

Married, But Not Certified: An Overview of the Rhode Island MBE/WBE Certification Process and Its Application to Married Women



Gary R. Pannone, Esq.
Managing Principal
Pannone, Lopes, Devereaux
& O’Gara, LLC
Johnston



Samantha M. Vasques, Esq.
Associate
Pannone, Lopes, Devereaux
& O’Gara, LLC
Johnston

But what precisely is the line between an MBE that is improperly dependent on a non-minority business, and one that has benefitted from sponsorship and training, and is now ready for an independent venture?

Rhode Island’s Minority Business Enterprise program offers important opportunities to minority and women-owned business enterprises (MBEs¹) to participate in state-funded public construction programs and projects, as well as in state purchases of goods and services.² Undoubtedly, the program’s goal is a laudable one. And to achieve it, careful attention must be paid to whether an MBE is truly owned and controlled by a minority or woman, rather than merely in name only. A line of cases from the courts of this state highlights a countervailing policy concern: potential interference with the ability of new business owners to obtain MBE certification where they have received substantial support, mentorship, and experience from individuals who are not women or minorities. That is not to say that all such mentorship is problematic or affects a business’s ability to obtain MBE certification. However, in at least one context, the difficulty of balancing these concerns—sham ownership versus support and sponsorship—is readily apparent: that of married women striking out on their own and seeking women’s business enterprise (WBE) certification.

Before tackling that line of cases, it is helpful to understand the context of the MBE program. The program began with a 1983 executive order by then-Governor J. Joseph Garrahy,³ followed by legislation enacted by the General Assembly in 1986 that built the program’s statutory framework.⁴ The law declared as its purpose “to carry out the state’s policy of supporting the fullest possible participation of firms owned and controlled by minorities and women (MBEs) in state-funded and state-directed public construction programs and projects and in state purchases of goods and services.”⁵ In other words, the program would create opportunities for minority and women-owned businesses to become meaningfully involved in state procurements.

The MBE statute also provided for the establishment of rules and regulations to set “standards which shall determine whether a construction project is covered by this chapter, compliance formulas, procedures for implementation, and procedures for enforcement” consistent with parallel federal regulations for

MBEs.⁶ Those rules and regulations, known as the Rules, Regulations, Procedures and Criteria Governing Certification and Decertification of MBE Enterprises (Rules), outline the criteria for a business to become certified as an MBE.⁷ The process for certification is fairly straightforward on its face: Once an application for MBE certification is submitted, it is reviewed and evaluated by a Department of Administration (DOA) staff member, who may conduct a site visit in reviewing the application.⁸ Then, the DOA staff member will prepare a report on the application to the Assistant Administrator of the Minority Business Enterprise Compliance Office (MBECO) and the Associate Director of the Office of Diversity, Equity, and Opportunity (ODEO) of the DOA.⁹ Together, the Assistant Administrator and Associate Director will decide whether to certify the applicant as an MBE. If their decision is that the applicant does not meet the criteria (or their decision is not unanimous), the applicant may seek review by way of a hearing before the Certification Review Committee (CRC).¹⁰ At the hearing, the applicant may present evidence in support of its application, and afterward, the CRC notifies the applicant by certified mail of its decision, which includes findings of fact and conclusions of law and is administratively final.¹¹

But what criteria are used throughout this process by the DOA staff members, the Assistant Administrator and Associate Director, and ultimately, the CRC? The answer lies in the statutory definition of an MBE, as set forth in the program’s enabling legislation. An MBE is a “small business concern ... owned and controlled by one or more minorities or women,” meaning that the business is at least fifty-one (51%) owned by minorities or women, and that the management and daily business operations are controlled by one or more minorities or women.¹² In other words, ownership and control of a business by minorities or women are two of the key requirements that must be fulfilled before a business can have any hope of becoming certified as an MBE. Substantial investment, discussed later, is the third requirement.

