



Certified Business Enterprise (CBE) Program Review

Submitted To:

Mayor Vincent C. Gray

Prepared By:

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INTRODUCTION

The Department of Small and Local Business Development (“DSLBD” or “Department”) supports the development, economic growth, and retention of District-based businesses, and promotes economic development throughout the District’s commercial districts. DSLBD is committed to developing a business environment that connects local companies to business opportunities in real-time, supports quick and confident navigation of government, and provides entrepreneurs with great ideas and great plans the capital they need to grow. The Department serves as the District of Columbia’s small business services agency, and administers the city’s Certified Business Enterprise (“CBE”) program (“CBE Program”), which provides District-based firms with advantages in doing business with the District Government, and expands the availability of business opportunities with District-sponsored development projects.

In order to be eligible for CBE certification, a business enterprise must meet a local standard to demonstrate that it is a bona fide District-based business. Among other requirements, the business enterprise must have its principal office located in the District, and maintain a District-based office in which the chief executive officer and senior leadership team perform the firm’s managerial functions. In addition, the enterprise must meet one of four standards: it must have more than 50% of its assets located in the District; more than 50% of its total sales or other revenues derived from transactions in the District; more than 50% of its employees must be District residents; or, more than 50% of the owners must be District residents. The CBE Program evolved from the Sheltered Market program managed by the Minority Business Opportunity Commission (“MBOC”) and the Local, Small, and Disadvantaged Business Enterprise (“LSDBE”) program managed by the Office of Local Business Development (“OLBD”) and, eventually, DSLBD.

The CBE program’s history within the District dates back to the mid-1970s. Over three decades, the program has evolved as one of the most progressive local inclusion programs in the United States, serving as a best practice model for other local and state jurisdictions. A comparative analysis of state preference practices shows that 13 states do not have mandated preference programs. Of the state preference programs, most are industry-specific and do not offer local businesses the benefit level of the CBE Program.¹ California is the only state with a more generous total local business preference (15%), but California’s maximum preference cost cannot exceed \$50,000.²

Recently, the District has been recognized as one of the most thriving local economies for small businesses, with the Wall Street Journal and MarketWatch’s acknowledgment of the District as the #1 City for Business³ in 2010 and 2011. In 2012, the District was also recognized as the #24 city in the world for startups⁴, and #5 in the United States for small business investment⁵. While the CBE Program

¹ “Listing of States’ Absolute and Percentage Preferences,” last modified July 2, 2010, <http://www.eva.state.va.us/library/files/buyers/listing-states-preferences.pdf>

² “Listing of States’ Absolute and Percentage Preferences,” last modified July 2, 2010, <http://www.eva.state.va.us/library/files/buyers/listing-states-preferences.pdf>, pg. 5

³ “Washington Tops Best Cities for Business,” last modified December 13, 2011, http://articles.marketwatch.com/2011-12-13/economy/30748740_1_jobless-rates-marketwatch-saic

⁴ “Top 25 World’s Best Places for Successful Business Startups,” last modified April 22, 2012, <http://www.ibtimes.com/articles/331543/20120422/top-25-world-s-best-places-live.htm>

has provided the opportunity for many small and local businesses to succeed in the District, its framework and execution have faced challenges throughout the years.

EXECUTIVE SUMMARY

At the request of the Mayor, DSLBD has conducted a comprehensive review of the CBE program to identify programmatic challenges, areas of legislative and policy improvement, and ongoing resource concerns. The review articulates the weaknesses of the program, and puts forward recommendations that if fully supported and adopted, will ensure the CBE Program's proper administration and further position it as a tool that stimulates the District's local economy. To execute the CBE Program Review, the Department conducted a thorough environment scan of previous analyses and reports completed on the District's CBE and legacy programs, and reviewed preferential procurement practices in other jurisdictions. The intent of the CBE Program Review is not to replicate or update previous work, but to apply deeper insights into the current state of the existing CBE Program and recommendations for the pathway forward.

The following sections of the CBE Program Review outline the history of the program, its program components, and recommendations for improvement. In total, DSLBD outlines challenges in three thematic areas, proposes 19 recommendations which include investments of approximately \$1,000,000 for a total of ten (10) full time employees ("FTEs"), and legislative and regulatory changes to provide a baseline for effective operation.

SUMMARY OF CBE PROGRAM RECOMMENDATIONS

1. Business Certification

- 1.1** Greater coordination among District Government agencies, and approaches to business services similar to the multi-agency permitting operations for building related issues at the Department of Consumer and Regulatory Affairs, would minimize a firm's need to interact with the District Government. Reducing multiple in-person interactions with the District Government, and investing in the coordination of online platforms across District Government agencies, would improve the delivery and perception of business services in the District, and specifically, improve the certification process. DSLBD recommends the creation of a Business One Stop online portal that reduces the number of touch points that a firm has with the District Government. This approach would align the District with many other jurisdictions throughout the country, including the City of New York, which launched NYC Business Express, an interactive website which assists business with regulations, licensing, permitting, registrations, and government incentives. **(Long-term Solution)**
- 1.2** Provisional certifications are no longer utilized as a result of amendments to the Act which provided DSLBD with the authority to approve and deny certification applications.

⁵ "Top Cities for Technology Startups," last modified August 24, 2012, <http://www.usatoday.com/tech/columnist/talkingtech/story/2012-08-22/top-tech-startup-cities/57220670/1>.

Because DSLBD has the ability to expedite its review of an application to ensure a CBE can pursue a pending contracting opportunity, DSLBD recommends the Act be amended to eliminate provisional certifications.

- 1.3** To ensure that firms receive full benefits for participation in the CBE Program, DSLBD recommends that the Act is amended to cure an omission of percentage reductions in price for the Veteran Owned Business (“VOB”) and Local Manufacturing Enterprise (“LME”) certification categories. This corrective action would align the VOB and LME categories with the six (6) other certification categories and provide full benefits to firms certified in those two categories.
- 1.4** DSLBD will evaluate the application process for firms seeking certification as a Joint Venture (“JV”). DSLBD will coordinate with key procuring agencies to evaluate firms seeking JV certification, and to assess the capacity of the CBE partner to determine its ownership level of the joint venture. From this analysis, DSLBD will determine whether appropriate criteria have been met to demonstrate the CBE ownership and control required by District law for the allocation of CBE preference points. For construction opportunities where the CBEs seek 51% controlling interest of a certified JV, such criteria will include whether the CBE partner 1) has primary financial liability for at least 51% of the project bond; 2) is providing at least 51% of the financing for the project; 3) is providing the Project Executive for the job; 4) is providing other senior managers for the project; and 5) has past experience on jobs that are approximately 50% the size and scope of the proposed joint venture project. DSLBD will seek similar analysis of proposed joint ventures for other types of contracts. The new criteria will be developed through regulations. In addition, DSLBD recommends that D.C. Code §2-218.46 be amended to remove the requirement that CBE partners in a certified JV perform at least 50% of contracting efforts on construction and non-construction opportunities over \$250,000. By allowing CBE partners to participate at lower ownership levels in a certified JV, CBEs will have greater opportunities to build capacity, and will perform at levels in the certified JV that are in line with their capabilities.
- 1.5** The capacity of CBE and non-CBE firms to perform against the requirements of a contract or deliver a service is currently evaluated by the District’s contracting and procurement personnel. DSLBD’s Business Certification Division is not positioned to evaluate and determine a firm’s capacity and award NIGP codes, as the unit is not organized by commodities and it is not staffed by commodity specialists. The CBE Program does not have legislative authority and regulatory guidance for the designation of NIGP codes. Any effort to amend the Act and Regulations for the CBE Program to fully encompass the total population of NIGP codes, would be time consuming, cost prohibitive, and beyond the capacity of the Department to execute. In addition, this effort would be duplicative of the contracting and procurement operations currently established throughout the District Government, and would burden the certification application process with longer evaluations periods and processing times if the Act and Regulations were amended to provide guidance for the designation of NIGP codes. Therefore, in fiscal year 2013, DSLBD will discontinue the NIGP code evaluation and approval process for CBEs, and allow firms to self-select commodity codes associated with the profile of their company. The discontinuation of this process will afford CBEs the same treatment in the evaluation of their capacity as any firm seeking to do business with the District Government. This

step will allow DSLBD to focus its resources on the key element of the CBE Program—determining whether or not an applicant is a bona fide District-based business. In addition, the NIGP code self-selection process will align with the current process where CBE Program applicants can self-select Construction Specifications Institute (“CSI”) codes for construction related industries. DSLBD will also expand the functionality of CBE Online to allow applicants to share more data on their past performance, bonding capacity, and corporate capabilities.

