



## **Synopsis Of Changes In The Law**

*(Revised March 18, 2015)*

The Small and Certified Business Enterprise Development and Assistance Amendment Act of 2014, L20-0108, became applicable October 1, 2014 (“2014 Act”). The 2014 Act significantly amends the Small, Local and Disadvantaged Business Enterprise Development and Assistance Act of 2005 (“Old Law”). The 2014 Act makes significant changes to the laws affecting the Certified Business Enterprise (“CBE”) program by, among other things: Abolishing the Small and Local Business Opportunity Commission (“Commission”) and authorizing the Office of Administrative Hearings to hear appeals; Requiring government assisted projects, District contracts and private projects with District subsidies over \$250,000, to subcontract 35% with Small Business Enterprises; Granting the Department of Small and Local Business Development (“DSLBD”) the authority to impose civil penalties and fees; and, Enhancing the penalties for noncompliance with existing subcontracting requirements and the 2014 Act. The following summarizes some of the major aspects of the 2014 Act, highlighting changes to the Old Law.

***\*(This revised synopsis incorporates the changes to the 2014 Act made by the Small and Certified Business Enterprise Waiver and Recertification Amendment Act of 2014, L20-0234, which became effective March 11, 2015).***

### **Abolishment of the Commission**

- The 2014 Act abolished the Commission by repealing D.C. Code § 2-218.21 (Establishment of the Commission), D.C. Code § 2-218.22 (Functions of the Commission), and D.C. Code § 2-218.25 (By-laws and Internal Rules of the Commission) in their entirety; and by purging the Old Law of any references to the Commission. **NEW CHANGES**
- A business may now appeal the following directly to the Office of Administrative Hearings (OAH): **NEW CHANGES**
  - A denial of an application for certification;
  - The revocation or change to a previously issued certification; or
  - An enforcement action taken pursuant to the 2014 Act.

### **Functions of DSLBD, D.C. Code § 2-218.13** **NEW CHANGES**

- The 2014 Act changed § 2-218.13 of the Old Law, formerly titled “Organization and functions of the Department,” by removing the sections that outlined three primary offices within DSLBD (the Office of Certification, the Office of Business Opportunities and Access to Capital, and the Office of Training and Education); so that the section now solely addresses the functions of DSLBD.

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- The 2014 Act adds a new subsection (e), which states:
  - The Department, in coordination with the agency contracting officer, shall have the authority, in reviewing participation by CBEs, to disregard participation by a CBE when that CBE serves no commercially useful function in the performance of a contract. **NEW**

### **Certified Business Enterprises**

A Certified Business Enterprise or CBE is a business enterprise certified in any of eight categories. Certification as a Local Business Enterprise (LBE) is a prerequisite to being certified in any additional business enterprise category. Below are the requirements for each of the eight CBE categories.

### **Local Business Enterprise (LBE) D.C. Code § 2-218.31**

- Must have its principal office located physically in the District of Columbia;
- Must require that its chief executive officer and the highest level managerial employees of the business enterprise perform their managerial functions in their principle office located in the District; **NEW CHANGE**
- Must be able to demonstrate one of the following:
  1. More than 50% of the employees of the business enterprise are residents in the District;
  2. The owners of more than 50% of the business enterprise are residents of the District;
  3. More than 50% of the assets of the business enterprise, excluding bank accounts, are located in the District; **and**
    - More than 50% of the business enterprise's gross receipts are District gross receipts; **NEW**
- Must also be able to demonstrate one of the following:
  1. The business enterprise is licensed pursuant to Chapter 28 of Title 47 of the District of Columbia Official Code;
  2. The business enterprise is subject to the tax levied under Chapter 18 of Title 47 of the District of Columbia Official Code; or
  3. The business enterprise is a business enterprise identified in § 47-1808.01(1) through (5) of the District of Columbia Official Code and more than 50% of the business is owned by residents of the District.

### **Small Business Enterprise (SBE) D.C. Code § 2-218.32**

- Must be a LBE;
- Must be independently owned, operated, and controlled; and

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- Is certified by the United States Small Business Administration as a small business concern; **or** meets the definition of a small business concern under the Small Business Act (15 U.S.C.S. § 631 *et seq.*); or **NEW CHANGES**
- Has had average annualized gross receipts for the 3 years preceding certification not exceeding the limits to be established by DSLBD in regulations. **NEW CHANGES**
- Additional SBE certification requirements apply for business enterprises affiliated with another business enterprises through common ownership, management or control (see *D.C. Code § 2-218.32*).

