

Emergency Rule
LSA Document #08-213(E)

DIGEST

Temporarily adds provisions concerning minority and women's business enterprises. Temporarily adds the term "operating agents" to references to riverboat licensees and applicants. Temporarily replaces the term "contracts" with "purchases". Temporarily provides rules regarding credit for purchases made from uncertified minority and women's business enterprise vendors. Temporarily sets standards for compliance with and achievement of minority and women's business enterprise utilization goals. Temporarily repeals [68 IAC 3-3-10](#), [68 IAC 3-4-2](#), [68 IAC 3-4-3](#), [68 IAC 3-4-4](#), [68 IAC 3-4-5](#), [68 IAC 3-4-6](#), [68 IAC 3-5-1](#), [68 IAC 3-5-2](#), [68 IAC 3-5-3](#), and [68 IAC 3-5-4](#). Effective March 31, 2008.

SECTION 1. (a) This SECTION supercedes [68 IAC 3-1-1](#).

(b) It is the policy of the commission to ensure the following:

(1) That riverboat licensees, riverboat license applicants, and operating agents conduct all aspects of their operation in compliance with [IC 4-33-14](#).

(2) That riverboat licensees, riverboat license applicants, and operating agents establish such internal procedures and controls and provide such reports as the commission finds are necessary to ensure such compliance.

(c) The department of administration, minority business development shall perform certifications and compile a list of certified enterprises for the commission in accordance with this rule. The department of administration, minority business development may assist the commission in determining compliance with the Act and this article.

SECTION 2. (a) This SECTION supercedes [68 IAC 3-1-2](#).

(b) The following definitions apply throughout this rule:

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

(2) "Contract for goods or services, or both" means any consensual obligation, written or oral, executory or executed, between a riverboat licensee, a riverboat license applicant, or an operating agent and another party related to the acquisition of, by lease, purchase, or other form, any goods or services. As used in this subdivision, "goods and services" does not include those items excluded from the term under [IC 4-33-14-5\(a\)](#).

(3) "Contracting representative" means a contractor or a subcontractor whose participation in the substance of the contract is equivalent to less than twenty percent (20%) of the value of the contract.

(4) "Contractor" means a person, other than a riverboat licensee, a riverboat license applicant, or an operating agent, who is a party to a contract for goods or services with a riverboat licensee, riverboat license applicant, or an operating agent.

(5) "Established goals" means the annual goals adopted from time to time by the commission resulting from a statistical analysis of utilization study conducted pursuant to [IC 4-33-14-5\(b\)](#).

(6) "Owned and controlled" means having all of the following:

(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.

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

(7) "Participation plan" means an obligation imposed by a riverboat licensee, riverboat license applicant, or operating agent as part of its purchase with a vendor utilizing certified minority or women's business enterprises for a specified minimum percentage of the value of the purchase.

(8) "Subcontractor" means one (1) of the following:

(A) A person with a contractual relationship with a contractor who requires the performance of an activity that is directly traceable to fulfillment of the contractor's obligation to a riverboat licensee, a riverboat license applicant, or an operating agent.

(B) A person with a contractual relationship with a subcontractor that calls for performance of activity that is directly traceable through second tier subcontractors to fulfillment of a contractual

obligation with a riverboat licensee, a riverboat license applicant, or an operating agent. The term does not include a person who subcontracts a significant portion of the activity to the contractor, a higher-tier subcontractor, an affiliate of the contractor, or an affiliate of a higher-tier subcontractor.

SECTION 3. (a) This SECTION supercedes [68 IAC 3-1-3](#).

(b) The department of administration, minority business development shall compile a list of the minority and women's business enterprises that are certified under this rule. The list shall be made available to all riverboat licensees, riverboat license applicants, and operating agents.

SECTION 4. (a) This SECTION supercedes [68 IAC 3-2-1](#).

(b) The department of administration, minority business development shall certify that an enterprise is a minority business enterprise or a women's business enterprise, or both.

(c) To be certified, a minority or women's business enterprise must comply with all of the requirements of the department of administration, minority business development under [IC 4-13-16.5](#), [25 IAC 5](#), the Act, and this title.