2. Compliance & Enforcement

- 2.1 To execute its compliance and enforcement mandate, DSLBD recommends a minimum of \$1,000,000 be restored to its local budget to fund ten (10) FTEs which will address the personnel deficit in the CBE Program compliance and enforcement functions. The ten (10) FTEs will manage DSLBD’s portfolio of eight (8) compliance programs, and will execute enforcement actions against firms that violate the CBE Program Act and/or Regulations. The CBE Compliance and Enforcement program includes a workload of approximately 700 cases annually, with an estimated workload of 70 cases per employee per year (including correspondence, data collection, review, analysis, follow-up, and action). Cases include the total amount Agency cases (District Government, Corporations, and Instrumentalities), Sub-Contracting Requirements for Contracts over \$250,000, Development Projects, Equity Participation Requirements for Development Projects, Development Participation Requirements for Development Projects, certified Joint Ventures, Investigations into CBEs, and 10% to 20% of cases DSLBD has yet to identify because there are no employees currently doing the majority of the work outlined.
- 2.2 DSLBD successfully leveraged technology to deploy a new system to monitor agency compliance with SBE expenditures. The solution, however, is short term and does not link to the established enterprise procurement (PASS) and financial (SOAR) management systems used by the District Government. The PASS and SOAR systems are currently undergoing significant upgrades in fiscal years 2012 and 2013. DSLBD recommends making these systems interoperable. Linking the procurement and financial management systems to CBE Online will reduce the burden of District Government agencies compliance reporting, and will increase the ability of the Department to effectively management operating and capital budget expenditures with SBEs. In addition, linking enterprise systems to CBE Online would address a recommendation offered by the Office of the Inspector General in an audit of DSLBD’s operations conducted in fiscal year 2008. **(Long-term Solution)**
- 2.3 To clarify the authority to grant waivers of subcontracting requirements for District Government contracts over \$250,000, DSLBD recommends amendments to D.C. Code §2-218.46(a)(2) to allow only DSLBD, and not OCP, to grant waivers as contemplated in D.C. Code §2-218.46(g) and 2-218.51. DSLBD is best positioned to determine whether SBEs are available to satisfy subcontracting requirements.
- 2.4 DSLBD recommends that the Act be amended to require developers to enter into CBE Agreements for District-sponsored development projects with a subsidy over \$250,000,

which would align requirements with District Government subcontracting requirements over \$250,000.

- 2.5** DSLBD recommends that the Act be amended to require developers to report quarterly on progress towards subcontracting requirements with CBEs, and that penalties for the breach of CBE Agreements are authorized when subcontracting requirements are not met.
- 2.6** For certified Joint Ventures that violate provisions of the CBE Program, DSLBD recommends amending the Act to allow the Department to assess penalties to the JV, that each JV member not receive preference points or price reduction percentages for 2 years, and that the Department be authorized to revoke each participating CBE firm's certification for 2 years.
- 2.7** With the proper resources for compliance, DSLBD will launch proactive spot investigations of CBEs to ensure they maintain ongoing compliance with the CBE program. DSLBD would hire a CBE Compliance Investigator to investigate CBEs when requested by the OIG or when a sworn complaint has been received when a CBE is suspected of violating legal and regulatory requirements of the program. A CBE Compliance Investigator would allow for the delineation of responsibility between the certification and investigatory functions of the CBE Program.
- 2.8** DSLBD recommends that the Commission be eliminated, and that all authority to take enforcement actions, including revocation of certification, against a CBE be granted to the DSLBD Director.
- 2.9** With the elimination of the Commission, DSLBD further recommends that the appeal of application denials, currently heard by the Commission, be heard by the Office of Administrative Hearings (OAH). To align DSLBD's authority with other regulatory functions within District Government, OAH would serve as the administrative body to hear appeals of application denials and certification revocations by the Department. Authorizing OAH to serve as the adjudicatory body for CBE application denials and revocations would provide administrative judges trained to hear such matters.
- 2.10** DSLBD recommends amending the Act to allow the Department to assess penalties for the breach of requirements pursuant to the Act including but not limited to §2-218.46 (35% subcontracting requirement), §2-218.48 (breach of subcontracting plan), 2-218.49a (20% CBE Development Participation), and 2-2-218.64 (identification of CBEs in bids and proposals etc.). In addition, DSLBD recommends amending the Act such that any other penalty, fee or fine assessed under the Act and any civil penalties imposed pursuant to §2-218.63(c) be collected by the Department, deposited into the fund established under §2-218.75 (Small Business Micro Loan Fund) and disbursed accordingly by the Department.

3. Other Recommendations

- 3.1** DSLBD recommends the elimination of the 1% fee assessed to SBEs on the DCSS. The fee disproportionately targets SBEs, and is not applied consistently with all contracting vehicles across the District Government.

- 3.2** DSLBD recommends that the Mayor issue a Mayoral Order to reaffirm the Executive Branches commitment to SBE utilization, and to direct each District Government agency to appoint and expand the current role of agency CBE Compliance Officers. Agency CBE Compliance Officers should serve not only to report on the District Government agencies' expenditures with SBEs, but also as an advocate for the participation of SBEs on contracting opportunities. This approach re-aligns the District Government with the original intent of agencies establishing Liaisons or CBE Compliance Officers in Mayor's Order 2003-14, and would align the District Government with the OSDBU program, a best practice in the Federal Government.
- 3.3** Agency KPIs should include an indicator to track District Government agencies performance for SBE expenditures. KPI data is included in budget proposals, and reviewed in agency budget and oversight hearings that support decisions about the allocation of resources to agencies. Adding a KPI for SBE expenditures to each District Government agencies annual performance plan would further express the District Government's commitment to utilizing SBEs, and would highlight and incentivize agencies' compliance with SBE expenditure targets.
- 3.4** Agency SBE expenditure performance reports should be made reviewed during the Mayor's monthly Cabinet meetings with District Government Agency Directors. Making SBE expenditure data available during Cabinet meetings provide an opportunity for the Mayor to reaffirm the District Government's commitment to utilizing SBEs, and will help Agency Directors identify and manage SBE expenditure goals and performance.

HISTORY AND DEVELOPMENT OF THE CBE PROGRAM

An analysis of the CBE Program's history shows that its mandate substantially broadened over time. The CBE Program developed from the minority-focused Sheltered Market Program of the 1970s and 80s, to the focus on disadvantaged businesses that characterized the LSDBE Program of the 1990s and early-mid 2000s, and finally to the CBE Program's encompassing approach to business size, industry segment, geographic location, and ownership attributes. The CBE Program's broadening historical mandate matches the development of DSLBD as an agency, which itself developed from an exclusive focus on implementing the Sheltered Market and LSDBE Programs, into an agency charged with providing broad range of small business support services.

While the history and development of the CBE Program through the early 2000s is exhaustively described in other reports⁶, the historical insight most germane to this analysis is that as the scope of the CBE Program broadened and the number of qualifying firms increased, the resources to execute the program did not. The Office of Minority Business Development ("OMBD") focused exclusively on operating the Sheltered Market Program. Similarly, its successor agency, the Office of Local Business Development (OLBD) had ten (10) FTEs and was focused exclusively on the implementation of the LSDBE Program. In December 1985, there were 454 firms in the Sheltered Market Program⁷ operated by the OMBD. In October 2002, there were approximately 600 business enterprises in OLBD's LSDBE program supported by ten (10) FTEs.⁸ As of September 6, 2012, there were 1,121 CBEs supported by five (5) FTEs in DSLBD's Business Certification function and one (1) FTE in the Compliance & Enforcement function.

With eligibility criteria based on the economic disadvantaged status of the firms' principals, the LSDBE Program afforded most of the same procurement advantages as the present-day CBE Program; a maximum preference of 12 points or a reduction in price of more than 12 percent on bids and proposals. For the LSDBE program, all firms had to qualify as a Local Business Enterprise ("LBE"), but could also seek certification as a Small Business Enterprise ("SBE"), and Disadvantaged Business Enterprise ("DBE"). LBEs were defined as firms with a principal office in the District, licensed by the District, and subject to District taxes. SBEs were independently owned, operated, and controlled firms that did not exceed three-year annualized thresholds for gross revenue by industry. DBEs were firms that demonstrated to the Commission that either the individuals representing a majority ownership, operational, and controlling stake in the business were socially disadvantaged because the individuals have faced chronic, not fleeting, instances of prejudice or bias; or, economically disadvantaged because of diminished opportunities that have precluded these individuals from successfully competing in the open marketplace.

