

Tips for Small Business, Minority, Women and Disadvantage Business Compliance

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HOW DOES THIS APPLY TO MY PRACTICE?



Do your clients bid on...?

- Infrastructure work with federal dollars
- FDOT
 - Highway
 - Bridges
- Airport
- County and City projects
- School Boards

Florida Small Business and MWBE Laws

- Miami Dade County – Miami-Dade County Small Business Enterprise Construction Services (Sec. 10-33.02)
- Broward County – Broward County Business Opportunity Act of 2012 (Sec 1-81.1)
- Collier County – Small and Disadvantaged Minority and Women Business Enterprises (Sec. 2-199)

Florida Small Business and MWBE Laws

- Orange County – Minority/Women Business Enterprise (Sec. 17-318)
- Leon County - (Sec. 2-401)
- Palm Beach County- Equal Business Opportunity Program (Sec. 2-80)
- Duval County Public Schools – Minority/Women Business Enterprise Program and Small Business Enterprise.

School Districts

- Miami Dade Public Schools
 - M-DCPS certifies small, micro, minority and women-owned and veteran businesses in the geographical region of the Miami-Dade Metropolitan Statistical Area (Miami-Dade/Broward/Palm Beach counties).
- Broward County Public Schools – Policy 3330 – Supplier Diversity Outreach Program.

School Districts

- Duval County Public Schools
 - Minority/Women Business Program
 - Small/Micro Business Program
- Orange County Public School
 - Minority and Women Business Enterprise Assistance
 - Veteran Business Enterprise Program

Federal Projects

- DBE program.
 - All FDOT projects
 - Most Airport Projects
 - Certain Projects with Federal dollars
- SBA – 13 CFR 121.

PURPOSE

- Small, Minority, Women, Veteran owned businesses shall have the opportunity to compete for and participate in performance of projects financed in whole or in part with taxpayers dollars.

Key Concepts

- Commercially Useful Function – Small Businesses and MWBEs responsible for execution of the work. Order, price negotiation, pay for materials. NOT A PASS THROUGH
- Good Faith Effort – Prime Contractor has to document good faith efforts of its attempt to use small businesses or MWBEs.

ASK FOR PERMISSION NOT FORGIVENESS

- Provide early notification to agency of problems. Cover up is always worse than the crime.
- False Claims Act
 - Federal – 31 U.S. Code § 3729
 - Florida – F.S. 68.081
 - Miami Dade County False Claim Ordinance (Sec. 21-255)
 - Broward County False Claim Ordinance (Sec. 1-276)

WHAT IS A FALSE CLAIM

- Knowingly presents false or fraudulent claims for payment or approval.
- Knowingly makes or uses false records or statements material to false or fraudulent claims.
- Conspiring to violate the FCA.
- Knowingly delivers less property than is owed to the government.
- Makes or delivers a receipt of property without complete knowledge of the truth of the information.
- Knowingly receives property from an official not authorized to pledge it.
- Knowingly makes or uses false records to avoid or decrease an obligation to pay the government.

False Claim

- Specific intent to defraud not required. Any knowing submission of a false statement in support of payment sufficient (Deliberate indifferent to or reckless disregard).
- Payment certifications likely enough.
- Inaccurate utilization report.

How bad can it get?

- Treble damages
- Civil penalties
- Suspension, Debarment & Forfeiture
- Criminal Liability

Florida False Claim

- (1) knowingly presents or causes to be presented a false or fraudulent claim for payment or approval;
- (2) knowingly makes, uses, or causes to be made or used a false record or statement material to a false or fraudulent claim;
- (3) conspires to commit a violation of § 68.082(2), Fla. Stat.;
- (4) has possession, custody, or control of property or money used or to be used by the state and knowingly delivers or causes to be delivered less than all of that money or property;
- (5) is authorized to make or deliver a document certifying receipt of property used or to be used by the state and, intending to defraud the state, makes or delivers the receipt without knowing that the information on the receipt is true;
- (6) knowingly buys or receives, as a pledge of an obligation or a debt, public property from an officer or employee of the state who may not sell or pledge the property; or
- (7) knowingly makes, uses, or causes to be made or used a false record or statement material to an obligation to pay or transmit money or property to the state, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the state
- is liable to the state for a civil penalty of not less than \$5,500 and not more than \$11,000 and for treble the amount of damages the state sustains because of the act of that person.

