted by a prime contractor to the state requesting the contractor’s exemption from the contract goal and stating the reasons why the contractor requires the waiver.

(2) “Broker” means a business entity serving as an intermediary who negotiates contracts of purchase and sale, without assuming any risk of loss.

(3) “Commission” means the governor’s commission on minority and women’s business enterprises.

(4) “Commissioner” means the commissioner of the department of administration defined at IC 4-13-1-2.

(5) “Contract” means any contract awarded by a state agency for construction projects or the procurement of goods or services, including professional services.

(6) “Contract goal” means a targeted amount of participation as measured by the desired percentage of involvement by minority and women’s business enterprises.

(7) “Contractor” means a person or business entity that contracts with a state agency to provide goods or services.

(8) “Department” means the Indiana department of administration.

(9) “Deputy commissioner” means the deputy commissioner for minority and women’s business enterprises of the department as set forth in IC 4-13-16.5-1.

(10) “M/WBE compliance review committee” means the committee that is responsible for the appeal of specific contract issues. The committee consists of:

(A) the chairman of the governor’s commission on minority and women’s business enterprises;

(B) the general counsel of the department; and

(C) the director of the public works or procurement division of the department;

whichever is appropriate, or their respective designees.

(11) “MBE/WBE program waiver” or “waiver” means the document supplied by the state to the prime contractor that approves the application for MBE/WBE program waiver.

(12) “MBE/WBE subcontractor plan” or “plan” means the document supplied by prime contractors to the state (usually required at the time of most bid submittals), which indicates the means whereby the minority or women’s business participation will be attained.

(13) “Minority business enterprise” or “MBE” means an individual, partnership, corporation, limited liability company, or joint venture of any kind that is owned and controlled by one (1) or more persons who are:

(A) United States citizens; and

(B) members of a minority group.

(14) “Minority group” means the following:

(A) Blacks.

(B) American Indians.

(C) Hispanics.

(D) Asian Americans.

(E) Other similar minority groups as defined by 13 CFR 124.103.

(15) “Offeror” means any business entity that makes an offer to enter into a binding contract for the provision of materials or services to a state agency.

(16) “Owned and controlled” means having:

(A) ownership of at least fifty-one percent (51%) of the enterprise, including corporate stock of a corporation;

(B) control over the management and active in the day-to-day operations of the business; and

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

(17) “Program” means the minority and women’s business enterprises program as administered by the department.

(18) “Qualifying member” means, for MBE goals, any member of a minority group and, for WBE goals, a woman.

(19) “State agency” means any of the following:

(A) An authority, board, branch, commission, committee, department, division, or other instrumentality of the executive, including the administrative department of state government.

(B) An entity established by the general assembly as a body corporate and politic.

(C) A state educational institution.

The term does not include the state lottery commission or the Indiana gaming commission with respect to setting and enforcing goals for awarding contracts to minority and women's business enterprises. The term does not include the Indiana gaming commission to the extent the subject matter of these rules conflict [*sic.*, *conflicts*] with or are [*sic.*, *is*] otherwise covered by IC 4-33-14, et seq.

(20) "Subcontractor" or "second tier contractor" means any person entering into a contract with a prime vendor to directly furnish services or supplies toward the contract.

(21) "Supplier" or "distributor" means any business entity supplying materials, but no significant on-site labor is contributed in furtherance of the contract or to a vendor.

(22) "Vendor" means any person or business entity that has entered into a binding contract for the provision of materials or services to a state agency.

(23) "Women's business enterprise" or "WBE" means an individual, partnership, corporation, limited liability company, or joint venture of any kind that is owned and controlled by one (1) or more persons who are:

(A) United States citizens; and

(B) whose gender is female.

(b) A reference to a federal statute or regulation is a reference to the statute or regulation in effect January 1, 2001.

(c) Notwithstanding this section, with reference to business certification status as a broker or supplier, historic purchasing practices, standards for the industry, and risk of loss may be considered. (*Indiana Department of Administration; 25 IAC 5-2-1; filed May 30, 2003, 11:00 a.m.: 26 IR 3296*)

Rule 3. Certification Standards

25 IAC 5-3-1 Certification policy

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 1. The department will act on behalf of the state to actively promote, monitor, and enforce the standards for certification of minority business enterprises and women's business enterprises. (*Indiana Department of Administration; 25 IAC 5-3-1; filed May 30, 2003, 11:00 a.m.: 26 IR 3297*)

25 IAC 5-3-2 Application for certification as an MBE or a WBE

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-14-3-4; IC 5-22

Sec. 2. (a) The enterprise seeking certification as an MBE or a WBE shall submit its application on the form or forms approved by the department, accompanied by all requested documentation.

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

(c) The individual signing the application for certification shall be a qualifying member. The qualifying member or members are those whose participation is relied upon to meet the ownership and control requirements, and each shall certify as to his or her status as a qualifying member. The qualifying member signing the application for certification for not-for-profit enterprise must be the highest-ranking official working in the enterprise on a day-to-day basis.

(d) An enterprises [*sic.*] seeking MBE or WBE 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 MBE or WBE certification.

(e) An enterprise seeking MBE or WBE certification has an affirmative obligation to disclose all material and relevant information affecting that's [*sic.*, *that*] enterprise's eligibility for certification. Any material misrepresentation or omission may be grounds for denial of certification or may result in the issuance of an order to show cause why such certification should not be revoked.

(f) All documents submitted in connection with an application for certification as an MBE or WBE are subject to the Indiana Access to Public Records Act, IC 5-14-3. The department will maintain as confidential any tax returns, other financial information, and trade secret information as authorized under Indiana Code section 5-14-3-4(a).

(g) An applicant (an individual who is a qualifying member) can submit a maximum of two (2) applications per year. At any time, only one (1) application can be pending.

(h) If an enterprise withdraws its application prior to completion of the review process, it may reapply at any time, but the reapplication will be treated as a new application and considered in the order in which it is received.

(i) An enterprises [sic.] certified as an MBE or WBE as of the date these rule [sic.] become effective shall retain its certification until it expires, unless revoked as provided in this article.

(j) If an enterprise has an application for certification as an MBE or a WBE with the department at the date these rules become effective, the department will make its certification determination based on the rules that were in effect at the time the application was received. (*Indiana Department of Administration; 25 IAC 5-3-2; filed May 30, 2003, 11:00 a.m.: 26 IR 3297*)

25 IAC 5-3-3 Certification standards regarding qualifying membership determination

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 3. (a) In determining whether an individual asserting that he or she is a member of a minority group (for MBE certification) or a woman (for WBE certification), the department shall consider all the facts in the record, viewed as a whole.

(b) The department will rebuttably presume that a citizen of the United States who is a women or a member of a minority group is a qualifying member.

(c) Being born in a country does not, by itself, suffice to make an individual a member of a minority group.

(d) In a [sic.] making its determination regarding qualifying membership, the department may consider whether the person has historically held himself or herself out to be a qualifying member and whether the person is regarded as a qualifying member by the relevant community.

(e) The department may request such additional documentation as it may reasonably need to support an individual's claim that he or she is a member of a minority group or a woman. (*Indiana Department of Administration; 25 IAC 5-3-3; filed May 30, 2003, 11:00 a.m.: 26 IR 3298*)

25 IAC 5-3-4 Ownership determinations

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 4. (a) In determining whether a qualifying member owns an enterprise, the department shall consider all the facts in the record, viewed as a whole.

(b) To be an eligible MBE or WBE, an enterprise must be at least fifty-one percent (51%) owned by qualifying members. In the case of a:

(1) corporation, qualifying members must own at least fifty-one percent (51%) of each class of voting stock outstanding and fifty-one percent (51%) of the aggregate of all stock outstanding;

(2) partnership, fifty-one percent (51%) of each class of partnership interest must be owned by qualifying members, and such ownership must be reflected in the partnership agreement; and

(3) limited liability company, at least fifty-one percent (51%) of each class of membership interest must be owned by qualifying members.