From 1992-2002, OLBD exclusively focused on implementing the LSDBE Program, continuing the operations established during the years of the Sheltered Market Program. In 2002, the Office of the

⁶ The Mayor's Task Force on Local, Small and Disadvantaged Business Opportunity Development, "Local, Small and Disadvantaged Business Opportunity Development Report" (paper presented to Mayor Anthony A. Williams, Washington, District of Columbia, October 16, 2002).

⁷ Coopers & Lybrand, "Survey Report on the District of Columbia Minority Procurement Program", December 1985, pg. 1.

⁸ The Mayor's Task Force on Local, Small and Disadvantaged Business Opportunity Development, "Local, Small and Disadvantaged Business Opportunity Development Report" (paper presented to Mayor Anthony A. Williams, Washington, District of Columbia, October 16, 2002), pg. 30.

Deputy Mayor for Planning and Economic Development launched reSTORE DC, an initiative that supported the revitalization of the District's neighborhood commercial districts and small businesses by 1) providing technical and funding assistance in targeted neighborhoods to retain District businesses, design and improve storefronts and streetscapes, and promote the District's business neighborhood districts; and, 2) building the capacity of neighborhood nonprofit organizations to assist businesses and coordinate sustainable community-driven revitalization efforts. This effort was the first initiative by the District Government to broaden its focus on small business support and development.

Another milestone was reached in the Department's evolution in 2005 with the passage of the "Small, Local and Disadvantaged Business Enterprise Development and Assistance Act of 2005" ("Act"). The Act made significant changes to the laws affecting the LSDBE program and mandated the conversion of the Office of Local Business Development into a full-fledged cabinet-level agency for small business development. The Act signaled a formal shift in emphasis of the agency from certification and District agency compliance reporting, to value added business development services. By calling for the establishment of 2 new programmatic areas – an *Office of Business Opportunities and Access to Capital* and an *Office of Training and Education*, the Act created an agency designed to engage in the work of facilitating the growth and development of local businesses through advocacy, and program and policy development.

With the design established to support small business development, DSLBD aggressively pursued opportunities to expand its business support offerings. In 2007, the reSTORE DC program was moved to DSLBD, reflecting the Department's new comprehensive business support approach. In addition, in 2009, the Department was awarded a federal grant from the U.S. Department of Defense's Defense Logistics Agency to launch a Procurement Technical Assistance Program, which provided intensive procurement and business development support to District small businesses pursuing opportunities with the federal government. Similarly, in 2011, the Department was awarded the U.S. Small Business Administration's State Trade and Export Promotion grant to provide export development and trade promotion services to small businesses in the District.

The Act also redefined the respective roles of DSLBD and the Small and Local Business Opportunity Commission ("SLBOC" or "Commission") such that the Department, rather than the Commission, became responsible for making certification decisions. This change was timely, since the number of certification applications substantially increased. Between 2003 and 2006, the volume of certification applications grew by 62%⁹. In 2006 new application submissions grew from 692 to 976 or approximately 81 new application submissions per month. By 2008, certification application submissions increased to approximately 100 per month. In response to the increase in volume, DSLBD took steps to make the certification process more efficient. Rather than once per month, which was the practice of the Commission, DSLBD began to make certification decisions on a weekly basis. In addition, DSLBD reduced the number of certification denials by adopting a business development approach, which allowed applicants to withdraw their application to rectify deficiencies that could be cured immediately, and apply again. This approach proved helpful for some businesses as the applicant did not have to wait six months before submitting another application, if a denial is issued, as

⁹ Erik Moses, "Testimony of Erik A. Moses" (testimony presented at the FY2007 Agency Performance Oversight Hearing for DSLBD, Washington, DC, February 23, 2007).

required by the Regulations. In addition, DSLBD ceased the issuance of provisional certifications, moving instead to expedite the processing of an application if an applicant faced a pressing deadline for a contracting opportunity. These efforts helped to position the certification process to operate more effectively, and provided the basis for the current operation of the CBE certification process. In 2011, DSLBD increased its business development approach to the certification process by introducing pre-submission business consultation sessions designed to provide one-on-one feedback to applicants to ensure the submission of complete certification applications.

The shift of the LSDBE program to the CBE program occurred with the passage of the Act, which expanded the program to include three new certification categories: Resident-owned Businesses ("ROB"), Longtime Resident Businesses ("LRB"), and LBEs with principal offices located in an Enterprise Zone ("DZE"). With the addition of the three new categories, totaling six, the agency moved to rename the program "CBE" from the pre-existing terminology of "LSDBE" to reflect a broader, and more expanded program that provides greater incentives (and more certification categories) to locally based firms. In 2010, subsequent certification categories were added to the CBE program, which included Veteran-Owned Business ("VOB") and Local Manufacturing Business ("LME").

The CBE Program consists of three (3) elements: business certification; compliance and enforcement; and, business development. The focus of the CBE Program Review is on the business certification process, and the compliance and enforcement functions of the CBE Program.

BUSINESS CERTIFICATION

Business Certification is the process that affords businesses the opportunity to receive, maintain, and benefit from CBE designation. Pursuant to D.C. Code §2-218.13(c)(1), the Business Certification Division is responsible for reviewing all applications for certification and providing information and assistance to business enterprises regarding the certification and application process. Certification with the Department is valid for two (2) years, provided that the CBE remains in compliance with the program requirements.

Businesses may be certified in any of the following categories; however, a maximum of 12 points or percentage reduction can be applied toward the evaluation of bids or proposals for a contracting opportunity with the District Government.

<u>Certification Categories</u>	<u>Authority</u>	<u>Preference</u>	<u># of CBEs</u> (as of 8/15/2012)	<u>% of CBEs w/ Category</u> (as of 8/15/2012)
Local Business Enterprise (LBE)	§2-218.31	2 or 2%	1101	100%
Small Business Enterprise (SBE)	§2-218.32	3 or 3%	1042	95%
Disadvantaged Business Enterprise (DBE)	§2-218.33	2 or 2%	596	54%
Resident Owned Business (ROB)	§2-218.35	5 or 5%	548	50%
Development Zone Enterprise (DZE)	§2-218.37	2 or 2%	632	57%
Longtime Resident Business (LRB)	§2-218.36	5 or 10%	83	8%
Veteran Owned Business (VOB)	§2-218.38	2 or 0%*	40	4%
Local Manufacturing Business (LME)	§2-218.39	2 or 0%*	1	0%