A better understanding of these criteria is necessary to assess their application in the context of married women starting businesses and later seek-

ing WBE certification. Beginning with “ownership,” the meaning of this requirement is readily apparent from the statute, though the Rules provide a finer gloss, including the prohibition on any agreements that could result in less than fifty-one percent (51%) ownership of the business by minorities or women, and the demand that minority and/or women owners “substantially share in all the risks assumed” by the business.¹³ Similarly, whether there is “control” is better understood by reference to the Rules. To demonstrate that they have control over the day-to-day management of the business, and the policy-making mechanisms of the business, minority and female owners applying for MBE certification must establish that they meet all six of the following criteria, specifically that they:

- a. Have the power to direct or cause the directions of the purchase of goods, equipment, business inventory and services needed in the day-to-day operation of the business;
- b. Have the authority to hire and fire employees, including those to whom management authority is delegated;
- c. Are an authorized signatory on all corporate accounts – checking, savings, and other financial accounts;
- d. Have a thorough knowledge of the financial structure of the business and authority to determine all financial affairs;
- e. Have the capability, knowledge and experience required to make decisions regarding the particular type of work engaged in by the MBE; and
- f. Have displayed independence and initiative in seeking and negotiating contracts, accepting and rejecting bids and in conducting all major aspects of the business.”¹⁴

At the same time, the following conditions create an irrefutable presumption that the minority or women owners do *not* have control of the business seeking MBE certification (the MBE applicant): where the owners of the business are current employees of a non-minority business which has a significant ownership interest in the MBE applicant; the directors/management of the MBE applicant are substantially the same as an affiliated non-minority firm; the MBE applicant is a wholly-owned subsidiary of a non-minority firm; or the MBE applicant has an extremely dependent relationship on a non-minority firm or individual.¹⁵

Last, the Rules layer on a third criterion: that women or minorities invest a substantial amount of money, capital, equipment, or property in the business.¹⁶ Importantly, contributing personal or professional services is not enough, though the Rules note such contributions will “receive consideration” in the certification process, “in conjunction with other tangible forms of investment.”¹⁷ Likewise, where a significant portion of the MBE applicant’s equity is financed by a loan or gift from a non-minority business with a significant interest in the MBE applicant, there is an irrefutable presumption that the minority or women owners have not made a substantial investment in the business.

Taken together, the requirements of ownership, control, and investment are the keys to obtaining MBE certification. From reviewing the extensive showing that minority and women business owners must make to meet those requirements, it is apparent that the MBE program is designed to avoid situations of sham ownership, where the MBE-certified company is controlled behind the scenes by a non-minority business. As noted in one

of the Rhode Island Superior Court decisions discussed below, “[t]he concern for an alleged MBE/WBE company’s dependency on a non-minority business is that the non-minority business is essentially using the potential minority status of the dependent company to capitalize on the benefits of the MBE/WBE program.”¹⁸

But what precisely is the line between an MBE that is improperly dependent on a non-minority business, and one that has benefitted from sponsorship and training, and is now ready for an independent venture? Although the Rhode Island Supreme Court has yet to directly address this issue, several Rhode Island Superior Court cases have successfully navigated this tricky balancing act in the context of married women running business ventures and seeking WBE certification.

The first case to be decided on the subject was **Marshe Constr. Co. v. Paolino**.¹⁹ In that case, the WBE applicant was Marshe Construction Company, a concrete construction firm established in 1984 by a married woman named Martha Shean.²⁰ Before owning Marshe, Ms. Shean worked for nine years as a secretary for a company called Shean Associates.²¹ That company, a general contractor, was owned and operated by Ms. Shean’s husband, George Shean, but was later dissolved due to bankruptcy.²²

In 1991, Ms. Shean sought WBE certification from the Office of Minority Business Assistance (OMBA)²³ for Marshe.²⁴ The OMBA conducted a certification review of the applicant company and recommended that certification be denied.²⁵ It highlighted the background and technical expertise of Ms. Shean’s husband, including his “many years of experience in the construction field,” and his responsibility for “critical areas of the firm’s operations.”²⁶ The CRC then held a hearing on Marshe’s application, and Ms. Shean provided testimony.²⁷ However, the CRC ultimately denied certification, agreeing with OMBA’s assessment that Ms. Shean lacked the “superior background and technical expertise to control the affairs of the firm” that her husband possessed.²⁸

In reviewing the CRC’s decision, the Superior Court agreed that there was sufficient evidence that Marshe was actually controlled by Ms. Shean’s husband, not Ms. Shean.²⁹ The court focused on testimony and documentary evidence presented to the CRC, including that Shean Associates—now dissolved—had conducted business in the very same office as Marshe.³⁰ The court also observed that Ms. Shean’s husband was employed by Marshe, though he did not draw a salary.³¹ Moreover, the court noted that Ms. Shean had admitted her husband had “greater technical and construction expertise” and could not answer a technical question posed to her at the CRC hearing.³²

