

From: bmahanna@zuckerman.com
Sent: Wednesday, October 09, 2013 4:02 PM
To: Duffy, Daniel
Cc: Torres Rojas, Genara; Van Duyne, Sheree; Qureshi, Ann
Subject: Freedom of Information Online Request Form

Information:

First Name: Brian
Last Name: Mahanna
Company: Zuckerman Spaeder LLP
Mailing Address 1: 1185 Avenue of the Americas
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City: New York
State: NY
Zip Code: 10036
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Phone: 212-704-9600
Required copies of the records: No

List of specific record(s):

Please provide the Port Authority's current Minority and Women Owned Business Enterprise Guidelines, or any similar comprehensive set of the rules and regulations for the Port Authority's Minority and Women Owned Business program collectively, the "Guidelines", as well as all previous versions of such Guidelines in effect since January 1, 2007. I have not been able to find complete versions of either current or past Guidelines on your website. In the event that all or part of this request is denied, please cite each specific FOI Code exemption and notify me of appeal procedures. I agree to be notified that the records have been posted on the Port Authority's Web site and are available for inspection. Please post responsive records as they are identified, rather than waiting to gather all records. Please contact me by phone at 212 704-9600 or bmahanna@zuckerman.com with any questions. I expect a response to this request within five business days.

THE PORT AUTHORITY OF NY & NJ

FOI Administrator

October 17, 2013

Mr. Brian Mahanna
Zuckerman Spaeder LLP
1185 Avenue of the Americas, 31st Floor
New York, NY 10036

Re: Freedom of Information Reference No. 14333

Dear Mr. Mahanna:

This is a response to your October 9, 2013 request, which has been processed under the Port Authority's Freedom of Information Code (the "Code", copy enclosed), for copies of records related to the Port Authority's current Minority and Women Owned Business Enterprise Guidelines, or any similar comprehensive set of the rules and regulations for the Port Authority's Minority and Women Owned Business program collectively, the "Guidelines", as well as all previous versions of such Guidelines in effect since January 1, 2007.

Material responsive to your request and available under the Code can be found on the Port Authority's website at <http://www.panynj.gov/corporate-information/foi/14333-O.pdf>.

Please refer to the above FOI reference number in any future correspondence relating to your request.

Very truly yours,



Ann L. Qureshi
FOI Administrator

Enclosure

*225 Park Avenue South, 17th Floor
New York, NY 10003
T: 212 435 3642
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**Guidelines for Certification of
Minority Business Enterprises (MBEs)
and
Women-owned Business Enterprises (WBEs)**

Office of Business Diversity and Civil Rights
233 Park Avenue South, 4th Floor
New York, NY 10003

Office of Business Diversity and Civil Rights

MBE/WBE Certification/Recertification Review Procedures

I. Overview

The Port Authority of New York and New Jersey ("Port Authority") has a long-standing practice of making its opportunities available to as many firms as possible and has taken affirmative steps to encourage firms owned by minorities and women to seek business opportunities with the Port Authority. (See Appendix A - Board M/W/SBE Policy of June 10, 1993.) As part of this practice, the Port Authority operates a Minority Business Enterprise/Women-owned Business Enterprise ("M/WBE") Program which includes certification requirements and procedures that are designed to conform with its own internal policies. The Port Authority's Office of Business Diversity and Civil Rights ("OBDCR") is responsible for the overall administration of the Port Authority M/WBE policies including the administration of the certification program. Forms used for certification are described later and included in the attached appendices.

II. Definitions

A. Minority

"Minority" means a person who is a citizen or lawful permanent resident of the United States and who is:

1. Black (a person having origins in any of the black African racial groups not of Hispanic origin);
2. Hispanic (a person of Puerto Rican, Mexican, Dominican, Cuban, Central or South American culture or origin, regardless of race);
3. Asian and Pacific Islander (a person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands); or
4. Native American or Alaskan Native persons having origins in any of the original peoples of North America and maintaining identifiable tribal affiliations through membership and participation or community identification in an Indian Tribal Entity or a Native Entity within the State of Alaska recognized by the Federal Government and listed as such in the Federal Register pursuant to 25 CFR Part 83. Such affiliation shall be evidenced by a valid identification card or other writing issued by the entity for the purpose of confirming affiliation.

- B.** "Minority Business Enterprise" or "MBE" means a business entity which is owned and controlled by one or more members of one or more minority groups.
- "Women-owned Business Enterprise" or "WBE" means a business entity which is owned and controlled by one or more women.

- C. "Owned and controlled" means a business entity:
1. which is at least 51 percent owned by one or more members of minority groups or women, or in the case of a publicly held corporation, at least 51 percent of the stock of which is owned by members of one or more minority groups or women; and
 2. whose management and daily business operations are controlled by one or more such individuals who are citizens or permanent resident aliens.