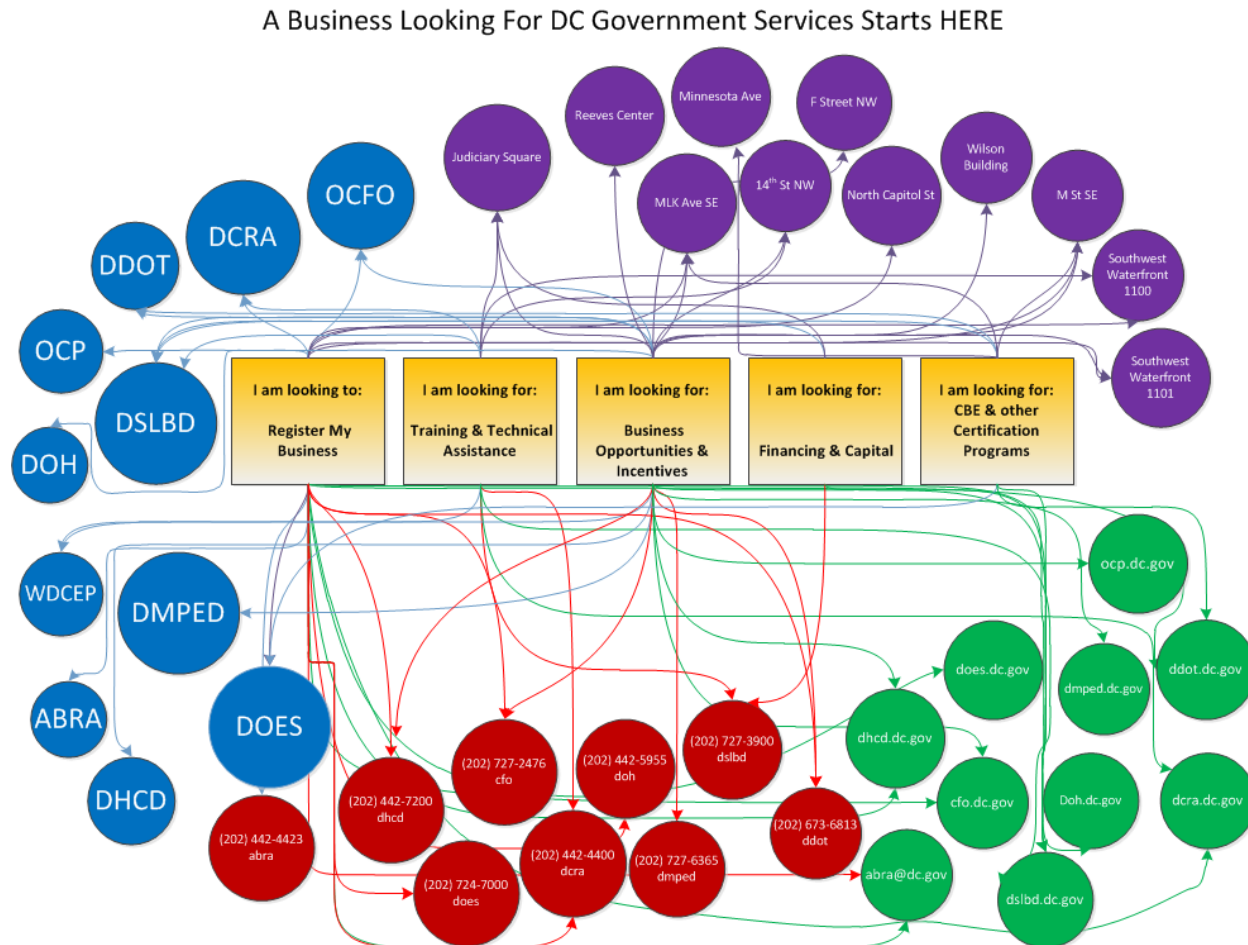
* Note: The 2% Preference Benefit for VOBs and LMEs was not initially included in the legislation establishing the two categories. DSLBD recommends that the 2% preference for VOBs and LMEs is added to align these two designations with the other preference categories.

Establish a Business One-Stop Approach

Business owners and entrepreneurs seeking to establish a new business or maintain compliance with operating a business in the District must interact with numerous agencies and business operations throughout the District Government. Depending on the industry, small businesses, specifically CBEs, may have to interact with any combination of ten (10) District Government agencies to establish or maintain compliance, or to identify contracting opportunities and other benefits and incentives for their firm. Consistently, District Government agencies and their business service systems are on different technology platforms which result in the requirement of businesses to provide duplicative, redundant information multiple times to multiple agencies.

Figure 1 outlines the interactions that a CBE could have with the many agencies, locations, online presence, and customer service platforms of the District Government, based on the desired services needed by the firm. The licensing, registration, and certification processes established throughout the District Government are not linked and organized to limit a firm's interactions with the District Government. Requirements for a firm to complete a certification application include documentation from other District Government agencies and are often a barrier for successful application submission.

Figure 1. Small Business Services in the District



CBE Program Recommendation 1.1: Greater coordination among District Government agencies, and approaches to business services similar to the multi-agency permitting operations for building related issues at the Department of Consumer and Regulatory Affairs, would minimize a firm's need to interact with the District Government. Reducing multiple in-person interactions with the District Government, and investing in the coordination of online platforms across District Government agencies, would improve the delivery and perception of business services in the District, and specifically, improve the certification process. DSLBD recommends the creation of a Business One Stop online portal that reduces the number of touch points that a firm has with the District Government. This approach would align the District with many other jurisdictions throughout the country, including the City of New York, which launched NYC Business Express, an interactive website which assists business with regulations, licensing, permitting, registrations, and government incentives. (Long-term Solution)

Elimination of Provisional Certifications

Prior to passage of the Act, certification decisions were made by the Commission. The Commission met bi-weekly or monthly, reviewed application documentation furnished by the applicant through the Department, and made certification decisions. If an applicant submitted an acceptable certification

application to DSLBD, and the Department concluded that the Commission was likely to approve their certification, DSLBD would issue a provisional certification which the applicant could use to pursue a contracting opportunity with District Government. The Department would issue a provisional certification to ensure that the timing of the Commission meeting did not interfere with or prevent a CBE from pursuing a contracting opportunity in the event the Commission was unable to meet or did not have quorum to officially approve certification applications during a scheduled meeting.

With the amendment to the Act to provide authority to the Department to approve (and deny) certification applications, DSLBD moved to make certification application decisions on a weekly basis, and expedite application decisions as necessary to preserve imminent business opportunities for applicants.

CBE Program Recommendation 1.2: Provisional certifications are no longer utilized as a result of amendments to the Act which provided DSLBD with the authority to approve and deny certification applications. Because DSLBD has the ability to expedite its review of an application to ensure a CBE can pursue a pending contracting opportunity, DSLBD recommends the Act be amended to eliminate provisional certifications.

Alignment of VOB and LME Preferences with Other Categories

The Act and Regulations authorize CBEs to receive preferential benefits on District Government contracting opportunities. Preference benefits apply during the evaluation of bids and proposals submitted by CBEs, and are applied based on the CBE Programs eight (8) designations (i.e. SBE, DBE, and ROB).

In 2010, the Act was amended to add two new CBE category designations, Veteran Owned Business (“VOB”) and Local Manufacturing Enterprise (“LME”). The two new categories were intended to receive all the benefits and preferences associated with the other CBE Program designations. There is a discrepancy in the Act, however, with the omission of a percentage reduction in price for bids for the two new categories.

CBE Program Recommendation 1.3: To ensure that firms receive full benefits for participation in the CBE Program, DSLBD recommends that the Act be amended to cure an omission of percentage reductions in price for the VOB and LME certification categories. This corrective action would align the VOB and LME categories with the six (6) other certification categories and provide full benefits to firms certified in those two categories.

Certification of Joint Ventures

A certified joint venture (“JV”) is an association of two or more businesses temporarily formed to carry out a single business activity or project for profit in which they combine their property, capital, efforts, skill, and knowledge. The association is limited in scope and duration. One or more of the businesses associated in a JV must be a CBE. The JV certification lasts for two years; thus, re-certification is required for a JV that successfully pursued a contracting opportunity with the District Government that exceeds two years. JVs can be certified with as little as 20% CBE member participation and 80% non-CBE member participation to receive preference points or price percentage reductions.

CBEs pursue JVs to increase their competitiveness when pursuing contracting opportunities. The Regulations allow for preference benefits for JVs whether the CBE holds a majority or minority stake in the JV. The percentage of ownership by CBEs in the JV will determine the level of preference the JV will receive towards bids and proposals submitted for District Government contracting opportunities.

The Regulations authorize CBEs and JVs to receive preferential benefits only on District Government contracting opportunities. In the past, DSLBD would approve applications submitted by CBEs to form JVs for the pursuit of subcontracting opportunities on development projects. Per the Regulations, DSLBD revised its procedures to only process JV applications for business enterprises pursuing contracting opportunities with the District Government. Once the closing date has passed, DSLBD will not accept new applications for the formation of a JV under that specific District Government contracting opportunity. Firms that desire to form JVs in response to contracting or subcontracting opportunities issued by developers, prime or general contractors may continue to do so; however, the JV will not be certified by DSLBD. DSLBD has the authority to certify JVs pursuing contracting opportunities issued by District Government, not for JVs pursuing subcontracting opportunities with developers, prime or general contractors who were awarded a contracting opportunity or District-sponsored development project from the District Government.

CBE Program Recommendation 1.4: DSLBD will evaluate the application process for firms seeking certification as a Joint Venture (“JV”). DSLBD will coordinate with key procuring agencies to evaluate firms seeking JV certification, and to assess the capacity of the CBE partner to determine its ownership level of the joint venture. From this analysis, DSLBD will determine whether appropriate criteria have been met to demonstrate the CBE ownership and control required by District law for the allocation of CBE preference points. For construction opportunities where the CBEs seek 51% controlling interest of a certified JV, such criteria will include whether the CBE partner: 1) has primary financial liability for at least 51% of the project bond; 2) is providing at least 51% of the financing for the project; 3) is providing the Project Executive for the job; 4) is providing other senior managers for the project; and, 5) has past experience on jobs that are approximately 50% the size and scope of the proposed joint venture project. DSLBD will seek similar analysis of proposed joint ventures for other types of contracts. The new criteria will be developed through regulations. In addition, DSLBD recommends that D.C. Code §2-218.46 be amended to remove the requirement that CBE partners in a certified JV perform at least 50% of contracting efforts on construction and non-construction opportunities over \$250,000. By allowing CBE partners to participate at lower ownership levels in a certified JV, CBEs will have greater opportunities to build capacity, and will perform at levels in the certified JV that are in line with their capabilities.