(c) An enterprise's ownership by qualifying members must be real, substantial, and continuing, going beyond any pro forma ownership reflected in ownership documents. The qualifying members must enjoy the customary incidents of ownership and share in the risks and profits commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements.

(d) All securities used to evidence the ownership interest of a qualifying member shall be held directly by the qualifying member. Except as provided in this subsection, no securities or assets held in trust, or by any guardian for a minor, will be considered as held by a qualifying member in determining the ownership of an enterprise. However, securities or assets held in trust will be regarded as held by a qualifying member for the purpose of determining ownership of the enterprise if either of the following apply:

- (1) The beneficial owner of securities or assets held in trust is a qualifying member, and the trustee is the same or another such individual.
- (2) The beneficial owner of a trust is a qualifying member who, rather than the trustee, exercises effective control over the management, policymaking, and daily operational activities of the enterprise. Assets held in a revocable living trust may be counted only if the same qualifying member is the sole grantor, beneficiary, and trustee.

(e) The contributions of capital or expertise by the qualifying member to acquire an ownership interest must be real and substantial. Examples of insufficient contributions include a promise to contribute capital, an unsecured note payable to the enterprise or an owner who is not a qualifying member, or mere participation in an enterprise's activities as an employee. Debt instruments from financial institutions or other organizations that lend funds in the normal course of business do not render an enterprise ineligible, even if the debtor's ownership interest is security for the loan.

(f) The following requirements apply to situations in which expertise is relied upon as part of a qualifying member's contribution to acquire ownership:

- (1) The owner's expertise must be as follows:
 - (A) In a specialized field.
 - (B) Of outstanding quality.
 - (C) In areas critical to the enterprise's operations.
 - (D) Indispensable to the enterprise's potential success.
 - (E) Specific to the type of work the enterprise performs.
 - (F) Documented in the records of the enterprise. These records must clearly show the contribution of expertise and its value to the enterprise.
- (2) The individual whose expertise is relied upon must have a significant financial investment in the enterprise.

(g) In evaluating enterprise ownership, the department will deem the qualifying member to hold all interests in a business or other assets obtained by the qualifying member:

- (1) as the result of a final property settlement or court order in a divorce or legal separation, provided that no term or condition of the agreement or divorce decree is inconsistent with this section; or
- (2) through inheritance, or otherwise because of the death of the former owner.

(h) In evaluating enterprise ownership, the department will disregard all interests in a business or other assets obtained by a qualifying member as the result of a gift or transfer without adequate consideration from any nonqualifying individual or non-MBE or WBE enterprise that is:

- (A) involved in the same enterprise, or an affiliate of the enterprise, for which MBE or WBE certification is sought; or
- (B) involved in the same or a substantially similar line of business; or
- (C) engaged in an ongoing business relationship with the enterprise, or an affiliate of the enterprise, for which MBE or WBE certification is sought.

(2) To overcome this presumption and permit the interests or assets to be counted, the qualifying member must demonstrate that:

- (A) the gift or transfer to the qualifying member was made for reasons other than obtaining certification as a MBE or WBE; and
- (B) the qualifying member actually controls the management, policy, and operations of the enterprise, notwithstanding the continuing participation of a nonqualifying individual who made the gift or transfer.

(i) The department will apply the following rules in situations in which marital assets form a basis for ownership of an enterprise:

(1) When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by one (1) spouse, the ownership interest in the enterprise must be *[sic.]* deemed to have been acquired by that spouse with his or her own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the enterprise is domiciled. The department may not count a greater portion of joint or community property assets toward ownership than state law would recognize as belonging to the by qualifying member of the applicant enterprise.

(2) A copy of the document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the enterprise must be included as part of the enterprise's application for MBE or WBE certification.

(3) The department must take into consideration financial implications of the transfer/renouncement. For example, if the renouncement is for rights to a home, the applicant shall provide documentation of the transfer with mortgage holder.

(j) The department will consider the following factors in determining the ownership of an enterprise; however, it will not regard a contribution of capital as failing to be real and substantial, or find an enterprise ineligible, solely because:

(1) A qualifying member acquired his or her ownership interest as the result of a gift, or transfer without adequate consideration, other than the types set forth in subsection (h).

(2) There is a provision for the cosignature of a spouse who is not a qualifying member on financing agreements, contracts for the purchase or sale of real or personal property, bank signature cards, or other documents.

(3) Ownership of the enterprise or its assets is transferred for adequate consideration from a spouse who is not a qualifying member to a spouse who is such an individual. In this case, the department will scrutinize the ownership and control of an enterprise to ensure that it is owned and controlled, in substance as well as in form, by a qualifying member.

(k) Except as provided in this subsection, an enterprise that is not owned by qualifying members, but instead is owned by another enterprise, even an MBE or WBE enterprise, cannot be an eligible MBE or WBE.

(1) If qualifying members own and control an enterprise through a parent or holding company, established for tax, capitalization, or other purposes consistent with industry practice, and the parent or holding company in turn owns and controls an operating subsidiary, the department may certify the subsidiary if it otherwise meets all requirements of this subdivision. In this situation, the individual owners and controllers of the parent or holding company are deemed to control the subsidiary through the parent or holding company.

(2) The department may certify such a subsidiary only if there is cumulatively fifty-one percent (51%) ownership of the subsidiary by qualifying members. The following examples illustrate how this cumulative ownership provision works:

(A) Qualifying members own one hundred percent (100%) of a holding company, which has a wholly-owned subsidiary. The subsidiary may be certified if it meets all other requirements.

(B) Qualifying members own one hundred percent (100%) of a holding company, which owns fifty-one percent (51%) of a subsidiary. The subsidiary may be certified if all other requirements are met.

(C) Qualifying members own eighty percent (80%) of a holding company, which in turn owns seventy percent (70%) of a subsidiary. In this case, the cumulative ownership of the subsidiary by qualifying members is fifty-six percent (56%) (eighty percent (80%) of the seventy percent (70%)). This is more than fifty-one percent (51%), so the department may certify the subsidiary if all other requirements are met.

(D) Same as examples in clause (B) or (C), but someone other than the qualifying members of the parent or holding company controls the subsidiary. Even though the subsidiary is owned by qualifying members through the holding or parent company, the department cannot certify it because it fails to meet control requirements.

(E) Qualifying members own sixty percent (60%) of a holding company, which in turn owns fifty-one percent (51%) of a subsidiary. In this case, the cumulative ownership of the subsidiary by qualifying members is about thirty-one percent (31%). This is less than fifty-one percent (51%), so the department cannot certify the subsidiary.

(l) Recognition of an enterprise as a separate nonconsolidated entity for tax or corporate purposes is not necessarily sufficient to demonstrate that an enterprise is an independent business, owned and controlled by qualifying members.

(m) An enterprise that is owned by an Indian tribe, Alaska native corporation, or native Hawaiian organization as an entity, rather than by Indians, Alaska natives, or native Hawaiians as individuals, may be eligible for certification. Such

an enterprise must be controlled by qualifying members, as provided in this article and 13 CFR 124.103. (*Indiana Department of Administration, 25 IAC 5-3-4; filed May 30, 2003, 11:00 a.m.: 26 IR 3298*)

25 IAC 5-3-5 Control determinations

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 5. (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 as a MBE or WBE. An independent business is one the viability of which does not depend on its relationship with another enterprise or enterprises.

(1) In determining whether a potential MBE or WBE is an independent business, the department will scrutinize relationships with non-MBE or non-WBE enterprises in such areas as personnel, facilities, equipment, financial, bonding support, and other resources.

(2) The department must consider whether present or recent employer/employee relationships between the qualifying member of the potential MBE or WBE and non-MBE or WBE or persons associated with non-MBE or WBEs compromise the independence of the potential MBE or WBE.

