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ARTICLE

You Down with MWBE? Yeah You Know Me: A Summary of the MBE, WBE, and DBE Programs in the State of Missouri

*Shomari Benton and David Lloyd**

ABSTRACT

The State of Missouri and Missouri municipalities want to encourage minority and women owned businesses in their communities. The governments have created formalized programs to utilize these businesses. The purpose of these programs is to increase participation of women, minority, and other historically disadvantaged businesses in government related contracts. To bid upon or enter into government related contracts, minority, women, and other historically disadvantaged groups must apply for and receive program certification by different government entities. The certification application and process can be confusing, time consuming, and costly. But with guidance, can be navigated and be beneficial to minority and women business owners.

This article examines the women's business enterprise and minority owned business enterprise programs available within the State of Missouri. This article identifies and describes the primary programs available to women, minority, and other historically disadvantaged groups administered by the State of Missouri, the Missouri Department of Transportation, the Kansas City, Missouri metropolitan area and the St. Louis, Missouri metropolitan area, and outlines their application processes. The federal certification programs are also outlined.

I. INTRODUCTION

This is an informational legal article discussing the minority, women, and disadvantaged business enterprise programs available in the State of Missouri. The purpose of this paper is to identify and summarize available programs and serve as a guide through the certification process. The scope of this paper is limited to Minority and Women's Business Enterprises and Disadvantaged Business Programs administered by the State of Missouri or local governments within the State of Missouri.

A. MBE and WBE Defined

A Minority Business Enterprise ("MBE") is a certified for-profit business owned and controlled by one or more minorities.¹ A "minority" is generally defined by race or origin as individuals who are African American, Native American, Hispanic American, or Asian Pacific American.² The scope of the definition is intended to be broad.

A Women's Business Enterprise ("WBE") is a certified for-profit business owned and controlled by one or more women.³ For purposes of this article, both MBE and WBE are referred to as ("MWBE(s)").

Both women and minorities are presumed to be historically disadvantaged groups that may qualify for additional certifications such as a Disadvantaged Business Enterprise ("DBE")

certification from the federal Small Business Administration ("SBA"), Department of Transportation, and state and local certifying bodies.⁴

B. Landmark MWBE Decisions

The pivotal case addressing MWBE programs is *City of Richmond v. J.A. Croson Company*.⁵ Decided in 1989, the case dealt with the City of Richmond, Virginia's "Minority Business Utilization Plan" ("Plan") requiring general contractors awarded city construction contracts to subcontract at least 30% to MBEs.⁶ The Plan contained a waiver of the 30% MBE requirement when sufficient proof was provided that qualified MBEs were unavailable or unwilling to participate.⁷

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1. MO. REV. STAT. § 37.020(1)(3) (2014).

2. See e.g., Mo. Code Regs. Ann. tit. 1, § 10-17.010(1)(F) (2014) (defining "minority" for purposes of the State of Missouri "Minority Business Enterprise" definition set forth in MO. REV. STAT. § 37.020(1)(3)); see also 49 C.F.R. §§ 23, 26 (including traditional racial minority groups within the definition of "disadvantaged" for purposes of DBE certification).

3. See MO. REV. STAT. § 37.020.1(6).

4. Small Business Act, Pub. L. No. 85-536, 67 Stat. 232 (1958).

5. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

6. *Id.* at 477.

7. *Id.* at 479–80.

Here, the City of Richmond sent a bid out for installation work at a city jail.⁸ J.A. Croson Company was the only responder to the bid, but the City rejected it based on Croson's inability to obtain the 30% MBE requirement, and reopened the bid.⁹ Croson filed suit in the Federal District Court of the Eastern District of Virginia based on the claim that the Plan was unconstitutional on its face and by application.¹⁰ The District Court ruled that the plan did not violate the Equal Protection Clause of the Fourteenth Amendment, and on appeal, the Fourth Circuit Court of Appeals affirmed.¹¹

The United States Supreme Court granted certiorari, remanded and vacated for further consideration in light of *Wygant v. Jackson Board of Education*,¹² which held that a "strict scrutiny" standard applied to MBE programs when reviewing their legitimacy under the Equal Protection Clause of the Fourteenth Amendment.¹³ On remand, the Court of Appeals held that the Plan violated both prongs of the strict scrutiny standard of review and the U.S. Supreme Court affirmed.¹⁴