Evaluation of CBE Capacity

As part of the certification application, a business enterprise may select National Institute of Governmental Purchasing (“NIGP”) numeric commodity codes, which identify goods and services provided by the firm. Applicants select NIGP codes based on areas of expertise and areas that the business enterprise seeks to identify opportunities to sell to the District Government. The use of NIGP codes during the certification process is based on the Office of Contracting and Procurement’s (“OCP”) use of NIGP codes for the purpose of procuring goods and services for the District Government.

As part of its review process, DSLBD would evaluate the NIGP codes selected by the applicant, and make a determination as to whether the firm would be granted the desired codes based on proof of its expertise, past performance or a business plan identifying a level of proficiency in the delivery of the requested commodity code. NIGP codes are structured at 3-, 5-, 7-, and 11- digit levels. OCP utilizes the 7-digit NIGP code structure, which contains over 36,000 codes.

The CBE Program was not designed to assess and evaluate a business' capacity and competencies to perform or deliver a specific service or product. Legislative authority and regulatory guidance provided by Title 27 DCMR Chapter 8 ("Regulations") for the review and determination of CBE qualifications center on the CBE Programs eight (8) designations (i.e. SBE, DBE, and ROB), joint venture certification, and compliance. Assessments of a firm's capabilities are directly aligned with the contracting and procurement process. Certification with the Department occurs every two years, whereas procurement opportunities are publicized on a multitude of occasions touching various NIGP codes throughout a given two year period. Whether for goods, services, or other opportunities (i.e. construction), contracting and procurement operations are directly responsible for identifying the core competency of firms attempting to do business with the District, whether the firm is designated a CBE or not.

The Business Certification Division consists of five (5) FTEs, and is responsible for processing all applications for certification, re-certifications, and upgrades to applications, which currently includes the review and approval of NIGP codes requested by the firm. DSLBD's Business Certification Division is not best positioned to assess a firm's capability, as this function is performed by contracting specialists and officers across the District Government who serve as subject matter and industry professionals, or commodity experts, on the specific good or service being procured. The contracting and procurement process analyzes a firm's capabilities and capacity to perform, which includes an evaluation of the expertise of the firm's principals, its past performance, and other factors designed to identify whether the firm's core competencies align with requirements outlined by specifications or a statement of work in a contracting opportunity. This core competency identification is directly aligned with DSLBD current process to assign NIGP codes. However, whether a firm is a CBE or non-CBE, contracting and procurement operations will conduct the same analysis of companies seeking to do business with the District, and evaluate whether the firm meets certain NIGP codes and are competent to perform on a contracting opportunity.

CBE Program Recommendation 1.5: The capacity of CBE and non-CBE firms to perform against the requirements of a contract or deliver a service is currently evaluated by the District's contracting and procurement personnel. DSLBD's Business Certification Division is not positioned to evaluate and determine a firm's capacity and award NIGP codes, as the unit is not organized by commodities and it is not staffed by commodity specialists. The CBE Program does not have legislative authority and regulatory guidance for the designation of NIGP codes. Any effort to amend the Act and Regulations for the CBE Program to fully encompass the total population of NIGP codes, would be time consuming, cost prohibitive, and beyond the capacity of the Department to execute. In addition, this effort would be duplicative of the contracting and procurement operations currently established throughout the District Government, and would burden the certification application process with longer evaluations periods and processing times if the Act and Regulations were amended to provide guidance for the designation of NIGP codes. Therefore, in fiscal year 2013, DSLBD will discontinue the NIGP code evaluation and approval process for CBEs, and allow firms to self-select commodity

codes associated with the profile of their company. The discontinuation of this process will afford CBEs the same treatment in the evaluation of their capacity as any firm seeking to do business with the District Government. This step will allow DSLBD to focus its resources on the key element of the CBE Program- determining whether or not an applicant is a bona fide District-based business. In addition, the NIGP code self-selection process will align with the current process where CBE Program applicants can self-select Construction Specifications Institute (“CSI”) codes for construction related industries. DSLBD will also expand the functionality of CBE Online to allow applicants to share more data on their past performance, bonding capacity, and corporate capabilities.

COMPLIANCE & ENFORCEMENT

DSLBD is charged with monitoring, tracking, reporting, and enforcing the CBE contracting activities of District agencies and government corporations, as well as government contractors and developers for CBE utilization, and CBE equity and development participation on District-sponsored projects. DSLBD ensures compliance with the utilization and participation of CBEs pursuant to the Act, as amended, and the Regulations.

District agencies are required to spend at least 50% of their expendable budgets with SBEs. In addition, District agency contracts in excess of \$250,000 require a 35% SBE subcontracting utilization plan and monitoring throughout the life of the contract, unless granted a waiver. Developers that enter into CBE Agreements with the District on private projects are required to subcontract at least 35% of the project’s adjusted budget to CBEs. In total, DSLBD’s mandate includes eight (8) compliance and enforcement programs (see Figure 2), which include monitoring over 80 District Government agencies which account for nearly \$300 million in projected operating expenditures with CBEs; 32 District Government agencies which account for over \$5 billion in capital projects (SBE goal undetermined due to the lack of capacity), over 150 District-sponsored projects which account for over \$1 billion in projected expenditures with CBEs; nearly 100 JVs and CBE investigations.

Figure 2. Summary of DSLBD Compliance Programs

<i>Compliance Programs</i>	<i>Authority</i>	<i># of Entities Monitored</i>	<i>Requirement</i>	<i>Dollar Volume</i>	<i>Discretionary (Expendable) Budget</i>	<i>CBE Goal</i>
Agency Expendable (Operating) Budget Compliance for SBE Expenditures ¹⁰	\$2-218.41 \$2-218.50 \$2-218.52 \$2-218.53	78	50%	\$6,060,652,139	\$482,620,179	\$241,310,090
Agency Expendable (Capital) Budget Compliance for SBE Expenditures ¹¹	\$2-218.41 \$2-218.50 \$2-218.52 \$2-218.53	29 (242 projects)	50%	\$5,176,714,000 \$862,785,667 average annually	Undetermined (Not Monitored)	Undetermined (Not Monitored)
Agency Subcontracting Compliance for Contracts over \$250,000 ¹² (Construction and Non-Construction)	\$2-218.46 \$2-218.48 \$2-218.51	120	35%	\$142,809,988	Undetermined (Not Monitored)	Undetermined (Not Monitored)
Developer CBE Utilization Compliance ¹³	CBE Agreements	159	35%	\$3,890,492,771	\$2,602,879,323	\$1,057,998,855
CBE Equity Participation Compliance Program for Development Projects	\$2-218.49a	<159	20%	Undetermined (Not Monitored)	Undetermined (Not Monitored)	Undetermined (Not Monitored)
CBE Development Participation Compliance Program for Development Projects	\$2-218.49a	<159	20%	Undetermined (Not Monitored)	Undetermined (Not Monitored)	Undetermined (Not Monitored)
Joint Venture Program Compliance	27 DCMR 812	~88	Varies	Undetermined (Not Monitored)	Undetermined (Not Monitored)	Undetermined (Not Monitored)
CBE Investigations ¹⁴	27 DCMR 815 27 DCMR 816	~1100	N/A	N/A	N/A	N/A

During the fiscal year 2010 budget formulation process, the Council of the District of Columbia ("Council") voted to transfer DSLBD's newly established Compliance and Enforcement Division (the unit charged with compliance responsibilities previously outlined) to the Office of the DC Auditor ("ODCA"). The transfer included all DSLBD FTEs in the newly created compliance & enforcement function, and the associated budget authority, and left DSLBD without the resources to execute its compliance and enforcement responsibilities, which remained with the Department. The Council's actions established a new role for ODCA in compliance monitoring, but eliminated DSLBD's ability to fulfill its responsibilities, and ultimately weakened the CBE Program's compliance and enforcement efforts. In an attempt to maintain some compliance presence, DSLBD re-assigned an employee from

¹⁰ Total appropriated gross funds budgets, DSLBD monitored in 2011.

¹¹ Total FY 2013 to FY 2018 planned capital funding.