(3) The department must examine the enterprise's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential MBE or WBE enterprise.

(4) In considering factors related to the independence of a potential MBE or WBE, the department must consider the consistency of relationships between the potential MBE or WBE and non-MBE or WBE with customary industry practice.

(c) An MBE or WBE must not be subject to any formal or informal restrictions that limit the customary discretion of the qualifying members. There can be no restrictions through corporate charter provisions, bylaw provisions, contracts, or any other formal or informal devices, including, but not limited to, cumulative voting rights, voting powers attached to different classes of stock, employment contracts, requirements for concurrence by nonqualifying partners, conditions precedent or subsequent, executory agreements, voting trusts, or restrictions on or assignments of voting rights, that prevent the qualifying members, without the cooperation or vote of any nonqualifying individual, from making any business decision of the enterprise. This subsection does not preclude a spousal cosignature on documents as provided for in this section.

(d) The qualifying members must possess the power to direct or cause the direction of the management and policies of the enterprise and to make day-to-day as well as long term decisions on matters of management, policy, and operations.

(1) A qualifying member must hold the highest officer position in the enterprise, for example, chief executive officer or president.

(2) In a corporation, qualifying members must control the board of directors.

(3) In a partnership, one (1) or more qualifying members must serve as general partners, with control over all partnership decisions.

(e) Individuals who are not qualifying members may be involved in an MBE or WBE as owners, managers, employees, stockholders, officers, and directors. Such individuals must not, however, possess or exercise the power to control the enterprise or be disproportionately responsible for its the *[sic.]* operation.

(f) 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 fire any person to whom such 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.

(g) The qualifying members must have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the enterprise is engaged and the enterprise's operations. The qualifying members are not required to have experience or expertise in every critical area of the enterprise's operations,

or to have greater experience or expertise in a given field than managers or key employees. The qualifying members must have the ability to intelligently and critically evaluate information presented by other participants in the enterprise's activities and to use this information to make independent decisions concerning the enterprise's daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the enterprise is insufficient to demonstrate control.

(h) If federal, state, or local law, statute, ordinance, or regulation requires an individual to have a particular license or other credential in order to own or control a certain type of enterprise, then the qualifying members who own and control a potential MBE or WBE of that type must possess the required license or credential. If federal, state, or local law does not require such a person to have such a license or credential to own or control an enterprise, the department may not deny certification solely on the ground that the person lacks the license or credential. However, the department may take into account the absence of the license or credential as a factor in determining whether the qualifying members actually control the enterprise.

(i) The department may consider differences in remuneration between the qualifying members and other participants in the enterprise in determining whether to certify an enterprise as a MBE or WBE. Such consideration shall be in the context of the duties of the persons involved, customary industry practice, the enterprise's policy and practice concerning reinvestment of income, and any other explanations for the differences proffered by the enterprise.

(1) The department may determine that an enterprise is controlled by a qualifying member although that person's remuneration is lower than that of some other participants in the enterprise.

(2) In a case where a nonqualifying individual formerly controlled the enterprise, and a qualifying member now controls it, the department may consider a difference between the remuneration of the former and current controller of the enterprise as a factor in determining who controls the enterprise, particularly when the nonqualifying individual remains involved with the enterprise and continues to receive greater compensation than the qualifying member.

(j) In order to be deemed as controlling an enterprise, a qualifying member cannot engage in outside employment or other business interests that conflict with the management of the enterprise or prevent the individual from devoting sufficient time and attention to the affairs of the enterprise to control its activities. For example, absentee ownership of a business and part-time work in a full-time enterprise are not viewed as constituting control. However, an individual will be viewed as controlling a part-time business that operates only on evenings or weekends, or both, if the individual controls it all the time it is operating.

(k) The following are requirements concerning control of an enterprise run by a family:

(1) A qualifying member may control an enterprise even though one (1) or more of the individual's immediate family members (who themselves are not qualifying members) participate in the enterprise as a manager, employee, owner, or in another capacity. Except as otherwise provided in this subsection, the department must make a judgment about the control the qualifying member exercises vis-à-vis other persons involved in the business as it does in other situations, without regard to whether or not the other persons are immediate family members.

(2) If the department cannot determine whether a qualifying member, as distinct from the family as a whole, controls the enterprise, then the qualifying member has failed to carry his or her burden of proof concerning control, even though he or she may participate significantly in the enterprise's activities.

(l) Where an enterprise was formerly owned or controlled, or both, by a nonqualifying individual (whether or not an immediate family member), ownership or control, or both, was transferred to a qualifying member, and the nonqualifying individual remains involved with the enterprise in any capacity, the qualifying member now owning the enterprise must demonstrate that:

(1) The transfer of ownership or control, or both, to the qualifying member was made for reasons other than obtaining certification as an MBE or WBE.

(2) The qualifying member actually controls the management, policy, and operations of the enterprise, notwithstanding the continuing participation of a nonqualifying individual.

(m) In determining whether an enterprise is controlled by qualifying members, the department may consider whether the enterprise owns equipment necessary to perform its work. However, the department may not determine that an enterprise is not controlled by qualifying members solely because the enterprise leases, rather than owns, such equipment,

where leasing equipment is a customary industry practice and the lease does not involve a relationship with a prime contractor or other party that compromises the independence of the enterprise.

(n) The department must grant certification to an enterprise only for specific types of work in which the qualifying members have the ability to control the enterprise. To become certified in an additional type of work, the enterprise must have been certified for at least six (6) months in its current type of work, or certified by the department for at least one (1) year, and demonstrate that its qualifying members are able to control the enterprise with respect to the newly-requested type of work. The department may not, in this situation, require that the enterprise be recertified or submit a new application for certification, but it must verify the qualifying member's control of the enterprise in the additional type of work. However, the department must apply the same standards to additional types of work that were applied originally. Certification in these additional work areas are not guaranteed simply because the enterprise is currently certified. Further, there is a presumption against having more than three (3) industry variations in the same enterprise.

(o) An enterprise operating under a franchise or license agreement may be certified if it meets the standards in this part and the franchiser or licensor is not affiliated with the franchisee or licensee. In determining whether affiliation exists, the department will generally not consider the restraints relating to standardized quality, advertising, accounting format, and other provisions imposed on the franchisee or licensee by the franchise agreement or license, provided that the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Alternatively, even though a franchisee or licensee may not be controlled by virtue of such provisions in the franchise agreement or license, affiliation could arise through other means, such as common management or excessive restrictions on the sale or transfer of the franchise interest or license.

(p) In order for a partnership to be deemed controlled by qualified members, any nonqualifying partners must not have the power, without the specific written concurrence of the qualifying member, to contractually bind the partnership or subject the partnership to contract or tort liability.

(q) The qualifying members controlling an enterprise may use an employee leasing company. The use of such a company does not preclude the qualifying members from controlling the enterprise if they continue to maintain an employer-employee relationship with the leased employees. This includes being responsible for hiring, firing, training, assigning, and otherwise controlling the on-the-job activities of the leased employees, as well as ultimate responsibility for wage and tax obligations related to the employees.

(r) There is a presumption against the ability to operate and control more than three (3) enterprises within the context of this article. (*Indiana Department of Administration; 25 IAC 5-3-5; filed May 30, 2003, 11:00 a.m.: 26 IR 3300*)

25 IAC 5-3-6 Other factors considered for certification

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6-4; IC 5-22

Sec. 6. (a) The department will consider whether an enterprise performs a commercially useful function in making decisions about whether to certify an enterprise as a MBE or WBE. Determination that an enterprise performs a commercially useful function will be made based on the following considerations:

(1) An MBE or WBE performs a commercially useful function when it 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, the MBE or WBE 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. To determine whether an MBE or WBE is performing a commercially useful function, one must evaluate the amount of work subcontracted, industry practices, whether the amount the enterprise is to be paid under the contract is commensurate with the work it is actually performing and the credit claimed for its performance of the work, and other relevant factors.