In 1995, the U.S. Supreme Court upheld the *City of Richmond* in *Adarand Constructors, Inc. v. Peña*,¹⁵ specifically affirming that all racial classifications imposed by federal, state or local governmental bodies must be analyzed under the strict scrutiny standard of review.¹⁶

C. Brief History

MWBE certification programs were created at the federal government level and began in the 1960s in response to the Civil Rights Movement. Executive Order 10925, issued by President Kennedy, created an Equal Opportunity Committee and mandated that projects financed with federal funds "take affirmative action" to ensure that hiring and employment practices were free of racial bias.¹⁷ Executive Order 11246 issued by President Johnson required government contractors to take specific measures to ensure equality in hiring, and encouraged employment of underrepresented groups, including minorities and women.¹⁸ Subsequently, under the Nixon administration, the federal government established the SBA's Section 8(a) program to enhance federal purchases from socially and economically disadvantaged owners of small businesses and created the Office of Minority Business Enterprise in order to provide minority business owners with more federal resources.¹⁹

Thereafter, federal MWBE programs expanded into state and local governments. Initially, the federal programs were carried out by state and local government entities, such as the Missouri Department of Transportation.²⁰ Today, state and local governments continue to administer and participate in federal MWBE programs and

8. *Id.* at 481.

9. *Id.* at 483.

10. *Id.*

11. *Id.* at 484.

12. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

13. *Id.* at 280.

14. *City of Richmond*, 488 U.S. at 485.

15. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

16. *Id.*

17. Exec. Order No. 10,925, 26 Fed. Reg. 1977 (Mar. 8, 1961).

18. Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 28, 1965).

19. Small Business Act, Pub. L. No. 85-536, 67 Stat. 232 (1958).

20. 49 C.F.R. § 26 (2014); Mo. Code Regs. Ann. tit. 7, § 10 (2014).

have established similar independent MWBE and DBE programs intended to capture state and local government contracting opportunities.

II. MISSOURI MBE AND WBE PROGRAMS

A. *Certifying Bodies*

MWBEs are primarily certified by governmental bodies at the federal, state, and local levels, qualifying the MWBE to bid on and enter into contracts with the respective government entity, as a general contractor or subcontractor.²¹ Businesses in Missouri may receive MBE, WBE, and DBE certifications from the state and local government entities discussed below.

MWBEs are also certified by non-government entities, such as non-profit organizations dedicated to women or minority business interests. Businesses in Missouri may receive MBE or WBE certifications recognized by certain government entities from the following third-party, non-government entities: Mid-States Minority Supplier Development Council; Missouri Regional Certification Committee; Mountain Plains Minority Supplier Development Council; East-West Gateway Council of Governments; Missouri Women's Council; National Women Business Owners Corporation; Mid-America Regional Council (primarily in the Kansas City area); and St. Louis Minority Business Council (primarily in the St. Louis area).

This paper will focus on the programs administered by the State of Missouri and briefly discuss programs in the Kansas City and St. Louis, Missouri area.

B. *State of Missouri Programs*

In the State of Missouri, there are three primary MWBE certification programs: (1) State of Missouri; (2) Kansas City, Missouri; and (3) St. Louis, Missouri.

i. *State of Missouri*

The State of Missouri has two MBE / WBE programs: (1) The Office of Administration; and (2) The Missouri Department of Transportation.²²

(1) The Office of Administration

The State of Missouri MBE and WBE programs are administered by the Missouri Office of Equal Opportunity. The scope of the programs includes all government related contracts entered into by the State of Missouri, excluding the Department of Transportation. The annual participation goals are 10% MBEs and 10% WBEs. There are three separate applications: (1) Standard Certification; (2) Rapid

21. James H. Lowry, *A Brief History of Minority Business Enterprise*, ANYFLIP (Aug. 19, 2015), <http://www.anyflip.com/vdoi/iqts/basic>.

22. *M/WBE Certifications*, MO. OFF. EQUAL OPPORTUNITY, https://oeo.mo.gov/oeo_certifications/ (last visited Mar. 12, 2018).

