

THE DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

May 24, 2017



Presented by:
Antonio R. Franco
Jacqueline K. Unger



PRESENTED BY



Antonio R. Franco, Senior Partner
afranco@pilieromazza.com
202-857-1000



Jacqueline K. Unger, Associate
junger@pilieromazza.com
202-857-1000



IMPORTANT

THIS MATERIAL IS PRESENTED WITH THE UNDERSTANDING THAT THE AUTHOR IS NOT RENDERING ANY LEGAL, ACCOUNTING, OR OTHER PROFESSIONAL SERVICE OR ADVICE. BECAUSE OF THE RAPIDLY CHANGING NATURE OF THE LAW, INFORMATION CONTAINED IN THIS PRESENTATION MAY BECOME OUTDATED. AS A RESULT, THE USER OF THIS MATERIAL MUST ALWAYS RESEARCH ORIGINAL SOURCES OF AUTHORITY AND UPDATE INFORMATION TO ENSURE ACCURACY WHEN DEALING WITH A SPECIFIC LEGAL MATTER. IN NO EVENT WILL THE AUTHOR BE LIABLE FOR ANY DAMAGES FROM THE USE OF THIS MATERIAL.



ABOUT PILIEROMAZZA

PilieroMazza PLLC is a full-service law firm located in Washington, D.C. We are most well known as a government contracting firm and for more than 25 years we have helped our clients navigate the complexities of doing business with the federal government. We also provide a full range of legal services including advice on business, corporate, labor and employment, SBA procurement programs, and litigation matters. Our clients value the diverse array of legal guidance they receive from us and our responsiveness as we guide their growth and secure their success.

Sign up for our newsletters and blog at
www.pilieromazza.com

PM Legal Minute – our blog, written by all of PilieroMazza’s attorneys, provides trending insight to small and mid-sized businesses.

Legal Advisor Newsletter – our quarterly publication which addresses current issues that are of concern to federal government contractors and commercial businesses nationwide. The Legal Advisor articles focus on recent legal trends, court decisions, legislative and regulatory rule-making, as well as other newsworthy events.

Weekly Update – an email sent every Friday that provides an up-to-the-minute recap of legislative and regulatory issues affecting small businesses.

Webinars on YouTube – all of our past webinars can be found on the PilieroMazza YouTube channel.

Follow us on:  @pilieromazza



PilieroMazza Channel



DBE CONTRACTING OPPORTUNITIES UNDER THE TRUMP ADMINISTRATION

- Significant investment in infrastructure
- Increase in funding available for state and local Department of Transportation (“DOT”) assisted transportation projects.
- Dollars filtered through prime contractors and their Disadvantaged Business Enterprise (“DBE”) partners.
- With billions of dollars likely to hit the streets, this is a good time for firms to look into the DBE program.



OVERVIEW

- Purpose of the DBE Program.
- The DBE certification process.
- Certification standards for qualifying as a DBE.
- Requirements for remaining in the DBE program.
- Similar programs for minority businesses enterprises.



PURPOSE OF THE DBE PROGRAM

- The program applies to transportation contracts, which are federally funded by the U.S. DOT.
- To ensure that DBEs can compete fairly for federally funded transportation-related projects.
- To ensure that only eligible firms participate as DBEs.
- To assist DBE firms in competing outside the DBE Program.



CONTRACTING OPPORTUNITIES

- State and local transportation agencies receiving DOT funding must follow DOT guidelines and provide preferences to certified DBEs.
- Agencies evaluate their DOT-assisted contracts throughout the year and establish contract specific DBE subcontracting goals.
- At the end of the year, the amount of contract/subcontract awards to DBEs should be consistent with the contract's overall DBE participation goal.



CONTRACTING OPPORTUNITIES

- Construction projects
- Services
- Engineering
- Landscaping
- Utilities
- IT
- Airport concessionaires
- Car rental concessions operations



THE ROLE OF THE DOT

- DOT distributes substantial funds each year to finance highway, transit, and aviation projects initiated by state and local governments.
- Since 1983, DOT is required by statute to ensure that at least 10% of the funds authorized for these projects be expended with DBEs.



THE ROLE OF THE DOT

- The DBE program involves three major DOT operating administrations:
 - The Federal Highway Administration;
 - The Federal Aviation Administration; and
 - The Federal Transit Administration.



THE ROLE OF THE DOT

- DOT is responsible for:
 - Developing the rules and regulations for the national DBE program;
 - Providing guidance and conducting oversight to make sure that the rules and regulations are followed by the recipients of DOT funds; and
 - Considering appeals from state/local certification decisions.



THE ROLE OF STATE AND LOCAL TRANSPORTATION AGENCIES

- State and local transportation agencies are responsible for:
 - Certifying the eligibility of DBE firms to participate in their DOT-assisted contracts;
 - Establishing narrowly tailored goals for the participation of disadvantaged entrepreneurs; and
 - Evaluating their DOT-assisted contracts throughout the year and establishing contract-specific DBE subcontracting goals as necessary to achieve the overall goal of the agency.



BIDDER'S/PRIME CONTRACTOR'S ROLE

- Must make Good Faith Efforts (“GFE”) to meet contracting goal.
- Document efforts to meet goals (e.g.):
 - Market research
 - Sources sought
 - Attendance at match-making event
 - RFP’s to DBE’s
- Prime Contractor must identify DBE firm to be awarded subcontract:
 - Describe work and NAICS code
 - Dollar amount
 - Proof of commitment to use DBE from Prime Contractor
 - Proof from DBE of intended use



TERMINATING/SUBSTITUTING A DBE FIRM

- The prime contractor can reduce the amount of work committed to the DBE only for good cause and only with the written concurrence of the state agency.
- DOT views reducing the amount of work committed to a DBE at the time contract award as a partial termination of the DBE's contract.
- Prime contractors must also make good faith efforts to replace a DBE firm that could not complete its contract with another DBE firm.