(2) An MBE or WBE 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 MBE or WBE participation. In determining whether an MBE or WBE is such an extra participant, one must examine similar transactions, particularly those in which MBEs or WBEs do not participate.

(3) In the case of construction contracts, if an MBE or WBE does not perform or exercise responsibility for at least the agency's requisite percent of the total cost of its contract with its own work force, or the MBE or WBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, it is presumed that the enterprise is not performing a commercially useful function.

(b) The department may consider, in making certification decisions, whether an enterprise has exhibited a pattern of conduct indicating prior involvement in attempts to evade or subvert the intent or requirements of the MBE or WBE program.

(c) The department shall evaluate the eligibility of an enterprise on the basis of present circumstances. It will not refuse to certify an enterprise based solely on historical information indicating a lack of ownership or control by qualifying members in the past, if the enterprise currently meets the ownership and control standards of this part.

(d) The department will not require an MBE or WBE enterprise to be prequalified (or certified under the division of public works) as a condition for certification. Standards for prequalification and certification are made pursuant to 105 IAC 11 and IC 4-13.6-4, respectively. However, if the prequalification (certification) is industry/trade-specific, the department will require all enterprises that participate in its contracts and subcontracts related to that area to be prequalified.

(e) The applicant for MBE or WBE certification must possess reasonable prospects for success in competing in the public sector. The department will deem an enterprise that has been in business for two (2) full years immediately prior to its date of application as possessing reasonable prospects for success in competing in the public sector.

(1) Income tax returns for each of the two (2) previous tax years must show operating revenues in the selected types of work for which the applicant is seeking certification.

(2) The department may waive the two (2) years in business requirement if each of the following conditions is met:

(A) The qualifying member or members have demonstrated management experience.

(B) The qualifying member or members have demonstrated technical experience to carry out type of business for which certification is sought.

(C) The qualifying member has a record of successful performance on contracts from governmental or nongovernmental sources in its primary area of certification.

(D) The applicant for certification as an MBE or a WBE has demonstrated, or can demonstrate, its ability to timely obtain the personnel, facilities, equipment, and any other requirements needed to perform contracts.

(Indiana Department of Administration; 25 IAC 5-3-6; filed May 30, 2003, 11:00 a.m.; 26 IR 3302)

25 IAC 5-3-7 Review by the department of applications for certification as an MBE or WBE

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 7. (a) Certification process requirements are as follows:

(1) At a minimum, the department will take the following steps in determining whether an enterprise meets the standards for certification as an MBE or WBE:

(A) On-site visits. The department will:

(i) Make on-site visits during normal business hours to company headquarters with little or no advance notice in its efforts to make an accurate determination of the ownership and control of an enterprise. The department may interview the principal officers of the enterprise and review their resumes and work histories. The department may also perform an on-site visit to job sites if there are such sites on which the enterprise is working at the time of the eligibility investigation in its jurisdiction or local area.

(ii) With regards to out-of-state enterprises, the department may rely upon the site visit report of other recognized governmental entities with respect to an enterprise applying for certification.

(B) If the enterprise is a corporation, analyze the ownership of stock in the enterprise.

(C) Analyze the bonding and financial capacity of the enterprise.

(D) Determine the work history of the enterprise, including contracts it has received and work it has completed.

(E) Obtain a statement from the enterprise of the type of work it prefers to perform as part of the MBE or WBE program and its preferred locations for performing the work, if any.

(F) Obtain or compile a list of the equipment owned by or available to the enterprise and the licenses the enterprise and its key personnel possess to perform the work it seeks to do as part of the program.

(G) Require potential enterprises to complete and submit an appropriate application form.

(2) The applicant will be required to certify the completeness, accuracy, and truthfulness of the information submitted by way of notarized affidavit.

(3) The department must review all information on the application form prior to making a decision about the eligibility of the enterprise. If the department determines that the form clearly indicates the applicant is ineligible for certification, it may waive the on-site requirement.

(4) The department may request, at any time that it deems necessary, further information or clarification of any matter relating to an enterprise's qualification as an MBE or a WBE.

(5) The department must conduct preliminary audits of accounting records, project files, and any legal documents that may be pertinent or relevant to the certification of an enterprise as an MBE or a WBE.

(6) The department will make recommendations to the appropriate agencies and departments based on the totality of its investigation, including document reviews, interviews, site visits, and audits regarding the enterprise seeking certification as an MBE or a WBE.

(7) The department will make recommendations to the appropriate agencies and departments for further investigation if misrepresentation is suspected.

(8) The department will make a determination on applications for certification within ninety (90) of the completion of its on-site investigation or, in the case of an out-of-state enterprise, within ninety (90) days of the receipt of its home state investigation report. The department may extend this time period once, for no more than an additional sixty (60) days, upon written notice to the enterprise, explaining fully and specifically the reasons for the extension. Failure to make a determination by the applicable deadline under this paragraph 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 5-4-2.

(b) Applications from MBE or WBE enterprises domiciled outside of Indiana require the following, in addition to the items in this article:

(1) The enterprise must be qualified and in good standing with the state of its organization.

(2) The home state shall provide the on-site interview that was conducted in association with the certification. Certification of out-of-state applicants by the department is conditional to the out-of-state applicant meeting the standards of certification set forth in this article. The department reserves the right to grant or deny certification to an MBE or WBE with current, in-place certification status with other governmental agencies and departments with recognized certification authority.

(c) An applicant for certification as an MBE or a WBE may notify the department that it is seeking similar certification from another agency or certifying entity and request that the department provide a copy of its application documentation and report of site visit to such agency or entity. The notice may be on a form prescribed by the department. The department will respond to two (2) requests a year at no charge to the applicant. Additional requests will be honored only if the applicant pays the department's then-prevailing copying costs and postage. (*Indiana Department of Administration; 25 IAC 5-3-7; filed May 30, 2003, 11:00 a.m.: 26 IR 3303*)

25 IAC 5-3-8 Rules affecting an enterprise's responsibility after being certified as an MBE or a WBE

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 8. (a) An enterprise's responsibilities after certification include, but are not necessarily limited to, the responsibilities set forth in this section. Failure to comply with the provisions of this section may result in an order to show cause why MBE or WBE certification should not be revoked.

(b) Each MBE-certified enterprise and each WBE-certified enterprise must notify the department in writing within thirty (30) days of each change affecting its qualifying membership, ownership, or control requirements, and of any other material change to the information provided in the application form.

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

(2) Management responsibility among members of a limited liability company must be reported.

(3) Supporting documentation must be attached describing in detail the nature of such changes.

The notice must take the form of a notarized affidavit.

(c) A certified MBE or WBE enterprise must provide, every year on the anniversary of the date of its certification, a notarized affidavit stating that there have been no changes to enterprise's qualifying members, ownership, or control requirements, or any other material change to the information provided in its application form, except for changes about which the enterprise has previously notified the department. The affidavit shall specifically affirm that the enterprise continues to meet standards for certification under these rules.

(d) Once the department has certified an MBE or WBE, the enterprise shall remain certified for a period of at three (3) years unless or until 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 three (3) year period unless the factual basis on which the certification was made changes. (*Indiana Department of Administration; 25 IAC 5-3-8; filed May 30, 2003, 11:00 a.m.: 26 IR 3304*)

Rule 4. Procedures Governing Denial of Application for Certification or Revocation of Certification as an MBE or a WBE

25 IAC 5-4-1 Revocation of an enterprise's certification as an MBE or a WBE

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 1. (a) This section establishes standards for processing a complaint issued to a challenged enterprise concerning the possible revocation of its certification.

