

Repeal and Replacement of Virginia DBE Regulations

Virginia has repealed its Administrative Code (“VAC”) provisions concerning Disadvantaged Business Enterprise (“DBE”) certification and other requirements.¹ These provisions are administered by the Department of Small Business and Supplier Diversity (“Department”).² They are replaced with the new 7 VAC 13-20-10 through 7 VAC 13-20-230, which you can see [here](#).³ The new provisions largely repeat the former provisions and reorganize them. The most substantial changes are in the procedures for initial certification;⁴ procedures concerning certification revocation;⁵ and appeals from a denial of certification or revocation of certification.⁶

The Virginia Department of Transportation (“VDOT”) has essentially adopted the United States Department of Transportation Commercially Useful Function (“CUF”) standards.⁷ A discussion of all federal and state DBE programs and regulation in Virginia can be seen [here](#).⁸ The VAC applicable to all non-VDOT public procurement states only that any entity must perform a CUF in order to be a certified DBE.⁹ This CUF requirement is now moved, but kept unchanged.¹⁰ This regulation seems to speak only to the qualification for certification as a DBE. It is entitled “Control” and states that governance, operation, management and independence are all factors that will be examined in determining who controls an applicant's business.

This regulation concludes by stating:

c. An agent, broker, dealer, or manufacturer's representative, unless it is the standard for the industry, generally does not qualify for certification.

d. A business that adds no material value or does not perform a commercially useful function in the provision of the products or services being supplied or has no ownership, financial responsibility, legal liability, or does not possess or handle the item being procured with its own employees, equipment, or facilities generally does not qualify for certification, unless the business structure is the standard in the industry.¹¹

¹ Formerly at 7 VAC 10-21-10 through 7 VAC 10-21-610.

² Va. Code Anno. § 2.2-1603 (Michie 1950) Statutory Authority.

³ Virginia Administrative Code - Title 7. Economic Development - Agency 13. Department of Small Business and Supplier Diversity - Chapter 20. Regulations to Govern the Certification of Small, Women-Owned, and Minority-Owned Businesses.

⁴ Formerly 7 VAC 10-21-310, now at 7 VAC 13-20-140.

⁵ Formerly 7 VAC 10-21-530, now at 7 VAC 13-20-210.

⁶ Formerly 7 VAC 10-21-600, now at 7 VAC 13-20-230.

⁷ Disadvantaged Business Enterprise Program Statement of Commitment dated January 30, 2015, which states that VDOT receives federal financial assistance from the United States Department of Transportation and, as a condition of receiving this assistance, VDOT signed an assurance that it will comply with 49 CFR Part 26. *Also see eg.* http://www.vdot.virginia.gov/business/civil_rights_commercially_useful_function.asp.

⁸ <http://www.fullertonlaw.com/disadvantaged-business-enterprises#virginia>.

⁹ See Formerly 7 VAC 10-21-220 now unchanged at 7 VAC 13-20-110. Control.

¹⁰ Formerly 7 VAC 10-21-220, now unchanged at 7 VAC 13-20-110.

¹¹ 7 VAC 13-20-110(3)(c) & (d), formerly 7 VAC 10-21-220(3)(c) & (d). Control, Independence[Emphasis Added].

The more substantial changes to the VAC, applicable to all non-VDOT public procurement, include the former “Procedures for initial certification of businesses previously certified by other qualifying local, state, private sector, or federal certification programs.”¹² This section formerly stated that a business can be certified as a DBE in Virginia if the business has been certified by another local, state, private sector, or federal certification program that meets the minimum eligibility, ownership and control requirements in the VAC. Those sections are now repealed. There are no new similar provisions requiring the Department to continue to evaluate certification programs of other jurisdictions. As it now reads, the VAC contains only the “general provision” of the former Code, stating:

The department may at its discretion evaluate any local, state, private sector or federal certification program to determine whether it meets the minimum eligibility, ownership and control requirements for certification of small, women- and minority-owned businesses as set forth in this chapter.¹³

Also gone are former sections allowing a business certified by another program to ask the Department to evaluate that program according to its own criteria¹⁴ and that required the Department to maintain a list of other certification programs it determined met the Virginia minimum eligibility requirements.¹⁵

