

Business Law Section - Practice Tip
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Introduction

In today's challenging business environment, every business is looking for a competitive advantage. As a result, we have seen an increase in the number of matters involving whether and how companies can qualify under the Small, Women - and Minority - Owned Business Procurement Initiative ("SWaM") of the Virginia Department of Minority Business Enterprise (the "DMBE").

Analysis

Chapter 14 of Title 2.2 of the Code of Virginia creates the DMBE and defines the DMBE's powers and duties. Va. Code §§ 2.2-1400 to -1405. However, these powers are general in nature and require the DMBE to promulgate regulations for the implementation of the SWaM program. Title 7, Chapter 21 of the Virginia Administrative Code, entitled Regulations to Govern the Certification of Small, Women - and Minority-Owned Businesses, are the applicable regulations (the "Regulations"). 7 Va. Admin. Code §§ 10-21-10 to-610.

One of the threshold requirements is that the business must qualify as women- or minority-owned. The Regulations establish the minimum requirements for the certification of women- and minority - owned businesses pursuant to Chapter 14 of Title 2.2 of the Code of Virginia. The Regulations describe the 2-part test that a business must pass in order to become certified as women or minority - owned:

A business may be certified as a women or minority - owned business if:

1. (i) It is at least 51% owned by one or more women or minority individuals who are U.S. citizens or noncitizens in full compliance with U.S. immigration law; or (ii) in the case of a corporation, partnership or limited liability company or other entity, at least 51% of the equity ownership interest is owned by one or more women or minority individuals who are U.S. citizens or noncitizens in full compliance with U.S. immigration law;
2. One or more of the women or minority owners control both the management and daily business operations; and (in the case of minority-owned businesses);
3. The minority owner(s) is regarded as such by the community of which the person claims to be a part. 7 Va. Admin. Code §§ 10-21-110 and 10-21-120.

In determining ownership and control, the department will consider all the facts in the record, viewed as a whole, as they appear at the time of the application. For example, an eligible applicant will not be refused certification if in the past women or minority individual(s) owned less than 51% of the applicant. 7 Va. Admin. Code § 10-21-200. General Provisions.

One of the primary issues the department will examine is who controls an applicant's business. The following factors are critical in determining whether a business is controlled by a women or a minority owner:

1. Governance. The organizational and governing documents of an applicant must not contain any provision that restricts the ability of the women or minority individual owner(s) from exercising managerial control and operational authority of the business. A woman or minority owner must hold the highest executive officer position in the company by whatever title.

2. Operation and management. The woman or minority individual owner(s) must possess the power to direct or cause the direction of the management and policies of the business and to make the day-to-day decisions as well as major decisions on matters of management, policy and operations. This power must include both (x) operational authority and (y) managerial control. Factors used to determine operational authority include (i) experience, (ii) responsibility for decision making, and (iii) technical competence. In determining managerial control, the women or minority individual owner(s) must produce documents that clearly indicate his or her control of basic business functions. Agreements for support services that do not impair the women or minority individual owner(s)'s control of the company are permitted as long as the owner's power to manage the company is not restricted or impaired as determined by the department in its sole administrative discretion.

3. Independence. The women or minority owner(s)'s expertise must be indispensable to the business's potential success, and he or she must have the ability to perform in the applicant's area of specialty or expertise without substantial reliance upon finances and resources (e.g., equipment, automobiles, facilities, etc.) of businesses that are not eligible for certification. 7VAC10-21-220 Control

A company's evaluation is based on both present and historical circumstances. However, a company should not be refused certification based solely on historical information indicating a lack of ownership or control of the company by women or minority individuals at some time in the distant past, as long as the company currently meets the ownership and control standards. It is important to note that the DMBE does give consideration to whether a company has exhibited a pattern of conduct indicating its involvement in attempts to evade or subvert the intent or requirements of the program.

Conclusion

A company's qualification under the SWaM program of the DMBE can present a number of new business opportunities. However, determining whether a company qualifies is a very fact-specific analysis. An attorney needs to work closely with his or her client to explain the requirements and implications of qualifications. A good resource for both is the "Policy and Procedure for Evaluating Firms Applying for SWaM Certification" which can be found through the Virginia Department of Business Assistance website. This document provides useful advice on steps a company should consider.

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