

discretion of the Director, information that is deemed confidential and/or private may be redacted prior to disclosure.

(d) Nothing in this subchapter shall preclude the Division from showing a party or witness a document from the investigative file during the pendency of an investigation when deemed necessary by the Division to complete the investigation.

13:4-13.3 [Discovery of Division's investigatory files by non-parties] (Reserved)

[Non-parties to a verified complaint shall not have access to the material in the Division's investigatory files of that verified complaint, except that non-parties may inspect and receive a copy of the verified complaint, the answer, the final disposition, and the dispositions of any motions made during the pendency of the case. When a verified complaint is taken pursuant to N.J.A.C. 13:4-2.10, non-parties may only inspect the pseudonym verified complaint.]

TREASURY—GENERAL

(a)

DIVISION OF REVENUE AND ENTERPRISE SYSTEMS

Development of Women-Owned and Minority-Owned Small Businesses

Proposed New Rules: N.J.A.C. 17:46

Authorized By: Elizabeth Mauer, State Treasurer.

Authority: N.J.S.A. 52:18A-30, 52:27H-21.7 et seq., and 52:32-17 et seq.; P.L. 2008, c. 27; and Executive Order Nos. 71 (2003) and 34 (2006).

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2020-080.

Submit comments by October 16, 2020, electronically to the New Jersey Department of the Treasury at https://www.state.nj.us/treas/treas_comments.shtml.

The Department encourages electronic submittal of comments. In the alternative, comments may be submitted on paper to:

Jennifer Keyes-Maloney
Assistant Treasurer
225 West State Street
Trenton, NJ 08625-0295
Jennifer.maloney@treas.nj.gov

The agency proposal follows:

Summary

N.J.S.A. 52:27H-21.17 et seq. (the Act), establishes a program for certifying entities as minority or women's businesses, and delineates the documentation required to establish that an entity qualifies as such a business under the Act. Additional statutes address the use of the certification as a qualification in purchasing and procurement systems run by the State and its related entities.

At one time, the minority and women's business certification program was administered by the New Jersey Commerce Commission; however, P.L. 2008, c. 27, abolished the New Jersey Commerce Commission and transferred the functions, powers, and duties of the Division of Development for Small Businesses and Women's and Minority Businesses to the Department of the Treasury, to be administered within that department as the State Treasurer so determined. The State Treasurer has allocated the functions, powers, duties, and authority for the chapter to the Division of Revenue and Enterprise Systems (Division) in the Department of the Treasury (Department). Pursuant to that change, rules were promulgated in April of 2009 in accordance with N.J.S.A. 52:14B-1 et seq. Those rules expired on April 20, 2016.

The purpose of the Act and Chapter 46 is to set forth the manner in which the Division may assist in providing equal opportunity for minority and women's businesses to participate in the State purchasing and

procurement processes. The objective of the rules was then, and continues to be, the implementation of N.J.S.A. 52:27H-21.17 et seq., 52:32-17 et seq., and 52:18A-30; P.L. 2008, c. 27; and Executive Order Nos. 71 (2003) and 34 (2006).

The Division seeks to propose new rules, consistent with the prior rules, to operationalize the requirements of the law, and to recognize current practice. The Division is allowing a 60-day comment period for this notice of proposal; therefore, this notice falls under the exception at N.J.A.C. 1:30-3.3(a) pertaining to the requirement for calendar notice.

Following is a summary of the provisions of each section of the proposed new chapter:

N.J.A.C. 17:46-1.1 sets forth the scope of the Division's role in the New Jersey Department of the Treasury with regard to the certification of minority and women's firms. N.J.A.C. 17:46-1.1 references P.L. 2008, c. 27, which authorized the transfer of the functions, powers, and duties, including the certification function, of the Division of Development for Small Businesses and Women's and Minority Businesses to the Division of Minority and Women Business Development in the Department of the Treasury.

N.J.A.C. 17:46-1.2 contains the definitions used in the chapter to reflect current operational practices and business requirements, as well as to incorporate definitions from the statute. In addition, several definitions seek to clarify or specify rights of appeal or challenge to certification determinations.

N.J.A.C. 17:46-1.3 outlines the eligibility requirements to qualify for certification as a minority business or women's business.

Certification procedures are set forth at N.J.A.C. 17:46-1.4. Initial certification is a one-year, provisional certification. N.J.A.C. 17:46-1.4 sets forth the documentation that must be submitted in order to demonstrate initial eligibility and to maintain eligibility in the following years. It also addresses recertification at the end of the three-year period. Additionally, the section lays out the required fees and establishes a means for challenging denial of certification.

N.J.A.C. 17:46-1.5 outlines what happens when a business is determined to be a minority or women's business, including eligibility for all appropriate State programs and initiatives designed to ensure equal opportunity for minority and women's businesses to participate in State purchasing and procurement processes.

