STATEMENTS OF POLICY

Title 4--ADMINISTRATION

DEPARTMENT OF GENERAL SERVICES

[4 PA. CODE CHS. 58 AND 68]

Internal Guidelines for MBE/WBE Certification

[35 Pa.B. 5129]

The Department of General Services (Department), under the authority of Executive Order No. 2004-6 (§§ 1.451--1.455 (relating to minority and women business enterprises)), adds a statement of policy in Chapter 58 (relating to contract compliance) regarding internal guidelines for certification of Minority Business Enterprise/Women's Business Enterprise (MBE/WBE) and deletes the prior statement of policy in Chapter 68, Subchapter C to read as set forth in Annex A.

Purpose

Executive Order 2004-6 rescinded and replaced Executive Order 1996-8. The Department is deleting and replacing its statement of policy to reflect current Executive Order 2004-6 and to revise the Internal Guidelines for MBE/WBE Certification.

Overview of Changes in Statement of Policy

The statement of policy states the criteria for determination of applications for certification as an MBE or WBE and describes the procedures for businesses to follow in applying for certification. In response to Executive Order 1996-8, the Department amended the statement of policy in 2002. See 32 Pa.B. 615 (February 2, 2002). The statement of policy in Chapter 58 retains much of the language of the statement of policy published in 2002. The Department considered amending the 2002 statement of policy but decided to rescind the policy, issue a new statement and relocate the statement of policy to Chapter 58.

The businesses certified under the statement of policy participate in construction and procurement as regulated by Part III, Subpart C (relating to construction and procurement). Subpart C contains a general article, an article regarding construction and an article regarding procurement. The deleted statement of policy was in Chapter 68 (relating to contract compliance) under Article III (relating to procurement). The Department proposes to update and relocate the regulations remaining in Chapter 68 in the near future.

The new statement of policy will be in Chapter 58 under Subpart C, Article I (relating to general). The decision to place the new statement of policy in Article I signifies that the Department has one unified policy for construction and procurement. The statement of policy will:

a. Reflect the change in the name of the Department's Bureau of Contract Administration and Business Development to the Bureau of Minority and Women Business Opportunities (BMWBO).

b. Recognize the BMWBO's authority to accept certifications by third parties to include private certification entities in addition to public certification bodies.

c. Expressly limit certification to "for-profit" businesses.

d. Identify the evidence required to establish "minority" origin.

e. Ensure that licensing as an indicia of operational control will be required only when State or Federal law mandates that the minority or woman business owner possess the license.

f. Permit certification under defined circumstances when the securities constituting ownership of the business are held by a corporation or trust.

g. Explicitly permit certification denial if an applicant refuses to answer questions relevant to certification.

h. Enable businesses to continue to participate in the program beyond the current 8-year limitation period.

Affected Individuals and Organizations

The Department is committed to ensuring nondiscrimination in contracting and increasing the

opportunities for participation by disadvantaged businesses in Commonwealth contracts. Approximately 1,700 businesses are certified by the Department as an MBE or WBE. The Department received input from the Governor's Advisory Committee on Minority and Women Business Opportunities. The statement of policy will benefit currently certified and potential MBEs and WBEs by clarifying the requirements for certification and by eliminating the 8-year limitation on participation in the program.

Fiscal Impact

The Department will continue to incur personnel and other costs in administering the MBE/WBE certification program. During Fiscal Year 2003-2004, the Department spent $338,000 to operate the Certification Division in the BMWBO.

Paperwork Requirements

The statement of policy will not increase the paperwork associated with the MBE/WBE certification process.

Effective Date

The statement of policy shall be effective upon publication in the *Pennsylvania Bulletin*.

Contact Person

For information regarding this statement of policy, contact Mary Benefield Seiverling, Assistant Chief Counsel for Government Operations, Office of Chief Counsel, Department of General Services, 603 North Office Building, Harrisburg, PA 17125, (717) 787-5599.

(*Editor's Note:* The regulations of the Department, 4 Pa. Code, are amended by deleting a statement of policy in §§ 68.201--68.210 and by adding a statement of policy in §§ 58.201--58.210 to read as set forth in Annex A.)

Fiscal Note: 8-10. No fiscal impact; (8) recommends adoption.

STATEMENT OF POLICY

Annex A
Title 4. Administration
Part III. Department of General Services
Subpart C. Construction and Procurement
Article I. General
Chapter 58. Contract Compliance
Subchapter C. Internal Guidelines for
MBE/WBE Certification- - Statement of Policy

Sec.