Miami Dade County False Claim Ordinance

- The purpose of the Miami-Dade County False Claims Ordinance is to deter persons from knowingly causing or assisting in causing the County to pay claims that are false, fraudulent, or inflated, and to provide remedies for obtaining damages and civil penalties for the County when money is sought or obtained from the County by reason of a false claim.

(1) The following action(s) shall constitute a violation of this article:

- (a) Any person who knowingly presents or causes to be presented to the County, or to any officer, employee, agent, or consultant of the County, a false or fraudulent claim for payment or approval;
 - (b) Any person who knowingly makes, uses, or causes to be made or used, a false record or statement to get a false, fraudulent, or inflated claim paid or approved by the County;
 - (c) Any person who conspires to defraud the County by facilitating the payment of a false, fraudulent, or inflated claim allowed or paid by the County;
 - (d) Any person who delivers, with the intent to defraud the County, goods or services of different quality or quantity than that specified in the applicable contract or specification;
 - (e) Any person who is authorized to make or deliver a document certifying receipt of property used, or to be used, by the County and, intending to defraud the County, makes or delivers the receipt without completely knowing that the information on the receipt is true;
 - (f) Any person who knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer, employee, or agent of the County who lawfully may not sell or pledge the property; or
 - (g) Any person who knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the County.
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- (3) Any person found to have submitted a false claim to the County shall:
- (a) Be liable to the County for an amount equal to three (3) times that part of the claim which is false, fraudulent, or inflated;
 - (b) Immediately, fully, and irrevocably forfeit the entire amount of the claim;
 - (c) Be liable to the County for all costs and fees (including, without limitation, reasonable legal, expert, and consulting fees) incurred by the County to review, defend, and evaluate the claim and
 - (d) Be subject to debarment from County contracting for a period not to exceed five (5) years. Additionally, any person who certified a claim later found to be false shall be subject to debarment from County contracting for a period not to exceed five (5) years.
- (4) Liability under this section shall be joint and several for any act committed by two (2) or more persons.

Whistleblower Receives Over \$2 Million for Exposing DBE Fraud by Chicago Construction Company

In 2014 a whistleblower was awarded over \$2 million out of a \$12 million recovery by the government for bringing an FCA lawsuit against McHugh Construction Company in Chicago. Management representatives directed by McHugh Construction, a non-DBE, determined the materials to use, negotiated the pricing, often drafted the purchase orders and managed the workforce on federally funded DOT construction projects. Yet McHugh Construction has falsely certified that women-owned DBEs would perform such work.

Whistleblower Receives \$500,000 for Proving Fraud in DOT Construction Project

In 2016 a whistleblower was awarded \$500,000 out of a \$2,250,000 recovery by the government for bringing an FCA lawsuit against Mountain States Contractors in the United States District Court for the Middle District of Tennessee. Mountain States “loaned” its employees to, paid for the employee health insurance for, and “leased” equipment to, the purportedly independent DBE on several federally funded DOT construction projects.

Whistleblower Receives \$875,000 for Showing VA Construction Work Was Not Performed by Company Owned by Service-Disabled Veteran

In 2016, a whistleblower was awarded \$875,000 out of a \$5 million recovery by the government for bringing an FCA lawsuit against Hayner Hoyt Corporation based in Syracuse, New York. Senior managers of Hayner Hoyt controlled all of the major business decisions and provided the employees for work on contracts with the U.S. Department of Veterans Administration, so that certifications that the work was actually performed by another company owned by a service-disabled veteran were false.

