

Henry L. Goldberg



Stephen L. Brodsky

M/WBE Regulatory Compliance- "MAKE THE EFFORT/GET THE WAIVER"

by: *Henry L. Goldberg & Stephen L. Brodsky*

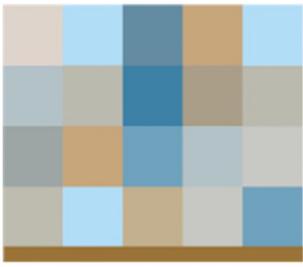
As discussed in the first of this two-article series, public agencies often inappropriately pressure contractors to meet M/WBE participation “goals” on projects as if such goals were strict quotas or mandates. They are not.

With Governor Cuomo’s drastically increased 30% goal for M/WBE participation, coupled with the shortage of qualified M/WBEs in the State and the resulting threat of liquidated damages, bidders feel their “backs are to the wall,” and that they are without recourse. In fact, however, under both the applicable New York State law and regulations, the correct procedure is that you either: (1) meet the goals or (2) clearly demonstrate your good faith effort to do so. That’s it. (See 5 NYCRR §§ 142.7 and 142.8.)

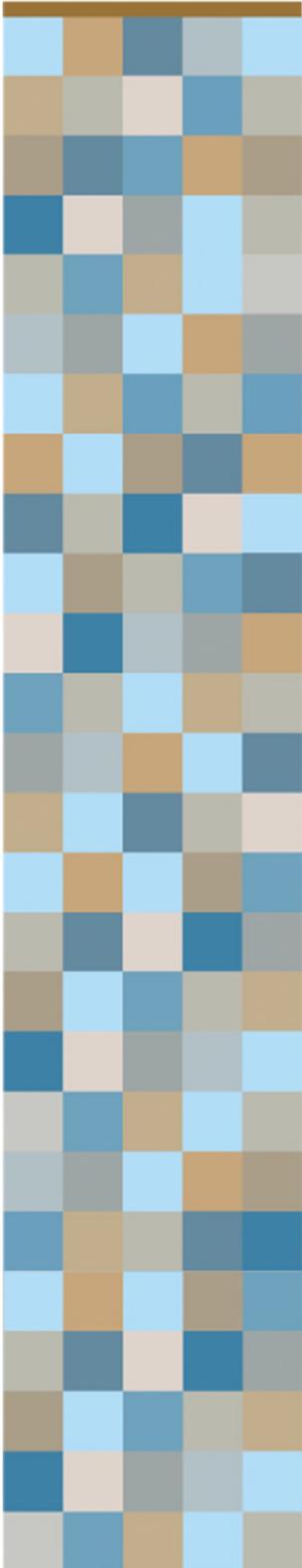
This is because the United States Supreme Court, in its landmark City of Richmond v. Croson decision, correctly observed that all governmental race-based classifications are inherently suspect and, thus, require the “most exacting” judicial examination and review. As a result, the rules and regulations established for the State’s M/WBE program do, in fact, provide bidders with a remedy if a contractor genuinely cannot meet a project’s M/WBE goals. They expressly allow for a bidder to request a partial or complete waiver of a project’s M/WBE participation goal requirements upon the bidder’s satisfactory demonstration of its “good faith efforts” to meet such goals. As stated in our earlier article, such a waiver is not a privilege, it’s your right.

In today’s legal and political environment, it is of the utmost importance for bidders to clearly know their legal rights and how to best protect them. Getting creative with M/WBE compliance has gotten too many contractors, including some of our region’s largest, into serious trouble. This article will discuss best practices for contractors to follow to effectively establish their good faith efforts and obtain a waiver when needed.