N.J.A.C. 17:46-1.6 specifies that, in general, a business may apply to be certified at any time and includes appeal procedures for addressing denial of, or revocation of, certification.

N.J.A.C. 17:46-1.7 provides a process for withdrawal from either the minority or women's business programs.

N.J.A.C. 17:46-1.8 provides a process, and rules for appeal of, a denial or revocation of certification under the program.

N.J.A.C. 17:46-1.9 outlines the procedures for challenging the Division's determination that a business is eligible for certification as a minority business and/or women's business.

N.J.A.C. 17:46-1.10 requires submission of accurate information and sets penalties for supplying false information or withholding required information.

N.J.A.C. 17:46-1.11 provides a procedure for certification reciprocity for entities that have been deemed sufficient under the Federal Disadvantaged Business Enterprise program, pursuant to P.L. 114-94 (December 4, 2015).

Finally, N.J.A.C. 17:46-1.12 specifies that, beyond certain information that must be publicly disseminated, information submitted to the Division as part of a certification application is deemed confidential and not subject to disclosure. Further, all documents provided to the Division are confidential and not subject to disclosure.

Social Impact

The adoption of N.J.A.C. 17:46 will provide for the continued implementation of the Division of Development for Small Businesses, and Women's and Minority Businesses Act, N.J.S.A. 52:27H-21.7 et seq. The purpose of the Act and this chapter is to foster participation by minority and women's businesses in the purchasing and procurement processes of the State, the various types of State entities, and casino licensees. The adoption of this chapter will help businesses interested in certification

understand how the process works, and, through this, foster increased participation in the certification program.

Economic Impact

The adoption of this chapter will impact the State’s economy by offering continued assistance for minority and women’s businesses. Over 96 percent (96.6) of New Jersey companies employ fewer than 100 workers and 37 percent of New Jersey workers are employed by these small businesses. Thus, fostering the continued health of these business is vital to the growth and stability of New Jersey’s economy. Moreover, the proposed fees associated with the program are nominal and support the program.

Federal Standards Statement

There are no Federal standards or requirements applicable to the proposed new rules. As a result, an explanation or analysis of the proposed new rules pursuant to Executive Order No. 27(1994) is not required.

Jobs Impact

The adoption of this chapter will result in continued services provided by the Division of Revenue and Enterprise Services in the Department of the Treasury. These services enable small businesses and minority and women’s businesses to maintain, grow, and expand their employment.

Agriculture Industry Impact

The proposed new rules may have limited impact on the agriculture industry, although the extent to which the industry is affected is unknown.

Regulatory Flexibility Analysis

Since the proposed new rules specify services to be provided by the Division to small businesses and women’s and minority businesses, the impact on small businesses will continue to be positive. The proposed new rules contain reporting and compliance requirements, but no reporting requirements, as discussed in the Summary above. However, because the requirements are not administratively burdensome, the Department has not provided any exceptions or lesser requirements for small businesses.

Housing Affordability Impact Analysis

The proposed new rules will have no impact on the affordability of housing in New Jersey, nor will they involve a change in the average costs associated with housing, as the proposed new rules specify services to be provided by the Division to small businesses and women’s and minority businesses.

Smart Growth Development Impact Analysis

Any impact with respect to the achievement of smart growth and the implementation of the State Development and Redevelopment Plan would be a result of the participation of women’s and minority businesses in projects within designated smart growth areas. In, and of themselves, the proposed new rules will have no impact on Planning Areas 1 or 2, or in designated centers, under the State Development and Redevelopment Plan, as the proposed new rules specify services to be provided by the Division to small businesses and women’s and minority businesses.

Racial and Ethnic Community Criminal Justice and Public Safety Impact

The Department of the Treasury has evaluated this rulemaking and determined that it will not have an impact on pretrial detention, sentencing, probation, or parole policies concerning adults and juveniles in the State. Accordingly, no further analysis is required.

Full text of the proposed new rules follows:

CHAPTER 46

DEVELOPMENT OF MINORITY AND WOMEN’S BUSINESSES

SUBCHAPTER 1. CERTIFICATION

17:46-1.1 Application and scope

(a) This subchapter is promulgated by the Department of the Treasury to implement the Unified Certification Act (the Act), P.L. 1986, c. 195, and Executive Order No. 34 (2006). The Act establishes a unified procedure for the certification of minority businesses and women’s businesses that are seeking to qualify for certain government programs and/or do business with casino licensees pursuant to P.L. 1987, c. 137.