Most Common Fraud Schemes

- Fronts or pass-throughs
 - How much control does the prime exert over the MWBE?
 - Is the MWBE independent?
 - Is the MWBE actually performing the work?
 - What is the commercially useful function?

FRAUD RED FLAGS

- MWBE has no actual office or share space with a majority owned firm.
- Principals lack knowledge / expertise
- Certification lapse.
- No employees performing work on site.

Six Arrested in Virginia Key Wetlands Restoration Project Corruption

KYLE MUNZENRIEDER | OCTOBER 5, 2009 | 5:45PM

Six business owners were arrested today, accused of scamming the county for work done on the Virginia Key Wetlands Restoration Project.

In 2007, American Earth Movers submitted a successful bid to work on the project. The county had set aside 16 percent of the job for a program, meant to help minority-owned and disadvantaged companies get county contracts. Because American Earth Mover is not a disadvantaged or minority-owned business, it subcontracted 19 percent of the project to Pabon Engineering.

The project was completed in February '08, but the Miami-Dade Police Department's Public Corruption Investigation Bureau received an anonymous tip that Pabon had actually done no work on the project, and instead received kickbacks -- and fraudulent documents were submitted to the county. American Earth Movers paid Pabon \$340,019.56; then Pabon paid out \$323,709.53 to subcontractors.

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Fronting By M/WBE Electrical Contractor

We began an investigation on information received from the M-DCPS Office of Economic Opportunity (OEO) that it suspected Complete Power Systems (CPS), a certified Minority/Women-Owned Business Enterprise (M/WBE) of being a “front” company. OEO contacted the M-DCPS OIG after receiving information that CPS’s 51% minority owner, Jubert Lowe, was no longer affiliated with CPS. OEO attempted to confirm whether Mr. Lowe was still the 51% minority owner of CPS by contacting CPS’s non-minority co-owners. However, they were unable to confirm Mr. Lowe’s status with the company. Based on OEO’s contact with CPS’s non-minority owners, OEO became suspicious that Mr. Lowe may have been used as a “front” in order for CPS to receive certification as a M/WBE.

How to monitor

- Audits
- Field investigations
- On-site Interviews

FRAUD HOTLINES

WHAT SHOULD I REPORT TO THE MBE FRAUD HOTLINE?

Incidents you should report:

- A Certified MBE was listed in a bid or proposal without its permission.
- An MBE is offered payment for the sole usage of its City of Orlando issued MBE Certification Number in bid/solicitation documents.
- The certified MBE gave permission to be listed in the bid documents, but its services were not used to perform the contract. (For example, a prime contractor contacts a certified MBE. After negotiations, the MBE agrees to work as a subcontractor. The project/contract begins and the MBE, who has maintained contact with the prime contractor while waiting to begin its part of the project, learns that the prime or another contractor completed the work it was expecting to do).

Good Faith Effort

- Good Faith Efforts – what is it really.
 - A black hole?
 - Subjective?
 - Aspirational goal or quota.

SECTION A – Advertising Effort**5 points**

Please provide documentation and supporting evidence to show how the criteria was fulfilled.

- ☐ Advertise opportunities for SBBC-certified S/M/WBEs a minimum of three (3) times in print and/or digital media outlets at least two (2) weeks prior to the bid opening.
- ☐ Publish these opportunities in the general circulation media, minority-focused media, trade association publications, or trade-related publications, unless SBBC waives this requirement due to time constraints.
- ☐ Additional efforts, if any: (Provide information in space provided below)

Requirements:

- ☐ Attach copy of advertisements (i.e. newspaper Tear Sheet) with the name and location of the project, the location where plans and specifications can be viewed, the subcontractor proposal due date, and the items of work or specialties being solicited.

SECTION B – Outreach to Identify S/M/WBE Firms**15 points**

Please provide documentation and supporting evidence to show how the criteria was fulfilled.