(b) Requirements for ineligibility complaints are as follows:

(1) Any person may file with the department a written complaint alleging that a currently certified enterprise is ineligible and specifying the alleged reasons why the enterprise is ineligible. The department is not required to accept a general allegation that an enterprise is ineligible or an anonymous complaint. The complaint may include any information or arguments supporting the complainant's assertion that the enterprise is ineligible and should not continue to be certified.

(2) The department must review its records concerning the enterprise, any material provided by the enterprise and the complainant, and other relevant information. The department may request additional information from the enterprise or conduct any other investigation deemed necessary.

(3) If the department determines, based on this review, that there is reasonable cause to believe that the enterprise is ineligible, the department must provide written notice to the enterprise that it proposes to find the enterprise ineligible, setting forth the reasons for the proposed determination. If the department determines that such reasonable cause does not exist, it must notify the complainant and the enterprise in writing of this determination and the reasons for it. All statements of reasons for findings on the issue of reasonable cause must specifically reference the evidence in the record on which each reason is based.

(c) If, based on notification by the enterprise of a change in its circumstances or other information that comes to the attention of the department that there is reasonable cause to believe that a currently certified enterprise is ineligible, the department must provide written notice to the enterprise that it proposes to find the enterprise ineligible, setting forth the reasons for the proposed determination. The statement of reasons for the finding of reasonable cause must specifically reference the evidence in the record on which each reason is based.

(d) Requirements for complaints from other state agencies are as follows:

(1) If a state agency determines that information in an enterprise's records, or other information available to that agency, provides reasonable cause to believe that a certified enterprise does not meet the eligibility criteria of this subsection, the state agency may request that the department initiate a proceeding to remove the enterprise's certification.

(2) The state agency must provide the department all relevant documentation or other information.

(e) The department may issue an order requiring an enterprise to show cause why its certification as an MBE or a WBE should not be revoked as provided in subsection (a), (b), or (c). In such case the enterprise shall be entitled to a hearing as set forth in 25 IAC 5-4-2 [section 2 of this rule].

(f) The department must not base a decision to remove eligibility on a reinterpretation or changed opinion of information available to the department at the time of its certification of the enterprise. It may base such a decision 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 a department.
- (4) A change in the certification standards or requirements since the enterprise was certified.
- (5) A documented finding that the department's determination to certify the enterprise was factually erroneous.

(g) During the pendency [*sic., pendency*] of a proceeding to determine if an enterprise's WBE or MBE should be revoked or suspended, the enterprise shall retain its status until a final order revoking certification is issued by the commission.

(h) When an enterprise's certification as an MBE or a WBE 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 (e) has been issued, the ineligible enterprise does not count toward the contract goal or overall goal. The prime contractor is to meet the contract goal with an eligible enterprise or 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 use the enterprise on the contract and may continue to receive credit toward its goal for the enterprise's work. In this case, or in a case where a prime contract has been awarded to an enterprise that is subsequently decertified, the portion of the decertified enterprise's performance of the contract remaining after the notice of its ineligibility shall not count toward the overall goal, but may count toward the contract goal.

(Indiana Department of Administration; 25 IAC 5-4-1; filed May 30, 2003, 11:00 a.m.: 26 IR 3305)

25 IAC 5-4-2 Review of determinations by the department regarding certification as an MBE or a WBE

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 4-21.5-3-5; IC 5-22

Sec. 2. (a) An enterprise:

- (1) whose application for certification as an MBE or as a WBE has been denied; or
 - (2) to which the department has issued an order to show cause why its MBE or WBE certification should not be 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 commission.

(d) When an enterprise is denied certification, it cannot reapply for certification for nine (9) months. The time period for reapplication begins to run at the time the enterprise's administrative and judicial remedies are exhausted. *(Indiana Department of Administration; 25 IAC 5-4-2; filed May 30, 2003, 11:00 a.m.: 26 IR 3306)*

Rule 5. MBE/WBE Participation in Procurement and Contracting; Prime Contractors

25 IAC 5-5-1 Policy; procurement and contracting

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13-1.3-3; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 1. (a) It is the policy of the state to provide an equal opportunity for minority and women's business enterprises to

participate in the state's procurement and contracting processes as prime contractors.

(b) Pursuant to IC 4-13-1.3-3, the department may delegate its authority to a state agency. *(Indiana Department of Administration; 25 IAC 5-5-1; filed May 30, 2003, 11:00 a.m.: 26 IR 3306)*

25 IAC 5-5-2 Activities to achieve participation

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 2. The department shall perform activities to provide minority and women's business enterprises the opportunity to participate in the state's award of purchases and contracts. *(Indiana Department of Administration; 25 IAC 5-5-2; filed May 30, 2003, 11:00 a.m.: 26 IR 3306)*

25 IAC 5-5-3 Outreach and assessment

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 3. (a) The department shall perform activities to outreach to minority and women's business enterprises. The department shall assess where and when the programs are most valuable to these enterprises.

(b) The department shall provide information on qualifications necessary for enterprises to compete for bid opportunities. *(Indiana Department of Administration; 25 IAC 5-5-3; filed May 30, 2003, 11:00 a.m.: 26 IR 3306)*

25 IAC 5-5-4 Promoting MBE/WBE participation as prime contractors

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 4. The department shall provide and promote opportunities for minorities and women to participate in procurement and contracting opportunities as prime vendors. *(Indiana Department of Administration; 25 IAC 5-5-4; filed May 30, 2003, 11:00 a.m.: 26 IR 3306)*

25 IAC 5-5-5 Monitoring MBE/WBE participation as prime contractors

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6-4; IC 4-13.6-5; IC 5-22

Sec. 5. (a) In monitoring MBE/WBE participation in prime contract awards, the department shall do the following as it pertains to procurement and contracting at the agency level pursuant to IC 4-13.6-4 and IC 4-13.6-5:

(1) Establish a standard method to record solicitations of these procurements.

(2) The agency shall provide the department with such information as the department deems reasonably necessary to carry out the purposes of this rule, including:

(A) Information on the contractors contacted, including name, address, telephone number, fax, and e-mail.

(B) The contractor's ethnicity and gender.

(C) Whether or not the contractor is a small business.

(D) Whether or not the contractor is new to the state's procurement process.

(E) The contractor's bid amount (or that the contractor chose not to bid).

(F) The person completing the form.

(G) The personnel responsible for the solicitation.

(b) To monitor MBE/WBE participation in prime contract awards, the department shall do the following as it pertains to contracts other than procurement and contracting at the agency level:

(1) Monitor the lists of enterprises bidding to develop potential strategies to increase the number of bidders. The form for such recording should include, but not be limited to, the following:

(A) Information on the contractors, including name, address, telephone number, fax, and e-mail.

(B) The contractor's ethnicity and gender.

- (C) The reason or reasons the company has chosen not to bid.
- (2) Establish a system to debrief bidders who do not win state contracts. The method of debriefing may include:
- (A) Feedback to MBE and WBE bidders in general to ensure they are aware of the availability of information regarding bid tabulations.
 - (B) Work with small business assistance organizations to counsel MBE and WBE bidders in general on strengthening future proposals and understanding of state requirements.
- (3) Maintain a list of bidders, consisting of information regarding all enterprises that bid or quote contracts. This list shall be used to compile and track those enterprises that have shown an interest in participating in the state's procurement and contracting processes. The information to be compiled shall include, but may not be limited to, the following:
- (A) Company name, address, phone number, fax, and e-mail.
 - (B) Owner's name, gender, and ethnicity.
 - (C) If new to the state bid process, age of enterprise and gross annual receipts.
 - (D) For this bid, name of proposed subcontractors proposed, including, for each company, the company's name, owner's name, gender, and ethnicity.

