



## CONSTRUCTION LAW E-UPDATE

### Revisions To New York City's M/WBE Law

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In 2005, New York City enacted Local Law Section 129, which was designed to promote the increased utilization of the City's minority and women owned business enterprises (M/WBE) on City-funded projects. Since that time, the effectiveness of the law has been questioned by the various stakeholders in the City's construction industry.

In response to these concerns, new legislation was just signed into law on January 7, 2013. The amendments to Local Law Section 129 will take effect on July 1, 2013. The revisions, among other things, address: how credit is obtained toward goals; M/WBE certification fraud; improvement in the dissemination of M/WBE qualification information; updated M/WBE goal percentages; and an increase in agency reporting and accountability with respect to the meeting of M/WBE goals.

#### **M/WBE Participation Credit**

As originally enacted, the Local Law did not allow credits for any M/WBE contracts in excess of one million dollars. Under the revisions there will be no limit on the size of the contracts eligible for M/WBE program credits. This is a major change sought by both the prime contractor and M/WBE communities. Based on this change, it has been reported that the value of program eligible contracts will more than quadruple<sup>1</sup>. The revisions also further expand the contracts that will be eligible to provide M/WBE credits by what has been called a "total business approach," allowing credits not only for subcontracts but for prime contracts and second tier subcontracts with certified

M/WBEs. Contracting agencies may also now allow goals to

be achieved through a combination of MBEs, WBEs and a new business class to the program to be known as, "Emerging Business Enterprises" ("EBE")<sup>2</sup>.

#### **Certification-Related Amendments**

The revisions to the Local Law require the agency that administers the City M/WBE program, NYC Small Business Services ("SBS"), to establish guidelines for conducting site visits to applicant firms as part of the certification process. The amendments also provide that certified firms shall "graduate" from the program once they meet the industry-specific size standards established by the U.S. Small Business Administration for three years and receive at least \$50 million in City contracts over three years. SBS will also now be required to enhance its on-line directory to include information for each M/WBE including the particular skill sets for which it was certified, bonding capacity, recent job history and union affiliations, if any.

#### **Updated Goals**

The revisions to the Local Law also contain an update of the City's M/WBE program goals reflecting the City's recent disparity analysis. For construction services, the amendments added goals for all women of 18% and Asian Americans of 8% and lowered the goals for African Americans to 8% (from 12.63%) and Hispanic Americans to 4% (from 9.06%).

#### **Accountability**

Additionally, the revisions strive to increase agency reporting and accountability with respect to each agency's effort and

progress toward meeting the M/WBE program goals set by the City. The revisions will establish an accountability program, “M/WBESat,” which will require agencies to provide quarterly reports (up from semi-annual reports) and to meet with a ranking City official quarterly to discuss M/WBE progress. The officials from M/WBESat are charged with holding the agencies accountable for their level of progress and with providing best practices towards meeting the goals. An agency that fails to meet its goals in the prior year is required to provide a performance improvement plan detailing the steps it will take to improve its performance. Each contracting agency will also be required to review prime contractors’ progress towards meeting M/WBE goals at least once each year, for the duration of the contract.

Lastly, the revisions also require SBS to provide an updated schedule online at the beginning of each fiscal year with each City agency’s schedule of the contracts that they anticipate entering into.

### **G&C Commentary**

The revisions to Local Law 129 represent some commendable reforms such as: (1) increasing the types of contracts (e.g., second tier subcontracts or subcontracts in excess of \$1,000,000) that can apply toward M/WBE goals; (2) enhancing the M/WBE database to alert contractors as to M/WBE firms’ qualifications and contact information; (3) advising contractors of agencies’ intentions with respect to their M/WBE programs for each fiscal year.

More importantly, the revisions take some practical, concrete steps toward improving the M/WBE program by removing the former problematic one million dollar cap on M/WBE subcontracts, as well as giving credit for M/WBE prime contracts and second-tier subcontracts that were not permitted under original Local Law 129. The revisions should also help minimize certification fraud by, for the first time, requiring that guidelines be established for pre-certification, on-site visits of applicant M/WBE firms.

The information to be made available online may also work in a real way to advance the effectiveness of the M/WBE

program. In this regard, contractors may have a better chance to engage certified M/WBE contractors that are legitimate and properly qualified to perform their work and all parties will have a better idea of how the City’s M/WBE goals will be distributed by each agency in their capital plans for each fiscal year. However, contractors must also take note that the increased scrutiny and accountability of agencies to meet Citywide M/WBE goals will almost certainly “flow down” to the prime and subcontractors alike.

Overall, these amendments should be a positive development. Long time complaints, such as the unworkable \$1M subcontractor cap or the wholly ineffective government-maintained M/WBE directories, should inure to the benefit of all program participants. More needs to be done, but periodic adjustment along the way will hopefully continue. The best development, it appears, is the implicit acknowledgement by the City that merely demanding more and more “compliance” by the prime contracting community, without the government being more accountable itself for the program success, will not be a sustainable way to continue to proceed. The intent of this legislation appears to recognize that the City must be more of a partner in the development and success of its own program. It remains to be seen whether this goal will be achieved.

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[1] See NYC Council, Committee Report of the Governmental Affairs Division, pp. 9.

[2] EBEs are business owned and operated by an individual with 51% or more ownership interest in the firm that is socially and economically disadvantaged. Qualification for certification as an EBE does not depend upon the principal owner’s race, national origin or gender.

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