58.201. Policy.
58.202. Definitions.
58.203. Certification of eligible MBEs and WBEs.
58.204. Eligibility standards.
58.205. Joint venture.
58.206. Approved certification.
58.207. Certification denial.
58.208. Decertification.
58.209. Review of decertifications.
58.210. Hearing.

§ 58.201. Policy.

(a) Executive Order No. 2004-6, 4 Pa. Code Chapter 1, Subchapter LL (relating to minority and women business enterprise), established the Department as the central agency to manage and develop the participation of minority and women-owned businesses and other disadvantaged businesses in Commonwealth contracts. The Executive Order directed the Department to expand the pool of minority and women-owned businesses that are certified as MBEs and WBEs. The Department has assigned these responsibilities to its BMWBO.

(b) This subchapter establishes guidelines that the Department will follow in determining whether a business entity should be certified and which business entities, previously certified, shall be decertified. The Executive Order and 62 Pa.C.S. Part I (relating to Commonwealth Procurement Code) give the Department broad authority governing the management and development of the participation of MBEs and WBEs and governing the formulation of general procurement policy. This subchapter gives direction to BMWBO, executive agencies and others as to how that broad authority and agency discretion will be exercised. This subchapter constitutes guidelines to BMWBO, the executive agencies and others within this Commonwealth. This subchapter is not and does not purport to operate as a regulation and does not have or purport to have the force of law.

§ 58.202. Definitions.

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise:

BMWBO – The Bureau of Minority and Women Business Opportunities within the Department.

Certification – A determination made by the BMWBO that a for-profit business entity is an MBE or WBE. In the alternative, BMWBO may, by declaration, accept the certification program of other public or private bodies if the certification program conforms substantially to the program of BMWBO established in Chapter 1, Subchapter LL (relating to minority and women business enterprise). When the certification program of another public or private body has been declared to be accepted, MBE or WBE will be deemed certified under this program if the certification remains current and if the business entity has not been decertified.

Department – The Department of General Services of the Commonwealth.

MBE – Minority Business Enterprise – A small for-profit business concern that is one of the following:

(i) A sole proprietorship, owned and controlled by a minority.

(ii) A partnership or joint venture controlled by minorities in which at least 51% of the beneficial ownership interest is held by minorities.

(iii) A corporation or other business entity controlled by minorities in which at least 51% of the voting interest and 51% of the beneficial ownership interest are held by minorities.

Minority –

(i) A person who is a citizen of the United States who is a Black American, Hispanic American, Native American, Asian-Pacific American or Asian-Indian American.

(A) *African Americans* –

(I) Persons having origins from any of the Black groups of Africa.

(II) The term includes persons having origins in any of the original peoples of the Cape Verde Islands.

(B) *Hispanic American* – Persons having their origins from one or more of the Spanish-speaking peoples of Mexico, Puerto Rico, Cuba, Central or South American or the Caribbean Islands.

(C) *Native Americans (Alaskans)* – Persons having origins from one or more of the original peoples of North America and who are recognized as an Indian by a tribe or tribal organization.

(D) *Pacific Islanders* – Persons having origins from one or more of the original peoples of the Pacific Islands, including Samoa and the Philippine Islands.

(E) *Asian-Americans* – Persons having origins from one or more of the original peoples of the Far East, Southeast Asia including China, Japan, Korea, India, Pakistan and Bangladesh.

(ii) To establish origins of a particular "minority" group, the applicant shall provide a document issued by a Federal, state or local governmental entity establishing that either the applicant, the applicant's biological parents or the applicant's biological grandparents are members of the minority group.

Secretary – The Secretary of the Department or a designated deputy secretary of the Department.

Small business – A business in the United States which is independently owned, is not dominant in its field of operation and employs no more than the maximum number of employees established by 62 Pa.C.S. § 2102 (relating to definitions).

WBE – Women's Business Enterprise--A small business that is one of the following:

(i) A sole proprietorship, owned and controlled by a woman.

(ii) A partnership or joint venture controlled by women in which at least 51% of the beneficial ownership is held by women.

(iii) A corporation or other entity controlled by women in which at least 51% of the voting interest and 51% of the beneficial ownership interest are held by women.

Women – United States citizens who are of the female gender.

§ 58.203. Certification of eligible MBEs and WBEs.