The Act also allows the Department of the Treasury to certify minority and women’s businesses for purposes other than qualifying for certain government programs and doing business with casino licensees pursuant to P.L. 2003, c. 189, such as programs and initiatives that are designed to ensure equal opportunity for minority and women’s businesses to participate in State purchasing and procurement processes. Executive Order No. 34 (2006) established the Division of Minority and Women Business Development to administer and monitor policies, practices, and programs, for which minority and women’s businesses may be certified, which will further the State’s efforts to ensure equal opportunity for minority and women’s businesses to participate in State purchasing and procurement processes.

(b) Under P.L. 2008, c. 27, the New Jersey Commerce Commission was abolished, and the responsibilities of the unit that administered the certification program were transferred to the Department of the Treasury to be administered within that department as the Treasurer so determined. The State Treasurer has determined to administer those responsibilities through the Division of Revenue and Enterprise Services.

(c) Applications and questions regarding certification of minority and women’s businesses should be addressed to the New Jersey Division of Revenue and Enterprise Services at the contact address listed on its website at www.nj.gov/njbgs.

(d) The Act applies to every minority and women’s business that wishes to do business with any department or agency of the State of New Jersey that has specific programs requiring certification of authenticity of ownership for minority and women’s businesses and for businesses wishing to do business with casino licensees pursuant to P.L. 1987, c. 137.

17:46-1.2 Definitions

The following words and terms, as used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

“Appeal” means a timely filed written challenge to a denial or revocation of a certification as a minority business or a women’s business.

“Applicant” means a business that applies for certification as a minority business or a women’s business, in accordance with the provisions of P.L. 1986, c. 195 (N.J.S.A. 52:27H-21.17 et seq.).

“Business” means an entity organized for profit including, but not limited to, an individual or individuals, sole proprietorship, partnership, Limited Liability Company, corporation, or joint venture.

“Certification” means a determination by the Division that an applicant has met the standards for certification as a minority and/or women’s business under the Act and this chapter.

“Control” (managerial and operational control) means authority over the affairs of a business, including, but not limited to, capital investment, property acquisition, employee hiring, contract negotiations, legal matters, officer and director selection, operating responsibility, financial transactions, and the rights of other shareholders or joint partners. Control shall not include absentee ownership. Control shall be deemed not to exist where an owner is not a minority in the case of a minority business; or where the owner is not a female in the case of a women’s business. Additionally, control shall not be deemed to exist where someone, other than a minority or a woman, is disproportionately responsible for the operation of a business, or for policy and contractual decisions.

“Day” or “business day” means any weekday, excluding Saturdays, Sundays, State or Federal legal holidays, and State-mandated furlough days.

“Denial” means an administrative decision by the Division to reject an application for reasons such as the submission being incomplete, inaccurate, or failing to meet the eligibility standard for a minority business or a women’s business.

“Department” means the Department of the Treasury.

“Director” means the head of the Division of Revenue and Enterprise Services in the Department of the Treasury.

“Disadvantaged Business Enterprise” means certification, pursuant to the Fixing America’s Surface Transportation Act, P.L. 114-94 (December 4, 2015).

“Division” means the Division of Revenue and Enterprise Services in the Department of the Treasury, which has been allocated the authority by the State Treasurer to register vendors for the New Jersey Set-Aside program and certify businesses under the Uniform Certification Act.

“Filed” means received by the Director or a Division representative.

“Hearing officer” means a State of New Jersey, Department of the Treasury employee designated by the State Treasurer to hear cases involving an appeal of a denial of a certification or a challenge to a certification, pursuant to the provisions of this chapter, and to render decisions on those appeals and challenges.

“Joint venture” means a business undertaking between two or more entities who share risk and responsibility for a specific project while otherwise retaining their distinct identities.

“Minority” means a person who is:

1. Black, which is a person having origins in any of the black racial groups in Africa;

2. Hispanic, which is a person of Spanish or Portuguese culture, with origins in Mexico, South or Central America, or the Caribbean Islands, regardless of race;

3. Asian American, which is a person having origins in any of the original peoples of the Far East, Southeast Asia, Indian Subcontinent, Hawaii, or the Pacific Islands; or

4. American Indian or Alaskan native, which is a person having origins in any of the original peoples of North America.

“Minority business” means a business, pursuant to N.J.S.A. 52:27H-21.18, which is:

1. A sole proprietorship, owned and controlled by a minority;

2. A partnership or joint venture, owned and controlled by minorities in which at least 51 percent of the ownership interest is held by minorities and the management and daily business operations of which are controlled by one or more of the minorities who own it; or

3. A corporation or other entity, whose management and daily business operations are controlled by one or more minorities who own it, and which is at least 51 percent owned by one or more minorities, or, if stock is issued, at least 51 percent of the stock is owned by one or more minorities.

“Selective Assistance Vendor Information (SAVI)” means the database in which the Division maintains a public listing of registered small businesses, veteran’s businesses, disabled veteran-owned businesses, and certified minority and women’s businesses.