Still, the court recognized that Ms. Shean was the sole record shareholder of the company, spent about half of her time actually supervising in the field, and had taken several courses in construction in an attempt to gain expertise.³³ Acknowledging that the evidence before the CRC was “mainly circumstantial,” and that it was a “close case,” the court concluded that weighing the facts and assessing the credibility of Ms. Shean was the CRC’s task, not the court’s, and that the CRC’s determination would stand.³⁴

Years later, in **P.C.M., Inc. v. Minority Bus. Enterprise Comm’n**,³⁵ the Superior Court reached a similar conclusion. That case involved a construction company, P.C.M., Inc., that applied for WBE certification through its president and trea-

sure, Regina C. Parry.³⁶ After a visit by a Contract Compliance Officer³⁷ of the CRC, it was recommended that P.C.M.'s application be denied, a decision that was upheld at a subsequent CRC hearing.³⁸ In turn, the Superior Court agreed with CRC's findings that Ms. Parry lacked the capability and technical knowledge necessary to control the operational aspects of P.C.M. without heavy reliance on her husband, and that she lacked "independence and initiative in seeking out and negotiating contracts."³⁹ Therefore, although the court acknowledged Ms. Parry managed financial decisions for the firm, negotiated bonds and insurance, hired and fired employees, and shared signatory authority for business accounts as well as marketing and sales responsibilities with her husband,⁴⁰ it found that "[e]very area of the business that should have been conducted by [Ms. Parry] to meet the control requirement was carried on by her husband."⁴¹ The court also found noteworthy Ms. Parry's lack of experience in construction management and her previous work exclusively in the travel industry.⁴² Again and again, the court highlighted Ms. Parry's dependence on her husband, and in the end it affirmed the CRC's denial of P.C.M.'s certification application.⁴³

Last, the most recent decision of **Ace Concrete Cutting, LLC v. R.I. Dep't of Admin.**,⁴⁴ involved Ace Concrete Cutting, LLC, an asphalt and concrete cutting company owned by Debra Stowik.⁴⁵ Ms. Stowik formed Ace in 2006; years before, her husband, Stanley Stowik, had formed a different concrete cutting operation known as Advanced Concrete Cutting, LLC.⁴⁶ For years, Ms. Stowik worked for her husband's company, Advanced, and later, when she formed Ace, she requested a loan from her husband, which ultimately came from Advanced's accounts.⁴⁷ Ms. Stowik's initial employees at Ace were also former Advanced employees.⁴⁸ She worked out of a home office for both Ace and Advanced, dividing her day between the two companies, which shared an email address but had separate phone numbers.⁴⁹

A few years after Ms. Stowik formed Ace, her husband gifted her ownership of Advanced, remaining on the payroll for the company but primarily focused on maintaining equipment.⁵⁰ Ms. Stowik later submitted a WBE application for both Ace and Advanced.⁵¹ The initial investigation by an MBECO employee culminated in a recommendation that the matter be set down for a hearing before the CRC to discuss issues of "ownership, control, and dependency on a non-minority individual."⁵² The CRC conducted the hearing and took testimony from Ms. Stowik, but remained concerned that Ms. Stowik's husband was still involved in the operation of Ace and the blurred lines between Ace and Advanced.⁵³ In the end, the CRC voted to deny applications for WBE certification for both companies, taking issue with tax returns that had listed Ms. Stowik's husband as the owner of Ace, the start-up funding from Advanced, Ms. Stowik's use of a home office in the house shared with her husband, and Ms. Stowik's lack of "sufficient construction-related experience to control a concrete cutting business independently."⁵⁴ The CRC declared that Ace in particular was, "at best, a family owned and operated business enterprise, rather than a WBE."⁵⁵ Ms. Stowik appealed, but only as to Ace.

The Superior Court carefully assessed the CRC's decisions and found no evidence in the record to support the CRC's finding that Ms. Stowik did "not appear to have any direct construction related and/or saw cutting experience."⁵⁶ To the contrary, the court noted that Ms. Stowik's testimony indicated she had

field experience in the concrete cutting business, testified about technical details of concrete cutting, used the vernacular of the saw cutting business, and possessed over ten years of experience as an office manager for Advanced.⁵⁷

