

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Small and Local Business Development



Public Hearing on:

B23-0860, “Power Line Undergrounding Program Certified Joint Venture Majority Interest
Amendment Act of 2020” and

B23-0471, “Independent Compliance Office Establishment Act of 2019”

Testimony of
Kristi C. Whitfield
Director

Virtual Hearing

Before the
Committee on Business and Economic Development
Kenyan McDuffie, Chairman

September 15, 2020
3:00PM

Good afternoon, Chairman McDuffie, distinguished members of the Council, District residents and fellow entrepreneurs. My name is Kristi C. Whitfield and I have the privilege of serving as the Director of the Department of Small and Local Business Development, also known as DSLBD. I am grateful for the opportunity to testify before you today on two bills that will undoubtedly impact our District's certified business enterprises: B23-0860, the "Power Line Undergrounding Program Certified Joint Venture Majority Interest Amendment Act of 2020" and B23-0471, the "Independent Compliance Office Establishment Act of 2019."

I would be remiss if I did not take the time to note that this virtual hearing is taking place in the midst of a global health pandemic – a pandemic that continues to affect the 75,000 plus small and local businesses that call the District of Columbia home. To those businesses, I can confidently assure you that the Bowser Administration is working zealously to combat the negative effects of this public health emergency. As Mayor Bowser stated in a recent interview, "There is light at the end of the tunnel. Let's not just get back to normal. Let's be better than normal." With that said, please know that DSLBD is committed to fulfilling this promise of being "better than normal."

Throughout this novel coronavirus, my staff and I have made purposeful efforts to go beyond "normal" and to re-envision the way that we work to best serve District businesses.

Such efforts led to DSLBD:

- Conducting over 195 virtual spot checks to guarantee continued compliance amongst current certified business enterprises;
- Proactively contacting over 1,800 certified business enterprises to check-in and address their needs;
- Securing a Small Business Administration declaration for economic injury assistance allowing District businesses to be the first in-line in the region to apply for pandemic disaster loans;
- Awarding, and quickly disbursing, close to \$800,000 in Robust Retail grants;
- Collaborating with the Office of the Deputy Mayor for Planning and Economic Development to promote and score over \$30,000,000 in small business recovery micro-grants;
- Helping the District's Main Streets reconfigure their operations, repurpose their budgets to meet the changing demands of impacted businesses, and award over \$750,000 in sub-grants to over 300 local businesses;
- Assisting numerous businesses across all industries with federal loan application processes;
- Utilizing the DC Business Toolkit to direct businesses to resources offered through DSLBD's Community Development Financial Institution (CDFI) partners; and
- Organizing and participating in a host of tele-town halls and webinars geared towards helping businesses find new and innovative ways to pivot, survive, and thrive.

As the District continues to navigate its way out of this pandemic, the Administration is making all efforts to ensure that our certified business enterprises (CBEs) have every opportunity to thrive. B23-860, the "Power Line Undergrounding Program Certified Joint Venture Majority Interest Amendment Act of 2020" is a testament to this.

The DC Power Line Undergrounding (DC PLUG) initiative is a partnership between the District and Pepco to improve the reliability and resiliency of the District of Columbia electric system by placing select systems underground. Under current law, a CBE partner in a certified joint venture applying for a DC PLUG contract could own either a majority or minority interest; this could result in unintended situations where joint ventures with minimal CBE controlling interest receive contract awards. This would directly undermine the spirit of the DC PLUG law as it relates to CBE participation aims clearly outlined in D.C. Official Code § 34–1311.02(7).

The Executive’s amendment would maximize CBE participation for any contracts connected to this initiative by recommending that any certified joint venture be comprised only of majority CBE membership.

I hope that the Council will take prompt and favorable action on this legislation.

The Executive, however, cannot lend its support for B23-471, the “Independent Compliance Office Establishment Act of 2019.”

This proposed legislation raises significant concerns as it seeks to remove compliance and enforcement responsibilities from DSLBD and place them into a newly created Office of the Chief Compliance Officer. Additionally, we are concerned that this action would result in increased bureaucracy, thus diverting time and resources from being spent directly on local businesses at a time when those resources are needed more than ever.