### **Disadvantaged Business Enterprise (DBE)** *D.C. Code § 2-218.33*

- Must be a LBE; and
- Must be owned, operated, and controlled by economically disadvantaged individuals;
- Additional DBE certification requirements apply for business enterprises affiliated with another business enterprise through common ownership, management or control.

### **Resident-Owned Business (ROB)** *D.C. Code § 2-218.35*

- Must be a LBE owned by an individual who is, or a majority number of individuals who are, subject to personal income tax *solely* in the District of Columbia

### **Longtime Resident Business (LRB)** *D.C. Code § 2-218.36*

- Must be a business enterprise that has been continuously eligible for certification as a LBE for 20 consecutive years, or as a SBE for 15 consecutive years

### **Local Business Enterprise With Principal Offices Located In An Enterprise Zone (DZE)** *D.C. Code § 2-218.37*

- Principal office of LBE must be located in the area of the District designated as the District of Columbia Enterprise Zone under 26 U.S.C.S. § 1400 **or** an economic development zone designated by the Mayor and approved by the Council pursuant to D.C. Official Code § 6-1501 through 6-1504.

### **Veteran-Owned Business Enterprise (VOB)** *D.C. Code § 2-218.38* **NEW CHANGES**

- Must be a LBE; and
- Must not be less than 51% owned and operated by one or more veterans; and
- Must have one or more veterans control the management and daily operations; and
- In the case of any publicly owned business, must have not less than 51% of the stock of which is owned by one or more veterans.

### **Local Manufacturing Business Enterprise (LME)** *D.C. Code § 2-218.39* **NEW CHANGES**

- Must be a LBE; and
- Must make a product through a process involving raw materials, components, or assemblies, usually on a large scale, with different operations divided among different workers; and

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- Manufactures **only** in the District of Columbia. **NEW**

### Certified Joint Venture D.C. Code § 2-218.39a **NEW CHANGES**

- DSLBD has the authority to certify joint ventures for all public, public-private, and private projects **NEW**
- Joint ventures are certified for specific solicitations **NEW**
- A joint venture is eligible for certification if it has a member, with either a majority or minority interest, that meets the definition of a CBE
- DSLBD shall consider the totality of circumstances when determining a joint ventures eligibility for certification, including the defined contribution and defined benefits provided by each member of the joint venture
- If DSLBD determines that a CBE owns a majority interest in the joint venture, the joint venture will receive the preference points or price reductions that the CBE would receive in accordance with § 2-218.43; provided that if the certified joint venture is formed to serve as a general contractor, the joint venture must establish that: **NEW**
  - Any bond for the project is provided by the CBE, and the CBE is solely and individually liable as the principal to the surety for at least 51% of each claim asserted under the bond;
  - The CBE provides the individual primarily responsible for project decisions; and
  - The CBE provides at least 50% of the staff the joint venture devotes to the project.
- If DSLBD determines that the CBE owns a minority interest in the joint venture, DSLBD will indicate that in the joint venture's certification and specify the preference points and price reductions the joint venture shall receive, but in no event will those preference points or price reductions exceed 50% of the preference points or price reductions that would otherwise be applicable to a CBE **NEW**
- A joint venture shall relinquish its status as a certified joint venture if it is not awarded the contract, or if the solicitation has been withdrawn or cancelled **NEW**
- If a joint venture is awarded a contract, it will retain its certification status throughout the duration of the awarded contract **NEW**
- A joint venture will not be certified for the following: **NEW**
  - To meet the SBE and CBE subcontracting requirements of § 2-218.46
  - To meet the equity and development participation requirements of § 2-218.49a

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- DSLBD may adopt regulations that establish additional industry-specific requirements for the certification of a joint venture that has a majority interest held by a CBE **NEW**

### District Agency<sup>1</sup> Contracting & Procurement Goals D.C. Code § 2-218.41 **NEW**

#### **CHANGES**

- Each agency, including an agency that contracts or procures in whole or in part through the Office of Contracting and Procurement (OCP), shall exercise its contracting and procurement authority so as to meet, on an annual basis, the goal of procuring and contracting **50%** of the dollar volume of its expendable budget to qualified SBEs.
- If the agency determines in writing that there are not at least 2 qualified SBE's, the agency may use any qualified CBE to fulfill the requirements of this section. **NEW**
- An agency that cannot meet the goal of procuring and contracting **50%** of the dollar volume of its expendable budget to qualified SBEs (or CBEs) shall notify the Mayor and shall be prohibited from spending its remaining expendable budget with non-SBEs or non-CBEs. **NEW**
- The Mayor may waive the prohibition set forth above. **NEW**
- By October 1 of each year beginning October 1, 2015, each agency is required to submit to DSLBD a spending plan that details how the agency intends to spend its expendable budget with SBEs and CBEs during the fiscal year; and an annual allocation letter signed by the agency director on a form prescribed by DSLBD that specifies the agency's 50% expendable budget goal. **NEW**
- The contracting and subcontracting goals and requirements shall be applicable to every government-assisted project, unless DSLBD establishes a specific exemption for a particular type or class of government-assisted project, in DSLBD's regulations. **NEW**