“State contracting agency” or “contracting agency” means any board, commission, committee, authority, division, college, university, department, or agency of the State that possesses the legal authority to enter into, or award, contracts for goods and services or construction contracts. A list of State contracting agencies shall be maintained at www.newjerseybusiness.gov and updated, as necessary, to reflect the addition or elimination of agencies.

“Woman” or “women” means an individual, regardless of race, who self-identifies her gender as a woman, without regard to the individual’s designated sex at birth.

“Women’s business” means a business, pursuant to N.J.S.A. 52:27H-21.18, which is:

1. A sole proprietorship owned and controlled by a woman;

2. A partnership or joint venture owned and controlled by women in which at least 51 percent of the ownership is held by women and the management and daily business operations of which are controlled by one or more women who own it; or

3. A corporation or other entity whose management and daily business operations are controlled by one or more women who own it, and which is at least 51 percent owned by women, or, if stock is issued, at least 51 percent of the stock is owned by one or more women.

17:46-1.3 Standards of certification for minority businesses and women’s businesses

(a) A business may be eligible to be certified as a minority business, a women’s business, or both.

(b) In order to be eligible as a minority business, a business must be a sole proprietorship, partnership, joint venture, corporation, or other business entity authorized under the laws of the United States, which is at least 51 percent owned, operated, and controlled by persons who are Black, Hispanic, Asian American, American Indian, or Alaskan native.

(c) In order to be eligible as a women’s business, a business must be a sole proprietorship, partnership, joint venture, corporation, or other business entity authorized under the laws of the United States, which is at

least 51 percent owned, operated, and controlled by persons who are women, without regard to race.

(d) In order to be eligible to be certified under the Act, a minority or women’s business must be independently owned, operated, and controlled and can demonstrate the ability to be considered a “going concern,” as in the business has sufficient resources needed to continue operating indefinitely by normal industry standards. A business shall meet the following standards to be certified as a minority business or women’s business:

1. **Ownership:** A business shall be deemed to be independently owned, operated, and controlled, if its management, as specified in its certification application, is responsible for both its daily and long-term operation, and that management owns at least 51 percent interest in the business. The ownership and control by minorities or women shall be real, substantial, and continuing, demonstrating authority over the affairs of the business, and shall go beyond the pro forma ownership of the business as reflected in its ownership documents;

2. **Business Entity:** Recognition of the business as a separate entity for tax or corporate purposes is not necessarily sufficient for recognition as a minority business or women’s business. In determining whether a potential minority business or women’s business is an independent business, all relevant factors shall be considered, including the date the business was established and the degree to which financial, equipment leasing, and other relationships with non-minority and non-women businesses vary from industry practice; and

3. **Licensing:** When a professional or occupational license or certification is required by Federal or State law to perform the primary business operations of the applicant business, and the woman owner in the case of a women’s business or the minority owner in the case of a minority business does not possess the applicable license or certification, the woman or minority owner shall demonstrate competence in the affairs of the business in order to satisfy the requirement for managerial and operational control.

17:46-1.4 Certification procedures for minority businesses and women’s businesses

(a) Provisional applications. Pursuant to P.L. 2003, c. 189, the documentation required for first-time applicants seeking certification may be abbreviated. The documentation requirements in this subsection only apply to first-time applicants for certification.

1. A first-time applicant for certification as a minority business or women’s business must submit documentation necessary to determine the applicant’s eligibility for certification.

2. The Division shall prepare a New Jersey Uniform Certification Application. The application shall be an online application available from the Division website. A business seeking to be certified as a minority business and/or women’s business must be registered to do business in New Jersey at <https://www.state.nj.us/treasury/revenue/gettingregistered.shtml>.

3. The information submitted in support of an application shall include, but not be limited to:

i. The names and addresses of the owner, partners, or shareholders, as applicable, and their representative shares of ownership;

ii. The names and addresses of members of the board of directors, in the case of corporations;

iii. The names and addresses of the officers of the business;

iv. The number of shares of stock issued and outstanding, in the case of a corporation;

v. The articles of incorporation, bylaws, partnership agreements, or joint venture agreements, as applicable;

vi. Organizational charts;

vii. An applicant’s certificate of birth, or motor vehicle driver’s license, passport, or other acceptable form of identification; and

viii. An affidavit, signed by the individual seeking certification, certifying that the applicant is a minority business or women’s business, as defined pursuant to section 2 of P.L. 1986, c. 195 (N.J.S.A. 52:27H-21.18).

4. A first time applicant’s certification shall be provisional and shall be operative for one year from the date of application and upon the payment

of a non-refundable \$100.00 application fee. This fee may be waived on a program wide basis by the State Treasurer.

(b) Certification after provisional/initial application of one year and subsequent certification. Following a provisional certification year, pursuant to (a) above, a business shall reapply for certification.