DSLBD’s mission is to support the development, economic growth, and retention of District-based businesses and to promote economic development throughout the District’s commercial corridors. In furtherance of this mission, DSLBD’s compliance and enforcement division, in coordination with the Office of Contracts and Procurement (OCP) and the Office of the Chief Financial Officer (OCFO), has developed a critical network that has substantially improved the District’s overall administration of the CBE Program and are working together jointly to ensure that District agencies, and beneficiaries selected to perform on government-assisted projects comply with established CBE utilization requirements.

DSLBD’s ability to fulfill its mission and effectively advocate on behalf of District-based small and local businesses is critical and absolutely dependent on symbiosis amongst the agency’s six divisions. The need for such symbiosis was made evidently clear when the Council previously relocated certain compliance functions to the Independent Auditor’s office – a decision which did not prove efficient and effective thereby causing the Council to then return such compliance functions back to DSLBD.

The agency’s strength and its ability to continue improving its operations is entirely dependent upon DSLBD maintaining a structure that connects all DSLBD functions including certification, business development, and compliance and enforcement working closely in tandem as a single cohesive unit under a single department. Separation of these divisions by way of removing compliance and enforcement, as proposed, would undoubtedly result in a debilitated agency with no actual authority to compel or enforce others to act on behalf of the best interests of small and

local businesses, and will adversely affect the current synergism and progress made since Mayor Bowser took office.

DSLBD would like to work with the Council and the CBE community on legislation that would strengthen the CBE Program.

Rather than disrupting DSLBD's current progress by relocating compliance and enforcement to a newly created independent office with remarkably identical responsibilities and enforcement authority, DSLBD urges the Council to work with the Department on more impactful, and less disruptive, solutions that will advance the cause we both seek to achieve and not result in:

- (1) Irreparable harm to the tangible compliance and enforcement advancements made;
- (2) Increased costs to District taxpayers with the creation of an unnecessary new office; and
- (3) Increased red tape, confusion, and bureaucracy for District-based small and local businesses, particularly during a time when most are suffering from the effects of a global health crisis.

Of course, DSLBD welcomes the opportunity to explore valuable ways to strengthen the CBE program. The Executive has already shared some of these ideas with your staff and is working on a more substantive, legislative overhaul of the Program, which I am happy to share once it has completed internal review.

The Executive's legislative overhaul proposes five sweeping changes to current CBE law.

First, it strengthens the integrity of the certification process by tightening eligibility requirements for becoming a local business enterprise (LBE), the prerequisite for gaining entry into the CBE Program. More specifically, it requires a business applying for certification as an LBE to be independently owned and operated, and eliminates the "asset test" as a qualification for eligibility as an LBE in order to thwart out-of-state, larger businesses from establishing a "local" office for the purpose of gaining preference for District contracts and procurements.

This past year, I have heard from District businesses that are skeptical of the CBE Program because they believe that non-bona fide local enterprises are able to get certified. These concerns regarding entry into the CBE program are top of mind for the Executive.

Second, it adds protections for CBE subcontractors by mandating beneficiaries to invoice the District for work performed on a government-assisted project every 30 days, and following receipt of payment by the District, to pay subcontractors for work invoiced and performed, further guaranteeing that CBE subcontractors are paid timely and at a regular cadence.

The Executive understands that subcontractors rely on scheduled payments. As an entrepreneur, I, personally, also understand the harm that not receiving one's money on time can have on daily operations and employee morale.

Third, it imposes a stricter penalty structure for beneficiaries who fail to demonstrate a good faith adherence to overall subcontracting requirements.

Fourth, it eliminates the ability for a beneficiary that was awarded a contract over \$250,000 to fulfill the mandated 35% CBE subcontracting requirement by subcontracting to a business enterprise that it has an ownership or financial interest in.

And fifth, it protects equity sponsors (*i.e.*, small investors, disadvantaged investors, certified equity participants) from bearing disproportionate project costs while ensuring that proportionate voting rights are guaranteed. In addition, this legislation would tighten eligibility requirements for equity sponsors to ensure that certain existing relationships do not exist between them and project sponsors that would create bias or conflict or the perception of bias or conflict.