¹² Information provided from OCP website at <http://ocp.dc.gov>. Data reflects an estimate of contracts awarded in 2011 with one base year or multi base years and multi-option years.

¹³ Based on DSLBD CBE Agreements executed between 2009 and 2012. Note some projects may have ended construction and require closing out.

¹⁴ CBE Investigations are conducted based on sworn complaints or at the request of the Office of the Inspector General (OIG).

its Business Development team to work on compliance and enforcement responsibilities. The Department reduced its business development efforts as a result, and now has only one (1) FTE attempting to perform the work outlined previously for a minimum of five (5) FTEs.

In fiscal year 2012, despite not having compliance personnel, DSLBD moved to improve the compliance and enforcement process. Leveraging technology, the Department launched a new system to streamline the process of tracking the compliance of District Government agencies operating budget expenditures with SBEs. The launch of the new system has been successful, but accounts for only a marginal improvement to the Department's eight (8) compliance program responsibilities. The greatest weakness of the CBE Program is the lack of investment in compliance personnel to effectively execute the Department's mandated compliance and enforcement responsibilities.

CBE Program Recommendation 2.1: To execute its compliance and enforcement mandate, DSLBD recommends a minimum of \$1,000,000 be restored to its local budget to fund ten (10) FTEs which will address the personnel deficit in the CBE Program compliance and enforcement functions. The ten (10) FTEs will manage DSLBD's portfolio of eight (8) compliance programs, and will execute enforcement actions against firms that violate the CBE Program Act and/or Regulations. The CBE Compliance and Enforcement program includes a workload of approximately 700 cases annually, with an estimated workload of 70 cases per employee per year (including correspondence, data collection, review, analysis, follow-up, and action). Cases include the total amount Agency cases (District Government, Corporations, and Instrumentalities), Sub-Contracting Requirements for Contracts over \$250,000, Development Projects, Equity Participation Requirements for Development Projects, Development Participation Requirements for Development Projects, certified Joint Ventures, Investigations into CBEs, and 10% to 20% of cases DSLBD has yet to identify because there are no employees currently doing the majority of the work outlined.

Outlined below are details of the compliance and enforcement programs mandated for DSLBD to execute. CBE Program recommendations for individual compliance and enforcement functions are also provided as appropriate.

Agency Expendable Budget Compliance for SBE Expenditures

Operating Budget. D.C. Code §2-218.41 requires annually that District Government agencies, including those with independent contracting authority or government corporations, procure and contract 50% of their expendable budget (total budget minus exemptions approved by DSLBD) with SBEs. In a given year, DSLBD is responsible for monitoring approximately 80 District Government agencies.

As previously mentioned, DSLBD launched a new system to monitor District Government agencies expenditures with SBEs. The new system equips District Government agencies with better SBE expenditure information and allows them to track their SBE expenditures throughout the fiscal year. Also, the new system allows for greater transparency with agency progress toward SBE expenditure targets. Agencies are able to use the system to access and report on their approved expendable budgets, SBE expenditure goals, annual procurement plans, quarterly expenditures, and, multi-year data to view previous years' progress towards meeting SBE expenditure targets.

Capital Budget. Over 30 District Government agencies have capital budgets, and are subject to procure and contract 50% of their expendable budget with SBEs, as the capital budget comprises part of District Government agencies total budget. The District Government capital budget plan outlines a total of \$5.2 billion in expenditures for fiscal years 2013 through 2018, and is currently not presently monitored by the Department as a result of the transfer to ODCA.

While DSLBD successfully deployed a new system to management District Government agencies' operating budget expenditures with SBEs, with plans to expand the system to tracking capital budget expenditures, the technology utilized is not ideal. The District Government's enterprise systems are not linked to the CBE Program online system, CBE Online, therefore procurements and expenditures are not linked to CBEs, and the compliance monitoring process is disjointed, requires exhaustive manual input, and faces challenges with human error causing issues with accuracy.

CBE Program Recommendation 2.2: DSLBD successfully leveraged technology to deploy a new system to monitor agency compliance with SBE expenditures. The solution, however, is short term and does not link the established enterprise procurement (PASS) and financial (SOAR) management systems used by the District Government. The PASS and SOAR systems are currently undergoing significant upgrades in fiscal year's 2012 and 2013. DSLBD recommends making these systems interoperable. Linking the procurement and financial management systems to CBE Online will reduce the burden of District Government agencies compliance reporting, and will increase the ability of the Department to effectively management operating and capital budget expenditures with SBEs. In addition, linking enterprise systems to CBE Online would address a recommendation offered by the Office of the Inspector General in an audit of DSLBD's operations conducted in fiscal year 2008¹⁵. (Long-term Solution)

Agency Subcontracting Compliance for Contracts over \$250,000

D.C. Code §2-218.46 requires that all construction and non-construction contracts in excess of \$250,000 subcontract 35% of the contract dollar volume with SBEs. Bids or proposals submitted by a prime contractor in response to a solicitation that fail to include a subcontracting plan should be deemed nonresponsive and rejected unless the contract is not subject to¹⁶, or has been granted a waiver from, subcontracting requirements. Once awarded, the prime contractor is required to submit quarterly reports to the Department which list expenditures with subcontractors.

Subcontractor requirements are not consistently applied across the contracting agencies of the District Government. Consequently, contracts in excess of \$250,000 have not consistently required subcontracting plans or the 35% subcontracting mandate with SBEs. Subcontracting requirements are currently not monitored by the Department as a result of the transfer of personnel and resources to ODCA. In addition, the provisions in the D.C. Code which provide guidance on the waiver of

¹⁵ "Audit of Operations within the Department of Small and Local Business Development," OIG No. 06-1-12MA, July 11, 2008.

¹⁶ CBEs that win a contracting opportunity are not required to subcontract out 35% of the contract; they may self-perform the entire contract. However, if they subcontract out any portion of the contract, that portion will be subject to the 35% SBE subcontracting requirement.

subcontracting requirements are found in two sections that present conflicting guidance between the authority of the Department and OCP.

D.C. Code §2-218.51 specifically provides any waivers that are issued must be approved by the DSLBD Director in accordance with requirements outlined. D.C. Code §2-218.46(a)(2) conflicts with the remaining sections of the Act as well as the Regulations, in that OCP is granted authority to provide waivers on non-construction contracts, as opposed to DSLBD. D.C. Code §2-218.46(a)(2) is the only section that grants authority to OCP to grant waivers. D.C. Code §2-218.46(a)(1) was not amended in 2010 and does not contain the added language to allow OCP to grant waivers for construction contracts over \$250,000. In addition, D.C. Code §2-218.46(g) provides that the subcontracting requirements of D.C. Code §2-218.46 may be waived pursuant to §2-218.51, which only provides the authority to grant waivers to the Director of DSLBD. D.C. Code §2-218.46(a)(2), as currently written, would require OCP to grant waivers for all District agencies and government corporations with independent contracting authority seeking such waivers for non-construction contracts over \$250,000.

CBE Program Recommendation 2.3: To clarify the authority to grant waivers of subcontracting requirements for District Government contracts over \$250,000, DSLBD recommends amendments to D.C. Code §2-218.46(a)(2) to allow only DSLBD, and not OCP, to grant waivers as contemplated in D.C. Code §2-218.46(g) and 2-218.51. DSLBD is best positioned to determine whether Small Business Enterprises (SBEs- a subset of CBEs) are available to satisfy subcontracting requirements.

Developer CBE Utilization Compliance

District-sponsored development projects are required to subcontract 35% to CBEs through the execution of a CBE Agreement. CBE Agreements are required only when a developer is directed by a District Government agency based on a subsidy received for a District-sponsored development project. Although District Government contracts over \$250,000 are required to subcontract 35% to SBEs, the Act does not likewise require SBE or CBE subcontracting for private developments with District subsidies such as:

- (a) District agency or government corporation loan;
- (b) District agency or government corporation grant;
- (c) Planned Unit Development (PUD);
- (d) Zoning Commission Order;
- (e) Tax Increment Financing (TIF);
- (f) Payment in Lieu of Taxes (PILOT);
- (g) Any other tax abatements;
- (h) Land related agreements with District agencies or government corporations as a party including but not limited to: Property Disposition Agreement, Disposition Agreement, Ground Lease Agreement, Lease Agreement, Land Acquisition, Land Use Agreement, Land Disposition Agreement, any other agreement concerning the lease or transfer of District owned land;
- (i) Revenue Bonds (including but not limited to Housing Finance Agency and Industrial Revenue Bonds);
- (j) Notes or other financial obligations issued by the District or government corporation; and
- (k) Any other District or government corporation subsidy.