1. The Division shall prepare an application for recertification. The application shall be an online application available from the Division website. A business seeking to be certified as a minority business and/or women's business shall first register at <https://www.state.nj.us/treasury/revenue/gettingregistered.shtml>.

2. As part of its recertification application to the Division, a business shall provide all required information and documents requested in the recertification, which may include, but not be limited to, the following, in addition to the information required at (a)3 above:

- i. Place of business;
- ii. Names and addresses of the officers of the business;
- iii. Names and addresses of capital investors and the amount of capital contributed. Gifted ownership shall not be considered;
- iv. Personal and Corporate Tax Returns for each owner, director, and officer of the business for the past three consecutive years (including W2s);
- v. The bonding capacity and history of the business;
- vi. The affiliation of the business or any of its owners, officers, or directors with any other business entity;
- vii. A current organizational chart;
- viii. A representative list of current and prior clients for the past two years, where applicable;
- ix. A complete list of major real and personal property holdings of the business;
- x. A complete disclosure of financial statements and balance sheets;
- xi. A complete listing of banking institutions with which the business is affiliated;
- xii. A complete listing of previously attained certifications and a listing of all legal entities that denied certification; and
- xiii. Copies of office/warehouse, lease/rental agreements, and/or deeds, and mortgages, when home-based.

3. A business shall submit a completed application.

4. Upon approval, a certificate issued under this subsection shall be valid for three-years, subject to annual verification that there has been no change in status.

5. Every three years thereafter, but no later than 20 days prior to the expiration of the business's current certification, and not earlier than 60 days prior to the expiration of such certification, a business interested in remaining certified as a minority or women's business shall comply with the certification procedures in this subsection.

6. An applicant shall fully and accurately complete all relevant parts of the Uniform Certification Application. Failure to complete an application may result in denial.

7. Annually, the business must submit, not more than 20 days prior to the anniversary of the certification, an annual Certification Verification Statement, in which it shall attest that there is no change in the ownership, control, or any other factor of the business affecting eligibility for certification as a minority or women's business.

i. If the business fails to submit the annual Certification Verification Statement by the anniversary date, the certification will lapse and the business will be removed from the SAVI, which lists certified minority and women's businesses. If the business seeks to be certified, it will have to reapply and pay the \$100.00 application fee. This fee may be waived on a program-wide basis by the State Treasurer.

ii. If the business submits the annual Certification Verification Statement by the anniversary date, but either the Certification Verification Statement or other information received by the Division indicates that the business is no longer eligible for certification as a minority or women's business, the Division shall revoke the certification pursuant to this section and, following revocation, the business shall be removed from the SAVI. The business may appeal this revocation pursuant to the procedures set forth at N.J.A.C. 17:46-1.8.

(c) Grounds for denial shall be as follows:

1. In the event that the Division, after reviewing the application, requests additional information or documentation that is necessary to

make a determination, the applicant's failure to comply with the request within 30 days of the request will result in denial; and

2. If the applicant knowingly supplies incorrect, incomplete, or inaccurate information, the applicant shall be disqualified under this chapter, barred from reapplying for certification for a period of 18 months from the date of notice of disqualification, and may be subject to other penalties as set forth at N.J.A.C. 17:46-1.10(g) and (h).

17:46-1.5 Acceptance as a certified minority business or women's business

(a) When a business is determined by the Division to be a minority and/or women's business, the business will be added to the State's SAVI database. Each business shall be placed on the database denoting its status as a minority and/or women's business.

(b) When a business is placed on the SAVI, that business shall be eligible for all appropriate State programs and initiatives that are designed to ensure equal opportunity for minority and women's businesses to participate in State purchasing and procurement processes. Once a business is placed on the database, it cannot be denied an opportunity to participate in the various State programs until it is removed from the database.

(c) When a business is placed on the SAVI, it shall be informed by the Division of its certification status. The Division shall also issue an individual certification number exclusive to the business as part of the certification procedure.

17:46-1.6 Time for application to be certified as a minority and/or women's business

A business may apply to be certified by the Division at any time, unless restricted pursuant to this chapter.

17:46-1.7 Right of withdrawal

An applicant for the State of New Jersey Unified Certification Program may request in writing, to the Director, that its application be withdrawn. Such withdrawal will not be prejudicial to any subsequent application. An applicant may reapply not sooner than 90 calendar days following the date of withdrawal, but not more than three times in a calendar year. An applicant may withdraw once during a 12-month period.

17:46-1.8 Denial of initial certification and revocation of certification for reasons other than a challenge

(a) The Division may deny or revoke a certification as a minority or women's business it has determined that:

1. The applicant has failed to meet certification criteria;
2. The business has ceased to meet certification criteria;
3. The applicant has not timely renewed its certification; or
4. The applicant has knowingly provided incorrect or false information.

