

NOME Leadership Summit

“Enhancing Capacity and Experience”

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Current Governmental Marketplace

- Government contracting is **BIG BUSINESS!!!**
- Significant opportunities for government consultants
- DBE/MBE/WBEs must perform a “*commercially useful function*”
- Government contracts are highly regulated
- Regulations often are complex, extensive, unclear, and inconsistent
- Significant efforts by to reduce waste, fraud, and abuse in government contracting
- **Government investigations, audits, and enforcement have drastically increased**

DBE Fraud

A contractor who misrepresents which companies performed the contract work in order to increase job profit while appearing to be in compliance with contract goals for involvement of minority or women-owned businesses.



DBE Program

DBE Program

- Local recipients of DOT funds
 - ✓ Illinois Department of Transportation (IDOT)
 - ✓ Chicago Department of Transportation (CDOT)
 - ✓ Chicago Transit Authority (CTA)
 - ✓ Metra
 - ✓ Pace
- DOT is responsible for ~
 - ✓ Developing rules and regulations for national DBE program
 - ✓ Providing guidance to and oversight of funding recipients



DBE Program

Good Faith Efforts

“Good Faith Efforts” are actions undertaken by a bidder or contractor to achieve a contract specific goal that, by their scope, intensity and appropriateness to the objective, can reasonably be expected to fulfill the DBE program requirements.

Contract Monitoring and Compliance

“Contract monitoring and compliance” occurs when agencies and prime contractors undertake certain tasks during the project to ensure that the DBE contract participation goals are achieved by certified firms that actually perform the work.



DBE Program

Commercially Useful Function

DBEs must perform a “commercially useful function” in order for their contract participation to be counted towards the goals by governing agencies. A DBE performs a commercially useful function when it is responsible for the execution of the work and is carrying out its responsibilities by actually performing, managing, and supervising the work involved.



DBE Program

Commercially Useful Function (cont'd)

- ▶ In addition to performing, managing, and supervising the work involved, DBEs must be responsible for ~
 - ✓ Materials and supplies used on contract
 - ✓ Negotiating price
 - ✓ Determining quality and quantity
 - ✓ Ordering and installing materials
 - ✓ Paying for materials



What is Fraud?

Criminal False Claims Act (US Code)

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency, any claim upon or against the United States, or any department or agency, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and be subject to a fine.



What is Fraud?

Illinois False Claims Act (IL Compiled Statutes)

Any person who knowingly makes, uses or causes to be made or used, a false record or statement material to an obligation to the State... is liable to the State for a civil penalty of not less than \$5,500 and not more than \$11,000, plus 3 times the amount of damages which the State sustains.



What is Fraud?

- **Recent Case Studies (2015/2016)**

- **Georgia** - HD Supply Waterworks, Ltd

- **New York**

- ✓Yonkers Contracting Inc.

- ✓ING Civil

- **North Carolina** – Boggs Paving, Inc.

- **Pennsylvania** –

- ✓Century Steel Erectors Co.

- ✓Karen Construction and Carl M. Weber Steel Service

- ✓Vertech International



Common Penalties

Penalties for Noncompliance

- ▶ Default may be declared by governing agency
- ▶ Contract may be terminated
- ▶ Contractor, its employees and DBEs may be debarred
- ▶ Contractor, its employees and DBEs may be suspended
- ▶ DBEs may be decertified
- ▶ Payments may be withheld by agency until corrective action is taken
- ▶ Agency may assess liquidated damages
- ▶ Contractor may terminate responsible persons
- ▶ Agency may refer matter to appropriate agencies for criminal investigation, prosecution and/or fines
- ▶ **Imprisonment of responsible persons**



Lessons Learned

- DBE steel supplier cannot arrange for steel to be drop shipped to project site by manufacturer. DBE must manufacture or store steel; and deliver/ship steel
- Prime cannot report that DBEs performed work if it or another non-DBE actually performed the work
- Prime cannot pay non-DBEs through DBE
- DBE should not enter into subcontract to perform work that it knows it cannot perform. DBE must have the labor, equipment and finances to do the work
- DBE cannot arrange for third parties to perform their subcontract work for a mark-up or fee
- Prime cannot perform the work of its DBE



Lessons Learned

- Prime cannot set up DBE front company with ex-employee or family member to obtain DBE participation credit
- Prime cannot control DBE's sales, marketing, project selection and price estimating, purchasing, project supervision and/or hiring
- DBE cannot share computer network, office space, equipment, fuel, materials and employees with prime
- Prime cannot direct its employees and DBEs to falsify payroll and procurement records regarding its DBE contract participation
- **DBE must perform CUF!** Prime cannot negotiate prices with suppliers of their DBEs; obtain supplies for their DBEs; order and install materials for their DBE; and/or pay for the materials for their DBE
- Non-DBE subcontractor cannot misrepresent its DBE second-tier participation to prime and cause prime to submit false certifications to government



How to be the Preferred “Top One” Government Contractor

- Understand the bidding and contracting process: know current laws, regulations, statutes, codes and ordinances
 - ✓ Complex area of law which changes often
 - ✓ Ignorance of the law is no excuse!
- Governing agencies have different rules, regulations, and contract requirements or they may interpret the same rules differently
- Seek contract opportunities that make sense
- Conduct thorough review of and carefully follow RFP/RFQ/IFB/RFIs (including schedules, clauses, attachments)
- Submit timely, competitive, responsive, solution-focused proposal
- Must understand government’s needs; must articulate how you will deliver an appropriate solution; and must convince government that you are the best fit to perform work



How to be the Preferred “Top One” Government Contractor

- Ask for debriefing if you aren’t selected for contract
- Ask your attorney to review your contracts before you sign them
- Supervise and train your employees
- Perform a “commercially useful function”
- Conduct compliance review/audits of current projects
- Submit accurate DBE contract participation information
- Report prime contractors that ask you to be a “front company” for them to obtain DBE contract participation credit or ask you to submit false claims/records
- **Knowledge is everything!** Participate in NOME and other business groups (GCBF) to network and share information
- Seek guidance from your attorney and other experienced contracting professionals

THANK YOU!
QUESTIONS & ANSWERS