Certification; and (3) Out of State Certification. The application process requirements and time frame depend on the status of the applicant.²³

“Standard Certification” is available online for those businesses whose principal place of business is located in the State of Missouri.²⁴ Applicants must complete the MWBE application and submit it with the required documentation.²⁵ An onsite visit by the Office of Equal Opportunity to the applicant’s place of business is also required before certification is granted or denied.²⁶

“Rapid Certification” is available to those applicants whose principal place of business is located within the State of Missouri and have been certified as an MBE and or WBE by a separate qualified MWBE certifying body.²⁷ Currently, rapid certification is available for businesses that have been certified by one of the following entities: Missouri Department of Transportation; City of St. Louis, Missouri; City of Kansas City, Missouri; Kansas City Area Transportation Authority; Lambert St. Louis International Airport; Mid States Minority Supplier Development Program Council; National Women Business Owners Corporation; St. Louis Minority Council; or the Mountain Plains Minority Supplier Development Council.²⁸

“Out of State Certification” is available to those applicants whose principal place of business is located outside of the State of Missouri and who meet certain conditions.²⁹ The applicant must be certified by their home state or local certifying body.³⁰ Such certification processes must be similar to the State of Missouri’s.³¹ Currently, the following state certifying bodies are the only recognized by the State of Missouri: Delaware, Illinois, Indiana, Kansas, Kentucky, Maryland, Massachusetts, New Jersey, New York, Oregon, Rhode Island, South Carolina, Tennessee, Virginia, Washington, and Wisconsin.³²

(2) Missouri Department of Transportation

The State of Missouri Department of Transportation MBE and WBE programs are administered by the External Civil Rights Division of the Missouri Department of Transportation. The scope of this program includes all government related contracts entered into by the Missouri Department of Transportation. The annual participation goal for years 2018, 2019, and 2020 is 15%.³³

The application process is similar to the federal Disadvantaged Business Enterprise certification, discussed below.

23. *Eligibility/Application*, MO. OFF. EQUAL OPPORTUNITY, <https://oeo.mo.gov/eligibilityapplication/> (last visited Mar. 12, 2018).

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Disadvantaged Business Enterprise Submittal Program Submittal*, MO. DEP’T TRANSP. 31 (Oct. 1, 2017), http://www.modot.org/business/contractor_resources/External_Civil_Rights/documents/DBEProgramSubmittalFFY18-updated.pdf.

ii. Kansas City Area Programs

The Kansas City, Missouri area has three primary MWBE programs: (1) The City of Kansas City, Missouri; (2) The Kansas City International Airport; and (3) The Kansas City Area Transit Authority.

The City of Kansas City, Missouri MWBE programs are administered by the Human Relations Department of the City of Kansas City, Missouri.³⁴ The City of Kansas City also offers a DBE program and a Small Business Enterprise (“SBE”) program.³⁵ The scope of the programs includes all city-funded (including incentives) contracts located in the City of Kansas City except those related to the Kansas City International Airport and Kansas City Area Transit Authority contracts.³⁶ To qualify for certification, the business must be located in the greater Kansas City Metropolitan area (consisting of the Missouri counties of Cass, Clay, Jackson and Platte; and the Kansas counties of Johnson, Leavenworth, and Wyandotte).³⁷ Minority and women-owned businesses must meet the SBA size standards for small business and industry classifications. Minority and women-owned businesses must meet certain DBE individual income and asset requirements.³⁸

The Kansas City International Airport and the Kansas City Area Transit Authority (“KCATA”) are self-administered by each entity, respectively.³⁹ The scope of the programs include The Kansas City International Airport, or KCATA funded or related contracts.⁴⁰ The application process is similar to the federal Disadvantaged Business Enterprise certification.

iii. St. Louis Area Programs

The St. Louis, Missouri area has three primary MWBE programs: (1) The City of St. Louis; (2) The Lambert St. Louis International Airport; and (3) The St. Louis Sewer District.⁴¹

The City of St. Louis, Missouri MWBE programs are administered by the Disadvantaged Business Enterprise Office.⁴² The office also administers the Lambert St. Louis International Airport Disadvantaged Business Enterprise Program and the

