



# **XBE (MBE, WBE, VBE, DBE): A Path of Opportunity For Your Business?**

**By: Kathleen Hart - RBE Partner**

The federal government is planning in some manner to “build it back better,” the State of Indiana is awarding \$500 million for projects under the Regional Economic Acceleration and Development Initiative (“READI”), and local governments will also benefit from these activities. Each governmental opportunity typically requires that some portion of awarded contracts for work include minority-owned or other recognized disadvantaged businesses; thus, contractors frequently seek out such businesses to award subcontract work for such a project. This article addresses the main requirements for a business to obtain certification as a minority-owned or other recognized disadvantaged business to qualify to receive such subcontract work.

## **First, Be Aware that Seeking Certification is Intensely Personal**

The agencies certifying businesses require extensive personal and confidential information about the company’s owners, management, and finances not only at the initial application stage but also for recertification every three years. Applicants must provide documents such as birth certificates, tax returns, passports, resumes, pending contracts, payments/invoicing, and company records including minutes and tax returns. Before proceeding to seek certification with any agency, a would-be applicant should read the checklist of items required as part of an application to determine if the desire for certification justifies the sharing of such information. Having counsel familiar with this process can also assist applicants in appropriate redactions or other measures to protect as much confidential information as possible from public access or disclosure.

## **Second, Know the Key Terminology**

“XBE” is a generic moniker for a “Business Enterprise” owned by either recognized Minorities (“MBE”), Women (“WBE”), Veterans (“VBE”), or socially and economically “Disadvantaged” persons (“DBE”). These terms may vary depending on applicable certifying agency—for example a business may instead be called “WOSB” for woman-owned small business or “VOSB” for one that is veteran-owned. A business seeking certification must be majority-owned and controlled by a “qualifying member” of one of the foregoing groups. For example,

applicable law defines “minorities” as Blacks, American Indians, Hispanics, Asian Americans, and similar minority groups. And “disadvantaged” is defined by applicable law as the foregoing minority persons or other qualifying disadvantaged persons whose (current) personal net worth falls below \$1.32 million and whose entity’s prior three-year average gross receipts (presently) do not exceed \$26.29 million.

### **Third, Know Where to Apply**

In the State of Indiana, the primary certifying agencies are the Indiana Department of Administration (“IDOA”) for State of Indiana contracts; the City of Indianapolis Office of Minority & Women Business Development (“City”) for contracts involving the City of Indianapolis; and the Indiana Department of Transportation (“INDOT” which applies federal U.S. Department of Transportation regulations) for transportation-related contracts such as those involving roadways. Other relevant certifying agencies include the federal Small Business Administration (“SBA”) and an early-established for-profit company commonly known as WBENC (Women Business Enterprise National Council), upon which several large private companies have relied for certification. Other states, regions, and agencies also provide various certifications and generally follow the same basic requirements. There are reciprocal arrangements between various certifying agencies as well, so a company wishing to seek multiple certifications should research (or hire experienced counsel) to plan the best route to take advantage of such arrangements.

### **Finally, Know the General Requirements for Certification:**

**1.** To be eligible for certification in one of the applicable groups, the qualifying member must own at least 51% of the applicant company with an interest in the company’s capital, assets, profits, and losses proportionate to that ownership percentage. In other words, if applying for WBE certification, the woman as a qualifying member must own at least 51% of the company and have requisite “skin in the game” for that ownership. More than one woman can constitute the 51% ownership level if they meet all other requirements for certification. If her purchase is financed, it must be arms-length from standard or third-party lenders rather than seller-financed, especially if the seller is not a qualifying member. Moreover, the purchase of the 51% interest must be legitimately based on an appraisal or other acceptable valuation method; an applicant owner paying a nominal amount for a valuable company will be highly scrutinized and possibly denied certification. In fact, nearly all the regulations prohibit certification for companies who restructure simply to obtain XBE certification; instead, they must have a business reason or purpose for any restructuring that results in eligibility for certification. Common business reasons are business succession planning, like when a qualifying member has been promoted over time and acquires at least 51% ownership, or the death/illness of a non-qualified founder or majority owner that causes ownership change to eligible status.

**2.** Another requirement for certification is that the qualifying member must “control” the entity by managing and having an active role in the company’s day-to-day operations. Here, the relevant agency will review the corporate organizational records to ensure that the qualifying member has the requisite control over the entity, either by having a 51% controlling vote or by being the sole Board member. Essentially, the qualifying member must be the highest-ranked officer without reporting to any non-qualifying member. The agency will review compensation records to discover if the qualifying member is the highest-compensated. The agency will also review contracts to ensure the qualifying member is participating in the business, and it may interview key vendors or staff to determine whether the qualifying member is truly running the company. If the entity must be licensed to run its business, the qualifying member must hold that license. The resume of the qualifying member will also be scrutinized for the requisite expertise to manage the company, and the regulations generally deny that someone previously in human resources or marketing has such capacity. Other business interests are also evaluated to determine whether the qualifying member is working full time in operating the applicant company.

The foregoing are the general requirements for certification. In nearly 20 years of working in this area, this author has assisted several businesses to obtain XBE certification, several of which had unusual circumstances that facially may have prevented qualification without effective presentation of their application. She has also helped obtain XBE certification for clients who were initially denied certification when they applied without the assistance of experienced counsel. There are pitfalls along the path to certification, so it is highly recommended that businesses utilize counsel who are experienced in this subject matter to minimize delays and uncertainties regarding certification. Costly and timely appeals or awaiting the 1-year reapplication period may be avoided by hiring qualified counsel from the start.

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## About Kathleen Hart



Kathleen Hart serves as outside general counsel for various privately-held businesses and strategist to high net-worth individuals, using her combined employment law and litigation experience to help them evaluate or negotiate employment, non-competition, confidentiality/non-disclosure, employment, change-in-control, and severance agreements. For most of her career, Kathleen has also assisted women and minority clients obtain MBE/WBE/DBE certification with governmental or other certifying agencies.

In addition, Kathleen practices in civil and commercial litigation, frequently pursuing or defending cases that involve injunctive relief, such as breach of non-competition agreements, trade secret misappropriation, and unfair competition claims; contract and property disputes; shareholder and corporate control battles; failed business transactions; and RICO, fraud, embezzlement and business tort claims. She helps clients evaluate the strengths and weaknesses of their claims and defenses in order to position themselves to resolve disputes.

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