III. Description of Certification Application and Review Process

A. M/WBE Certification Application (Certification Application)

The "Certification Application" is a detailed informational form required by an applicant for Port Authority certification as an M/WBE firm. This application is reviewed by OBDCR. After submitting the initial application form, if deemed necessary by the Port Authority to clarify special areas of concern, an applicant may be requested to: submit additional information, appear for a personal interview, and/or be available for personal interviews at their office and work sites.

IV. Requirements for MBE/WBE Certification

A business seeking certification as an M/WBE shall cooperate with the Port Authority in supplying additional information which may be requested in order to make a determination.

A. Eligibility Requirements

1. The applicant should demonstrate by earned revenues, executed contracts or other agreements that it has engaged in commercial activity (preferably for

one year or more) in the field in which it seeks to be qualified or in which it provides services. When reviewing the application of a newly established firm, the Port Authority, in its sole discretion, may consider the commercial activity of other firms in which any or all of the minority or women owners has held an ownership interest of 51% or more.

2. Participation of MBEs and WBEs in programs implemented pursuant to the Port Authority's current MBE/WBE policy will be limited to firms having their principal place of business in either New York or New Jersey and, subject to the limitations and restrictions set forth in that policy, to firms having a principal place of business elsewhere but with a history of doing business in either New York or New Jersey. In lieu of visiting the offices of a firm located outside of the state of New York or New Jersey, the Port Authority may require that such a firm demonstrate that it has been certified as MBE or WBE or DBE by a U.S. Department of Transportation grant recipient utilizing guidelines set forth in 49 CFR Part 26 and 23.
3. The following standards are used in determining whether a firm is owned and controlled by one or more minorities or women. These elements of ownership must be clear and apparent for a firm to be considered eligible as an MBE or WBE.
 - (a) An eligible MBE or WBE 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 firm as reflected in its ownership documents. The minority or women owners shall enjoy the customary incidents of ownership, and shall share in the risks and profits commensurate with their ownership interests, as demonstrated by an examination of the substance rather than form of arrangements.

The fact that a business is separately incorporated or is recognized as a separate entity for tax purposes is not necessarily sufficient to support

the conclusion that the business is an independent entity entitled to MBE or WBE certification.

In determining whether a potential MBE or WBE is an independent business, the Port Authority considers all relevant factors, including the date the business was established, the adequacy of its resources, and the degree to which financial, equipment leasing, and other relationships with non-minority or non-woman owned firms vary from industry norms.

- (b) The minority or woman owner(s) shall also possess the power to direct and to cause the direction of the management and policies of the firm, and to make the day-to-day as well as major decisions on matters of management, policy, and operations. The firm shall not be subject to any formal or informal restrictions which limit the customary discretion of the minority or women owner(s). For example, there shall be no requirements or allowance in corporate bylaws, operating procedures, partnership agreements, shareholder agreements or charter for cumulative voting rights, or other voting arrangements, that prevent the minority or woman owner without the cooperation or vote of any owner who is not a minority or woman, from making a business decision for the firm.

Where the firm's owner is legally required to possess a license in order for the firm to engage in the business in which the firm seeks to be qualified, the M/WBE owner shall hold the appropriate license.

The M/WBE owner(s) shall, in fact, exercise real control over the critical aspects of the business.

- (c) All securities which constitute ownership and/or control of a corporation for purposes of establishing it as an M/WBE shall be held directly by minorities or women. No securities held in trust, or by any

guardian for a minor, shall be considered in determining M/WBE ownership or control of a corporation.

- (d) The contribution of capital and expertise by the minority or women owners to acquire their interests in the firm shall be real and substantial.

Examples of insufficient contributions include a promise to contribute capital, a note payable to the firm or its owners who are not minorities or women, or the mere participation by minorities or women as an employee, or in any managerial capacity, rather than owner.

- 4. The following are examples of circumstances which, if observed, should be carefully scrutinized by the OBDCR staff member reviewing a firm's certification application. While these circumstances will not automatically result in denial of the application, they may cast doubt on the firm's ownership and/or control by minorities and/or women and any such doubt should be resolved before certification is granted:

- (a) Shareholders, members, managerial employees or others associated with the firm who are not minorities or women appear to be disproportionately responsible for the operation of the firm.
- (b) The ownership and/or control of the firm has recently changed.
- (c) Owners of the firm also held an ownership interest in a firm which was previously denied certification by The Port Authority.
- (d) Family members, whether related by blood or through marriage, who are not women or minorities play major roles in the operation of the business or appear to be the primary possessors of the expertise necessary to operate the firm.
- (e) A prior employer of a minority or woman owner has a relationship with the firm which entails that employer's operational or financial involvement in the firm.

