

Business & Tax Team

September 29, 2016

AALRR Alert



WOMAN, MINORITY, OR OTHER DISADVANTAGED BUSINESS ENTERPRISE CERTIFICATION CAN GROW YOUR BUSINESS (Tips on a Successful Application for Certification)

Cindy Strom Arellano Lisa C. Zaradich
Cerritos Cerritos
562.653.3200 562.653.3200
carellao@aalrr.com lzaradich@aalrr.com

Government contracting can present opportunities for thousands of dollars' worth of new business; however, securing a contract may not be easy. One way to give your business a competitive advantage in bidding for government contracts is by obtaining certification as a business owned by a socially and/or economically disadvantaged individual or group of individuals. Common certification programs are for woman-owned businesses (WBE), minority-owned businesses (MBE), veteran-owned businesses (VOSB), and businesses owned by an economically disadvantaged individual (DBE). There are also certification programs geared specifically to the size of the business (SBE, for small business enterprise) without regard for the qualifying status of the business owners.

Unfortunately, businesses seeking W/M/V/D/SBE certification often make errors or omit information on their applications and/or make unintended mistakes in structuring a newly organized business. These errors and omissions can delay the processing of an application or even lead to denial of an application, in

which case the applicant would have to engage in the time-consuming process of filing an appeal. However, the appeal must demonstrate that, based on the information contained in the application and based on the facts as they existed at the time the application was submitted, the business should have been granted certification. The certifying entity will generally not allow new information to be presented during an appeal.

The following are tips on avoiding common issues that may lead to delay and/or denial of a certification application:

1. Know the Eligibility Requirements of the Agency.

Make sure that you are applying for certification with the correct agency and become familiar with the eligibility requirements before you apply. **It is important to remember that the applicant has the burden of proving eligibility – NOT the certifying agency.** For example, when applying for certification as a DBE, there are specific rules and regulations limiting the value of assets that can be held by the

qualifying individual. Similarly, many MBE certification programs require the qualifying individual to be able to prove he or she is at least 25% Asian, Black, Hispanic, or Native American. For SBE certification applications, there are limits to the amount of annual revenue of the business or the number of employees, depending on the certifying agency.

2. Substantiate the Ownership and Management Status of the Qualifying Individual.

- (a) Ownership.

To qualify as any type of socially or economically disadvantaged business enterprise, the majority ownership of the business (at least 51% as defined by most certifying entities) must be held unconditionally

--> *“A misstep in the organization of a new business, a seemingly simple error on an application, or a small omission from the supporting documents to an application can cause a denial of certification.”*

by the disadvantaged individual or group of individuals. One general requirement of certification is that the purchase price or contribution of capital by the qualifying individual to acquire his or her interest in the business is real and substantial. A common mistake for individuals who are married is not providing proof of spousal renunciation (or transmutation of a community property interest) when joint marital assets are used to start a business and both spouses are not presumed socially or economically disadvantaged.

(b) Management and Control.

In addition to being at least 51% owned by the qualifying individual or group of individuals, the management and daily operations of the business must also be controlled by one or more of those individuals. For example, the qualifying individual:

- Must hold the highest office and control the board of directors;
- Should hold the requisite license or certification necessary to operate the business (i.e. for construction companies, he or she should be the Responsible Managing Officer (RMO) on the business' contractors license);
- Should not hold outside employment or business interests that conflict with the management of the business; and

- Must have the experience necessary to make day-to-day as well as major decisions in the management of the business.

The control must be real, substantial, and continuing, and must not be reliant upon non-disadvantaged individuals or entities for significant financial, management, or technical assistance. **Providing unclear titles for the business's officers can result in confusion about each officer's duties and is a red flag to certifiers.**

3. Make Certain the Application is Complete.

Before the application is submitted, review it to ensure all the information is accurate and the application is complete. However, it should be noted that applicants often have the opportunity to correct any errors in the application up until the certifying agency issues an eligibility decision. Two common errors and omissions are (i) leaving blank spaces on the application without explanation and (ii) applying for incorrect or unnecessary NAICS/SIC codes.

4. Include All of the Applicable Required Documents.

Not including all applicable required supporting documents listed on the application checklist can also be detrimental to a successful application. Even if it does not result in a denial, the follow-up requests from a certifier to an applicant to obtain missing documents delays the application process, which

may result in lost contracts. Lost contracts = lost opportunities!

Other issues may arise if an applicant includes unsigned documents with the application, such as tax returns, contracts for bank loans or leases, and stock certificates, without explanation, or if an applicant includes boilerplate bylaws or articles of incorporation provisions that create confusion and cast doubt on who controls the business.

We have found that each applicant is unique when it comes to describing and categorizing its business in an application. A misstep in the organization of a new business, a seemingly simple error on an application, or a small omission from the supporting documents to an application can cause a denial of certification. We strongly urge businesses seeking W/M/V/D/SBE certification to have their application and business structure reviewed prior to submitting the application.

Need More Information?

If you would like further information about preparing your business for a successful application as a small business enterprise, woman-, minority-, veteran-owned, or other qualifying socially and/or economically disadvantaged business enterprise, please contact the attorneys listed above.