(Indiana Department of Administration; 25 IAC 5-5-5; filed May 30, 2003, 11:00 a.m.: 26 IR 3307)

25 IAC 5-5-6 Reporting MBE and WBE participation as prime contractors

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13-16.5-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 6. All state agencies, as defined in IC 4-13-16.5-1, shall report to the department its award of prime contracts to MBEs and WBEs on a quarterly basis. The form of the report shall be in compliance with policies and procedures of the department. *(Indiana Department of Administration; 25 IAC 5-5-6; filed May 30, 2003, 11:00 a.m.: 26 IR 3307)*

Rule 6. MBE and WBE Participation in Procurement and Contracting; Subcontractors

25 IAC 5-6-1 Promoting MBE and WBE participation as subcontractors

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13-1.3-3; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 1. (a) The department shall provide and promote opportunities for minorities and women to participate in procurement and contracting opportunities as subcontractors.

(b) Pursuant to IC 4-13-1.3-3, the department may delegate its authority to a state agency. *(Indiana Department of Administration; 25 IAC 5-6-1; filed May 30, 2003, 11:00 a.m.: 26 IR 3307)*

25 IAC 5-6-2 Monitoring MBE and WBE participation as subcontractors

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 2. (a) In monitoring the participation of MBEs or WBEs as subcontractors, the department shall conduct preproject meetings with all subcontractors and prime contractors. The department shall determine which projects will require a preproject meeting. Items of discussion at the meeting shall include, but may not be limited to, the following:

- (1) Subcontractors will learn when their services are likely to be needed.
- (2) The department will explain the state's prompt payment program.
- (3) The department will provide a review of MBE/WBE program requirements.
- (4) The department will explain the state's nondiscrimination and antidiscrimination laws.

(b) All contract amendments and change order requests must include an explanation of how MBEs and WBEs will be used and the percentage represented above the current contract amount.

(c) Notify appropriate subcontractors when contracts are revised upward through amendments or change orders, or both.

(d) All prime contractors, including MBE and WBE prime contractors, must meet the contract goals through use of

subcontractors. MBE and WBE prime contractors will get no credit toward the contract goal for the use of their own workforce. (*Indiana Department of Administration; 25 IAC 5-6-2; filed May 30, 2003, 11:00 a.m.: 26 IR 3307*)

25 IAC 5-6-3 Reporting MBE and WBE participation as subcontractors

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13-16.5-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 3. (a) In addition to requirements mentioned in other areas of the part, prime contractors shall be required to report all subcontractor participation, that is, MBE/WBE-certified subcontractors and non-MBE/WBE certified subcontractors. The report shall include, but may not be limited to, the following:

- (1) Company name, address, telephone number, fax, and e-mail.
- (2) Owner's name, gender, and type of qualifying membership.
- (3) Name of contact person employed by the enterprise.
- (4) Work the enterprise will perform and the approximate date when the subcontractors' work will commence (individually).
- (5) Contract amount for services to be performed (individually).

(b) Each state agency, as defined in IC 4-13-16.5-1, shall report to the department its use of MBEs and WBEs as subcontractors on a quarterly basis. The form of the report shall be in compliance with policies and procedures of the department. (*Indiana Department of Administration; 25 IAC 5-6-3; filed May 30, 2003, 11:00 a.m.: 26 IR 3308*)

25 IAC 5-6-4 Procedure for subcontractor bid submission

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 4. (a) In a case where the bidder has arranged to subcontract one hundred percent (100%) or more of the subcontractor goal to MBEs and WBEs, a completed MBE/WBE subcontractor plan shall be submitted along with the other required bid documents.

(1) All MBE and WBE subcontractors must be validated by the department prior to the award of the contract. The completed plan shall include the following information:

- (A) Name of the enterprise to be employed.
- (B) Phone number of the enterprise.
- (C) Name of a contact person from the enterprise.
- (D) Work the enterprise will perform and the approximate date when the MBEs work will commence.
- (E) Contract amount for services that will be performed.

(2) In a case where the bidder has had the MBE/WBE subcontractor plan approved, where that bidder has been awarded the contract, and where the awarded contract is one hundred thousand dollars (\$100,000) or more, the bidder shall submit participation reports monthly, or at more frequent intervals, as may be requested.

(3) The department reserves the right to periodically require progress reports from the contractor on projects less than one hundred thousand dollars (\$100,000) regarding continuing MBE and WBE participation.

(b) Purchases from MBE or WBE suppliers are allowed for MBE or WBE credit in the program. The maximum allowable credit will be limited to sixty percent (60%) of the total project goal. The supplier must perform a commercially useful function.

(c) In a case where the bidder has been unable to arrange to subcontract one hundred percent (100%) of the subcontract goal, but has been able to arrange to subcontract some of the goal to MBEs or WBEs, both a completed MBE/WBE subcontractor plan and a completed application for MBE/WBE program waiver shall be submitted with the other required bid documents, as prescribed. All MBE and WBE subcontractors must be validated by the department prior to the award of the contract. All forms are to be completed as described in subsection (a).

(d) In a case where the bidder has been unable to arrange to subcontract the goal percentage or in a case where no MBE or WBE participation is expected to occur, a completed application for MBE/WBE program waiver shall be submitted, along with the other required bid documents, as prescribed. The application for program waiver shall be used to

demonstrate the bidder's efforts to employ MBEs and WBEs on the project. The application shall include the following information:

- (1) Names of the MBE and WBE enterprises that the bidder has contacted or been contacted by.
- (2) Persons working at the enterprises who were contacted.
- (3) Phone numbers of the enterprises.
- (4) Types of contacts or communications.
- (5) An explanation of the results obtained, such as price not competitive, unable to contact, or no response.

The state reserves the right to verify and seek further clarification of any information submitted.

(e) Compliance with this rule is considered to be a demonstration of the bidder's responsiveness and responsibility. Therefore, all statements shall be complete, legible, true, and correct and shall not omit material facts. Failure to provide complete and accurate MBE and WBE subcontractor plans using minority and women's business enterprises validated as MBEs and WBEs by the department or failure to provide applications for MBE/WBE program waivers, or both, may be the basis for rejection of the bid. *(Indiana Department of Administration; 25 IAC 5-6-4; filed May 30, 2003, 11:00 a.m.: 26 IR 3308)*

Rule 7. Compliance

25 IAC 5-7-1 Policy

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13-16.5-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 1. (a) The results of a Statistical Analysis of Utilization, conducted in accordance with IC 4-13-16.5-1, will determine the availability of qualifying minority and women's business enterprises in the marketplace.

(b) Should the Statistical Analysis of Utilization find statistically significant disparities in state contractual expenditures in specifically defined areas, as compared to the ready, willing, and able minority and women's business enterprises in the state, the department shall institute goals for procurement and contracting to remedy the disparate findings of the study. *(Indiana Department of Administration; 25 IAC 5-7-1; filed May 30, 2003, 11:00 a.m.: 26 IR 3309)*

25 IAC 5-7-2 Parties to whom this rule applies

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13-16.5-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 2. (a) This rule applies to all state agencies defined in IC 4-13-16.5-1 and 25 IAC 5-2-1(a)(19).

(b) This rule does not apply to state agencies whose purchases and contracts are not addressed in an applicable Statistical Analysis of Utilization. However, such state agencies shall provide reports to the department of MBE and WBE procurement and contracting. This information shall be incorporated as data for the next Statistical Analysis of Utilization. The state agency shall not be exempt from that point forward. *(Indiana Department of Administration; 25 IAC 5-7-2; filed May 30, 2003, 11:00 a.m.: 26 IR 3309)*

25 IAC 5-7-3 Goal setting

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13-16.5-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 3. (a) The goal setting shall be subject to the following provisions:

- (1) The goals shall be updated annually, during the month of March, to go into effect July 1 of the same year.
- (2) The goals shall reflect current utilization and availability.
- (3) The goals will apply to procurements and contracts as awarded, and to change orders, amendments, and other modifications to the contract, which affect contract value.
- (4) In accordance with IC 4-13-16.5-1, the findings of discrimination shall be updated, and the continuance of the goals shall be subject to the results of that review.

