



CONSTRUCTION LAW E-UPDATE

Have Faith In Your M/W/DBE Good-Faith Efforts

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We don't need to tell you that enforcement of M/W/DBE regulations has intensified of late and will continue to intensify. As we previously advised, the newly enacted amendments to NYC Local Law §129 focus, in large part, on monitoring and reporting both on government agencies' and prime contractors' progress toward meeting percentage goals. Likewise, pending proposed changes to federal DBE regulations will require agencies to include in each prime contract provisions conditioning contract award on the contractor's use of the DBEs listed in its utilization plan and mandating that failure to comply with DBE regulations is a material breach of the contract. As all prime contractors are required to "flow-down" M/W/DBE regulation compliance to their subcontractors, all subcontractors will invariably be subject to these heightened federal compliance requirements as well.

However, this does not mean that MBE goals are anything more than that, goals, to be reached, or **attempted** to be reached **in good faith**. Government personnel on the front lines, feeling the pressure from superiors to produce results (i.e., enhanced M/W/DBE employment), often cross the line in what they tell (or threaten) contractors in their efforts to enforce the regs. This does not diminish the availability of the "good faith efforts" defense.

So what can you do to best ensure that you are in compliance with these regulations? It begins with understanding what "compliance" under the law means. Despite what government agency representatives may convey, the percentage goals on any particular project are not absolute "quotas" that have to be met. That is **not** what the law, on any level, requires. Rather,

the law requires contractors to **either** obtain enough M/W/DBE participation to meet the stated goal percentage OR demonstrate bona fide good-faith efforts to attain the goal. In fact, federal regulations specifically prohibit contracting agencies from ignoring a contractor's good-faith efforts.

Therefore, as a matter of practice, we advise that, while contractors should always strive to attain the percentage goals of their contract, their focus must primarily be on always making good-faith efforts. In many of the recent, high-profile M/W/DBE cases, the violating contractor got into trouble by employing improper practices in order to claim that it met the goal percentage. Whereas, if the contractor had done the leg work and not gotten "creative" but rather focused on good-faith efforts instead, it likely would have avoided the draconian penalties that were ultimately imposed.

That being said, when employing good-faith efforts keep the following best practices in mind. First and foremost, good-faith efforts have to be meaningful and real. Government agencies do not want to see just a lengthy phone log or list of certified contractors for whom you left messages or sent solicitations. Rather, they want to see "quality" good-faith efforts, not just a large "quantity" of good-faith efforts. In this regard, you need to demonstrate that you followed up on solicitations to certified contractors in a real effort to attain their participation. Also, did you **timely** send them the specifications and/or drawings of the work for which you were soliciting them? Sending them the specifications on the eve of a bid will not be considered a good-faith effort. Did you invite them to pre-bid meetings to go over the potential scope of work; did you engage in meaningful negotiations with

certified contractors? Did you make efforts to carve out work for certified contractors to perform? These are the questions that agencies will ask.

Further, be sure to maintain accurate documentation of all your good-faith efforts. In particular, be sure to document when a certified contractor does not present a proposal notwithstanding your solicitation. Likewise, where you choose a non-certified contractor over a certified contractor, be sure to retain the quotes of both the certified and non-certified contractor and document the reasons for choosing the non-certified contractor. A reviewing agency will likely question the choice of a non-certified contractor over a certified one, so you need to be prepared to demonstrate your reasoning.

Lastly, be sure that your good-faith efforts continue throughout the project. For instance, the issuance of change orders during the project may result in the increase of your contract amount and, consequently, your certified participation goals. Or a change in scope may necessitate a modification to your utilization plan. In either situation, you will likely have to demonstrate additional good-faith efforts to meet an increased goal, which may be accomplished through solicitation of other certified contractors to perform the added work.

In addition, a consistent practice of trying to find new ways to foster certified contractor participation throughout a project can prove useful in the event you fall short of your participation goal at the end of a project. Such efforts could go a long way in mitigating a short fall on a goal. Moreover, NYS regulations specifically list as an indicator of good-faith efforts “whether the contractor offered to make up any inability to comply with the certified [contractor] goals in the subject State contract in other State contracts being performed or awarded to the contractor.”

As such, if you attain enough certified contractor participation to go over the goal percentage on one project, such overage may be looked at to make up for a short fall on another project. Thus, it is worth continuing good-faith efforts to solicit certified contractor participation throughout the life of a project.

G&C Commentary

Given the current environment of heightened scrutiny and enforcement of M/W/DBE regulations, it behooves all contractors to invest in a comprehensive practice of good-faith efforts. Those that do will best position themselves to protect their “franchise” in the public contracting marketplace. Contractors may question whether good-faith efforts, in lieu of full attainment of percentage goals, would be acceptable to government agencies. However, that is **clearly** the law. You would certainly rather be faced with disputing an agency’s rejection of your good-faith efforts than having to defend against an allegation that you employed questionable practices in attempting to “attain” the participation goal percentage.

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