Yet this was only one of several findings that the CRC relied upon in support of its decision, and as such, the court went on to consider the other factors, particularly Ace's relationship with Advanced and Mr. Stowik's involvement with Ace.⁵⁸ As to the former, the court found that the CRC was well within its authority when it concluded Ace maintained an "ongoing relationship and dependency on Advance," based in part on the start-up loan from Advanced to Ace, certain ongoing "inter-company transactions," and the shared employees and office space between Advanced and Ace.⁵⁹ This dependency created an irrefutable presumption that Ms. Stowik lacked control of Ace.⁶⁰ Likewise, the court found support for the CRC's finding that where Ms. Stowik's husband still performed maintenance for the company, earned an inflated salary, managed the garage property that the company leased, and owned the home housing the company office, the CRC was within its authority to find that Ace was dependent on Mr. Stowik as well, another non-minority.⁶¹

Reflecting on the fact-intensive and detailed analyses of **Marshe, P.C.M.**, and **Ace**, there is no doubt that the courts of this state have done their best to fulfill the purpose of the MBE program while guarding against non-minority businesses attempting to usurp the benefits of the program. Yet despite the careful and thoughtful decisions in those cases, it is difficult not to come away with the impression that married women face challenges in building a business with the support of their spouses.

It was difficult, for example, for Ms. Stowik to disentangle the years of financial support from her husband through his former company, Advanced, and her use of a home office in their shared residence, from her ownership and control of Ace.⁶² Nor could Ms. Parry's financial savvy and involvement in company management outweigh her reliance on her husband's technical expertise, nor could her assistance in soliciting contracts and accepting or rejecting bids cause the court to find she exhibited "independence and initiative" in preparing and negotiating contracts.⁶³ Even Ms. Shean, who the court acknowledged presented a "close call," given her time spent supervising in the field and her efforts at becoming more educated in the relevant industry, could not obtain the WBE certification for her company.⁶⁴

Why does it matter that these women were not able to stake out their independent success as business owners and obtain WBE certification for their companies? After all, the courts' careful analyses and attention to detail suggest that had the facts been slightly different, perhaps the conclusions would have been as well—the court in *Ace* even overturned one of the CRC's findings regarding a woman's technical expertise in a given industry after parsing through the testimony and evidence presented at the hearing.⁶⁵

In short, it matters because when Ms. Shean, Ms. Parry, and Ms. Stowik broke into the construction industries and concrete cutting industries, some of the best resources available to them included their associations with men in those industries—their spouses—and the support and experience those associations could provide. The practical realities of achieving success in industries dominated by non-minorities often require substantial buy-in and support from those individuals.

Of course, that's not always the case—nor is it necessarily a desirable state of affairs—but it remains true that the advantage of an active mentor, a willing teacher, an enthusiastic investor, or an encouraging boss cannot be overstated, especially for a minority or woman working their way up in an industry dominated by non-minorities.⁶⁶ The problem may be that for some WBE applicants, that sponsor may also be a spouse, and disentangling one from the other is as difficult as extricating the female spouse's independent achievements and capabilities from those of her male counterpart. Would **Marshe, P.C.M.** or **Ace** have been decided differently if the applicants relied on unrelated male sponsors in the construction or concrete industries who were not their husbands? It's possible, but far from certain. What is certain, however, is that courts in this state will continue to have to navigate the fine line between the support and sponsorship that a non-minority can provide and the ongoing concern that non-minority business may unduly usurp the advantages of a program not intended for their benefit.

