



M/WBE & DBE Update

LEGAL LOG

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As we discussed at our M/WBE and DBE Good-Faith Compliance Program that we recently presented to the STA, there continues to be new developments and “hot” issues arising in the ever-changing area of M/WBE and DBE contracting and regulation of which all contractors in public contracting need to be aware and which require further discussion.

Concern over DBE and M/WBE goals and monitoring and the enforcing of compliance with M/WBE and DBE statutes and regulations is now high on governmental agendas at the federal, state and local levels. In fact, in his first State of the State Address, Governor Cuomo stated that he planned to direct NYS agencies to double the current M/WBE participation goals from 10% to 20%. At the same time, a new division of the NYS Department of Economic Development, called the Division of Minority and Women’s Business Development, has recently issued new regulations governing the enforcement of M/WBE certification, goals and good-faith compliance.

At the NYC level, Comptroller John Liu recently released audit reports highly critical of NYC agencies and recommended that agencies should be required to, among other things, audit prime contractors’ records to verify payments to M/WBEs and conduct jobsite inspections and contact subcontracted M/WBEs. Contemporaneous with the audit report, the Comptroller also launched an online interactive M/WBE “Report Card” to track the City’s spending on M/WBE contractors and facilitate enforcement of Local Law §129.

With respect to federal DBE initiatives, the U.S. DOT also recently issued new regulations that changed the way in which DBEs are certified and increased the oversight of DBE usage by prime contractors.

New Federal DBE Certification Requirements

Under new rules effective February 28, 2011, the maximum personal net worth for DBE owners has increased from \$750,000 to \$1,320,000. In addition, recognition of DBE status between states has been affirmatively directed such that an applicant DBE will not be required to go through new certification procedures in the new state and the new state will be required to review the DBE’s information and accept the DBE for certification unless there is good cause not to.

While the regulations fell short of requiring periodic reviews of DBE certifications by State agencies, U.S. DOT “strongly encouraged” such reviews and urged State agencies to regard on-site reviews as a “critical part of their compliance activities,” thereby signifying U.S. DOT’s commitment to preventing fraudulent certifications and continued participation in the DBE program by firms that are no longer eligible for certification.

Differing Government Requirements

While keeping up on changes in DBE and M/WBE regulations, attention must also be paid to the important differences in requirements (and the enforcement of those requirements) between the different levels of government. For example, this confusion arises even among the use of the basic terminology at the various levels. DBE (Disadvantage Business Enterprise) is strictly a federal term which is not gender or race based. A white male who is a natural born citizen can be a DBE based on his individual circumstances. MBE or WBE, on the other hand, are New York State and New York City terms which are strictly race and gender based. In the area of self-performance, while the requirements of all three levels of government seem to allow M/WBE or DBE prime contractors that self-perform their work to receive

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100% credit towards their goals, however, we were recently advised that NYS may have back-tracked from this policy and may not, in fact, give credit for self-performance.

With respect to differences in certification, note that: (a) the federal government requires DBEs to have a personal net worth less than \$1.32 million; (b) New York State, requires the personal net worth to be less than \$3.5 million (almost three times that of the federal program); and (c) NYC does not have any personal net worth requirement.

Strict Enforcement of Utilization Plans

There is, however, one area in which all levels of government are in agreement, namely, strict enforcement of subcontractor utilization plans. Prime contractors obtaining waivers or modifications of their subcontractor utilization plans will confront greater scrutiny. All levels of government have expressed a new policy of strictly applying the time period in which prime contractors must submit their utilization plans (i.e., at the time of or shortly after the submission of bids). In addition, the allowance of substitutions or terminations of M/WBEs or DBEs will be limited to extraordinary circumstances.

In this regard, the U.S. DOT just issued a new regulation mandating that state agencies only consent to the termination of a DBE firm where the prime contractor has shown good cause, as set forth in the regulation itself.

G&C Commentary

Given the current environment of heightened scrutiny and the ever-changing landscape of regulation at all levels of government, it is critical that contractors understand the differing requirements of both certification and good faith compliance at the various levels of government, and at the various authorities. Those that do will best position themselves to protect their interest in a public contracting marketplace that is increasingly focused on meeting M/WBE and DBE goals and enforcing compliance.

In the future we may witness some consolidation and uniformity in the rules. For now, unfortunately, it is unnecessarily complicated and dangerous mind field from a client's prospective. It is important to know what you are doing, be certain to inquiry if you are not certain of your standing on any issue and be a beneficiary of expert counsel.

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