34. *Minority, Women and Disadvantaged Business Enterprise (MWDDBE)*, CITY KAN. CITY, MO., kcmo.gov/humanrelations/certification-compliance/mwdbe-slbe-affirmative-action/ (last visited Mar. 12, 2018).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *See DBE Program and Goal Submission*, KAN. CITY INT’L AIRPORT (Oct. 2016), <http://flykci.com/media/1683/dbe-plan-2017.pdf>; *Disadvantaged Business Enterprise Policy Statement*, KAN. CITY AREA TRANSP. AUTHORITY (Dec. 17, 2014), http://www.kcata.org/documents/procurement/DBE_Policy_Statements_2015.pdf.

40. *See DBE Program and Goal Submission*, *supra* note 39; *Disadvantaged Business Enterprise Policy Statement*, *supra* note 39.

41. *Get Certified*, ST. LOUIS LAMBERT INT’L AIRPORT, <https://www.flystl.com/business/business-diversity-development-1/get-certified> (last visited Apr. 22, 2018); *Disadvantaged, Minority, and Women Owned Business Enterprises*, ST. LOUIS-MO.GOV, <https://www.stlouis-mo.gov/government/departments/dmwbe.cfm> (last visited Apr. 22, 2018); *Supplier Diversity*, METROPOLITAN ST. LOUIS SEWER DISTRICT, <https://www.stlmsd.com/msd-work/supplier-diversity> (last visited Apr. 22, 2018).

42. *Minority, and Women Owned Business Enterprises*, *supra* note 41.

related Airport Concession Disadvantaged Business Enterprise programs.⁴³ The scope of the programs includes all city-funded (including incentives) contracts located in the City of St. Louis, Missouri, and those related to the Lambert St. Louis International Airport.⁴⁴

The St. Louis Sewer District offers recognition of MWBE certifications.⁴⁵ The application process is similar to the federal Disadvantaged Business Enterprise certification.

C. Missouri Regional Certification Committee Program

The Missouri Regional Certification Committee Disadvantaged Business Enterprise Program offers a single “one-stop” certification for businesses that meet DBE requirements. The Missouri Regional Certification Committee (“MRCC”) is a non-profit organization partnering with DBE government agencies and certifying bodies to provide reciprocity of DBE certification among its members.⁴⁶ All businesses certified as DBE under 49 C.F.R. § 26 by one member of the MRCC shall be recognized as certified as DBE by all members of the MRCC.⁴⁷ The application process is similar to the federal Disadvantaged Business Enterprise certification.

Members include the following: Missouri Department of Transportation; City of Kansas City, Missouri; Lambert St. Louis Airport Authority; Kansas City Area Transportation Authority; City of St. Joseph, Missouri; City of Springfield, Missouri; City of Columbia, Missouri; Mid America Regional Council; East West Gateway Coordinating Council; Federal Highway Administration; Federal Transit Administration; and Federal Aviation Administration.⁴⁸

D. MWBE Certification

Each MWBE certifying body has separate requirements for certification. The following discussion serves as a general guide setting forth common certification requirements and relevant documentation.

i. Process Generally: The Timeline

The certification process timeline for each certifying body varies. Generally, applicants can expect a three to six-month process. The application process is typically as follows: a MWBE must submit a completed application and all supporting

43. *Business Diversity Development*, ST. LOUIS LAMBERT INT’L AIRPORT, <https://www.fly-stl.com/business/business-diversity-development-1/business-diversity-development> (last visited Mar. 12, 2018).

44. See *2017 – 2019 Three Year Goal Methodology for St. Louis International Airport*, CITY ST. LOUIS AIRPORT AUTHORITY, <https://www.flystl.com/uploads/documents/programs/2017-2019-DBE-Goal-Methodology.pdf> (last visited Apr. 22, 2018); *Mayor Executive Order No. 28*, ST. LOUIS-MO.GOV (Feb. 2, 2016), <https://www.stlouis-mo.gov/government/departments/mayor/documents/mayor-executive-order-28.cfm>.

45. *Supplier Diversity*, *supra* note 41.