The former section “Revocation Procedure,” has been changed to remove certain provisions requiring the Department to provide notice of its intent to withdraw certification once it has completed an official review of a business’s continued eligibility.¹⁶ The Department still is required to give notice of its initial decision to review the business to verify its continued eligibility as a small, women-owned, or minority-owned business.¹⁷ Formerly, the notice of intent to withdraw certification, issued after the official review, had to include the reasons for withdrawal, information gathered during the review, as well as a request for a response to the notice. The new regulations remove those specific required contents of the notice of intent to withdraw certification. The new regulations state that the Department will issue a notice of its intent to withdraw certification if the business fails to respond to the Department’s requests for records or

¹² 7 VAC 10-21-310.

¹³ Former Section 7 VAC 10-21-400, kept unchanged at 7 VAC 13-20-170. However, the specific standards for evaluating other certification programs, enumerated in former 7 VAC 10-21-420, are now deleted; those standards were:

In conducting its evaluation of other certification programs, the department will determine: 1. Whether the minimum eligibility, ownership, and control requirements for certification are equivalent to or stricter than those set forth in this chapter; 2. Whether the program provides for a process for reviewing applications for certification that requires adequate documentation that the applicant meets the standards for certification; 3. Whether the program has a fair process for reviewing the application for certification (that may include an on-site visit); and 4. Whether the program provides an opportunity for an applicant to appeal a denial of certification.

¹⁴ 7 VAC 10-21-410.

¹⁵ 7 VAC 10-21-430.

¹⁶ Formerly 7 VAC 10-21-530, now at 7 VAC 13-20-210.

¹⁷ Formerly 7 VAC 10-21-530, now 7 VAC 13-20-210.

documentation.¹⁸ The business does still have the opportunity to request an informal fact-finding proceeding, within 10 days after the Department issues its notice of revocation (changed from 15 days), where the business could contest the withdrawal.¹⁹ The specific criteria used by the Department to revoke certification also remain unchanged.²⁰

Finally, the former section “Appeals from a denial of certification or revocation of certification” was changed considerably.²¹ In particular, the new section has inserted a legal standard that a complaining business must meet in order to have an adverse decision reconsidered:

A decision of the department will only be reconsidered if the complainant can demonstrate that a material mistake of fact formed the basis for the department's review of the application or other relevant record, or if the department's decision was not in accordance with applicable laws or regulations.²²

The former section stated that a business has the right to an “appeal”; however, the word “appeal” no longer appears. Instead the business has the right to request an informal fact-finding proceeding, in which it could present reasons why the decision should be reconsidered. There are rigorous conditions on such a request:

Any request for an informal fact-finding proceeding pursuant to subsection A of this section must be submitted in writing to the department within 10 days of the date on which the notice of denial of recertification or the notice of revocation was sent by the department. The request for an informal fact-finding proceeding shall include a clear, brief summary of all factual errors and legal grounds upon which the complainant intends to rely. Within 30 days of the receipt of a timely request for an informal fact-finding proceeding, the department shall issue a notice stating the date and time of the informal fact-finding proceeding. The informal fact-finding proceeding will not be scheduled less than seven and not more than 45 days from the date of the notice. Within 60 days from the date on which the informal fact-finding proceeding was held, the department shall issue a notice, in writing, stating the final decision of the department.²³

These changes to the VAC are the most significant. Less significant are slight changes in “Definitions” to “affiliate,” “certification,” “minority individual,” and “principal place of business.”²⁴ Other than that, the provisions of the former VAC remain essentially unchanged.

Readers are welcome to reprint or republish this article with the following attribution:
© (2016) James D. Fullerton, Fullerton & Knowles, P.C. Clifton, VA (703) 818-2600
Use the Free 680 page Construction Law Survival Manual at www.FullertonLaw.com

¹⁸ 7 VAC 13-20-210(B)(3).

¹⁹ See below re: 7 VAC 13-20-230.

²⁰ Formerly 7 VAC 10-21-520, now 7 VAC 13-20-200.

²¹ Formerly 7 VAC 10-21-600, now 7 VAC 13-20-230.

²² Formerly 7 VAC 10-21-600, now 7 VAC 13-20-230.

²³ 7 VAC 13-20-230(B).

²⁴ Formerly 7 VAC 10-21-20, now 7 VAC 13-20-10.