SECTION 5. (a) This SECTION supercedes [68 IAC 3-2-2](#).

(b) The guidelines for determining eligibility set forth in [25 IAC 5](#) shall be utilized by the department of administration, minority business development to determine eligibility for the Act and this title.

SECTION 6. (a) This SECTION supercedes [68 IAC 3-2-3](#).

(b) A person who has been denied certification as a minority or women's business enterprise may petition the department of administration to conduct a hearing following the procedures established in [25 IAC 5](#).

SECTION 7. (a) This SECTION supercedes [68 IAC 3-3-1](#).

(b) With the exception of [25 IAC 5-6-4\(a\)\(1\)\(E\)](#), when a riverboat licensee, a riverboat license applicant, or an operating agent enters into a transaction for goods or services that utilizes a subcontractor or a participation plan, the procedure set forth in [25 IAC 5-6-4](#) shall be utilized by the commission to determine whether or not a portion of the purchase value shall be counted toward the established goals. The commission may request that the department of administration, minority business development assist the commission in determining that the riverboat licensee, riverboat license applicant, or operating agent complies with [IC 4-33-14](#) and this title.

SECTION 8. (a) This SECTION supercedes [68 IAC 3-3-2](#).

(b) Except as provided in subsection (d), a certification issued under this article may be relied upon by a riverboat licensee, a riverboat license applicant, or an operating agent, to establish the eligibility of the certified enterprise to be considered as a minority or women's business enterprise for the purpose of attaining a riverboat licensee's, a riverboat license applicant's, or operating agent's established goals.

(c) A riverboat licensee, riverboat license applicant, or operating agent shall advise the executive director, in writing, if it becomes aware that one (1) or more of the following situations exist:

(1) That a certified minority or women's business enterprise is not qualified as such under the Act, this rule, [IC 4-13-16.5](#), or [25 IAC 5](#).

(2) That the minority or women's business enterprise submitted false or misleading information to support its application for certification.

(3) That the participation of the certified minority or women's business enterprise in any transaction with the riverboat licensee, riverboat license applicant, or operating agent is without economic substance.

(d) A riverboat licensee, riverboat license applicant, or operating agent may not rely upon a certification issued under the Act and this article for purposes of attaining the established goals if the riverboat licensee, riverboat license applicant, or operating agent has the knowledge set forth in

subsection (c).

SECTION 9. (a) This SECTION supercedes [68 IAC 3-3-3](#).

(b) Expenditures with business enterprises that qualify as both a minority business enterprise and a women's business enterprise may be counted toward the attainment of the established goal for either minority business enterprises or women's business enterprises at the election made by the riverboat licensee, riverboat license applicant, or operating agent, but not both.

SECTION 10. (a) This SECTION supercedes [68 IAC 3-3-4](#).

(b) A riverboat licensee, riverboat license applicant, or operating agent may attain its established goals of expending a certain minimum percentage of the value of its purchases for goods and services by one (1) of the following:

(1) Purchasing directly from minority and women's business enterprises. The value of the purchase shall be considered for the purpose of determining attainment of the established goal.

(2) Purchasing from a nonminority or nonwomen's business enterprise under terms and conditions that establish a participation plan. If a participation plan is established, the value of the expenditures with minority or women's business enterprises, directly or through the use of participation plans, shall be attributed to the riverboat licensee, riverboat license applicant, or operating agent for the purpose of determining attainment of the established goal.

(3) Purchasing directly from minority and women's business enterprises that are brokers or contracting representatives, in which case only the amount of the fees retained by the minority or women's business enterprise shall be considered for the purpose of attaining the established goal.

(c) A riverboat licensee, riverboat license applicant, or operating agent may not attain more than seventy percent (70%) of each of its established goals through the use of participation plans.

(d) A riverboat licensee, riverboat license applicant, or operating agent may not attain more than twenty-five percent (25%) of each of its established goals through contracting with minority or women's business enterprises who are brokers or contracting representatives.

SECTION 11. (a) This SECTION supercedes [68 IAC 3-3-5](#).