Returning to B23-471, during its September 17, 2019 introduction, four specific issues were credited as the impetus for this legislation:

- (1) DSLBD's handling of the waiver process;
- (2) DSLBD's lack of enforcement against agencies that fail to meet small business enterprise (SBE) spend goals;
- (3) DSLBD's monitoring of public-private development projects (PPDs); and
- (4) DSLBD's tracking of the number of set-aside contracts under \$250,000.

The issues raised during this introduction do not take into account the tangible, positive momentum created by DSLBD in the areas of compliance and enforcement.

More specifically, DSLBD has vastly strengthened its compliance and enforcement performance by:

- (1) Increasing its interaction with, and visibility in, the CBE community through announced and unannounced spot checks at the principal office of record;
- (2) Levying and collecting unprecedented fines for non-compliance and placing this money into the hands of small and local business owners;
- (3) Collaborating with agencies to maximize small business enterprise (SBE) spending and subcontracting;
- (4) Advocating for SBE contracting and procurement opportunities for SBEs through the waiver process; and
- (5) Improving monitoring over public-private development projects.

I would like to further emphasize the importance each of these improvements in greater detail and explain why I believe this legislation will actually have a detrimental effect.

DSLBD's heightened enforcement presence amongst CBEs.

In FY19, DSLBD, for the first time in the agency's history, committed to conducting at least one unannounced spot check at the listed principal offices of over 1400 active CBEs. DSLBD accomplished this feat setting a precedent that the agency is devoted to replicating every year going forward. These spot checks resulted in five revocations and five self-rescissions.

For sake of transparency, a list of entities that were revoked or self-rescinded is listed on the Department's site for public awareness. After conducting these spot checks, we can say with a degree of certainty that the overwhelming majority of CBEs are, in fact, complying with the law.

And, I would like to note that even during this pandemic, the Department adapted its compliance and enforcement practices accordingly and are currently conducting virtual spot checks.

DSLBD has ramped up compliance and enforcement efforts.

DSLBD has collected an unprecedented number of fines, of a record dollar amount, which were used to further empower the District's small and local business community. As of FY19, DSLBD levied and collected fines for non-compliance from beneficiaries in excess of \$3 million. As a result of these collections, the agency piloted the innovative Robust Retail grant program that infused over \$1.6 million into hands of the small retail establishment in the District.

In addition, through fines collected by DSLBD, the agency partnered with local Community Development Financial Institutions to provide local entrepreneurs with access to much-needed capital by leveraging \$200,000 into over 300 loans totaling \$1.5 million. I am proud to report that these loans created or retained over 300 District-based jobs.

The District has been able to identify and verify more contracting opportunities and dollars being spent with SBEs than ever before.

DSLBD understands that agency circumstances and budgets evolve and change throughout the fiscal year, so it is imperative that the Department prioritize working in partnership with, and not against, District agency directors, contracting officers, and CBE liaisons in order to espouse long-term best practices for agencies to consistently meet goals. This approach has proved prolific as evidenced by historical peaks in verified SBE spend, most recently to the tune of over \$900 million in FY19 (*see Attachment 1*). Prior to Mayor Bowser getting elected, the District was only able to account for just over \$300M in unverified, self-reported SBE payments.

Incidentally, during the September 17 introduction of B23-0471, it was stated that DSLBD failed to use its discretionary enforcement authority against agencies that did not meet SBE spend goals. The CBE law's ramifications for not meeting agency spend were meant to target and deter willful and repeating bad actors. DSLBD understands the distinction between a willful violation versus a case where an agency may have difficulty meeting its spending goals.

Over the last three fiscal years, only one agency out of the eighty-eight (88) monitored agencies has not consistently met annual SBE spend goals. Nevertheless, over time, and through the support of our compliance specialists, this agency's spending with SBEs has increased from achieving twenty-eight (28) percent of its SBE goal in FY16 to achieving eight-four (84) percent of its SBE goal in FY19.