(b) The appeal procedures for denials or revocations pursuant to (a)1, 2, or 3 above are at (d) below. The appeal procedures related to a determination that an applicant or certificate-holder has knowingly supplied false or misleading information (see (a)4 above) are set forth at N.J.A.C. 17:46-1.10.

(c) In all cases, when a determination to deny or revoke is made, the Division shall notify the business through the mail. The denial or revocation shall be effective as of the date of the notice.

(d) A business finding cause to challenge the denial or revocation shall submit an appeal to the Director setting forth, in detail, the grounds for such appeal in a written statement. The appeal shall be filed within 10 business days following the business's receipt of written notification that it was denied certification or that its certification was revoked. The appeal shall contain the following items:

1. The specific grounds for challenging the denial of the certification or the revocation of the certification, including all arguments, materials, and/or other documentation that may support the appellant's position; and
2. A statement as to whether the appellant requests an opportunity for an in-person presentation and the reason(s) for the request.

(e) The Director may disregard any appeal filed after the 10-day period.

(f) The appeal accepted by the Director shall be resolved by a written decision based on the Director's review of the written record including, but not limited to, the business's application, the written appeal, pertinent administrative rules, statutes, and case law, and any associated

documentation the Director deems appropriate. In cases where no in-person presentation is held, such review of the written record shall, in and of itself, constitute an informal hearing. The Director has sole discretion to determine if an in-person presentation by the appellant is necessary to reach an informed decision on the matter(s) of the appeal. In-person presentations are fact-finding for the benefit of the Director. The Director has the discretion to limit attendance at an in-person presentation to those parties likely to be affected by the outcome of the appeal. The determination issued by the Director, or the Director's designee, shall be a final agency decision, which shall be appealable to the Appellate Division of the Superior Court.

(g) The Director is entitled to request, receive, and review copies of any and all records and documents deemed appropriate and relevant to the issues and arguments set forth in the appeal. Upon receipt of the Director's request, the business shall promptly provide the requested records or information. The Director may also consider relevant information requested and received from other parties deemed appropriate.

(h) An applicant who receives a decision from the Division that the denial or revocation has been reaffirmed may reapply one year after the original date of denial or revocation.

17:46-1.9 Procedure for challenges to a business certified as a minority and/or women's business

(a) A third-party may challenge the qualifications of an applicant or a certified entity under this chapter for eligibility to be certified as a minority or women's business and be included in the SAVI database.

(b) A third-party finding cause to challenge a business' certification as a minority and/or a women's business shall submit an appeal to the Director setting forth, in detail, the grounds for such challenge in a written statement with copies to the challenged business and to the appropriate contracting agency if a specific contract is at issue. The challenge shall contain the specific grounds for challenging the certification, including all arguments, materials, and/or other documentation that may support the challenger's position. A challenge under this subsection is limited to the authenticity of a business under this chapter to be certified as a minority or women's business. The right to challenge a currently certified minority business or women's business is, in addition to, and independent of, any protest hearing rights that are afforded by any State contracting agency.

(c) When the Division receives a challenge, upon the request of the minority and/or women's business whose certification is at issue, the Division shall notify the affected business in writing.

(d) Upon proper notice, the Division shall conduct a hearing on the matter as follows:

1. The business must request the hearing within 10 days after receipt of notice that the business' certification is subject to a challenge;

2. The Director has sole discretion to determine if an in-person presentation is necessary to reach an informed decision on the matter(s) of the appeal. In-person presentations are fact-finding for the benefit of the Director. The Director has the discretion to limit attendance at an in-person presentation to those parties likely to be affected by the outcome of the proceeding. The Division shall notify all interested parties of the time and place of the hearing, and of the right to attend and be represented at the hearing;

3. The Director shall resolve any challenge received by written decision based on the Director's, or his or her designee's, review of the written record including, but not limited to, the business's application, the written appeal, pertinent administrative rules, statutes, and case law, and any associated documentation deemed appropriate. In cases where no in-person presentation is held, such review of the written record shall, in and of itself, constitute an informal hearing. The burden of proof lies with the third-party challenger. However, the Division may use its own resources to ascertain the viability of a challenge and the status of a business;

4. The determination issued by the Director, or the Director's designee, shall be a final agency decision, which shall be appealable to the Appellate Division of the Superior Court;

5. The Director is entitled to request, receive, and review copies of any and all records and documents deemed appropriate and relevant to the issues and arguments set forth in the challenge. Upon receipt of the Director's request, the business shall promptly provide the requested records or information. The Director may also consider relevant

information requested and received from other parties deemed appropriate; and

6. An applicant who receives a decision from the Division that the certification has been revoked may reapply for certification one year after the date of revocation.