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<sup>1</sup> “Agency” means an agency, department, office, board, commission, authority, or other instrumentality of the District government, with or without legal existence separate from that of the District government.” D.C. Code § 2-218.02(1).

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### **Bid and Proposal Preferences** D.C. Code § 2-218.43 **NEW CHANGES**

In evaluating bids or proposals, agencies shall award preferences as follows:

<b><u>CBE Category</u></b>	<b><u>Proposal Points</u></b>	<b><u>Bid % Price Reduction</u></b>
Small Business Enterprise	3	3%
Resident-Owned Business	5	5%
Longtime Resident Business	5	10%
Local Business Enterprise	2	2%
Enterprise Zone	2	2%
Disadvantaged Business Enterprise	2	2%
Veteran-Owned Business Enterprise <b>NEW</b>	2	2%
Local Manufacturing Business Enterprise <b>NEW</b>	2	2%

No CBE is entitled to a preference of more than 12 points or a reduction in price of more than 12 %.

### **Mandatory Set-Asides of District Agency Contracts for SBEs or CBEs** D.C. Code § 2-218.44

#### **NEW CHANGES**

- Each agency shall set-aside every contract or procurement of \$250,000 or less for qualified SBEs; provided that if the agency determines in writing that there are not at least 2 qualified SBEs that can provide the services or goods which are the subject of the contract the agency may use any qualified CBE to fulfill the requirements.
- An agency may decline to award a contract or procurement set aside and may thereafter issue the contract or procurement in the open market if the agency determines in writing that the bids for the contract or procurement set aside for a SBE or CBE are believed to be 12% or more above the likely price on the open market.
- Each of the written determinations mentioned above must be submitted to the Director of DSLBD, who will post a copy of the determination so that it can be reasonably accessed by the public via DSLBD's website.

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### **Mandatory Set-Asides of Contracts in the District Supply Schedule for SBEs or CBEs** D.C.

Code § 2-218.45 **NEW CHANGES**

- Each agency shall award contracts of \$250,000 or less to a qualified SBE included on the District Supply Schedule; provided, that if the agency determines in writing that there are not at least 2 qualified SBEs on the District Supply Schedule that can provide the services or goods which are the subject of the contract the agency may use any qualified CBE to fulfill the requirements.
- An agency may decline to award a contract or procurement set aside under this section and may thereafter issue the contract or procurement in the open market if the agency determines in writing that the bids for the contract or procurement set aside for a SBE or CBE are believed to be 12% or more above the likely price on the open market.
- Each of the written determinations mentioned above must be submitted to the Director of DSLBD, who will post a copy of the determination so that it can be reasonably accessed by the public via DSLBD's website.

### **Mandatory Set-Asides for SBEs or CBEs with Respect to Follow-on and Renewable**

**Acquisitions** D.C. Code § 2-218.45a **NEW**

- Where a contract or procurement is awarded by a District agency to a SBE or CBE, its follow-on or renewable acquisition shall be set aside for SBEs or CBEs.
- An agency that would like to fulfill a follow-on or renewable acquisition without using a SBE or CBE must:
  - Make a written request to the Director of DSLBD, and
  - Receive a written approval from the Director allowing the agency to waive the requirements of this section

### **Subcontracting Requirements for Construction & Non-Construction Contracts and**

**Subcontracting Plans** D.C. Code § 2-218.46 **NEW CHANGES**

- All construction contracts for *government-assisted projects*<sup>2</sup> in excess of \$250,000 shall include the following requirements:

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<sup>2</sup> D.C. Code § 2-218.02(9A) defines "government-assisted project" as:

- (A) A contract executed by an agency on behalf of the District or pursuant to statutory authority that involves District funds or, to the extent not prohibited by federal law, funds that the District administers in accordance with a federal grant or otherwise;
- (B) A project funded in whole or in part by District funds;
- (C) A project that receives a loan or grant from a District agency;
- (D) A project that receives bonds or notes or the proceeds from bonds or notes issued by a District agency, including tax increment financing or payment in lieu of tax bonds or notes, but not including industrial revenue bonds;
- (E) A project that receives District tax exemptions or abatements that are specific to the project and not to the nature of the entity undertaking the project, such as a religious institution or nonprofit corporation; or

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- At least **35%** of the dollar volume of the contract must be subcontracted to SBEs; **or**
  - If there are insufficient qualified SBEs to completely fulfill the 35% subcontracting requirement, then the subcontracting requirement may be satisfied by subcontracting 35% of the dollar volume to any qualified CBEs; provided that all reasonable efforts shall be made to ensure that qualified SBEs are significant participants in the overall subcontracting work.
  - CBEs who have been selected as the beneficiary of a government-assisted project, and who provide all of the goods and services for the project themselves, shall not have to comply with this 35% subcontracting requirement
- All non-construction contracts for government-assisted projects in excess of \$250,000, shall include the following requirements:
    - At least **35%** of the dollar volume of the contract shall be subcontracted to SBEs; **or**
    - If there are insufficient qualified SBEs to completely fulfill the 35% subcontracting requirement, then the subcontracting requirement may be satisfied by subcontracting 35% of the dollar volume to any qualified CBEs, provided that all reasonable efforts shall be made to ensure that qualified SBEs are significant participants in the overall subcontracting work.
    - CBEs who have been selected as the beneficiary of a government-assisted project, and who provide all of the goods and services for the project themselves, shall not have to comply with this 35% subcontracting requirement
- Each government-assisted construction and non-construction contract for which a CBE is selected as a beneficiary and is granted points or a price reduction or is selected through a set-aside program, shall include a requirement that the CBE perform at least 35% of the contracting effort with its own organization and resources.
    - If the CBE beneficiary subcontracts, 35% of the subcontracted effort must be with CBEs.
    - If the total contracting effort performed by the CBE is less than 35%, then the CBE shall be subject to enforcement by DSLBD, which may include civil penalties. **NEW CHANGES**
- Each government-assisted construction and non-construction contract for which a certified joint venture is selected as a beneficiary and is granted points or a price reduction or is selected through a set-aside program, shall include a requirement that the CBE perform at least **50%** of the contracting effort with its own organization and resources.

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(F) A development project conducted pursuant to a disposition under section 1 of An Act Authorizing the sale of certain real estate in the District of Columbia no longer required for public purposes, approved August 5, 1939 (53 Stat. 1211; D.C. Official Code § 10-801).



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- If the certified joint venture subcontracts, 35% of the subcontracted effort shall be with CBEs.
- If the total contracting effort performed by the CBE is less than 50%, then the business enterprise shall be subject to enforcement by DSLBD. **NEW**

### **CHANGES**

- Each government-assisted construction and non-construction project for which a CBE is utilized to meet the subcontracting requirements of this section shall include a requirement that the CBE perform at least 35% of the contracting effort with its own organization and resources. **NEW**
- Each government-assisted construction or non-construction project of \$1 million or less for which a CBE is selected as a beneficiary and is granted points or a price reduction or is selected through a set-aside program, shall include a requirement that the CBE perform at least **50%** of the on-site work with its own work force.
- Bids or proposals responding to solicitations, including an open market solicitation, shall be deemed nonresponsive and shall be rejected if the law requires a subcontracting plan and the beneficiary fails to submit a subcontracting plan that includes the following:

### **NEW CHANGES**

- The name and address of each subcontractor;
  - The current certification number of each SBE or CBE subcontractor;
  - The scope of work to be performed by each subcontractor; and
  - The price to be paid by the beneficiary to each subcontractor.
- The subcontracting plan shall be provided before the District accepts the submission of the bid or proposal.
  - A design-build project shall not be required to identify specific subcontractors as a condition precedent to performing preconstruction services; provided that a detailed subcontracting plan that meets the requirements above shall be submitted before entering into a guaranteed maximum price or such other contractual action authorizing the contractor to commence construction. **NEW**
  - No beneficiary shall be allowed to amend the subcontracting plan filed as part of its bid or proposal except with the consent of DSLBD's Director. Any reduction in the dollar volume of the subcontracted portion resulting from such amendment of the plan shall inure to the benefit of the District.
  - No multiyear contracts or extended contracts in which the options or extensions exceed \$ 1 million in value, which are not in compliance with the subcontracting requirements at the time of the contemplated exercise of the option or extension, shall be renewed or extended, and any such option or extension shall be void.