- ☐ Identify the scope of work required
- ☐ Seek relevant companies to perform the specified work
- ☐ Contact S/M/WBEs by utilizing the SDOP approved online database of certified firms
- ☐ Additional efforts, if any: (Provide information in space provided below)

Requirements:

- ☐ Attach dated documentation of all correspondence to target S/M/WBE Certified firms listed on www.BrowardSchools.com/sdop
- ☐ Include in dated documentation the business name, telephone number, fax number, email address, and type of work solicited to perform

SECTION C – Pre-Bid Meeting Attendance**5 points**

Please provide documentation and supporting evidence to show how the criteria was fulfilled.

- ☐ Attend pre-bid meeting to comply with the good faith effort requirement. Attendance is mandatory.
Note: If a pre-bid meeting is not offered, five (5) points will be deducted from the seventy (70) point minimum score.
- ☐ Additional efforts, if any: (Provide information in space provided below)

Requirements:

- ☐ Signature on SBBC's pre-bid meeting sign-in sheet to document the proposer's presence.

Good Faith Efforts Guidelines

- Sent written solicitations to appropriate certified MWBE?
- Documented Solicitation?
- Did not solicit MWBEs that do not perform relevant work (i.e. pro forma efforts)?
- Allowed adequate time for MWBE to respond
- Identified sufficient work items to meet the goal?
- Solicited available MWBE for work items
- Followed up with specific MWBE
- Negotiated with specific MWBE in good faith.

Good Faith Efforts Evaluation

- Necessary
- Appropriate
- Active
- Aggressive

RECRUITING AND OUT-REACH

- Be familiar with the regulations
- Start before project utilization plans are due.
(Advertise Strategically, Be proactive)
- Seek guidance on availability of firms in advance.
- Advocate for Certified Firms and Encourage Non-Certified firms to get Certified.
- Adhere to prompt payment contract language.
- Documentation is key.

Developing Relationships

- Establish pre-qualification forms
- Host mini forums (community involvement)
- Engage local supplier diversity office and staff
- Invest in Community & Government Relations.
- Embrace Diversity Practice

Subcontractor Replacement

- Must be replaced with another Small or MWBE
- Issues
 - Availability
 - Schedule
 - Payment
 - Approval by government

Consequences of non-compliance

- Contract goals
- Contractual damages
- Liquidated damages
- Criminal Liability
- Whistleblowers (Qui Tam)

Liquidated Damages

- Orange County
 - Liquidated damages equal to the dollar value of the utilization by certified and recognized business loss to the county due to the violation, not to exceed ten (10) percent of the dollar value of the contract, shall be the amount required to compensate the county for resulting delays in carrying out the purpose of the program, the costs of meeting utilization goals through additional contracts, the administrative costs of investigation and enforcement and other damages and costs caused by the violation.

Requirement to make up deficit

the contractor's eligibility to receive any future County contracts may be conditioned upon the contractor making up the deficit in CSBE participation in such future contracts by having CSBE(s) perform work equal to double the dollar value of the deficiency in the CSBE measure in the prior contract. Contract language shall provide that in order to be eligible for future County contracts, a contractor who fails to meet an established CSBE goal shall submit a CSBE Make-up Plan for the approval of the SBD Director. A Make-up Plan must be submitted as part of any bid or proposal for future contracts as part of the Utilization Plan submitted via the County's web-based system.

Broward County

- Director determines that Contractor has failed to make Good Faith Efforts to meet the CBE Commitment after implementation of the remedial plan, Contractor shall pay County liquidated damages in an amount equal to fifty percent (50%) of the actual dollar amount by which Contractor failed to achieve the CBE Commitment, up to a maximum amount of ten percent (10%) of total eligible subcontracting opportunities as Approved by the Director of OESBD in accordance with the CBE Ordinance.

Tips

- Achieve the contract goal or establish/demonstrate that you made real, aggressive efforts to achieve the goal but were unable to do so.
- Use bonafide firms.
- Certification and Commercial Useful Functions are two distinct concepts. (Ask what is the value being added by the MWBE)



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