ENDNOTES

- 1 This article will use the terms minority business enterprise (MBE) when speaking about both MBEs and women's business enterprises (WBEs) generally, and use the term WBEs when referring to women's business enterprises specifically.
- 2 See R.I. GEN. LAWS 1956 § 37-14.1-1.
- 3 Executive Order No. 83-13 (December 30, 1983).
- 4 See R.I. GEN. LAWS 1956 § 37-14.1-1 et seq.; see also "What is the MBE/WBE Program?" MBE/WBE/DBE Frequently Asked Questions, Minority Business Enterprise Compliance Office, State of Rhode Island Office of Diversity, Equity & Opportunity, Department of Administration, available at <http://odeo.ri.gov/offices/mbecolfaq.php> (last visited July 25, 2018).
- 5 R.I. GEN. LAWS 1956 § 37-14.1-1.
- 6 R.I. GEN. LAWS 1956 § 37-14.1-7.
- 7 Rules, Regulations, Procedures and Criteria Governing Certification and Decertification of MBE Enterprises by the State of Rhode Island, as amended August 2016, Rhode Island Department of Administration Office of Diversity, Equity and Opportunity (ODEO), Minority Business Enterprise Compliance Office (MBECO), available at <http://odeo.ri.gov/documents/rules-regulations-procedures-criteria-governing-certification-decertification.pdf> (last visited July 25, 2018) (hereinafter the "Rules").
- 8 See Rules at Section 5.00(A)-(D).
- 9 Rules, at Section 5.00(F), (H). The Minority Business Enterprise Compliance Office (MBECO) is one of several divisions of the Office of Diversity, Equity, and Opportunity (ODEO), which, by turn, is a division of the Department of Administration. See "ODEO Organizational Chart," About the Office, Minority Business Enterprise Compliance Office, State of Rhode Island Office of Diversity, Equity & Opportunity, Department of Administration, available at <http://odeo.ri.gov/about/index.php#organizational-chart> (last visited July 31, 2018).
- 10 Id. at Section 5.00(H).
- 11 Id. at Section 5.00(I), (J), (K).
- 12 R.I. GEN. LAWS 1956 § 37-14.1-3(f); see also Rules at Section 3.02, 3.03.
- 13 R.I. GEN. LAWS 1956 § 37-14.1-3(f); Rules, Section 3.02(E), (F).
- 14 Rules, Section 3.03(A)(a)-(f).
- 15 See Rules 3.03(B).
- 18 Ace Concrete Cutting, LLC v. R.I. Dep't of Admin., No. PC-2014-3460, 2015 R.I. Super. LEXIS 114, at * 33 (R.I. Super. Ct. Sept. 9, 2015) (citing CS-360, LLC v. U.S. Dep't of Veterans Affairs, 101 F. Supp. 3d 29, 2015 U.S. Dist. LEXIS 55935, 2015 WL 1925666, at *4 (D.D.C. 2015)).
- 19 No. PC-1992-4475, 1994 R.I. Super. LEXIS 39 (R.I. Super Ct. Feb. 23, 1994).
- 20 Id. at *1.
- 21 Id.
- 22 Id.

- 23 The Office of Minority Business Assistance (OMBA) was succeeded by the Minority Business Enterprise Compliance Office (MBECO)
- 24 Id. at *2.
- 25 Id.
- 27 Id. at *3-4.
- 28 Id. at *4.
- 29 Id. at *6.
- 30 Id. at *2, 6-7.
- 31 Id. at *7.
- 32 Id.
- 34 Id. at *8-9.
- 35 No. PC-1998-963, 1999 R.I. Super. LEXIS 93 (R.I. Super. Ct. Jul. 28, 1999).
- 36 Id. at *1.
- 37 The Contract Compliance Officer who performed the site review visit and provided a recommendation on the MBE certification application, appears to be a predecessor to the DOA staff member who currently performs a substantially similar function. See supra, note 9.
- 38 Id.
- 39 Id. at *13-14.
- 40 Id. at *5.
- 41 Id. at *13.
- 42 Id.
- 43 Id. at *12-13.
- 44 No. PC-2014-3460, 2015 R.I. Super. LEXIS 114 (Sept. 9, 2015).
- 45 Id. at *2.
- 46 Id.
- 47 Id. at *3.
- 48 Id. at *4.
- 49 Id. at *5-6.
- 50 Id. at *4.
- 51 Id. at *4-5.
- 52 Id. at *8-9.
- 53 Id. at *11-12.
- 54 Id. at *11, *18.
- 55 Id. at *18 (internal quotation marks omitted).
- 56 Id. at *22-26.
- 57 Id. at *23-25.
- 58 Id. at *27-35.
- 59 Id. at *29-31.
- 60 Id. at *32.
- 61 Id. at *34-35.
- 62 Id. at *27-35.
- 63 P.C.M., Inc., 1999 R.I. Super. LEXIS 93, at *13.
- 64 Marshe, 1994 R.I. Super. LEXIS 39, at *8.
- 65 Ace, 2015 R.I. Super. LEXIS 114 at *23-25.
- 66 A great example of this hits close to home in the legal industry. In a recent article that appeared in the ABA Journal that highlighted the problem of minority women leaving BigLaw, the author surveyed the problems that women of color face in reaching the partnership level and spoke to many attorneys about the issue. Liane Jackson, "Invisible then Gone: Minority women are disappearing from BigLaw—and here's why," ABA JOURNAL (March 2016), available at http://www.abajournal.com/magazine/article/minority_women_are_disappearing_from_biglaw_and_heres_why (last visited July 31, 2018). One bluntly stated, "I don't see women being placed into positions where they can become rainmakers. Unless you have a really good champion, a white male who will protect you in a certain way, it's a tough fight." Id. ◇