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- The subcontracting requirements may be waived by DSLBD's Director.
- A beneficiary shall submit to the agency contracting officer, project manager, District Auditor, and DSLBD Director copies of the executed contracts with the subcontracts identified in the subcontracting plan. Failure to submit copies of the executed contracts shall render the underlying contract voidable by the District.
- A beneficiary shall provide a quarterly report to DSLBD, agency contracting officer, project manager, and the District of Columbia Auditor, which shall include the following information for each subcontract with a subcontractor identified in the subcontracting plan:
  - The price to be paid by the beneficiary to the subcontractor under the subcontract;
  - A description of the goods procured or the services subcontracted for;
  - The amount paid by the beneficiary to the subcontractor under the subcontract; and
  - A copy of the fully executed subcontract, if the fully executed subcontract was not provided in a prior quarterly report
- If the fully executed subcontract is not included with a quarterly report, the beneficiary shall not receive credit toward the subcontracting requirements of this section for that subcontract. **NEW**
- The beneficiary shall meet on an annual basis with DSLBD, agency contracting officer, project manager, and District Auditor to provide an update of the subcontracting plan for utilization of SBEs and CBEs. **NEW**
- The beneficiary shall provide written notice to DSLBD and the District of Columbia Auditor upon the initiation and completion of a project. **NEW**
- A beneficiary, CBE, or member of a certified joint venture that fails to meet the requirements of this section shall be subject to penalties. **NEW**
- These obligations shall expire upon completion of the development or other activity that serves as the basis for such activity qualifying as a government-assisted project; provided, that the Mayor shall have the authority to negotiate any extensions under this section in the transaction documents that qualify an activity as a government-assisted project. **NEW**

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### **Enforcement & Penalties for Breach of Subcontracting Plan** D.C. Code § 2-218.48 **NEW**

#### **CHANGES**

- For any subcontracting plan required by law, the beneficiary shall be deemed to have breached the subcontracting plan for utilization of SBEs or CBEs in the performance of the contract if the beneficiary: **NEW CHANGES**
  - Fails to submit subcontracting plan monitoring or compliance reports or other required subcontracting information in a reasonably timely manner;
  - Submits a monitoring or compliance report or other required subcontracting information containing a materially false statement; or
  - Fails to meet the subcontracting requirements of 2-218.46.
- A contractor that is found to have breached a subcontracting plan for utilization of CBEs shall be subject to the imposition of penalties, including monetary fines, pursuant to §2-218.63. **NEW CHANGES**

### **Equity Participation and Development Participation** D.C. Code § 2-218.49a **NEW**

#### **CHANGES**

- In all development projects conducted pursuant to a disposition authorizing the sale of certain real estate in the District no longer required for public purposes under DC Code §10-801, **Small Investors**<sup>3</sup>, **Disadvantaged Investors**<sup>4</sup>, or **Certified Equity Participants**<sup>5</sup> shall invest a minimum of 20% of the total sponsor equity, excluding debt financing, mezzanine financing, or other equity contributions by limited or institutional investors. **NEW CHANGES**
- A Project sponsor must demonstrate its intent and ability to meet the 20% equity requirement of this section prior to the transfer of any District-owned property for the project. **NEW**
- In meeting the equity investment requirement, a certified equity participant may be a 100% sponsor of a component of a covered project; provided, that the certified equity participant's participation totals 20% of the total equity of the covered project. **NEW**
- For each government-assisted project involving development, in addition to the 35% subcontracting requirements of §2-218.46, at least 20% of the dollar volume of non-

<sup>3</sup> Pursuant to §2-218.02(16A), "Small Investor" means: (A) a SBE; or (B) A District-domiciled individual with a net worth that does not exceed the limit set by DSLBD for investors.

<sup>4</sup> Pursuant to §2-218.02(5A), "Disadvantaged Investor" means: (A) a DBE; or (B) A District-domiciled economically disadvantaged individual as determined by regulations promulgated by DSLBD.

<sup>5</sup> Pursuant to §2-218.02(1F), "Certified Equity Participant" means a single-purpose legal entity created to participate in real estate development projects and includes members that are Small Investors and Disadvantaged Investors.