- (f) The firm has been denied M/WBE certification by another agency participating in the Certification Application Program based on its failure to establish ownership and control by minorities or women.

The above list is not intended to be all inclusive and any circumstance which casts doubt on the ownership and/or control of an applicant firm should be addressed during the certification process.

5. M/WBE Certification Transfer Rights.

No certified firm can transfer its rights and privileges as an eligible M/WBE to a non-Port Authority certified M/WBE firm.

6. M/WBE Recertification

Once certified, an M/WBE shall update its submission every five (5) years by submitting a new Certification Application or M/WBE Recertification Application form (see Appendix C).

7. Name, Location or Ownership/Control Changes of Certified M/WBE Firms

In the event of a name change, or change of business location, or change in the ownership or control of the firm, certified firms are required to submit written notification to OBDCR within 30 days of such changes. Failure to do so within the required time may result in a termination of the firms certification. Upon review of such notification, OBDCR may require the firm to submit a new Certification Application or M/WBE Recertification Application.

A change of ownership and control of the firm will require the completion and submittal of a new certification application. A change of address may require the firm to submit an executed copy of the lease agreement for the new business location along with written notification. A business name change may be made by completing a Recertification Application or by written notification along with the submittal of a copy of the firm's amended Articles of Incorporation or Trade (Business) Name Certificate.

V Close-outs, Withdrawals, Denials, Suspensions and Decertification of an M/WBE

A. Close-outs

Close-out means that the Port Authority could not determine the eligibility of the applicant to be certified as an MBE or WBE from the information that was provided and when the applicant has not responded to requests for additional information.

When an applicant does not respond within 30 days by submitting requested information, the applicant will be notified in writing by OBDCR that the application is “closed out” and the firm will not be eligible to reapply for one (1) year. The one-year waiting period for close-out may be waived at the discretion of the Certification Manager of Office of Business Diversity and Civil Rights.

B. Withdrawals

An applicant may issue a written request to OBDCR to withdraw his/her M/WBE certification application from further consideration, if the written request is submitted prior to written notification of denial from OBDCR. An applicant will not be eligible to reapply for one (1) year once the request for withdrawal is approved.

C. Denials

OBDCR may deny the application of any firm upon its determination that the firm does not meet the definition of a Minority Business Enterprise or Women-owned Business Enterprise, set for above, and the requirements for certification also set forth above.

No certification application for the Port Authority's M/WBE Program will be accepted or evaluated in the name of the denied firm or any of its wholly-owned subsidiaries for two years following the date of the notice of denial.

D. Decertification

OBDCR may revoke the certification of any firm that it concludes no longer meets the guidelines of MBE/WBE eligibility. MBE/WBE revocation may be initiated for any of the following reasons:

- The business entity has been legally dissolved.
- The business entity's ownership and/or control by minorities or women has decreased to the extent that the business no longer meets the criteria for certification as an MBE or WBE.
- The business entity's current certification eligibility is re-examined and the business is found not to meet MBE/WBE certification criteria.
- Misrepresentation of the firm's ownership or control.
- It is determined that the business entity made false statements or misrepresentations on its application for MBE or WBE certification.
- Failure to maintain a regular, on-site presence and/or to exercise day-to-day financial and operational management, control and oversight of the work of a contract which the business entity has obtained either through negotiation or through set-aside bidding pursuant to The Port Authority's M/WBE Program.
- Failure to operate independently and to provide a commercially useful function on a subcontract which the business entity has been awarded by a firm which seeks to credit that subcontract toward the good faith M/WBE participation goals contained in its contract with the Port Authority. Conduct which will be closely scrutinized in this context includes but is not limited to, the following:
 - subcontracting beyond industry norms;
 - rental or lease of equipment from the prime contractor or from a third party beyond industry norms;
 - purchase of equipment from the prime contractor but only for the duration of the contract; and
 - hiring employees from or sharing employees with the prime contractor.

An MBE/WBE firm performs a commercially useful function when it is responsible for execution of a distinct element of the work of the contract and is carrying out its responsibilities by actually performing, managing and supervising the work involved. The MBE/WBE should have the skill and expertise to perform work for which it is being utilized. The MBE/WBE must be responsible for the purchase of, quality of, and payment for materials used to perform its work under the contract.

No certification application for the Port Authority's M/WBE Program, will be accepted or evaluated in the name of the decertified firm or any of its wholly-owned subsidiaries for two (2) years following the date of the original notice of decertification.