46. *Disadvantaged Business Enterprise Program: Unified Certification Agreement, Policies & Procedures*, MO. REGIONAL CERTIFICATION COMMITTEE 4 (Mar. 31, 2014, 3:21 PM), <http://kcmo.gov/wp-content/uploads/sites/7/2013/09/MRCCAdoptedPolicies-UCPAgreement.pdf>.

47. *Id.* at 6.

48. *Id.* at 4.

documentation to the certifying body, and the application fee, if any. The completed application is preliminarily screened by the certifying body for completeness and accuracy. It is important to highlight that the certifying body will not move forward with the MWBE application until it has received all relevant supporting documentation. After the initial review is completed, a desk or financial audit will take place providing an in-depth review of the application and business. This will also include a scheduled on-site visit from the certifying body to confirm operations and ask any related questions. After the in-depth review, an initial recommendation to the final application committee reviewing body is made. Once the reviewing body meets, it will consider each application, and will render a final decision. Once a final decision is reached, the applicant will either receive a certificate of MWBE status or will be denied. If a certificate is received, the applicant may apply to do business with or participate in contracts with the respective government entity.

ii. Certification Requirements

Generally, in order to become a certified MBE or WBE within the State of Missouri, the following requirements must be met.

(1) Minority or Woman Status: Legal Definition

A “minority” is defined as a member of any traditional minority group (discussed in Part I, Section A. MBE and WBE Defined). The minority and or woman owner must be a U.S. citizen or lawfully admitted permanent resident of the U.S.⁴⁹

(2) Ownership and Control

The minority or woman owner must own at least 51% of the ownership interest in the business.⁵⁰ The ownership interest must be considered equitable in nature.⁵¹ For example, in a corporation, ownership may be demonstrated by title to voting capital stock (not stock subject to conditions such as convertible stock, executory agreements, or voting trusts), control of a majority of the board of directors, or in a limited liability company, the minority or woman is a managing member. Applicants must prove that ownership is not a sham or shell for an entity that is not owned or controlled by minorities or women.⁵² If a minority or woman acquired ownership by gift or transfer, they must demonstrate that the intent for the gift or transfer is not for the purpose only of obtaining MWBE certification and must prove adequate consideration.

Applicants must submit documentation related to the legal structure, ownership, and control of the business. Ownership interests are typically documented in an applicant’s partnership agreement, a limited liability company’s operating agreement, or a corporation’s articles of incorporation, bylaws, stockholder’s agreement,

49. *Id.*

50. *Id.*

51. *Id.*

52. *M/WBE Certifications*, *supra* note 22.

or other similar agreement. The minority or woman must enjoy the customary incidents of ownership and share in the risks and profits commensurate with ownership. The reviewing body will examine the substance of the agreements, not merely the form or titles. Applicants can also expect to demonstrate the equitable nature of the minority or woman's interest in the business in origin and title to assets, capital contributions, and expertise in the respective business industry.

Control of a business is determined by action, role, and authority based on the totality of the circumstances, rather than title or position.⁵³ Control often includes the ability of each minority or woman, respectively, to influence or impact the daily and long-term operations and decisions of the business regarding the management, policies and operations of the business. Control must be real, substantial, and ongoing.

(3) Expertise

Business owners must demonstrate the requisite expertise in the business or industry. Minority or women owners must have an overall understanding of, and managerial and technical competence in or related to, the industry that the applicant's business engages in. Expertise considerations may include: licensure if required; specialization of field; quality; record of success; and whether the minority or woman is indispensable to the success of the business.

(4) Structure

The business must be organized as a for-profit entity and may be organized as any traditional legal structure, including sole proprietorships, partnerships, limited liability companies, and corporations.⁵⁴ The business must be independent and may not be owned or controlled by a parent company or similar structure that does not qualify for MWBE certification. The business must be in good standing in the State of Missouri and must be current in all licensure and permits.