(b) Upon approval of the commission, the department may set overall MBE and WBE goals, which may be met through the use of prime contractors, subcontractors, suppliers, joint ventures, or other arrangements that afford meaningful opportunities for MBE and WBE participation.

(c) Upon approval of the commission, the department may set specific MBE and WBE goals in the areas of construction, professional services, suppliers, and other business services based on the disparate findings of the Statistical Analysis of Utilization.

(d) Goals set by the department shall incorporate the availability of MBEs and WBEs to perform the work and the availability of MBEs and WBEs in the location where the work is to be done.

(e) Subgoals may be set, wherein specific race and gender goals are set, incorporating the findings of the study, and in accordance with applicable laws.

(f) Goals may vary on individual contracts. However, the combined participation shall represent the MBE and WBE participation for the year. (*Indiana Department of Administration; 25 IAC 5-7-3; filed May 30, 2003, 11:00 a.m.: 26 IR 3309*)

25 IAC 5-7-4 Compliance monitoring

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 4. (a) In the management of this program, the department shall exercise its rights to employ all available administrative actions and remedies to ensure that the goals and intent of the program are successfully met. Therefore, the department shall serve as the final authority in the authentication, acceptance, and certification of MBE and WBE enterprises according to the criteria established in this article.

(b) The department shall be final authority in the review, acceptance, and approval of all MBE and WBE affidavits and subcontractor plans, and applications for MBE/WBE program waivers, which are included in bid packages. In the performance of these duties, the department shall:

(1) Review all MBE and WBE affidavits and subcontractor plans, and applications for MBE or WBE program waivers, after the bid opening and before the award of the contract, in order to verify the authenticity of the documents and the successful bidder's adherence to the rules and regulations set forth in the contract documents.

(2) Contact and interview the successful bidder or its listed subcontractors and material suppliers if further information is required to establish authenticity and to issue approval of the submitted documentation.

(3) Conduct audits, as necessary, of the accounting records of the successful bidder and the MBE and WBE participants to determine and establish their authenticity for the final acceptance and approval of the documentation.

(4) Issue an official NOTICE OF REJECTION when it has been determined that the successful bidder has not complied with the instructions set forth in the contract documents and this rule. The department may direct the successful bidder to submit revised documentation within five (5) working days or file for an official application for MBE/WBE program waiver. The department shall reserve the right to reject any and all bids when the successful bidder fails to respond to the department's request.

(5) Issue an official NOTICE OF CONDITIONAL APPROVAL when the following has been determined:

(A) That the successful bidder has demonstrated a good faith effort towards compliance to the program, but when one (1) or more of the MBE or WBE enterprises listed does not conform to the guidelines of this article.

(B) When the levels of participation do not reach the goal of the project.

After a review of the situation and circumstances, the successful bidder may be directed to submit a revised MBE or WBE subcontractor plan or may be granted an official MBE/WBE program waiver, thereby allowing an exception to the goal for the project or any portion thereof.

(6) Issue an approval of the MBE or WBE subcontractor plan when it has been determined that the successful bidder has achieved compliance with the project goal.

(7) Issue an MBE/WBE program waiver from all or part of the project goal when it has been determined that the successful bidder has employed a good faith effort towards compliance to the program and when it has been determined that the realization of the project goal will not be feasible because of circumstances which are beyond the control of the bidder.

(8) Make recommendations to the appropriate agencies for further investigation if misrepresentation is suspected.

(c) The department is the final authority in the review and acceptance of the successful bidder's MBE and WBE program participation reports. Therefore, the department reserves the right to do the following:

- (1) Receive copies, on a timely basis or upon demand, of all reports for the expressed purpose of review, acceptance, or rejection. Timeliness of submittal, accuracy, and completeness will be subject to close scrutiny in the execution of this process.
- (2) Conduct interviews with the appropriate personnel or designated representatives from an enterprise, as necessary, to determine and establish authenticity for acceptance of the reports.
- (3) Conduct audits of the accounting records of an enterprise to determine accuracy in reporting and to establish authenticity for acceptance of the reports.
- (4) Direct the successful bidder and the MBE and WBE participants, or all, to provide, as necessary, additional documentation to establish authenticity for acceptance of the reports.
- (5) Make recommendations to the appropriate agencies for further investigation if misrepresentation is suspected.

(d) Because the attainment of the project goal has been established through contractual provisions with the prime contractor, the department shall consider the prime contractor to be the sole source of responsibility for goal attainment and project administration and shall, therefore, be held accountable for the actions of all of its subcontractors, including those subcontractors who have subcontracted work to MBE and WBE contractors or who have purchased materials from MBE and WBE suppliers.

(e) The department may employ its authority to make determinations of responsiveness and responsibility based on the actions of the subcontractors regarding adherence to Indiana laws and rules. (*Indiana Department of Administration; 25 IAC 5-7-4; filed May 30, 2003, 11:00 a.m.: 26 IR 3309*)

25 IAC 5-7-5 Application for MBE/WBE program waiver

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 5. (a) In cases where the contractor is unable to meet the project goal, the contractor may petition the department for relief from that goal by filing an application for MBE/WBE program waiver. The application for MBE/WBE program waiver shall show all reasonable good faith efforts that were made by the contractor for the purpose of fulfilling the project goal. Such reasonable efforts shall include, but may not be limited to, the following:

- (1) Documentation of direct contact or negotiations with MBEs and WBEs for specific contracting opportunities, the actions taken shall be reported in a manner that will include the following items:
 - (A) A detailed statement of the efforts made to negotiate with MBEs and WBEs, including the following:
 - (i) The names, addresses, and telephone numbers of MBEs and WBEs contacted.
 - (ii) A detailed statement of the reason why prospective agreements were not reached.
 - (B) A detailed statement of the efforts made to select portions of the work proposed to be performed by MBEs and WBEs in order to increase the likelihood of achieving the stated goal.
- (2) Documentation of any advertising that the contractor performed in the search for prospective MBEs and WBEs for the contract.
- (3) Documentation of any notifications that the contractor provided to minority business assistance agencies for the purpose of locating prospective MBEs and WBEs for the contract.
- (4) Documentation of the contractor's efforts to research other possible areas of participation, including, but not limited to, any of the following:
 - (A) Suppliers.
 - (B) Shipping or transport enterprises.
 - (C) Engineering enterprises.
 - (D) Any other role that may contribute to the production and delivery of the product or service specified in the contract.
- (5) Documentation regarding the contractor's affirmative action policies or programs as they pertain to the utilization of MBEs and WBEs. This documentation should also provide an explanation of the methods used to carry out the affirmative action policies.
- (6) Documentation relevant to any other efforts the contractor has made to assist MBEs and WBEs in overcoming the

traditional barriers of participation in the industry affected by the contract.

(b) When considering an application for MBE/WBE program waiver, the department will consider the following, including, but not limited to:

- (1) The methods utilized by the contractor.
- (2) The time the contractor has allowed for a meaningful response to its solicitations.
- (3) Statements received from MBEs and WBEs who have been listed as having been contacted by the contractor.

(c) The contractor shall maintain adequate records of all relevant data with respect to the utilization and attempted utilization of MBEs and WBEs and shall provide full access to these records to the department upon its request to inspect them. (*Indiana Department of Administration; 25 IAC 5-7-5; filed May 30, 2003, 11:00 a.m.: 26 IR 3310*)

25 IAC 5-7-6 Grant of waiver from project goal

Authority: IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-16.5; IC 5-16-6.5; IC 22-9-1-10

Sec. 6. Upon review and analysis of the documentation supplied to the department by the contractor, a determination will be made and the contractor will be promptly notified of the results. Such results may include the following:

- (1) Notification that the contractor has been granted a waiver from the project goal and has been authorized to proceed without any MBE or WBE participation on the contract.
- (2) Notification that the contractor has been granted a partial waiver from the project goal and has been authorized to proceed when MBE and WBE participation is greater than zero (0), but less than the project goal.
- (3) Notification that further information will be required before a final determination may be made.
- (4) Notification that the application for MBE/WBE program waiver has not been granted. In such a case, the following action may result:

(A) The contractor may be required to provide further information.

