



## CONSTRUCTION LAW E-UPDATE

### M/WBE & DBE COMPLIANCE UPDATE

DECEMBER 2010

M/WBE and DBE regulatory compliance is fast becoming one of the most treacherous legal challenges confronting contractors on major projects.

While we have been invited to participate in a number of compliance-related presentations regarding this topic in the coming months, the following are practical legal and operational guidelines you should consider immediately implementing:

#### **I. BE CERTAIN TO:**

Appreciate the differing compliance requirements between DBE-based (Federal) programs and M/WBE-based (New York State) programs. In this regard, also keep in mind that many State and municipal projects which receive federal funds will incorporate federal DBE program requirements in their contracts.

For example: Be aware of differences among Federal, New York State and New York City regulations regarding credit to be given against contractual goals for M/WBE or DBE suppliers (e.g. NYS: credits 100% of a supply contract's dollar value; Federal: credits only 60% of a supply contract's dollar value; NYC: only gives credit up to 25% of total goal for the entire project). Also note the new NYS development regarding the use of brokers (i.e., .25¢ per dollar).

Promptly communicate all questions and/or problems regarding goal compliance with the project owner's Civil Rights or Contract Compliance Department, despite your

instinct to do just the opposite. Treat such departments as an ally and resource in reaching your mutual goals. A contemporaneous, memorialized "sharing of the problem" helps in at least three ways:

- allows for the documented demonstration of good faith efforts on your company's part;
- requires government agencies to "share" the problem—they will likely have the same difficulties you had, provided you were vigorously trying to resolve your goal "shortfall"; and
- allows you to tap into the considerable amount of expertise and contacts these agencies possess.

Solicit and use M/WBEs and/or DBEs only for the work or skill sets for which they are specifically certified to do and no other.

Obtain a copy of the M/WBE's or DBE's actual certification to confirm both its currency and specific area(s) of certification. Advise the project owner immediately if it is not forthcoming.

Seek prior approval from the project owner to remove or substitute an M/WBE or DBE due to unsatisfactory performance, change in scope of work or any other reason. Seeking approval afterwards could be much more problematic.

#### **II. BE CERTAIN NEVER TO:**

Push an unrealistic or unattainable utilization plan that would require excessive "creativity" or managerial involvement in



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the M/WBE's or DBE's operations. Remember, it's a goal, not a set aside.

Mix M/WBEs and DBEs when trying to meet the goals of a specific program (e.g., the use of an M/WBE is not credited against the contractual goals of a DBE program). Also note that there is confusion, even among the agencies, as to whether the solicitation of an M/WBE can at least be counted towards demonstrating your good-faith efforts to meet the contractual goals of a federal DBE program. Such requirements must be analyzed on an agency-by-agency basis and this issue, if applicable, should definitely be brought up as early as possible during the plan approval process with the federally-funded, DBE-based project owner.

#### **G&C Commentary**

The foregoing pointers are as common-sensical as they are practical. However, it is surprising how many of them are simply ignored, either out of a hesitancy not to disclose matters to the government or a lack of appreciation of how to coordinate one's rights, responsibilities, and compliance efforts. Following suggestions such as those above can greatly reduce both the pain (i.e., cost) and risk (i.e., fines, penalties, disqualification, ... or worse) of entering into major public works contracts that contain M/WBE/DBE participation requirements.

Mr. Goldberg is Managing Partner to the law firm of Goldberg & Connolly. He may be reached at (516) 764-2800 or at [hlgoldberg@goldbergconnolly.com](mailto:hlgoldberg@goldbergconnolly.com).

Christopher K. Smith, an associate with the firm, assisted with preparation of this article.