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construction development goods and services shall be subcontracted to SBEs, if there are insufficient qualified SBEs to completely fulfill this requirement, then the requirement may be satisfied by contracting 20% of that dollar volume to any qualified CBEs; provided that all reasonable efforts shall be made to ensure that qualified SBEs are significant participants in the overall development goods and services work. **NEW**

- No more than 25% of the total 20% of equity participation (equal to 5% of the overall non-institutional equity contributed to the project) may be met by a CBE providing development services in lieu of a cash equity investment that will be compensated by the developer in the future at a date certain (“sweat equity contribution”).
- In the case of a sweat equity contribution, the developer and the CBE shall enter a service agreement describing the following:
  - A detailed description of the work that the CBE will perform;
  - The dollar amount that the CBE will be compensated for its services and the amount the CBE is foregoing as an investment in the project;
  - The date or time period the CBE will receive compensation;
  - The return, if any, the CBE will receive on its sweat equity contribution; and
  - An explanation of when the CBE will receive its return as compared to other team members or investors.
- The equity and development participation requirement does not apply if the entity that controls the development project is an entity tax-exempt under 26 U.S.C.S. § 501(c), or other not-for-profit entity.

### **Special Requirements for Government Corporations D.C. Code § 2-218.50 IS REPEALED BY THE 2014 ACT**

- The 2014 Act includes Government corporations, or instrumentalities of the District government, are in the definition of agency, therefore those instrumentalities are subject to the provisions of the 2014 Act and the entire DSLBD statute.

### **Waiver of Subcontracting Requirements D.C. Code § 2-218.51 **NEW CHANGES****

- The subcontracting requirements of §2-218.46 may be waived only if there is insufficient market capacity for the goods and services that comprise the project and such lack of capacity leaves the contractor commercially incapable of achieving the subcontracting requirements at a project level.

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- An agency<sup>6</sup> seeking waiver of the subcontracting requirements of §2-218.46 must submit to DSLBD's Director a request for waiver, which must include the following:
  - The number of CBEs, if any, qualified to perform the elements of work that comprise the project;
  - A summary of the market research or outreach conducted to analyze the relevant market; and
  - The consideration given to alternate methods for acquiring the work to be subcontracted in order to make the work more amenable to being performed by CBEs.
- Before DSLBD's Director can approve an agency's waiver request the Director shall: 1) send an electronic notice to all CBEs notifying them of the agency's waiver request; and 2) post a copy of the agency's waiver request on DSLBD's website (or other location established by DSLBD) for ten (10) days to provide the public reasonable notice of the waiver request. **NEW**
- Only DSLBD's Director can waive the subcontracting requirements of §2-218.46. If DSLBD's Director approves an agency's request for waiver of the subcontracting requirements of section 2346 and grants such a waiver, the Director's determination shall be in writing and shall set forth the information outlined in the waiver request.

### **Enforcement Mechanism Against an Agency** D.C. Code § 2-218.52 **NEW CHANGES**

- The performance plan for each agency shall include a metric for compliance with the provisions of the 2014 Act and the performance evaluation for each agency director shall reflect the agency's success in meeting those compliance goals. **NEW**

### **Agency Reporting Requirements** D.C. Code § 2-218.53 **NEW CHANGES**

- In addition to the report of prime contracting activity, each agency shall also submit to DSLBD and the District Auditor within 30 days of the end of each quarter, a report on a contract basis of payments made by beneficiaries to subcontractors that are CBEs, and such payments shall be reported against the amounts included in the approved detailed CBE subcontracting plan. **NEW**

### **DSLBD Reporting Requirements** D.C. Code § 2-218.54 **NEW CHANGES**

- In addition to DSLBD's reporting requirements to the District Auditor, on a semiannual basis DSLBD must report the following to the Chairman of the Council committee with purview over DSLBD:
  - District Agencies' compliance with §2-218.41;

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<sup>6</sup> A waiver request must come from an agency; not the beneficiary.

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- A list of contracting opportunities for SBEs and CBEs with District agencies;
- A list of projects in the District that require a 35% minimum subcontracting requirement in accordance with §2-218.46;
- A list of beneficiaries, SBEs, CBEs, or certified joint ventures that fail to meet the 35% minimum subcontracting requirements of §2-218.46;
- A list of projects in the District that have 20% equity and development participation requirements in accordance with §2-218.49a;
- A list of the beneficiaries that fail to meet the 20% equity and development requirements of §2-218.49a;
- A list of District government contracts or procurements and government assisted projects that were granted waivers or modifications to the requirements set forth in §2-218.46;
- A list of District agencies that fail to meet the requirements set forth in §2-218.41; and
- A list of SBEs and CBEs.