Furthermore, the proposed bill discussed today does not mandate that the head of a newly formed independent agency automatically enforce penalties against agencies that do not meet spend

goals, but rather maintains the ability for him or her to exercise discretion when making enforcement determinations.

DSLBD has increased contracting and procurement opportunities for small and local businesses by heavily scrutinizing agency waiver requests.

As you know, reviewing waiver requests is one of the most serious responsibilities of my job as the Director of DSLBD. While procurement laws do not give DSLBD the power to place a specific CBE on a contract, we do have the power to deny waiver requests and compel our agency partners to take another look at the CBE community when one of them raises their hand to say that they can perform the work.

Since Mayor Bowser appointed me two years ago, the dollar value of those waivers has decreased significantly each year, meaning the District is keeping more money within the CBE community. In FY19, \$120 million in waiver denials meant \$120 million into the pockets of local CBEs thanks to the diligence, determination, and advocacy of our compliance team.

DSLBD has improved transparency involving its decision-making processes by posting final waiver determinations online for public view.

Transparency surrounding agency-requested waivers is of the utmost importance to DSLBD. Although not required under the current law, DSLBD makes good faith efforts to post all final waiver determinations for the public to view.

DSLBD has made progress in its visibility over District public-private development projects.

Although the Council decided to remove \$720,000 in funding in FY21 for the District Enterprise System (DES) which would provide upgrades necessary for greater visibility over beneficiary-CBE interactions, the Department continues to improve public-private development (PPD) tracking and monitoring processes.

For example, DSLBD established a working group consisting of DSLBD, the Department of Employment Services (DOES), and all PPD funding agencies which meets, reviews, and discusses progress on currently active projects. Additionally, in FY19, DSLBD started co-hosting the Initial Compliance Meetings together with DOES for new PPDs once First Source and CBE Agreements were in place. This partnership, along with the working group meetings, helps direct DSLBD in monitoring the appropriate projects and be more effective by building strong collaboration with agency partners.

Most importantly, as the Director I am proud to say that after extensive review of over 600 known PPD projects, for the first time, under Mayor Bowser's watch, DSLBD can give an accurate accounting of CBE achievements on PPD projects.

As a means of improving oversight, DSLBD has also made arrangements with the various PPD funding agencies to have the CBE Agreement incorporated as part of the required closing loan

documentation. The pertinent loan closing documentation will then be provided to DSLBD. This practice will guarantee that, going forward, the agency is aware of every project that has a CBE requirement.

Lastly, DSLBD now has access to the DMPED and Department of Housing and Community Development (DHCD) pipeline which has significantly improved DSLBD's visibility into upcoming projects and will routinely facilitate the agency's receipt of listings of active and projected loan closings thereby allowing heightened PPD tracking.

DSLBD has made progress in its visibility over set-aside contracts under \$250,000 awarded to SBEs.

DSLBD has been working with agencies that have contracting and procurement authority to get greater visibility over these contracts, particularly through the creation of the District Enterprise System (DES).

Again, I am disheartened by the fact that the Council swept over \$700,000 allotted by the Executive in FY21 to make much-needed upgrades to the system. Such upgrades, for instance, would allow the Department to monitor and confirm in real time, payments to CBE subcontractors by beneficiaries. In spite of this, DSLBD continues to increase interagency communications with contracting officers on topics such as CBE law set-aside and determination and finding requirements.

In closing, I ask that the Council help to build on the success of DSLBD's work on behalf of small and local businesses to date and to work collaboratively with the Executive on solutions to strengthen the CBE Program, along the lines I outlined in the Executive's forthcoming legislation.

Lastly, I would like to voice my great appreciation for the team at DSLBD who suit up every day, whether virtually or in person, to further the interests of small and local businesses in the District. Throughout this public health emergency, they have made it a top priority to personally call and check in with every single certified business enterprise to inquire whether there is anything DSLBD can do to further assist them with their small business needs. This team realizes that when District businesses succeed, so do the communities, neighborhoods, and District residents who depend upon those local businesses for employment, goods, and services.

Thank you for the opportunity to testify today. I am happy to address any questions.

SBE Spend by Fiscal Year