(B) The contractor's bid may be rejected.

(*Indiana Department of Administration; 25 IAC 5-7-6; filed May 30, 2003, 11:00 a.m.: 26 IR 3311*)

25 IAC 5-7-7 Appeals process for bid rejection or denial of waiver

Authority: IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-16.5; IC 5-16-6.5; IC 22-9-1-10

Sec. 7. (a) Upon notification that the application for MBE program waiver has been denied, the contractor may request a hearing with the MBE compliance review committee. The request for the hearing shall be directed to:

M/WBE Compliance Review Committee
c/o Indiana Department of Administration
Indiana Government Center-South
402 West Washington Street
Indianapolis, Indiana 46204.

(b) In the appeals process, the committee shall be responsible for the following activities:

- (1) Arrange a time and place to hear the contractor's appeal within five (5) working days of the date of the receipt of the contractor's request for the hearing.
- (2) Provide the contractor with every opportunity to present the reason for the appeal.
- (3) Review and discuss all of the information at hand, including the following:
 - (A) MBE or WBE availability.
 - (B) The contractor's original efforts towards MBE and WBE utilization.
 - (C) Statements from MBEs or WBEs listed in the documentation supplied by the contractor.
 - (D) The arguments offered by the contractor at the hearing.
- (4) Arrive at a final determination within five (5) working days after the conclusion of the appeal hearing.

(c) If the contractor is dissatisfied with the decision made by the M/WBE compliance review committee, the contractor may submit to the commissioner within five (5) working days after receipt of the committee's decision, a written request

for review and reconsideration, stating with particularity the basis of its objections. The request for review may be accompanied by such additional written material as the contractor deems relevant to the review. The commissioner, or his or her designee, will consider the request and issue a written decision within ten (10) working days after receipt of all material. Failure of the commissioner to respond within ten (10) working days will be deemed a confirmation of the committee's decision. (*Indiana Department of Administration; 25 IAC 5-7-7; filed May 30, 2003, 11:00 a.m.: 26 IR 3311*)

25 IAC 5-7-8 Sanctions; contractors

Authority: IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-16.5; IC 5-16-6.5; IC 22-9-1-10; IC 35-43-5-9; IC 35-44-2-1

Sec. 8. (a) In the event of a violation of this rule, the department shall notify the contractor of the violations and will seek a course of action to correct them. The selected course of action may include the recommendation for the imposition of sanctions for material breach of contract if any of the following are determined:

- (1) The contractor has not demonstrated a good faith effort to comply with this rule.
- (2) The contractor has failed to cooperate in providing information regarding its good faith efforts to comply with this rule.
- (3) The contractor provides false or misleading information concerning its minority business enterprise contracting activity or in relation to the contractor's good faith efforts to comply with this rule.
- (4) The contractor fails to make prompt payment to a minority business for services, materials, or labor, whether with respect to the present contract or a previous contract between the contractor and the minority business, unless the contractor, in good faith, contests the payment or any part of it. The contractor fails to promptly pay the uncontested part to the minority business in the event the contractor, in good faith, contests part of a payment.
- (5) The business enterprise provides false or misleading information concerning its status as a bona fide entity, which is owned and actively controlled by racial minorities.
- (6) The contractor subjects an MBE or WBE to unlawful discriminatory conduct.

(b) In the event that it is determined that a violation of this rule has occurred, the department may elect to immediately employ one (1) or more of the following sanctions:

- (1) Withholding payments on the specific contract in which the deficiency is known to exist until such time that satisfactory corrective measures are made.
- (2) Adjustment to payments due or the permanent withholding of retainages of the specific contract in which the deficiency is known to exist.
- (3) Suspension or termination of the specific contract in which the deficiency is known to exist. In the event that this sanction is employed, the contractor will be held liable for any consequential damages arising from the suspension or termination of the contract, including damages caused as a result of the delay or from increased prices incurred in securing the performance of the balance of the work by other contractors.
- (4) Recommendation to the certification board to revoke the contractor's certification status with the public works division of the department. This recommendation may result in the suspension or revocation of the contractor's ability to perform on future state contracts for a period no longer than thirty-six (36) months.
- (5) Suspension, revocation, or denial of the MBE or WBE certification and eligibility to participate in the MBE or WBE program for a period of not more than thirty-six (36) months.

(c) In the event that sanctions are required, they may be employed immediately. Suspension or stay is in the sole discretion of the commissioner.

(d) In the event that the contractor has provided false or misleading information, the department may elect to provide the information to the appropriate investigating agencies for investigation and enforcement of any possible criminal violations or relevant statutes under IC 35-43-5-9 or IC 35-44-2-1.

(e) In the event that the contractor fails to pay the minority business in a timely manner or fails to satisfactorily resolve any outstanding claims, the department may elect to withhold the disputed amount from the payments due to the contractor and may elect to suspend or terminate the contract.

(f) In the event that the minority business enterprise has provided false or misleading information, the department may

elect to provide the information to the appropriate investigating agencies for investigation and enforcement of any possible criminal violations of relevant statutes. *(Indiana Department of Administration; 25 IAC 5-7-8; filed May 30, 2003, 11:00 a.m.: 26 IR 3312)*

25 IAC 5-7-9 Appeals process for violations ruling or sanctions imposed

Authority: IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-16.5; IC 5-16-6.5; IC 22-9-1-10

Sec. 9. (a) Upon notification of the determination of rules violations or sanctions imposed, the contractor may request a hearing before the MBE compliance review committee. The request for the hearing of an appeal shall be directed to:

M/WBE Compliance Review Committee
c/o Indiana Department of Administration
Indiana Government Center-South
402 West Washington Street
Indianapolis, Indiana 46204.

(b) In the appeals process, the committee shall be responsible for the following activities:

- (1)** Arrange a time and place to hear the contractor's appeal within five (5) working days of the date of the receipt of the contractor's request for the hearing.
- (2)** Provide the contractor with every opportunity to present the basis for the appeal.
- (3)** Review and discuss all of the information at hand and the arguments offered by the contractor at the hearing.
- (4)** Arrive at a final determination within five (5) working days after the conclusion of the hearing.

(c) If the contractor is dissatisfied with the decision made by the M/WBE compliance review committee, the contractor may submit to the commissioner within five (5) working days after receipt of the committee's decision, a written request for review and reconsideration, stating with particularity the basis of its objections. The request for review may be accompanied by such additional written material as the contractor deems relevant to the review. The commissioner, or his or her designee, will consider the request and issue a written decision within ten (10) working days after receipt of all material. Failure of the commissioner to respond within ten (10) working days will be deemed a confirmation of the committee's decision. *(Indiana Department of Administration; 25 IAC 5-7-9; filed May 30, 2003, 11:00 a.m.: 26 IR 3312)*

Rule 8. Commission Members

25 IAC 5-8-1 Ethics of commission members

Authority: IC 4-13-1-4; IC 4-13-1-7; IC 4-13-2-9; IC 4-13.6-3-1

Affected: IC 4-13-1; IC 4-13.5-1; IC 4-13.6; IC 5-22

Sec. 1. Commission members shall abide by all applicable state statutes, administrative rules, policies, and guidelines regarding ethical conduct. *(Indiana Department of Administration; 25 IAC 5-8-1; filed May 30, 2003, 11:00 a.m.: 26 IR 3313)*

SECTION 2. THE FOLLOWING ARE REPEALED: 25 IAC 2-19; 25 IAC 2-20.

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