17:46-1.10 Obligations to provide information; penalties for failure to provide complete and accurate information; information and hearing procedures

(a) Applicants for certification under this chapter shall accurately and honestly supply all information required by the Division.

(b) Any business certified by the Division as a minority and/or women's business shall immediately apprise the Division of any circumstances that in any way affect the ownership composition of the business, or the control over the business, or otherwise affect the eligibility of the business under this chapter.

(c) The failure of a business to report any such changed circumstances, or the intentional falsification, shall disqualify the business for inclusion on any electronic database under this chapter and may subject the business to other sanctions provided for by other State agencies or departments, the Attorney General, or other enforcement agencies.

(d) When the Division determines that a business has been certified as a minority and/or women's business on the basis of false information knowingly supplied, the Division shall provide notice, including notice of the proposed penalties.

(e) The certificate holder shall have 10 days to file a notice of appeal with the Director. The notice of appeal shall provide the specific grounds for appealing the determination, including all relevant documentation.

(f) Receipt of a proper appeal will constitute a contested case, eligible for hearing pursuant to N.J.S.A. 52:14B-1 et seq., and 52:14F-1 et seq., and N.J.A.C. 1:1.

(g) The Director may impose both financial penalties and periods of ineligibility upon the business, including:

1. Assessment of a penalty in the amount of not more than 10 percent of the total dollar amount of all contracts and/or purchases awarded by the State and any of its instrumentalities to that business in reliance on its representation of ownership and/or control, for the duration of the period of the misrepresentation; or

2. Revocation of the certification of the business and removal of the business from SAVI.

(h) Any applicant who knowingly supplies false information or has been awarded a contract to which the business would not otherwise have been entitled in the absence of that false information, shall, upon conviction, be guilty of a crime of the fourth degree.

(i) When a business's request for certification has been denied or its certification has been revoked based upon false information knowingly provided by that business in its submitted Uniform Certification Application or its annual Certification Verification Statement, the business has the right to an appeal. Revocation of a certification based on false information knowingly supplied by the business is addressed by the procedures in this section.

17:46-1.11 Certification reciprocity

(a) The Division may form reciprocal agreements with, or accept certifications by, other public and private certifying entities, to facilitate minority business and women's business development and growth.

(b) All reciprocal agreements must provide that the quality of the program of the other certifying agency is the relative equal of the Division's program.

(c) Documentation from the reciprocal agency showing certification shall be provided.

(d) In the event that the Division forms reciprocal agreements with, or accepts certifications by, other public and or private certifying entities, it shall post information on its website including the names of the entities, the effective date of accepting certifications by other entities, and links to such entities.

(e) The Division shall accept as sufficient, a Disadvantaged Business Enterprise (DBE) certification, pursuant to P.L. 114-94 (December 4, 2015), afforded by an agency or instrumentality of the State.

17:46-1.12 Information confidentiality

(a) All information and documents submitted to the Division as part of the certification application shall be deemed confidential and not subject to disclosure, unless required or allowed by applicable Federal and State law. Information required to be disclosed for purposes of inclusion in the SAVI database is not deemed confidential.

(b) Any records and files that the Division of Taxation treats as confidential pursuant to N.J.S.A. 54:50-8 shall be subject to the same standards of confidentiality for purposes of the certifications addressed by this chapter.

(c) Information and documents provided to the Division may be made available, subject to confidentiality limitations, under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 et seq., where required during a challenge or appeal proceeding under this subchapter.

OTHER AGENCIES

(a)

NEW JERSEY ECONOMIC DEVELOPMENT AUTHORITY

Administrative Rules

Authority Assistance Programs

Due Diligence

Proposed Amendments: N.J.A.C. 19:30-6.1 and 6.4; and 19:31-4.5, 8.14, 9.6, 10.12, 11.13, 14.14, 15.7, 16.11, 18.6, 19.5, and 20.6

Authorized By: New Jersey Economic Development Authority, Tim Sullivan, Chief Executive Officer.

Authority: N.J.S.A. 34:1B-1 et seq.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2020-082.

Submit written comments by October 16, 2020, to:

Jacob Genovay, Senior Legislative and Regulatory Officer
New Jersey Economic Development Authority
PO Box 990
Trenton, NJ 08625-0990
jgenovay@njeda.com

The agency proposal follows:

Summary

The New Jersey Economic Development Authority (“EDA” or “Authority”) is proposing to amend its rules to establish, for all programs, that an applicant shall pay, to the Authority, the full amount of direct costs of due diligence or other analyses by a third party retained by the Authority, if the Authority deems such retention to be necessary.

