

DSLBD INSTITUTES NEW CBE AGREEMENTS

For many years, in virtually every private or public/private development project that has taken place on District property or that was funded in whole or in part with economic assistance from the District (including, for example, grants, Tax Increment Financing (TIF), Payment In Lieu Of Taxes (PILOT), Planned Unit Development (PUD) or other zoning adjustments, tax abatements, and Industrial Revenue Bonds (IRBs)), the District has required that as a condition of the economic assistance, the private developer enter into a Memorandum of Understanding (“MOU”) with the Department of Small and Local Business Development (“DSLBD”). Traditionally, in these MOUs the developer agreed to use “good faith efforts” or “reasonable efforts” to contract with and procure from local businesses for at least 35% of the dollar volume of the goods and services required for the development project.

Over the past year, DSLBD has instituted a number of changes, process improvements, and policy shifts as part of DSLBD’s transformation into a full-fledged economic development agency charged with facilitating the growth, development, and retention of local businesses. One such recent change is the elimination of the former “MOU” and replacing it with the new Certified Business Enterprise Utilization and Participation Agreement (“CBE Agreement”). While the new CBE Agreements contain some of the same language as the old MOUs, there are a number of changes of which developers should be aware. The following highlights the differences between the old MOU and the new CBE Agreement, and the rationale for these changes:

Stronger Language & Firm Commitments

The new CBE Agreements strengthen the language of the agreements and require private developers to make firm commitments to use local businesses, rather than simply making “good faith” or “reasonable” efforts to reach a contracting “goal”. The CBE Agreements also require the developer to include certain language in its contracts with its general contractor(s) to ensure the importance of the contracting target is communicated to the general contractor(s). The name of the document was also changed to make clear the developer is entering into an “Agreement” rather than an “Understanding”. Other standard contractual terms, such as provisions regarding successors and assigns, notices, severability, amendments, etc., have also been added.

Incentives to Encourage Capacity Building

A priority of the District of Columbia is to assist local businesses in developing greater capacity, technical capabilities and valuable experience, especially in areas of development and construction related services. To accomplish this goal, private developers will have the right to earn and receive certain incentives for engaging in activities that are likely to create broader opportunities for CBEs generally, and to facilitate capacity building for Disadvantaged Business Enterprises (“DBEs”) in particular. Such incentives, when earned by private developers, will be applied by DSLBD to reduce the developer’s overall CBE utilization requirements.

Contingencies

Under the old MOU, there were no consequences if the developer did not meet its contracting goal. Developers therefore had little incentive to make the effort to use local businesses and the District had no recourse if the Developer failed to follow through on its agreement to try to use local businesses. To ensure that private developers do not ignore their responsibilities to contract with local businesses, the new agreements contain contingencies should the developer not meet its contracting targets. The type of contingency will depend on the type of economic assistance the developer receives from the District.

- In cases where the developer is receiving direct financing, such as a grant from the Office of the Deputy Mayor for Planning and Economic Development (“ODMPED”), DSLBD will escrow a portion of the grant funds, and if the developer does not meet its target, DSLBD will use the escrowed funds for other programs and services that assist small businesses with capacity building initiatives. The amount of the payments will depend on the degree to which the developer has fallen short of its contracting target. As the developer satisfies certain contracting milestones, the escrowed funds will be released to the developer.
- In cases where the developer receives conduit financing through the District, as in the case of Industrial Revenue Bonds (“IRBs”), DSLBD will grade the IRB recipients based on their contracting performance, but will not require monetary payments for deficient compliance. ODMPED, which administers the IRB program, may consider an applicant’s previous grade as part of the application process for future IRBs.
- A developer that receives some other type of economic assistance (*e.g.*, TIFs, PILOTs, PUDs, tax abatements, zoning adjustments, etc.) may generally expect the CBE Agreement to contain a contingency that falls somewhere between (1) escrowed funds and (2) grades for performance.

Equity & Development Participation Requirements

Where appropriate, the new agreements also include the equity and development participation requirements for local, small and disadvantaged business enterprises. Under District law, local, small and disadvantaged business enterprises must receive at least 20% in equity and development participation in all development projects supported by District funds or that take place on District owned property, including all development projects undertaken by government corporations or development projects where District owned real property is transferred to a third party. See D.C. Official Code § 2-218.49a.

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For questions about the new CBE Agreements, please contact:

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