(5) Operations: Operation Time

The business must be a viable, for-profit, small business and not a sham or shell entity.⁵⁵ Often, businesses must have been in operation for a minimum time period, typically one year, before qualifying for MWBE certification. Businesses can expect to disclose information related to size; finances; assets; number of employees; list of clients; and a description of the largest clients, transactions, or projects. Certain MWBE programs have size requirements that may disqualify the business from MWBE certification. Size requirements may be evaluated based on assets, employees, or revenues. Additionally, individuals may be subject to a net worth or income restriction requirement disqualifying them from eligibility.

53. *Eligibility/Application*, *supra* note 23.

54. *Id.*

55. *Id.*

(6) Documentation

Applicants can expect to provide the following documentation:

- **Basic Business Information.** Basic business information must include contact information, status as prime or subcontractor, and industry type using the NAICS code. A narrative of the history of the business is typically required.
- **Corporate Governance.** Corporate governance documentation typically includes documentation related to formation, structure, ownership, and control, including business licenses, tax identification numbers, permits, and relevant licensure. Applicants may be required to provide a copy of the minute book, corporate resolutions, and significant agreements.
- **Financials.** Financial information includes the basic financial statements, projected revenues up to three years, and bank authorization or signatory cards.
- **Business Operations and Expertise.** Applicants must provide significant documentation evidencing current operations and expertise in the relevant business industry, typically including a resume, business plan, list of references, list of directors, officers, managers, and duties thereof, and a list and description of business activities, investments, and relationships.
- **Client Information.** Required client information generally includes a list of the largest clients, a description of significant projects or transactions, and client contact information.
- **Individual Owner Information.** Individual owners must provide basic contact information, in-depth financial information, typically in the form of a personal financial statement disclosing information related to assets, liabilities, income, and potential conflicts of interest.

E. Other Certifications

i. DBE Certification

In addition to MWBE certification, many certifying bodies also provide Disadvantaged Business Enterprise (“DBE”) certification, in which an applicant’s determination of being “economically disadvantaged” could qualify the applicant for DBE certification, irrespective of the applicant’s race or gender.⁵⁶ For purposes of DBE qualification, minorities and women are presumed disadvantaged.

⁵⁶ See e.g., MO. REV. STAT. § 37.020.1(4) (2014) (defining “socially and economically disadvantaged individuals”); see also 49 C.F.R. §§ 23, 26 (including traditional racial minority groups within the definition of “disadvantaged” for purposes of DBE certification).

Historically, DBE programs were administered by the federal government and did not specifically include minorities or women. Today, the federal DBE program is carried out by state and local transportation agencies. Participation goals for the program are updated every three years.⁵⁷

The DBE certification process, application, requirements, documentation, and timeline are similar to, and often concurrent with, the MWBE certification process.

ii. Veterans Certification

A Service-Disabled Veteran-Owned Small Business Concerns (“SDVOSBC”) certification is administered by the SBA.⁵⁸ The purpose of this program is to provide procuring entities with the authority to set acquisitions aside for exclusive competition for SDVOSBCs.⁵⁹ Eligibility requires that the Service Disabled Veteran (“SDV”) have a service-connected disability determined by the Department of Veterans Affairs or Department of Defense. The SDVOSBC must be “small” under the North American Industry Classification System (“NAICS”) code. The SDV must unconditionally own 51% of the SDVOSBC. The SDV must control the management and daily operations of the SDVOSBC. And the SDV must hold the highest office position in the SDVOSBC.⁶⁰

III. CONCLUSION

Ultimately, if a business owner falls under any of these categories, it would behoove them to research local, state, and federal certification policies and, if possible, file for all that apply. In some instances, credit can be applied to multiple certifying categories for one firm. Since local certifying agencies are typically more restrictive than the Office of Equal Opportunity, it may make sense for a firm to apply to the local agency first, since receiving certification from a local agency evidences that certification through the Office of Equal Opportunity is likely—this one step kills two birds with one stone.

57. *DBE Program Overview*, U.S. DEP’T TRANSP. (Jan. 5, 2016), <https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/dbe-program-overview>.

58. Veterans Entrepreneurship and Small Business Development Act of 1999 § 103, 15 U.S.C. 657b (1999).

59. *Id.* § 102.

60. *Service-Disabled Veteran-Owned Small Businesses program*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/contracting/government-contracting-programs/service-disabled-veteran-owned-businesses> (last visited Mar. 12, 2018).