Some agencies require developers to engage DSLBD to enter into a CBE Agreement before the subsidy is provided. However, in some instances, District Government agencies that provide District subsidies

do not require developers to enter into CBE Agreements; therefore, there are no CBE subcontracting requirements.

CBE Program Recommendation 2.4: DSLBD recommends that the Act be amended to require developers to enter into CBE Agreements for District-sponsored development projects with a subsidy over \$250,000, which would align requirements with District Government subcontracting requirements over \$250,000.

CBE Program Recommendation 2.5: DSLBD recommends that the Act be amended to require developers to report quarterly on progress towards subcontracting requirements with CBEs, and that penalties for the breach of CBE Agreements are authorized when subcontracting requirements are not met.

CBE Equity Participation Compliance Program for Development Projects

D.C. Code §2-218.49a requires, through completion of a project, that CBEs contribute and maintain 20% equity participation in development projects, which includes a private development or redevelopment of real property on District owned or leased land and to which the District provides a grant¹⁷ of the greater of 15% of the development costs or \$500,000. The CBE Equity Participation Compliance Program for Development Projects is not currently monitored by the Department as a result of its staffing and capacity limitations.

CBE Development Participation Compliance Program for Development Projects

D.C. Code §2-218.49a requires 20% CBE development participation in development projects, which include a private development or redevelopment of real property on District owned or leased land and to which the District provides a grant of the greater of 15% of the development costs or \$500,000. The CBE Development Participation Compliance Program for Development Projects is not currently monitored by the Department as a result of its staffing and capacity limitations.

Joint Venture Program Compliance

JVs are required to file quarterly reports, of which, DSLBD is mandated to monitor to ensure that the JV is in compliance with the JV agreement. Active JVs do not consistently apply for re-certification after the initial two year certification period; therefore, JVs continue to operate with being properly certified by the Department. In addition, JVs have not submitted quarterly reports or complied with the requirements of executed JV agreements. The JV Compliance Program is not currently monitored by the Department as a result of its staffing and capacity limitations.

CBE Program Recommendation 2.6: For certified Joint Ventures that violate provisions of the CBE Program, DSLBD recommends amending the Act to allow the Department to assess penalties to the JV, that each JV member not receive preference points or price reduction percentages for 2 years, and that the Department be authorized to revoke each participating CBE firm's certification for 2 years.

¹⁷ Title 27 DCMR 899.1, defines Grant as a public subsidy for which the District does not anticipate repayment, such as a cash contribution, tax increment financing, payment in lieu of taxes, or similar programs or agreements.

CBE Investigations

At the request of the Office of the Inspector General (“OIG”), or upon the submission of a sworn complaint, DSLBD will launch an investigation into a CBE suspected of violating legal and regulatory requirements of the CBE Program. CBEs are responsible for maintaining ongoing compliance and, to hold business enterprises accountable, it is necessary for DSLBD to conduct timely investigations of suspected violations as well as conduct random inspections. Due to staffing limitations, CBE investigations are conducted by the Business Certification Division, the same unit that certifies CBEs. When an investigation is conducted, the Business Certification Specialist assigned to investigate the CBE halts their evaluation of certifications applications, which results in a delay in the approval of the certification applications in their portfolio.

In addition, at the conclusion of an investigation, DSLBD has limited authority to take an enforcement action if it is determined that a firm’s registration as a CBE should be revoked. The current authority to revoke the CBE status of a firm rests with the Commission. Currently the Commission faces challenges, as there is only one of nine Commissioners appointed¹⁸.

CBE Program Recommendation 2.7: With the proper resources for compliance, DSLBD will launch proactive spot investigations of CBEs to ensure they maintain ongoing compliance with the CBE program. DSLBD would hire a CBE Compliance Investigator to investigate CBEs when requested by the OIG or when a sworn complaint has been received when a CBE is suspected of violating legal and regulatory requirements of the program. A CBE Compliance Investigator would allow for the delineation of responsibility between the certification and investigatory functions of the CBE Program.

CBE Program Recommendation 2.8: DSLBD recommends that the Commission be eliminated, and that all authority to take enforcement actions, including revocation of certification, against a CBE be granted to the DSLBD Director.

CBE Program Recommendation 2.9: With the elimination of the Commission, DSLBD further recommends that the appeal of application denials, currently heard by the Commission, be heard by the OAH. To align DSLBD’s authority with other regulatory functions within District Government, OAH would serve as the administrative body to hear appeals of application denials and certification revocations by the Department. Authorizing OAH to serve as the adjudicatory body for CBE application denials and revocations would provide administrative judges trained to hear such matters.

CBE Program Recommendation 2.10: DSLBD recommends amending the Act to allow for the Department to assess penalties for the breach of requirements pursuant to the Act including but not limited to §2-218.46 (35% subcontracting requirement), §2-218.48 (breach of subcontracting plan), §2-218.49a (20% CBE Development Participation), and §2-2-218.64 (identification of CBEs in bids and

¹⁸ Although there is currently one Commissioner, D.C. Code §2-218.21 provides for 9 members. The Commissioner’s term expired on June 5, 2012 and the 180 day holdover status will terminate on December 2, 2012, after which date there will be no Commissioners. The District of Columbia Office of Boards and Commissions has been informed of the status of the Commission; however, there have been no appointments or re-appointments of members. After December 2, 2012, if any matters are presented to the Commission, those matters will be unable to be heard.

proposals etc.). In addition, any other penalty, fee or fine assessed under the Act and any civil penalties imposed pursuant to §2-218.63(c) be collected by the Department, deposited into the fund established under §2-218.75 (Small Business Micro Loan Fund) and disbursed accordingly by the Department.

OTHER RECOMMENDATIONS

Eliminate D.C. Supply Schedule SBE Fee

D.C. Code §2-354.12 authorizes the D.C. Supply Schedule (“DCSS”) as the city's multiple award schedule procurement program for providing commercial products and services to District Government agencies. In accordance with D.C. Code §2-218.45, each agency and government corporation must set aside every contact of \$100,000 or less for SBEs on the DCSS. The DCSS currently includes 16 commodity types¹⁹, and only SBEs are eligible to apply.

Established in 2002, and similar to the U.S. General Services Administration (GSA) multiple award program, the DCSS was intended to be a win-win for the District of Columbia and SBEs. For SBEs, being on the DCSS ensures set-aside consideration for purchases under \$100,000. For the government, the DCSS is designed to drive contract awards to SBEs and decrease time required to make small purchases by pre-qualifying companies in specific commodity types. Each quarter, however, SBEs on the DCSS are required to pay OCP 1% of their total DCSS invoiced sales. This requirement is inconsistent with the District Government’s practice with other citywide contract vehicles.

CBE Program Recommendation 3.1: DSLBD recommends the elimination of the 1% fee assessed to SBEs on the DCSS. The fee disproportionately targets SBEs, and is not applied consistently with all contracting vehicles across the District Government.

Coordinate SBE Utilization Support

In 2003, Mayor’s Order 2003-14 (“Order”), “Policy on the Participation of Local, Small, and Disadvantaged Business Enterprises in Executive Branch Procurements”, was executed and reaffirmed the Executive Branch’s support for SBEs, and established responsibilities for District Government agencies and the former OLBD. In addition, the Order directed District Government agencies to “designate an employee (“Liaison”) with procurement experience to work with OLBD to identify and promote contracting opportunities for LSDBEs.”²⁰

At present, District Government agencies select an employee that serves as the respective agency’s CBE Compliance Officer. Primarily, that employee only reports SBE expenditure information on behalf of respective District Government agency for which they are employed. The Order intended, however, for the District Government agency’s Liaison to perform the role of “identifying and promoting contracting opportunities” to SBEs. Further, the Order directs District Government agencies to “provide training and technical assistance programs” on procurement forecasts to identify the needs

¹⁹ “DC Supply Schedule Awarded Contracts”, last modified May 12, 2012, <http://ocp.dc.gov/DC/OCP/Publication%20Files/DCSS%20Contract%20Awards052212.pdf>

²⁰ “Mayor’s Order 2003-14: Policy on the Participation of Local, Small, and Disadvantaged Business Enterprises in Executive Branch Procurements”, last modified January 29, 2003.

for goods and services, and to structure procurements to facilitate competition amongst SBEs. This responsibility goes well beyond the current role executed by present-day CBE Compliance Officers, as the goal of the Order was to have an employee appointed within each agency that would serve as an advocate for the participation of SBEs in contracting opportunities. CBE Compliance Officers often rotate or their responsibilities shift causing significant and constant changes in the personnel that report SBE expenditure information to DSLBD.