You should first know that, when determining whether to grant a waiver, in addition to a contractor’s documented good faith efforts, agencies are to consider: (1) the number and types of M/WBEs available (and capable) to perform the subcontractable scopes of work of the contract; (2) the total dollar value of the State contract; (3) the contract scope of



CONSTRUCTION LAW ALERT



work to be performed; (4) the project size; (5) the project term; (6) the availability of other business enterprises located in the region qualified to do the work to be performed; (7) the ability of certified M/WBEs located outside the region to perform the State contract; and (8) the extent to which the contractor's own actions contributed to the contractor's inability to meet the maximum feasible portion of the contract goals. *See* 5 NYCRR § 142.7(a)

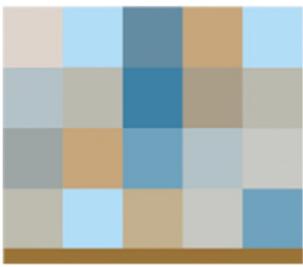
The timing of a waiver request is strategically important. While waivers may be requested either before or after a bid, it is best for a potential bidder to request a waiver prior to the contract letting process. This will enable adequate time for the agency to review the request as well as issue a needed amendment to the M/WBE goal for the project.

State regulation (5 NYCRR § 142.7(d)) lists nine items of information that agencies should request of contractors in their agency waiver request forms. Such items include the names of publications in which bids were solicited by you for purposes of complying with M/WBE goal requirements; the dates for which bid solicitations for certified M/WBEs were published in such publications; a list of the certified M/WBEs in the directory which were solicited in writing; proof of the dates of the solicitations; copies of responses from the solicited M/WBEs; and a statement setting forth the contractor's basis for requesting a partial or total waiver. Be sure to provide all of the information requested in the agency's waiver form.

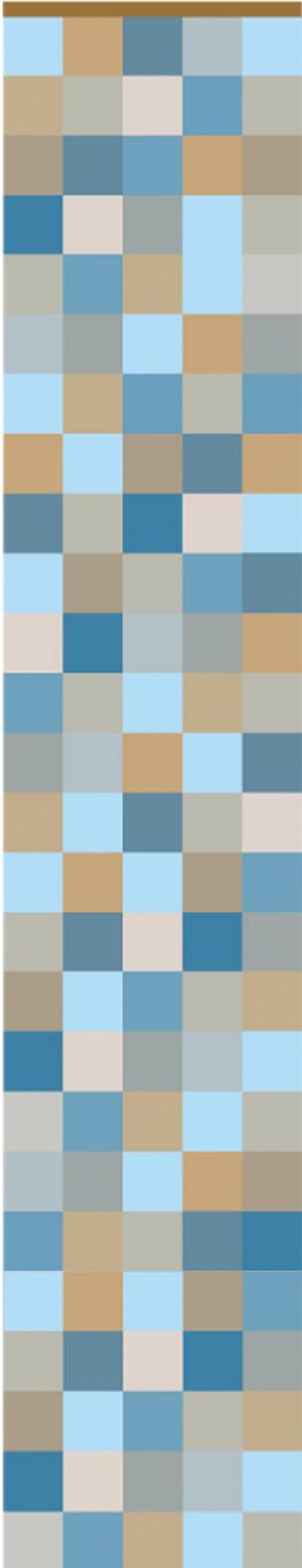
But, more than that, with your project's utilization plan, you should submit a comprehensive and detailed Good Faith Effort "package" that includes clear and complete documentation of all of your efforts. The key is to (overwhelmingly) establish the extent of your efforts, albeit unsuccessful, to secure M/WBEs that are actually qualified and available to meet your plan's participation goal.

You must demonstrate that you:

1. Actively solicited, through all reasonable and available means, certified M/WBEs, in the relevant region, that are qualified and capable of performing the required work on the contract. At a minimum, you should seek out certified M/WBEs within 75 to 100 miles of the region in which the contract is to be performed. Check if the contracting agency has guidelines on the radius, and if it does, follow them. It is important to use the services of M/WBE-focused media, as well as M/WBE trade associations and affinity groups in doing so. In addition, reach out to M/WBE "assistance offices" and similar organizations in your outreach efforts.
2. Follow up on your initial solicitations, to determine whether the M/WBEs you contacted are, in fact, interested. In connection with your follow-up, you should timely provide any and all interested M/WBEs with adequate and relevant



**CONSTRUCTION LAW
ALERT**



contract plans, specifications and other information to enable them to respond to your solicitation.