(a) *Purpose*. The purpose of this subchapter is to ensure that only those for-profit businesses and businesses which are owned and controlled in both form and substance by one or more minorities or women are certified.

(b) *Application form*. BMWBO will provide applications for businesses that are sole proprietors, partnerships, corporations and for other business entities. The appropriate application will be distributed to the businesses for completion. In the ordinary instance, it will be a reasonable exercise of agency discretion for BMWBO to decline to certify a business that fails to complete the application form. A distortion, false statement or nondisclosure of information that is a material misrepresentation will, in the ordinary instance, warrant denial of certification and may result in referral to other agencies for consideration of other civil or criminal actions.

(c) *Acceptance of other public jurisdictions' certification*. If the business has a current certification from a BMWBO-approved public or private body, evidence of that certification may be obtained and relied upon by BMWBO in lieu of completing a certification application. BMWBO may obtain, as part of the application process, information from out-of-State businesses on current MBE/WBE certification from the business' home state governmental certifying body and from other public jurisdictions. Out-of-State businesses must first be certified by their home state before applying for certification with the Department.

§ 58.204. Eligibility standards.

The following standards will be used by BMWBO in determining whether a business is owned and controlled by one or more minorities or women and therefore eligible to be certified as an MBE or WBE:

(1) *Business history*. The applicant shall have actually done business for 1 year before submission of the application, or if it has been in business for less than 1 year, the established operating business shall have a 2-year business plan reviewed by a Small Business Development Center or by a Pennsylvania enterprise center authorized by the Minority Business Development Agency of the United States Department of Commerce.

(2) *Ownership*.

(i) Bona fide minority and women group membership may be established on the basis of the individual's claim

that he is a member of a minority group or she is of the female gender. Verification of group membership may be accepted through submission of birth certificates, military records, passports or tribal cards.

(ii) An eligible MBE or WBE under this subchapter shall be an independent business. The ownership and control by minorities or women shall be real, substantial and continuing and shall go beyond the pro forma ownership of the business as reflected in its ownership documents. The minority and women owners shall enjoy the customary incidents of ownership and shall share in the risks and profits commensurate with their ownership interest as demonstrated both by an examination of the substance and form of arrangements. Recognition of the business as a separate entity for tax or corporate purposes is not necessarily sufficient for recognition as an MBE or WBE. In determining whether a potential MBE or WBE is an independent business, BMWBO will consider all relevant factors, including the date the business was established, its resources, and the nature of the financial and lease arrangements. The business relationship with non-MBE or WBE businesses, in areas such as personnel, facilities, equipment, financial or bonding support, or both, and other resources will also be considered. The business' relationship with prime contractors will be examined to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential MBE or WBE business.

(iii) The contributions of capital and expertise by the minority or women owners to acquire their interests in the business shall be real and substantial. Examples of insufficient contributions include a promise to contribute capital, a note payable to the business or to an owner who is not a minority or woman or the mere participation as an employee rather than as a manager.

(iv) For purposes of determining ownership, BMWBO will presume as not being held by a minority or woman all interests in a business or other assets obtained as the result of a gift, or transfer without adequate consideration, if the donor is:

(A) Involved in the same business for which the individual is seeking certification, or an affiliate of that business.

(B) Involved in the same or a similar line of business.

(C) Engaged in an ongoing business relationship with the business, or an affiliate of the business, for which the individual is seeking certification.

(v) To overcome this presumption and permit the interests or assets to be counted, the minority or women owners must demonstrate that:

(A) The gift or transfer to the minority or women owners was made for reasons other than obtaining certification as an MBE/WBE.

(B) The minority or women owners actually control the management, policy, and operations of the business, notwithstanding the continuing participation of the donor who provided the gift or transfer.

(3) *Management control*. The minority or women owners shall possess the power to direct or cause the direction of the management and policies of the business and to make the day-to-day as well as major decisions on matters of management, policy and operations. The minority or women owners shall hold the highest officer position in the company (for example--chief executive officer or president). In a corporation, the minority or women owners shall control the board of directors. The business may not be subject to formal or informal restrictions which limit the customary discretion of the minority or women owners. There may be no restrictions through, for example, by-law provisions, partnership agreements or charter requirements for cumulative voting rights or otherwise that prevent the minority or women owners, without the cooperation or vote of an owner who is not a minority or woman, from making a business decision of the business. If the actual management of the business is contracted out to, or otherwise has been placed with individuals other than the minority or women owners, those persons who have the ultimate power to hire and fire the managers will ordinarily be considered as controlling the business.

