



Common Sense Initiative

Mike DeWine, Governor
Jon Husted, Lt. Governor

Carrie Kuruc, Director

MEMORANDUM

TO: Todd McGonigle, Ohio Department of Administrative Services

FROM: Emily Groseclose, Senior Policy and Business Advocate

DATE: July 1, 2020

RE: **CSI Review – EDGE/MBE/WBE Certification (OAC 123:2-14-01, 123:2-14-02, 123:2-14-03, 123:2-14-04, 123:2-14-05, 123:2-14-06, 123:2-14-07, 123:2-14-08, 123:2-14-10, 123:2-15-01, 123:2-16-01, 123:2-16-02, 123:2-16-03, 123:2-16-04, 123:2-16-05, 123:2-16-06, 123:2-16-07, 123:2-16-09, 123:2-16-14, and 123:2-16-15)**

On behalf of Lt. Governor Jon Husted, and pursuant to the authority granted to the Common Sense Initiative (CSI) office under Ohio Revised Code (ORC) section 107.54, the CSI office has reviewed the abovementioned administrative rule package and associated Business Impact Analysis (BIA). This memo represents the CSI office's comments to the Agency as provided for in ORC 107.54.

Analysis

This rule package contains nine new and 11 rescinded rules submitted by the Department of Administrative Services (Department). The package was submitted on March 20, 2020, and the public comment period was held open through April 20, 2020. Twenty-one comments were received during that time, and the Department provided its response on June 17, 2020. Unless otherwise noted below, this recommendation reflects the version of the proposed rules filed with the CSI office on March 20, 2020.

The proposed rules establish requirements of the Minority Business Enterprise (MBE), Encouraging Diversity, Growth and Equity (EDGE), and Women Business Enterprise (WBE) programs. Specifically, the rules include definitions, certification and recertification criteria, expedited certification procedures, joint venture requirements, commercially useful function determinants, revocation processes, and adjudication hearings.

77 South High Street | 30th Floor | Columbus, Ohio 43215-6117
CSIOhio@governor.ohio.gov

Many of the provisions in the rescinded rules are continued in the proposed new rules, which in addition to governing the MBE and EDGE programs, will also govern the WBE program that was recently established by the Ohio General Assembly. The Department is making a new OAC Chapter 123:2-14 with the goal of creating consistency in regulations across the three programs. In addition, the Department seeks to improve its ability to limit the benefits of the programs to businesses that are owned and controlled by eligible individuals and serve a commercially useful function, and which have not simply been created to allow non-eligible individuals to receive the economic benefits of certification.

As part of early stakeholder outreach, the Department convened five meetings during August and September 2019. Stakeholders involved in the meetings and subsequent discussions include certified MBE and EDGE owners, women-owned business owners, representatives of various chambers of commerce and community organizations, private sector individuals, and subject matter experts. Additionally, the Department held one-on-one or small group discussions with representatives of the Cleveland Contractors Assistance Association, Associated General Contractors, the Ohio Association of EDGE Certified Companies, and the National Association of Women Owned Businesses (NAWBO).

The Department stated that it was their goal, as well as that of many program participants, to enhance the integrity of the programs, maintain the focus on small business development in the EDGE program, and make it feasible for businesses to attract successful leaders to serve on their boards. Through their discussions with stakeholders, suggestions were made to alleviate challenges faced by business owners when seeking certification and doing business with the state. Some specific changes that resulted include the removal of the 10-year program participation limit in the current EDGE rules and removal of the requirement that a majority of the board of directors and principal executives be considered socially and economically disadvantaged. The Department also removed the requirement that the owner of the certified business hold a professional license and instead allowed for review of how the licenses are held in the context of the business's structure. The draft rules add a requirement for all three programs that the certified business perform a commercially useful function, and establish reciprocal agreements with other states with similar WBE certification programs. Suggestions of NAWBO were a significant part of the proposed rules for the new WBE program.

Twenty-one comments were received during the CSI public comment period and the Department responded to the comments on June 17, 2020.

- In response to the concerns raised with removal of the requirement that a majority of the board of directors and principal executive officers of corporations be socially and

economically disadvantaged, the Department stated that it heard from several businesses that had concerns about the prohibition on appointing a board member who was not program eligible. The Department believes that this change will benefit EDGE and MBE firms by enabling them to seek industry professionals from which they can further learn and develop their business. The Department also noted that the rules include procedures that allow it to scrutinize the business construct to ensure that the non-program-eligible member was appointed by the program-eligible owner and to ensure that their influence does not outweigh that of the owner.

- In response to concerns raised about the six-year recertification requirement and its paperwork, the Department stated that financial, business, and net-worth documents are required for recertification to ensure that the company is still a viable business, that it is still owned and controlled by the program eligible individuals, and EDGE-certified individuals continue to meet economic guidelines. Additionally, the Department stated that ensuring program compliance through the six-year recertification requirement is critical to the integrity of the programs.
- In response to concerns about the limitation to bid only on set-aside procurement opportunities that match a company's industry code, the Department noted that as a business grows and develops into new market areas, it is encouraged to modify its classification codes to reflect those new markets. This requirement seeks to prevent front or pass-through companies and to protect current MBEs who are certified in those areas from being forced to compete with companies that are not.
- In response to suggestions requesting to establish reciprocity agreements for WBE, establish set-aside or goal provisions for the WBE program, apply EDGE data collection requirements to the WBE program, and remove the experience requirements from WBE certification criteria, the Department noted that it is currently negotiating reciprocity agreements with other states and organizations that have programs similar to Ohio. Statute does not allow for procurement goals in the WBE program or for the same data collection requirements as the EDGE program, and the experience requirement is necessary to prevent companies with no operating experience from being created solely to gain a competitive advantage.
- In response to a suggestion that the Department apply the new federal definition of small business, the Department noted that the rule cites to the current version of the Code of Federal Regulations and therefore will incorporate the recent changes by reference. However, to ensure that the documentation requirements meet what is needed to verify the

application of the size standards, the Department has amended OAC 123:2-14-01 and 123:2-14-02 for clarity.

The rules impact businesses and business owners that are seeking certification or recertification in the MBE, EDGE, or WBE programs. The adverse impact identified by the Department is the time required to apply for certification or recertification, collect and submit required documentation, and participate in an on-site interview. The time to complete these processes varies depending on the organization of the business but is estimated to range from five to ten hours. Additionally, the rules have an adverse impact on businesses that do not meet program criteria and are therefore ineligible, which could include denial or revocation of certification.

The Department noted that ORC 123.151, 123.152, and 123.154 require it to establish the MBE, EDGE, and WBE programs, and to create rules to administer the programs. The Department asserted that the adverse impacts to business are justified due to the need to limit eligibility in accordance with the criteria established in statute, and to ensure that the programs benefit only those that the legislature intended to receive the benefits of the programs.

Recommendations

For the reasons described above, the CSI office has no recommendations on this rule package.

Conclusion

Based on its review of the proposed rule package, the CSI office recommends that the Department of Administrative Services should proceed in filing the proposed rules with the Joint Committee on Agency Rule Review.