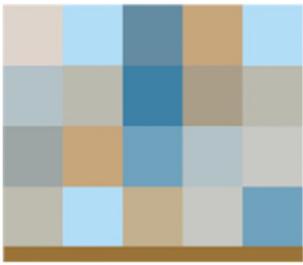
3. Maintain proof of your good faith negotiations with interested M/WBEs, by keeping a log of the names, addresses and contact information of M/WBEs you considered; a description of the contract information you provided; documentation as to your efforts to assist interested M/WBEs with bonding, lines of credit, insurance and the like, and the reasons as to why agreements could not be reached. Keep in mind that the fact that locating and using an M/WBE may be more costly is not an adequate basis for your inability to satisfy a contract's M/WBE participation goals.
4. Again... document, document, document! Then repeat!

The documentation of your good faith efforts must, at a minimum, include: (1) copies of all of your solicitations of certified M/WBEs, any responses you received, and documents or logs evidencing your follow-up efforts; (2) if a response by an M/WBE was received but the M/WBE was not selected, the specific reasons why the M/WBE was not selected; (3) copies of your advertisements in appropriate general and M/WBE-oriented publications, with the listings and dates of the publications of such advertisements; (4) the dates of attendance at any pre-bid, pre-award or other meetings scheduled by the agency awarding the contract, with certified M/WBEs which the agency determined were capable of performing the scope of work; and (5) information describing the specific steps you undertook to reasonably structure the contract scope of work for the purpose of subcontracting with, or obtaining supplies from, certified M/WBEs. *See* 5 NYCRR § 142.8(a). This is the minimum.

Agencies will also consider other matters to determine whether a contractor has demonstrated good faith efforts, such as, among other things, the number of certified M/WBEs in the region listed in the directory of certified business that could, in the judgment of the State agency, perform the work of the contract's scope of work; the actions taken by the contractor to contact and assess the ability of certified M/WBEs located outside the region in which the contract is to be performed to participate on the contract; and whether the contractor provided relevant plans and specifications to certified M/WBEs sufficiently in advance to enable their participation. *See* 5 NYCRR § 142.8(b).

HLG Commentary:

By carefully following these steps, documenting them, and providing the documentation in your comprehensive Good Faith Effort package along with your utilization plan, you will maximize your chances of obtaining the waiver you are entitled to under the law. By clearly demonstrating your good faith efforts to secure the M/WBE participation goal requirements, with clear, detailed and abundant documentation, you will essentially create



**CONSTRUCTION LAW
ALERT**



This Alert was written by Henry L. Goldberg and Stephen L. Brodsky.

Mr. Goldberg, a partner with the firm, chairs the firm's Construction Practice Group where he handles all facets of complex construction law related matters.

Mr. Brodsky, an associate of the firm, concentrates his practice on all aspects of complex commercial litigation and construction law related matters.

Moritt Hock & Hamroff LLP is a broad based commercial law firm with more than 70 lawyers and a staff of patent agents and paralegals. The firm's practice areas include: alternative dispute resolution; commercial lending & finance; construction; copyrights, trademarks & licensing; corporate & securities; creditors' rights & bankruptcy; cybersecurity; employment; equipment & transportation leasing and finance; healthcare; landlord & tenant; litigation; marketing, advertising & promotions; mergers, acquisitions & private equity; not-for-profit; patents; real estate; tax; and trusts & estates.

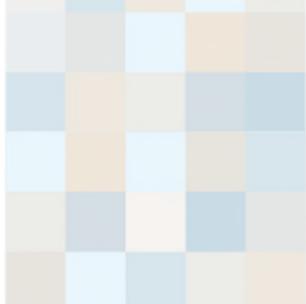
a *de facto* "safe harbor" from the contract's M/WBE participation goals. Earn your waiver!

Any issues raised in this Alert may be addressed to either Mr. Goldberg or Mr. Brodsky who can be reached at: (516) 873-2000 or by email at hgoldberg@moritthock.com or sbrodsky@moritthock.com.



This Alert is published solely for the interests of friends and clients of Moritt Hock & Hamroff LLP for informational purposes only and should in no way be relied upon or construed as legal advice.

©2017 Moritt Hock & Hamroff LLP



Attorney Advertising