(4) *Operational control*. The minority or women owners shall demonstrate through the application sufficient experience, knowledge and expertise to operate that particular business. The minority or women owners shall have an overall understanding of and technical competence directly related to the type of business in which the business is engaged. The minority and women owners are not required to have experience or expertise in every critical area of the business' operations, or to have greater experience or expertise in a given field than managers or key employees. The minority and women owners shall have the ability to intelligently and critically evaluate information presented by other participants in the business' activities and to use this information to make independent decisions concerning the business' daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or

bookkeeping functions unrelated to the principal business activities of the business is insufficient to demonstrate control. If State or Federal law requires the business owner to have a particular license or other credentials, the minority or women business owner shall possess the required license or other credentials. If State or local law requires the business to have a particular license or other credentials to own or control, or both, a certain type of business, the minority or women owned business shall possess the required license or other credentials. Additionally, if the owners of the business who are not minorities or women are disproportionately responsible for the operation of the business, the business will ordinarily be considered as not being controlled by minorities or women and not qualifying as an MBE or WBE. Notwithstanding anything in this subchapter to the contrary, BMWBO will not certify any business or individual that cannot produce a license or other authorization required by state or local law to operate the business.

(i) Securities, which constitute ownership or control, or both, of a corporation for business purposes of establishing it as an MBE or WBE shall be held directly by minorities, women, corporations or trusts. Corporations or trusts, holding the securities, must present proof that they are at least 51% controlled and owned by women or minorities.

(ii) Complete information regarding a change in ownership, control or financial condition must be provided to the BMWBO, which may consider a business' failure to provide promptly relevant information in decertification decisions.

(3) Circumstances for special review. In addition to the standards in paragraphs (1)--(4), BMWBO will ordinarily give special consideration to the following circumstances in determining eligibility under this subchapter:

(i) Newly formed businesses whose ownership or control, or both, has recently changed will be closely scrutinized to determine the reasons for the change in the business.

(ii) A previous or continuing, or both, employer-employee relationship between or among present owners will be carefully reviewed to ensure that the employee-owner has management responsibilities, requisite knowledge and expertise to direct and operate the business.

(iii) A relationship between an MBE or WBE and a business which is not an MBE or WBE, which has an interest financially or otherwise in the MBE or WBE, will be carefully reviewed to determine if the interest of the non-MBE or WBE conflicts with the ownership and control requirements of this subchapter.

(iv) The refusal of an applicant to answer questions that would assist the BMWBO staff in resolving issues or concerns regarding ownership, managerial control, or operational control, may result in the denial of the application.

§ 58.205. Joint venture.

(a) BMWBO will ordinarily find a joint venture eligible under this subchapter if the MBE or WBE partner of the joint venture meets the other certification criteria. The MBE or WBE partner shall be responsible for a clearly defined portion of the work to be performed, and the MBE or WBE shall maintain majority ownership and control in management responsibilities, risks and profits of the joint venture.

(b) BMWBO will ordinarily obtain from a business seeking certification as a joint venture MBE or WBE additional information needed to make a determination.

§ 58.206. Approved certification.

(a) If BMWBO determines that the applicant meets the criteria to be certified as an MBE or WBE, the applicant will be issued a certification number in recognition of its status.

(b) An MBE or WBE certification notice, unless revoked by decertification, will provide for automatic expiration 24 months from the date of issuance. If there is a change in ownership or control of the business, the MBE or WBE shall forward information within 2 weeks of the change to update the original application. Failure to comply may be cause for decertification.

(c) Applicants will be certified in the areas applied for, consistent with the field of expertise demonstrated through the application. Additional endeavors engaged in by the business shall be documented and submitted to BMWBO prior to approval of certification in those additional areas.

(d) A recertification of a previously certified MBE or WBE will ordinarily be treated as a new applicant for certification. The requirements of this subchapter will be applied to the recertification applicant, and no benefits or rights will be given to the recertification applicant because of its previous certification. Applicants may be recertified for an additional 24 months.

(e) An application which upon its face does not claim ownership or control by a minority or women as defined by this subchapter will ordinarily be denied.

§ 58.207. Certification denial.