This model aligns with practices established with the Federal Government. The federal Small Business Act, as amended by Public Law 95-507, established the Office of Small and Disadvantaged Business Utilization (“OSDBU”).²¹ The OSDBU is tasked with ensuring that each Federal agency and their large prime vendors comply with federal laws, regulations, and policies to include small business concerns as sources for goods and services as prime contractors and subcontractors. The goal of the OSDBU and related functions in each federal agency is to advocate for and manage the small business utilization programs for their agency.

Expanding the role of CBE Compliance Officers within District Government agencies to align with roles similar to the federal OSDBU would strengthen the District Government’s commitment to support SBEs, ensure compliance with SBE utilization mandates established by law, and re-align CBE Compliance Officers or Liaisons to serve their original purpose of being an advocate for the inclusion of SBEs. This function should be re-energized and should specifically include working with DSLBD to notify CBEs of upcoming business opportunities, independently coordinating training and technical assistance sessions for CBEs, and ensuring that District agency contracting staff are aware of CBE expenditure targets as they design solicitations and make contract awards. This responsibility would be assigned to staff currently responsible for aggregating CBE expenditure data, would not represent a necessity for agencies to hire an additional FTE, and would be supported by coordination from DSLBD.

CBE Program Recommendation 3.2: DSLBD recommends that the Mayor issue a Mayoral Order to reaffirm the Executive Branch’s commitment to SBE utilization, and to direct each District Government agency to appoint and expand the current role of agency CBE Compliance Officers. Agency CBE Compliance Officers should serve not only to report on the District Government agencies’ expenditures with SBEs, but also as advocates for the participation of SBEs on contracting opportunities. This approach re-aligns the District Government with the original intent of agencies establishing Liaisons or CBE Compliance Officers in Mayor’s Order 2003-14, and would align the District Government with the OSDBU program, a best practice in the Federal Government.

Agency SBE Expenditure Performance as an Agency Key Performance Indicator

Each year, District Government agencies are tasked with establishing an Annual Performance Plan which includes new initiatives targeted for achievement during the coming fiscal year, and Key Performance Indicators (“KPIs”) as a tool for measuring agency performance. KPIs quantitatively and qualitatively measure the performance of government agencies against specific goals over time. KPIs are developed and reported annually, and included in each fiscal year’s budget proposal. During agency performance and budget oversight hearings, KPI data is also used to highlight specific performance issues and support decision-making with regard to policymaking and budget formulation.

²¹ “The Federal Office of Small and Disadvantaged Business Utilization”, last updated April 2, 2012, http://www.osdbu.gov/about_us.html

As previously mentioned, District Government agencies develop KPIs that align with and measure progress toward broader agency objectives. SBE expenditure data shows that District Government agencies don't always meet their expenditure targets, and DSLBD is establishing tools to empower District Government with more information to meet their SBE expenditure targets.

CBE Program Recommendation 3.3: Agency KPIs should include an indicator to track District Government agencies' performance in meeting SBE expenditure requirements. KPI data is included in budget proposals, and reviewed in agency budget and oversight hearings that support decisions about the allocation of resources to agencies. Adding a KPI for SBE expenditures to each District Government agency's annual performance plan would further express the District Government's commitment to utilizing SBEs, and would highlight and incentivize agencies' compliance with SBE expenditure targets.

Use Cabinet Meetings to Highlight Agency Performance with SBE Expenditure Goals

On a monthly basis, the Mayor convenes Cabinet meetings with District Government agency heads to outline, coordinate, and monitor performance on key policy priorities. Cabinet meetings provide an opportunity to review agency performance data and ensure progress is being made on key public policy priorities. In reviewing the data presented, agency directors review the performance of their agencies relative to their peer agencies, and the Mayor reaffirms the priority of performance on the given topic.

As previously noted, DSLBD has launched a new system to monitor District Government agencies expenditures with SBEs. District Government agencies are able to use the system to access and report on their progress towards meeting SBE expenditure goals. In addition, District Government Agency Directors can view approved expendable budgets, SBE expenditure goals, annual procurement plan, quarterly expenditures, and access multi-year data to view previous years' performance. SBE expenditure data can be easily extracted by DSLBD and District Government agencies to monitor compliance with SBE expenditure targets. This data should be produced by DSLBD and made available to District Government Agency Directors for review at monthly Cabinet meetings, allowing the Mayor and Agency Directors to see SBE expenditures and make data-driven decisions to ensure compliance with SBE expenditure targets.

CBE Program Recommendation 3.4: Agency SBE expenditure performance reports should be reviewed during the Mayor's monthly Cabinet meetings with District Government Agency Directors. Making SBE expenditure data available during Cabinet meetings provide an opportunity for the Mayor to reaffirm the District Government's commitment to utilizing SBEs, and will help Agency Directors identify and manage SBE expenditure goals and performance.

CONCLUSION

The number of businesses in the CBE Program has grown substantially, from approximately 450 in the Sheltered Market Program of the mid-1980s to approximately 1,100 local companies in today's CBE Program. As the program serves more local businesses, its importance to the District's economy grows. Macroeconomic projections forecast an increasingly competitive regional economy²². With investment, the CBE Program can continue to support more local businesses and strengthen the District's competitiveness as a location to launch and grow a business.

The CBE Program's greatest weakness is in compliance and enforcement, and restoring compliance and enforcement resources is the most impactful recommendation articulated in this review. The Council's decision to transfer DSLBD's resources to the ODCA left DSLBD without the resources to execute its compliance and enforcement responsibilities, though the mandate remained with the Department. The Council's actions did establish a new role for ODCA in compliance monitoring, but simultaneously eliminated DSLBD's ability to fulfill its responsibilities, and ultimately weakened the CBE Program's compliance and enforcement efforts. With one (1) FTE, the Department cannot effectively perform duties designed for a team of five (5) FTEs, which include the oversight of over 80 District Government agencies which account for nearly \$300 million in projected operating expenditures with CBEs; 32 District Government agencies which account for over \$5 billion in capital projects (SBE goal undetermined due to the lack of capacity); over 150 District-sponsored projects which account for over \$1 billion in projected expenditures with CBEs; and nearly 100 JVs and CBE investigations.

The CBE Program Review reflects comprehensive recommendations by the Department to improve the CBE Program's implementation. Budget resources are scarce and DSLBD will continue to attempt to improve the CBE Program with its allocated resources. As previously described, the Department has taken actions to improve the CBE Program, from simplifying and approving certification applications faster than ever, to automating District Government agency reporting for operating budget expenditures with SBEs. These changes make it easier for qualified firms to become CBEs, empower District Government agencies to manage their performance in real-time, and increase DSLBD's ability to report and analyze CBE data.

Just as the CBE Program has grown into a comprehensive local business inclusion program, DSLBD's suite of services has grown to include a broad array of programs to help District businesses start and grow. The Department has pursued aggressive and innovative partnerships with organizations like Kauffman Fast Trac to develop Fast Trac DC, an effort to launch more than 250 businesses across the District. In January 2012, DSLBD launched ExportDC, the District of Columbia's first major export readiness and development program. Similarly, in 2012 DSLBD re-launched the District's Procurement Technical Assistance Program (PTAP) which will provide District of Columbia businesses with comprehensive support in pursuing business opportunities with the federal government. In fiscal year 2013, DSLBD will also roll out a Federal and State Technology partnership program, which will develop partnerships between the technology research assets in the academic, government, and private

²² Dr. Stephen S. Fuller and Dr. Ellen Harpel, "The Washington Metropolitan Area 2030 Economic Outlook: Standard Forecast" (paper presented to the 2030 Group, April 2009), http://cra.gmu.edu/pdfs/research_reports/2030_group_reports/1_2030_Standard_Forecast.pdf

sectors and facilitate technology research commercialization in the District of Columbia. The CBE reforms described in this document reflect an attempt to align the program's resources and structures with its historical ambitions. DSLBD's aggressive and successful efforts to roll out new business services reflect the Department's desire to align resources and structures with the ambition and enterprising spirit of the District's thriving business environment.

The District's economy is flourishing; smart investments in local business development can help District businesses benefit from this exciting time. As local enterprises, CBEs invest disproportionately in our local economy, hiring and paying taxes locally. A reciprocal investment in resources and program improvements from the District Government is smart and timely. Consideration of the recommendations above should proceed with that in mind.

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