DBE CERTIFICATION STANDARDS

- DBEs are **for-profit small businesses concerns** in which **socially and economically disadvantaged** individuals **own** at least a 51% interest and also **control** management and daily business operations.



PRESUMPTION OF SOCIAL AND ECONOMIC DISADVANTAGE

- **Women, Black Americans, Hispanic Americans, Native Americans, Asian–Pacific Americans, Subcontinent Asian Americans, or other minorities** are presumed to be socially and economically disadvantaged.
- Other individuals can also qualify as socially and economically disadvantaged on a case-by-case basis.
- Native American – federal or state recognized tribe.



PRESUMPTION OF SOCIAL DISADVANTAGE

- The agency is required to consider whether an individual applicant has held themselves out to be a member of their claimed group over a long period of time prior to applying for certification and whether the person is regarded as a member of the group by the relevant community.
- The agency may require the applicant to produce appropriate documentation of group membership.



PRESUMPTION OF ECONOMIC DISADVANTAGE

- Individual owners, whose ownership and control are relied upon for DBE certification, must certify that he or she has a **personal net worth** that does not exceed **\$1.32 million**.
- DOT requires that each individual submit a signed, notarized statement of personal net worth, with appropriate supporting documentation.
- The agency may require additional financial information, but such requests shall not be unduly burdensome or intrusive.



CALCULATING PERSONAL NET WORTH

- An applicant's personal net worth is calculated by excluding the following from one's assets:
 - An individual's ownership interest in the applicant firm.
 - An individual's equity in his or her primary residence (except any portion of such equity that is attributable to excessive withdrawals from the applicant firm).
 - A contingent liability.
 - Tax and interest penalties that would accrue if retirement savings or investments were distributed at the present time.



DEMONSTRATING OWNERSHIP

- To be an eligible DBE, a firm must be at least 51 percent owned by socially and economically disadvantaged individuals.
- This means owning 51 percent of each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding of a corporation;
- 51 percent of each class of member interest of a limited liability company; or
- 51 percent of each class of partnership interest of a partnership.



DEMONSTRATING CONTROL

- Only an independent business may be certified as a DBE. Its viability cannot depend on its relationship with another firm or firms.
- Agencies examine an applicant's relationships with non-DBE firms, prime contractors, and the present or recent employer/employee relationships between the disadvantaged owner(s) of the potential DBE and non-DBE firms.



SIZE REQUIREMENTS

- To be an eligible DBE, the firm must meet two separate size requirements
- Must be a small business under the Small Business Administration's size standards
- Must not exceed the DOT's overall cap of \$23.98 million in average gross receipts over the previous three fiscal years



THE DBE CERTIFICATION PROCESS OVERVIEW

- The DBE federal regulation requires participating state and local transportation agencies to agree to certify DBEs using the Unified Certification Program (“UCP”).
- Under the UCP, applicants in every state fill out the same “Unified Certification Application.”
- State and local transportation agencies certify the eligibility of DBE firms using federal regulations and additional guidance from DOT.



BECOMING DBE CERTIFIED

- In order to qualify as an eligible DBE, the UPC will consider an applicant's Unified Certification Application and any supplemental documents.
- The UPC is required to conduct on-site interviews of the applicant's officers.
- UPCs are directed by regulation to make certification decisions within 90 days of receiving the application.



REQUIREMENTS FOR REMAINING IN THE DBE PROGRAM

- Annual Certification:
 - DBE must annually certify that there were no changes in the firm's size, disadvantaged status, ownership, control, or any material information provided in application.
 - Supporting documentation required.
 - State may ask for more documents.



REQUIREMENTS FOR REMAINING IN THE DBE PROGRAM

- Changes in Circumstance:
 - DBE must inform state in writing of any change in circumstances affecting size, disadvantaged status, ownership, or control requirements or of any changes in management.
 - Notice within 30 days of the occurrence.
 - With documentation describing changes.



CERTIFICATION APPEALS

- A firm that is denied certification can appeal to DOT.
- An appeal to DOT is due no later than 90 days after the date of denial or removal of certification.
- An appeal should identify the errors, any potential facts that were not considered, or how the DBE regulations were misapplied.



SIMILAR PROGRAMS

- Individual states and localities also have minority-owned business programs, which are often referred to as Minority Business Enterprise (MBE) programs.
- Sometimes, firms are able to apply using a joint MBE/DBE application.
- Nearly all states have some type of goal for awarding contracts to MBEs.



SIMILAR PROGRAMS

- An estimated 15 States have formal targets for awarding contracts to MBEs.
- For example, Maryland's MBE participation goal for fiscal years 2014 and 2015 was 29%.
- MBE programs may have more lenient or stringent requirements than the DBE program.
- For instance, Maryland's MBE program has a higher personal net worth cap than the DBE program.



POSSIBLE EXPANSION OF DBE PROGRAM FOR VETERAN-OWNED SMALL BUSINESSES

- In 2015, the U.S. House of Representatives passed legislation that would expand the DBE program to include Veteran-Owned Small Businesses.
- Although the Senate did not pass this bill in the 114th Congress, making veterans eligible participants in the DBE program remains a possible component to any future veterans jobs legislation.



QUESTIONS?