(b) For expenditures made during the calendar year, each riverboat licensee, riverboat license applicant, or operating agent shall file a report with the commission concerning performance of its continuing obligation to meet the established goals. The report shall be filed with the commission quarterly, not later than January 15, April 15, July 15, and October 15 of each year. This report shall contain the following information, in the format proscribed by the commission, for each vendor:

(1) The total value of all purchases for goods and services.

(2) The total value of all purchases from certified minority and women's business enterprises.

(3) The total value of all purchases from a certified minority or women's business enterprises made as a result of a participation plan.

(4) The total value of purchases from noncertified minority and women's business enterprises for which the riverboat licensee, riverboat license applicant, or operating agent wishes to claim credit toward attainment of the established goals. Credit shall only be given for purchases made during the time an application for certification is pending. If an applicant for certification is denied, no credit will be given for expenditures made with that enterprise.

(5) Such other information deemed necessary by the executive director to ensure compliance with the Act and this title.

(c) Credit towards attainment of the established goals may be given for purchases from a certified minority or women's business enterprise whose certification is revoked or expired only if the minority or women's business enterprise is recertified before the end of the quarter following the quarter in which certification expired or was revoked. If the minority or women's business enterprise is not recertified by the end of the quarter following the quarter in which the certification expired or was revoked, no expenditures made to that minority or women's business enterprise following the expiration or revocation shall be credited toward attainment of its established goals.

(d) Until January 1, 2009, credit toward attainment of the established goals may be given for purchases from an out-of-state minority or women's business enterprise whose Indiana certification has

expired, provided the minority or women's business enterprise maintains certification in its home state.

(e) The executive director may require a riverboat licensee, riverboat license applicant, or operating agent to present a written or oral report to the commission concerning performance of its continuing obligation to achieve the established goals.

SECTION 12. (a) This SECTION supercedes [68 IAC 3-3-6](#).

(b) Each riverboat licensee, riverboat license applicant, or operating agent shall comply with the monitoring and certification requirements established by [25 IAC 5](#). The commission may request that the department of administration, minority business development assist the commission in determining that the riverboat licensee, riverboat license applicant, or operating agent complies with [IC 4-33-14](#), and this title. The commission shall be responsible for enforcing the Act and this title.

SECTION 13. (a) This SECTION supercedes [68 IAC 3-3-7](#).

(b) A riverboat licensee, riverboat license applicant, or operating agent may be considered as having failed to satisfy [IC 4-33-14](#) if any one (1) of the following occurs:

- (1) The riverboat licensee, riverboat license applicant, or operating agent has failed to make a good faith effort to achieve the established goals.
- (2) The riverboat licensee, riverboat license applicant, or operating agent fails to improve its efforts toward attainment of the established goals after becoming aware that it will fail to attain the established goals on an annual basis.
- (3) The riverboat licensee, riverboat license applicant, or operating agent fails to prepare and file accurate or timely reports as required by this rule.
- (4) The riverboat licensee, riverboat license applicant, or operating agent fails to meet any other provision of [IC 4-33-14](#) or this rule.

(c) A riverboat licensee, riverboat license applicant, or operating agent is responsible for the failure of a contractor to comply with the provisions of a participation plan.

SECTION 14. (a) This SECTION supercedes [68 IAC 3-3-8](#).

(b) Within thirty (30) days after a riverboat licensee, riverboat license applicant, or operating agent determines that it will not attain an established goal, or that it will not reach utilization consistent with capacity as determined by the most recent disparity study conducted pursuant to [IC 4-33-14-5\(b\)](#), the riverboat licensee, riverboat license applicant, or operating agent shall submit a report to the commission that includes a detailed description of its efforts to attain the established goal or capacity, including, but not limited to, the following:

- (1) Documentation of direct contact or negotiations with minority and women's business enterprises for specific contracting or transacting 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 minority and women's business enterprises, including the following:
 - (i) The names, business addresses, and business telephone numbers of the minority and women's business enterprises contacted.
 - (ii) A detailed statement of the reason why prospective agreements were not reached.
 - (B) A detailed statement of the efforts made to select work proposed to be performed by minority and women's business enterprises in order to increase the likelihood of achieving the established goal.
- (2) Documentation of any advertising performed in the search for prospective minority and women's business enterprises for the contract.
- (3) Documentation of any notifications provided to minority business assistance agencies for the purpose of locating prospective minority and women's business enterprises for the contract.
- (4) Documentation of efforts taken to research other possible areas of participation.
- (5) Documentation regarding the contractor's policies or programs as they pertain to the utilization of minority and women's business enterprises. This documentation should also provide an explanation of the methods used to carry out those policies or programs.
- (6) Documentation relevant to any other efforts made to assist minority and women's business enterprises in overcoming any traditional barriers of participation in the industry affected by the contract or transaction.

