



CONSTRUCTION LAW E-UPDATE

M/WBE & DBE COMPLIANCE UPDATE – Revisited

JANUARY 2011

Our recent “M/WBE & DBE Compliance Update” (December 13, 2010) has generated numerous interesting responses. This underscores the clear need for additional information regarding this complex, highly regulated area which is getting more and more enforcement attention every day. (In this regard, note that NYC Comptroller John C. Liu has just (12/23/10) issued a new audit entitled “More Agencies Fail in Contracting with Minorities and Woman” citing NYC-DDC and Parks Dept. deficiencies in Local Law 129 enforcement.)

Among the responses we received, was an inquiry regarding the recognition for purposes of goal compliance of “supplier” dollars on “City” projects. For example, approximately 80% of New York City DEP contracts are funded through New York State revolving funds to which different rules (i.e., from NYC normal rules) apply. Therefore, applying normal NYC rules to certain NYC-DEP projects could lead to difficulties.

The solution, as is so often the case, is to “follow the money”. Do not look so much to the identity of the owner-agency, as to the source of the project’s funding. This sounds arcane, but is precisely what has happened for decades regarding prevailing wage regulation. Whether NYS Labor Law § 220 or the federal Davis Bacon Law would apply to any given situation has depended not on the identity of the owner of a particular project, but on the funding for the project. If any federal dollars are spent on a NYC or NYS project, Davis Bacon, and not Labor Law § 220, will apply.

Along these same lines, we received a question regarding our prior statement concerning credit for supplies purchased from an M/WBE, namely, “NYC: only gives a credit up to 25% of total goal for the entire project.” We would like to provide additional clarification on this point. This statement does apply to NYC projects financed through the NYS Revolving Funds. It applies, for example, to the 80% of NYC-DEP projects referenced above. However, it does not apply to projects which are exclusively funded by NYC. In those instances, there are no credits given for purchases from a certified M/WBE operating solely as a supplier.

If you have any questions in this regard (which would certainly be understandable), please feel free to make further inquiries of us, or contact the appropriate representatives of the owner/agency involved. For now, please be vigilant as to the source of your particular project’s funding and the M/WBE or DBE requirements set forth in the project’s bid package.

We would like to thank John Chapman, NYC Dept. of Small Business Services, and Alan Wasserman, NYC Dept. of Environmental Protection, for their assistance in confirming the foregoing.

Finally, this memorandum is not intended to, nor can it, be a substitute for your obtaining individualized legal advice related to your particular situation, project, or agency. Please be certain to obtain legal advice based on your own particular and actual circumstances.