### **DSLBD's Certification and Recertification Process D.C. Code § 2-218.61 **NEW CHANGES****

- The certification period is extended from two (2) years to three (3) years<sup>7</sup> **NEW**
- A CBE that has had no material change in its business status can obtain recertification by submitting a written application for recertification (on a form prescribed by DSLBD). The application must include: **NEW**
  - A sworn affidavit attesting that the CBE has had no material change and still meets the certification requirements<sup>8</sup>; and, **NEW**
  - Proof of clean hands and good standing required by D.C. Code §§ 47-2861 and 29-102.08. **NEW**
- “Material change” is defined as a change in a business’ ownership, address, or size (if a SBE). **NEW**
- A CBE that meets the requirements above is deemed recertified upon the submission of the written application. [See footnote 10 below.] **NEW**

### **Provisional Certification D.C. Code § 2-218.62 **IS REPEALED****

<sup>7</sup> CBEs may still receive certification numbers that reflect a two-year expiration while DSLBD works to reprogram the system that automatically generates those numbers. Affected CBEs will receive an accompanying letter reflecting the correct expiration date.

<sup>8</sup> Since the 2014 Act changed the requirements for certification, only CBEs that have been certified once under the 2014 Act’s requirements (i.e., all CBEs that are re-certified on or after October 1, 2014 and after expiration apply for re-certification) can attest that there is no material change and that the CBE still meets the certification requirements. Such CBEs are eligible for recertification under this new process.

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### **Revocation of Registration & Penalties** D.C. Code § 2-218.63 **NEW CHANGES**

- It will be a violation of the 2014 Act, and penalties shall be assessed if DSLBD determines that:
  - A beneficiary, CBE, or certified joint venture fails to comply with the requirements set forth in §2-218.46, §2-218.48, or §2-218.49a;
    - DSLBD shall assess a civil penalty of:
      - not more than \$5,000 for the first offense;
      - not more than \$15,000 for the second offense; and
      - For each offense thereafter, DSLBD's Director shall refer the matter to the District Attorney General , who may bring a civil action in the District Superior Court against the beneficiary, CBE, or certified joint venture and its directors, officers, or principals
        - If the District Attorney General does not bring a civil action, DSLBD shall assess a civil penalty of not more than \$25,000; and
        - DSLBD shall refer the matter to the District Office of Contracting and Procurement (OCP), including matters involving agencies not subject to OCP authority, for investigation. If OCP determines that more than 2 violations have occurred, the beneficiary, CBE, or certified joint venture shall be:
          - Debarred from consideration of award of contracts or subcontracts with the District government for a period of not more than 5 years; and
          - Deemed ineligible from consideration for government assisted projects with the District government for a period of not more than 5 years;
  - A CBE:
    - Acted with gross negligence, financial irresponsibility, or misconduct in the practice of a trade or profession;
    - No longer qualifies as a LBE; or
    - Misrepresents its capability to DSLBD;
      - DSLBD shall suspend or revoke the certification of a beneficiary, CBE or certified joint venture determined to have committed any of the violations of this subsection (§2-218.63(a)(2)).
  - A beneficiary, CBE, or certified joint venture has:
    - Fraudulently obtained or held certification;
    - Willfully obstructed or impeded, or attempted to obstruct or impede, a city official or employee investigating the qualifications of a business enterprise that has requested certification;
    - In any CBE matter administered under the 2014 Act:

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- Fraudulently obtained, attempted to obtain, or aided another person in fraudulently obtaining or attempting to obtain, public moneys to which the person is not entitled under this subsection;
- Willfully falsified, concealed, or covered up a material fact by any scheme or device;
- Made a materially false statement or representation;
- Used a false writing or document that the person knows to contain a false statement or entry;
- Aided another person in performing an act prohibited under the above sections.
- Furnished substantially inaccurate or incomplete ownership or financial information;
- Failed to report changes that affect its eligibility for certification, including relocation of its principal office or change in ownership or control;
- Willfully violated any provision of the 2014 Act, or rules adopted pursuant to it;
- Substantially failed to operate and manage a certified joint venture in accordance with §2-218.39a;
- Knowingly and willfully submits a monitoring or compliance report or other required subcontracting information containing a materially false statement or knowingly and willfully violates the terms of a subcontracting plan; or
- Committed any other cause DSLBD determines to be sufficiently serious and compelling to affect responsibility as a District government contractor, including revocation, suspension, or debarment by another governmental entity for any cause listed in the rules and regulations.
  - DSLBD shall suspend or revoke the certification of a beneficiary, CBE, or certified joint venture determined to have committed any of the violations of this subsection (§2-218.63(a)(3)); and
  - The District Attorney General may bring a civil action in the District Superior Court against the beneficiary, CBE, or certified joint venture and its directors, officers, or principals. An individual, beneficiary, CBE, or certified joint venture found to be in violation of this subsection (§2-218.36(a)(3)) shall be subject to a civil penalty of the greater of \$100,000 or triple the profit earned by the individual, beneficiary, CBE, or certified joint venture on all contracts awarded; and
  - DSLBD shall refer the matter to OCP, including matters involving agencies not subject to OCP authority, for investigation. If OCP determines that a violation of this subsection (§2-218.36(a)(3)) has occurred, the beneficiary, CBE, or certified joint venture shall be:
    - Debarred from consideration of award of contracts or subcontracts with the District government for a period of not more than 5 years; and