(c) The riverboat licensee, riverboat license applicant, or operating agent and contractor shall maintain adequate records of all relevant data with respect to the utilization and attempted utilization of minority and women's business enterprises and shall provide full access to these records to the executive director or commission upon request to inspect them. The commission shall make the records required by this article available to the department of administration, minority business development upon the direction of the executive director. The records shall include, but not be limited to, the following information:

- (1) The degree of achievement of the goals the riverboat licensee riverboat license applicant, or operating agent believes possible and the time frame for achieving the established goals.
- (2) The plan devised by the riverboat licensee, riverboat license applicant, or operating agent regarding the utilization of minority and women's business enterprises.
- (3) The resources being devoted toward attainment of the established goal and any changes in that level during the past year.
- (4) Any problems encountered by contractors in complying with the provisions of a participation plan, the riverboat licensee's, riverboat license applicant's, or operating agent's reaction to these problems, and the efforts made to anticipate the problems and adjust the efforts accordingly.

SECTION 15. (a) This SECTION supercedes [68 IAC 3-3-9](#).

(b) A riverboat licensee, riverboat license applicant, or operating agent shall endeavor in good faith throughout the term of its certificate of suitability or license to attain the established goals. Whenever the executive director determines that a riverboat licensee, riverboat license applicant, or operating agent has failed to demonstrate that it has met an established goal, the executive director shall immediately advise the riverboat licensee, riverboat license applicant, or operating agent of that determination. Within ninety (90) days following the determination, the riverboat licensee, riverboat license applicant, or operating agent shall demonstrate its compliance with the established goals or a good faith effort to attain the established goals, or the executive director may initiate a disciplinary action under [68 IAC 13](#).

(c) When determining whether the riverboat licensee, riverboat license applicant, or operating agent has made a good faith effort to attain any or all of the established goals, the following factors may be considered:

- (1) The methods and effort utilized in an effort to achieve the established goals.
- (2) The time allowed for a meaningful response to solicitations.
- (3) Statements received from minority and women's business enterprises that have been listed as having been contacted by the riverboat licensee, riverboat license applicant, operating agent, or contractor.
- (4) The availability of certified minority and women's business enterprises to provide the riverboat licensee, riverboat license applicant, or operating agent with needed goods and services at a competitive price.
- (5) Any other factor the executive director or commission deems pertinent to a determination of the good faith effort. The executive director may consult with the department of administration, minority business development regarding a riverboat licensee's, riverboat license applicant's, or operating agent's good faith effort.

SECTION 16. (a) This SECTION supercedes [68 IAC 4-1-1](#).

(b) A person may challenge the certification issued to a minority or women's business enterprise as outlined in [IC 4-21.5-3](#) and [25 IAC 5](#).

(c) The department of administration, minority business development shall review challenges to certifications and make recommendations regarding these challenges to the commission.

(d) The challenge to a certification must meet the requirements outlined in [IC 4-21.5-3](#) and [25 IAC 5](#).

SECTION 17. THE FOLLOWING ARE REPEALED: [68 IAC 3-3-10](#); [68 IAC 3-4-2](#); [68 IAC 3-4-3](#); [68 IAC 3-4-4](#); [68 IAC 3-4-5](#); [68 IAC 3-4-6](#); [68 IAC 3-5-1](#); [68 IAC 3-5-2](#); [68 IAC 3-5-3](#); [68 IAC 3-5-4](#).

SECTION 18. This document is effective March 31, 2008.

LSA Document #08-213(E)

Filed with Publisher: March 25, 2008, 3:13 p.m.

Posted: 04/02/2008 by Legislative Services Agency

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