

THE ABC'S OF DBE CONTRACTING

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Construction contractors doing business with the Government may be required to comply with various socioeconomic programs. One such program requires participation in government contracts among disadvantaged ("DBEs"), minority ("MBEs") and women-owned businesses ("WBEs"). When a construction contractor circumvents or even abuses these programs, the government will impose sanctions or penalties such as civil fines, debarment precluding future government work, and criminal prosecution for false claims or mail fraud.

To facilitate these goals, state and local governments may provide potential bidders with lists of companies certified as DBEs. However, merely including such entities with a bid or proposal does not constitute compliance. Rather, a bidder must have the intention of "following through" by utilizing the listed company during performance of the work. Additionally, even utilization of the certified company is not a "safe harbor" for a prime contractor. Under federal regulations, which apply whenever there is federal funding, the DBE must perform a "commercially useful function" ("CUF") and not be a mere "extra participant" or "pass through." See, 49 C.F.R. § 26.55(c). Thus, a former Vice President of Purchasing for Perini Corporation's Civil Division pled guilty to money laundering and conspiracy for a scheme whereby "pass through" DBEs were used to meet DBE goals. In this instance, the "pass through" DBEs received 3% - 5% of the subcontract value as a "fee" to merely process payrolls and other documents. Perini paid \$9.75 million as part of a negotiated settlement to resolve its criminal and civil liability.

Similarly, Schiavone Construction Company recently admitted that between 2002 and 2007 it submitted reports on federally funded projects that falsely certified work was performed by certified DBEs and minority and women-owned business enterprises ("MWBE"). Under its settlement agreement with the federal government, Schiavone paid fines and penalties exceeding \$20 million.

Schiavone and Perini are not isolated cases. Rather, as a result of efforts by the Federal Construction Fraud Task Force, the United States Attorney in Brooklyn made 61 arrests in the past ten years for this type of fraud, and obtained forfeiture orders totaling more than \$150 million. In addition, 28 persons and companies have been banned from further federally funded contracts. [See Fraud Inquiries Focus on Public Works Hiring in New York. New York Times, November 23, 2010.](#)

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The Government's enforcement efforts are not limited to New York. The U.S. Department of Transportation through its Office of Inspector General ("DOTOIG") actively pursues DBE Fraud. The Department examines whether "under the scheme," a contractor misrepresents who performed the work in order to increase job profit while appearing to comply with goals for minority or women-owned businesses.

Project and management personnel should consider steps to monitor compliance with DBE goals. The DOTOIG has identified the following "Red Flags" for contractors to assess as indicators of DBE Fraud:

- DBE owner lacking background, expertise, or equipment to perform subcontract work;
- Employees shuttling back and forth between prime contractor and DBE-owned business payrolls;
- Business names on equipment and vehicles covered with paint or magnetic signs;
- Orders and payment for necessary supplies made by individuals not employed by DBE-owned business;
- Prime contractor facilitated purchase of DBE-owned business;
- DBE owner never present at job site;
- Prime contractor always uses the same DBE;
- Financial agreements between prime and DBE contractors;
- Joint bank accounts (Prime/DBE); or
- Absence of written contracts.

In addition to compliance with these "hiring" goals, a contractor must follow certain procedures and obtain owner approval when it wishes to "fire" or terminate a DBE subcontractor. Under recently promulgated regulations, the Federal Transit Administration requires "good cause" and approval by the state or local government entity for termination or removal of DBEs. 49 C.F.R. § 26.53(f)(1) and (2).



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