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- Deemed ineligible from consideration for government assisted projects with the District government for a period of not more than 5 years;
- It shall be a violation, and penalties may be assessed if DSLBD determines that an individual or business enterprise has willfully failed to cooperate in an audit or investigation conducted by:
  - The District Auditor pursuant to §1-204.55; or
  - The Chairman of the Council or the chairperson of the committee of the Council that conducts an investigation pursuant to §1-201.13.
    - DSLBD shall assess a civil penalty of not more than \$5,000 for a violation of this subsection (§2-218.63(b)).
- If DSLBD determines that an individual or business enterprise has failed to use commercially reasonable best efforts<sup>9</sup> to meet the subcontracting requirements established in §2-218.46, DSLBD shall assess a civil penalty equal to 10% of the dollar volume of the contract that the beneficiary or certified joint venture was required but failed to subcontract.
- Penalties provided shall be in addition to any other causes of action or remedies, legal or equitable that may be available.
- Any person may file a complaint with DSLBD alleging a violation of the 2014 Act against an applicant for registration as a CBE or certified joint venture.
  - The complaint must be in writing, sworn to by the complainant, and notarized.
  - DSLBD may dismiss the complaint without a hearing if it determines that it is frivolous or otherwise without merit.
  - If DSLBD does not dismiss the complaint, DSLBD will hold a hearing on the complaint within 3 months of its filing.
    - DSLBD shall have the authority to issue subpoenas requiring the attendance of witnesses and to compel the production of records, papers, and other documents at the hearing.
    - After the hearing if DSLBD determines that the respondent violated the 2014 Act or regulations, DSLBD shall issue a decision and order, accompanied by findings of fact and conclusion of law, and any penalty permitted by this section.
- DSLBD may downgrade the certification of registration of a CBE that ceases to meet the requirements of a particular category of certification; provided the CBE still qualifies as a LBE.

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<sup>9</sup> “commercially reasonable best efforts” shall require that the beneficiary or certified joint venture take all actions that a similarly situated beneficiary or certified joint venture would take to accomplish the goal; provided, that the beneficiary or certified joint venture shall not be required to expend amounts that are disproportionate to the benefit being obtained.

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- A CBE or certified joint venture may appeal to the Office of Administrative Hearings (OAH):
  - DSLBD's denial of an application for certification;
  - DSLBD's revocation or change to a previously issued certification; or
  - An enforcement action taken pursuant to §2-218.63
- OAH shall consider the appeal pursuant to §2-1831 *et seq.* and § 2-1801.01 *et seq.* and rules promulgated pursuant to those acts.
- OAH shall conduct the hearing based on the record developed by DSLBD. OAH's decision shall be the final administrative decision.

### **Identification of SBEs or CBEs in Bids or Proposals, False Statements on Certification;**

#### **Penalties** D.C. Code § 2-218.64 **NEW CHANGES**

- Except as otherwise provided by law, a beneficiary, CBE, certified joint venture, or individual may not:
  - Identify a SBE or CBE in a bid or proposal unless it:
    - Has obtained authorization from the SBE or CBE to identify the SBE or CBE in its bid or proposal;
    - Has notified the SBE or CBE before execution of the contract of its inclusion in the bid or proposal; and
    - Uses the SBE or CBE in the performance of the contract; or
  - Pay the SBE or CBE solely for the use of its name in the bid or proposal.
- A violation of any provision of this section is a felony and, upon conviction, subject to a fine not to exceed \$15,000, imprisonment not to exceed 5 years, or both.
- A beneficiary, CBE, certified joint venture, or individual shall not make false statements about whether a business is certified by DSLBD as a CBE or certified joint venture.
  - A violation of this section is a misdemeanor and subject to a fine not to exceed \$5,000, imprisonment not to exceed one year, or both.