Currently, the requirement that a developer shall pay the full amount of direct costs of an analysis by a third party retained by the EDA has been established for specific programs, particularly, the Economic Redevelopment and Growth (ERG) Program at N.J.A.C. 19:31-4.5(b), Urban Transit Hub Tax Credit (UTHTC) Program at N.J.A.C. 19:31-9.6(b), Grow New Jersey Assistance (Grow NJ) Program at N.J.A.C. 19:31-18.6(b), Offshore Wind Economic Development Tax Credit Program at N.J.A.C. 19:31-20.6(b), and Real Estate Impact Fund and Brownfields Loan Program at N.J.A.C. 19:30-6.1(a)4 and 5, respectively.

The Authority has performed due diligence, including its own debarment/disqualification review, on all companies applying for financial assistance in the past. However, to better ensure that financial assistance is awarded to applicants that are both eligible and responsible, and will deliver the economic benefits that the various programs were created to achieve, the Authority has expanded the level of due diligence completed for each company applying for financial assistance and at times utilizes third-party consultants for that purpose. The amendments, under proposed new N.J.A.C. 19:30-6.1(e), will require applicants to pay the full amount of direct costs of third-party analyses, including

debarment/disqualification reviews, as well as any other analyses for all EDA programs not otherwise provided for in existing rules. This means that if the Authority utilizes the services of a third party to perform due diligence or investigate the eligibility or responsibility of an applicant for, or recipient of, financial assistance from the Authority (including tax incentives), the Authority will require the applicant or recipient to reimburse it for those costs.

Accordingly, the amendments delete the provisions pertaining to the Real Estate Impact Fund at N.J.A.C. 19:30-6.1(a)4 and the Brownfields Loan Program at N.J.A.C. 19:30-6.1(a)5, as each would be included under proposed new N.J.A.C. 19:30-6.1(e). Proposed new N.J.A.C. 19:30-6.4(a)10 will require that the full amount of direct costs for due diligence, including, but not limited to, Authority debarment/disqualification reviews, or other analyses by a third party retained by the Authority, be paid in post-closing. In the Economic Redevelopment and Growth (ERG) Program at N.J.A.C. 19:31-4.5(b), Urban Transit Hub Tax Credit (UTHTC) Program at N.J.A.C. 19:31-9.6(b), Grow New Jersey Assistance (Grow NJ) Program at N.J.A.C. 19:31-18.6(b), and Offshore Wind Economic Development Tax Credit Program at N.J.A.C. 19:31-20.6(b), the above change is accomplished by deleting the terms “[i]n addition to the application fee(s)” and replacing the term “an analysis” with “due diligence, including, but not limited to, debarment/disqualification reviews, or other analyses” by a third party retained by the Authority, if the Authority deems such retention to be necessary.

Finally, the proposed amendments apply the modification to the following remaining EDA programs by adding a new provision that requires the applicant to pay the full amount of direct costs for due diligence reviews or other analyses by a third party retained by the Authority: Hazardous Discharge Site Remediation Program at proposed new N.J.A.C. 19:31-8.14(b), Business Employment Incentive Program at proposed new N.J.A.C. 19:31-10.12(i), Petroleum Underground Storage Tank Remediation, Upgrade, and Closure Fund at proposed new N.J.A.C. 19:31-11.13(d), Business Retention and Relocation Assistance Grant Program at proposed new N.J.A.C. 19:31-14.14(e); Tax Credit Certificate Transfer Program at proposed new N.J.A.C. 19:31-15.7(c), Sales and Use Tax Exemption Program at proposed new N.J.A.C. 19:31-16.11(d), and Angel Investor Tax Credit Program at proposed new N.J.A.C. 19:31-19.5(e).

As the Authority has provided a 60-day comment period on this notice proposal, this notice is excepted from the rulemaking calendar requirement, pursuant to N.J.A.C. 1:30-3.3(a)5.

Social Impact

In providing a financial means through which to pay for third-party analyses, the proposed amendments will enable the EDA to better promote economic development by ensuring that financial assistance is awarded to eligible and responsible applicants who will deliver the economic benefits that the various programs were created to achieve.

Economic Impact

The proposed amendments, which require a fee based on the amount of review needed for any due diligence or analyses by a third party, may have a positive economic impact resulting from greater transparency and oversight of financial assistance provided through the EDA. Under the current process, the applicant is informed of the fee prior to the third-party review or analysis, and the applicant decides whether to proceed with the application and the required review or analysis or withdraw prior to incurring the fee.

Federal Standards Statement

A Federal standards analysis is not required because the proposed amendments are not subject to any Federal requirements or standards.

Jobs Impact

The proposed amendments, which require a fee for any due diligence or analyses by a third party, are not intended to create jobs directly. While third-party entities will be employed and paid through these fees, the purpose of the fees is to support the appropriate level of due diligence to ensure that eligible and responsible entities receive the financial assistance and incentives pursuant to programs that support the creation and retention of jobs in New Jersey.