

OVERVIEW OF DBE PREFERENCES IN GOVERNMENT BIDDING AND CONTRACTING

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While Wisconsin counties are generally not required to administer their own Minority Business Enterprise (MBE) or Disadvantaged Business Enterprise (DBE) programs, it is nevertheless a good idea for counties to familiarize themselves with MBE/DBE programs because federal aid programs are often subject to MBE/DBE requirements. Additionally, a few counties and municipalities in the state have implemented their own MBE or DBE programs. Although local governments are largely permitted to implement their own MBE or DBE programs, counties desiring to implement their own program should consult their corporation counsel to ensure compliance with applicable state and federal laws.

Federal DBE Requirements

Importantly, federal aid is often conditioned on compliance with federal DBE program requirements. Probably the most robust program, and a good illustration of DBE programs generally, was created by the Surface Transportation Assistance Act of 1982 (the 1982 Act). The 1982 Act set a national goal of placing at least 10% of federal highway and transit funds with persons who qualify as disadvantaged small business operators.

The Wisconsin Department of Transportation (WisDOT) subsequently created its own DBE program in accordance with the U.S. Department of Transportation (U.S. DOT) regulations (*i.e.*, 49 CFR part 26). For this reason, the main components of the WisDOT program will be presented in order

to familiarize counties with the core concepts of DBE programs.

Under the regulations, WisDOT may not discriminate on the basis of race, color, national origin or sex in the award and performed of any U.S. DOT assisted contracts or projects, or in the administration of its DBE program or the requirements of 49 CFR part 26. In light of these requirements, nondiscrimination provisions are provided in all WisDOT contracts. Further, WisDOT's DBE policy statement provides the following as the main goals of its DBE program:

1. To ensure nondiscrimination in the award of U.S. DOT assisted contracts.
2. To create a level playing field on which eligible firms may compete fairly with U.S. DOT assisted contracts.
3. To ensure that the program is narrowly tailored in accordance with applicable law.
4. To ensure that only firms that fully meet the eligibility standards in the regulations are permitted to participate in the program.
5. To help remove barriers to the participation of DBE's in U.S. DOT assisted contracts.
6. To promote the use of DBE firms in all types of federally assisted contracts and procurement activities conducted by recipients.
7. To assist the development of firms that can compete successfully in the market place outside the program.

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Legal Issues

Relating to County Government

Under federal and state law, a DBE is any small business at least 51% owned, operated and fully controlled on a daily basis by a member or members (or in the case of publicly held firms, the member or members must own at least 51% of the stock issued) of the following groups:

- (a) African Americans
- (b) Native Americans
- (c) Hispanic Americans
- (d) Asian-Pacific Americans
- (e) Asian-Indian Americans
- (f) Women

Individuals who are not members of one of the groups above can be found to be socially disadvantaged as defined by Appendix E of 49 CFR Part 26.

Again, it is important for counties to familiarize themselves with these types of requirements because they are imposed on federal aid projects. For example, DBE requirements would apply if a county highway project is utilizing any federal funds. Even though WisDOT principally controls the administration of the project and also of the DBE program requirements to the extent necessary under federal law, Counties are still often involved in the administration of such projects to varying degrees. Moreover, all county money must be expended in accordance with federal law on these projects. WisDOT also does have the authority to delegate bidding and contracting responsibilities and also contract administration responsibilities to counties where it deems appropriate. While the administration of DBE requirements

In many areas of the state, counties are the primary local government charged with adoption and enforcement of land use regulations. The regulatory environment has become increasingly complex and "high stakes" in the areas of livestock regulation, shoreland zoning and environmental issues, to name but a few. The Government Law Group at von Briesen has the background and experience in all aspects of land use law and can leverage that knowledge to benefit corporation counsel and planning and zoning staff. We understand land use law and most importantly, we know county government.

To learn more about how our Government Law Group can assist you with your Land Use issues, please contact Andy Phillips at aphillips@vonbriesen.com.

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Even though counties are not required to administer their own DBE programs, counties will undoubtedly encounter situations in which they need to understand how the programs function.

is ultimately the responsibility of WisDOT, counties should be familiar with the requirements (particularly the contract provisions related to nondiscrimination) so that they can effectively manage the bid process and/or administration of construction contracts when directed to do so by WisDOT.

This is just one example of federal aid projects involving DBE program requirements. Most (if not all) federal aid will contain similar nondiscrimination provisions related to MBE/DBEs.

Furthermore, only certain agencies in each state are authorized by the federal government to certify businesses as DBEs. In Wisconsin, WisDOT has the most robust and readily available list of DBEs available for use (WisDOT maintains a unified disadvantaged business certification program). The City of Madison (Department of Civil Rights), Dane County (Office of Equal Opportunity), and Milwaukee County (Community Business Development Partners) are also DBE certification entities in the state.

State of Wisconsin MBE Requirements

At the state level, the state Minority Business Program was created in 1983 through the enactment of Wisconsin Act 390 which requires the Wisconsin Department of Administration (“DOA”) and other state agencies to comply with certain MBE requirements when making purchases. According to Act 390, firms wishing to participate in the program must be certified by the DOA. The benefits of being certified include a preference which may be awarded to any MBE bid that is no more than 5% higher than the apparent low bid or competitive proposal that is no more than 5% lower than the most advantageous offer. This permissive 5% low-bid preference is applicable to all state purchases except printing

and stationery. As stated above, the State MBE requirements are not applicable to county purchasing, however, such requirements would be applicable to cooperative purchasing contracts administered by DOA at the state level.

County MBE/DBE Requirements

Counties (and other municipalities) are not required to administer their own MBE/DBE programs.³ However, some counties have chosen to do so and have set forth program requirements in ordinance. The program requirements typically mirror the federal requirements and goals discussed above with respect to county level purchasing and contracting. However, it is highly advised that counties desiring to implement their own MBE/DBE program should consult their corporation counsel to ensure compliance with applicable state and federal laws.⁴

Conclusion

Wisconsin counties should familiarize themselves with the DBE programs, requirements and concepts discussed above. Even though counties are not required to administer their own DBE programs, counties will undoubtedly encounter situations in which they need to understand how the programs function. If you have any questions about DBE preferences in bidding and contracting, or any other governmental law needs, please contact the Association or any member of the von Briesen & Roper Government Law Group (www.vonbriesen.com). ♦

Endnotes

1 <https://www.apha.org/topics-and-issues/health-equity/racism-and-health>

2 <https://www.rwjf.org/en/library/research/2017/05/what-is-health-equity-.html>

3 See 68 OAG 306.

4 At the local government level, such programs generally must satisfy two conditions in order to be constitutional as follows: (1) the need to use a plan to remedy prior discrimination must be adequately demonstrated, and (2) the plan must be narrowly tailored.