(a) The denial of certification by BMWBO will not ordinarily be reconsidered, except under subsection (b). BMWBO may accept reapplications for certification, and information and documentation correcting technical deficiencies in the MBE/WBE certification application at any time. BMWBO will reject reapplications where the reason for the denial was substantive unless deficiencies in ownership and control have been corrected and unless a sufficient period of time, usually 1 year, has passed with the new provisions on ownership and control in place. BMWBO will exercise care to ensure that directors, officers and employees of businesses that have been denied certification are not reapplying under new business names in an attempt to frustrate BMWBO's review.

(b) BMWBO will permit reconsideration of the denial of certification if the submittal is made in writing within 30 days of the denial letter. BMWBO will forward to the Secretary or a designee the information submitted in support of reconsideration. A decision on reconsideration will be made by the Secretary or a designee.

(c) A person who knowingly makes or causes to be made, a false, deceptive or fraudulent statement on the application will be denied certification by BMWBO. BMWBO will ordinarily refer the statements to the appropriate authorities for possible further criminal or civil action.

§ 58.208. Decertification.

(a) BMWBO will ordinarily decertify businesses for reasons relating to the considerations in this subchapter including the following:

(1) The business is no longer owned or controlled by minority or women.

(2) The business received certification by knowingly submitting false and misleading information.

(3) The business knowingly allowed the misuse of its certification status.

(4) The business failed to respond, cooperate or otherwise comply with a request for information from BMWBO or another Commonwealth department, agency, commission, board, office, official or other representative.

(5) There are other causes affecting the business's status or responsibility, or both, as may be determined by BMWBO to warrant decertification.

(b) BMWBO will send a business a Notice of Proposal to Decertify (Notice) by certified mail. The Notice will:

(1) Specify the reasons for the proposed decertification in terms sufficient to put the business on notice of the conduct or transactions upon which the notice is based.

(2) State the causes relied upon under subsection (a) for proposing decertification.

(3) Advise that, within 20 days after receipt of the Notice, the business may submit, in person, in writing or through a representative, information in opposition to the proposed decertification, including information that raises a genuine dispute over the material facts.

(4) State the potential effect of the proposed decertification.

(5) Advise that the Director of BMWBO will make this decision.

(c) The decision letter informing the business that it has been decertified will also inform the decertified business of rights of review it has.

(d) If the actions of the business appear to be flagrant criminal conduct, BMWBO may, upon the filing of an indictment, information or other charge, temporarily suspend the certification until the determination is made to decertify or to reinstate. A review of this temporary suspension may be made by the Secretary.

§ 58.209. Review of decertifications.

(a) The Secretary or a designee will ordinarily require that requests for review of decertifications be made in writing and that the request recite the grounds upon which the request is based.

(b) The Secretary or a designee may reject requests that are untimely or insufficient. Ordinarily, requests made more than 30 days after the date of the decertification letter will be considered untimely. Further, requests that do not raise issues suggesting that the decertification is in error will be denied as insufficient.

(c) In the exercise of discretion, the Secretary or a designee may direct that a hearing be conducted under § 58.210 (relating to hearing).

§ 58.210. Hearing.

(a) *Scope*. This hearing procedure applies only to requests for review of the decertification decision. The Secretary may delegate to a designee, usually a hearing officer, the responsibility for conducting a fact-finding hearing and for making a report and recommendation. Fact-finding hearings will only be held when the business requests a review under § 58.209 (relating to review of decertifications).

(b) *Purpose*. The fact-finding hearing will be held to determine the operative and relevant facts forming the basis for the decertification action as delineated in the written notice of decertification action provided to the business. The hearing will also determine the sufficiency of the grounds for the review as delineated in the writing. The results of proceedings before BMWBO will also be considered. The fact-finding hearing affords the business which has been decertified an additional opportunity to demonstrate that the facts upon which the decertification is based are insufficient, incorrect, misleading or otherwise do not warrant the decertification. In addition to presenting material relevant to disputed facts, the business may present other information and arguments in accordance with the grounds stated in the request for review showing why it should not be decertified. Other information may be used by the designee in making a recommendation to the Secretary.

(c) *Conduct of hearing*. If a hearing is warranted, it will be conducted under 2 Pa.C.S. §§ 502--508 and 701--704 (relating to Administrative Agency Law). If the BMWBO takes the action, it has the burden of proof.

ARTICLE III. PROCUREMENT
CHAPTER 68. CONTRACT COMPLIANCE
Subchapter C. (Reserved)

§§ 68.201--68.210. (Reserved).
[Pa.B. Doc. No. 05-1715. Filed for public inspection September 16, 2005, 9:00 a.m.]