E. Suspension of M/WBE Certification Pending Decertification

The decision to revoke a firm's M/WBE certification will take effect 30 days following the date of OBDCR's notice of decertification unless the firm has appealed that decision. Immediate as of the date of OBDCR's notice of decertification, the firm's M/WBE certification shall be suspended. The suspension shall be in effect until the above reference 30 day period has expired or, if an appeal has been requested, until such appeal has been resolved. However, in no event shall such suspension exceed 60 days.

During the period of suspension, the firm will be ineligible to participate as an M/WBE in any program implemented by the Port Authority for the benefit of M/WBEs. Such programs include but are not limited to price preferences and set-aside bidding. Furthermore, the suspended firm's name will not appear on the list of certified M/WBE subcontractors prepared by the Port Authority's Engineering Department for use by Port Authority contractors seeking to achieve the M/WBE good faith participation goals contained in their contracts.

OBDCR will maintain the necessary database to administer the aforementioned provisions.

VI. Appeals of Certification Revocation or Denial

Businesses aggrieved by the Port Authority's determination may appeal in accordance with procedures set forth below.

A. Filing and Hearing Procedures

Firms are advised in writing of the reason(s) for the denial or revocation of certification and of their right to an appeal. The appeal shall be in writing and shall be forwarded to OBDCR no later than 30 days after the date of the notification of denial or revocation.

Upon the timely filing of a request for an appeal, the Port Authority shall convene a hearing within a reasonable time at which the firm is afforded an opportunity to be heard. The Hearing Officer shall be the OBDCR's General Manager or his/her designee. A Port Authority attorney may be present at the request of the Hearing Officer. The OBDCR staff member who made the initial decision to deny or to revoke certification will present the case to the Hearing Officer. In cases where technical expertise is necessary and/or appropriate, the Hearing Officer may request the presence of an engineer or other expert to participate as a consultant.

The firm has the right to be represented by counsel and the right to present testimony and other evidence.

The firm may elect to present information and arguments in writing, without going to a hearing.

B. Determination

After considering all the relevant information, the Hearing Officer shall make a determination and shall inform the firm in writing filing the appeal of its decision and reasons therefore.

Appendix A

Port Authority M/WBE Program Board Policy

Port Authority Policy for Revised Minority and Woman-owned Business Enterprise and Small Business Enterprise Programs

The Port Authority has a longstanding commitment to maximize business opportunities available to minorities, women and small entrepreneurs in the New York/New Jersey region. A reaffirmation of this commitment is particularly desirable in light of the findings of the Port Authority staff entitled "A Study of Disparity and Utilization of Minority and Women-owned businesses by the Port Authority" which identified a disparity between Port Authority availability and utilization of minorities and women in most procurement categories.

In order to facilitate the expansion of opportunities for minorities, women and small entrepreneurs, the revised Minority, Women and Small Business Enterprise (M/W/SBE) programs set forth in the attached statement (policy) are proposed. These programs will encourage such firms to enter the mainstream of business participation and improve their competitive positions.

In addition, a delegation of authority to the Executive Director to authorize the award of contracts and contracts resulting from requests for proposals included the programs authorized in the attached policy in amounts not in excess of \$500,000 is proposed. The Executive Director shall periodically report to the Board on all contracts authorized under these programs whether awarded pursuant to this delegation or otherwise

Pursuant to the foregoing report presented by staff, the following resolution was adopted with Commissioners Goldberg, Henderson, Lronr, McGoldrick, O'Neill and Paterson voting in favor; none against:

RESOLVED, that the Board hereby accepts and adopts the findings and conclusions of a staff study of disparity between Port Authority availability and utilization of minority and women-owned businesses set forth in a "A Study of Disparity And Utilization Of Minority And Women Owned Businesses By The Port Authority" and accepts the findings of disparity between the availability and utilization of certain ethnic, racial and gender groups as reported by the states of New York and New Jersey and the City of New York; and it is further

RESOLVED, that the Board hereby adopts the "Port Authority Policy for Revised Minority, Women and Small Business Enterprise (M/W/SBE) Programs" (attached hereto), to maximize business opportunities available to minorities, women and small entrepreneurs in the New York/New Jersey region, consisting of a menu of programs to be implemented where the findings, respectively, justify the use of such programs as a narrowly tailored remedy to correct the under utilization of racial, ethnic and gender protected classes found for major procurement categories; and it is further

(Board – 6/10/93)

EXECUTIVE GUIDE (111)

RESOLVED, that the Executive Director be and he hereby is authorized, for and on behalf of the Port Authority, to award construction and non-construction contracts including contracts resulting from requests for proposals, pursuant to the programs authorized in this policy. in an amount not to exceed \$500.000; and it is further

RESOLVED, that the Executive Director shall periodically report to the Board on all contracts authorized under these programs whether awarded pursuant to this delegation or otherwise.