American Bar Association  
Forum on Construction Law  

Workshop C: Social Programs, Preferences, and Incentives for Federal and State Projects  

Brenda Radmacher  
Gordon & Rees Scully Mansukhani, LLP  
Los Angeles, CA  

Rhonda Levinson  
Perry & Trent LLC  
Bonner Springs, KS  

Timothy D. Matheny  
Peckar & Abramson, PC  
Dallas, TX  

Presented at the 2019 Mid-Winter Program  
January 30 – February 1, 2019  
Millennium Biltmore Hotel, Los Angeles, CA  

© 2019 American Bar Association
The complex topics of DBEs, MBEs, SBA enterprises, Section 8, minority set-asides, Enterprise Zones, veteran programs, “Buy American” acts, and other governmental incentive programs are intimidating enough for public construction lawyers and are downright fearsome for lawyers who focus primarily on private construction projects. The goal of this program is to demystify these programs and provide a “what you need to know” overview of government incentives and preferences. The program will also cover various constitutional and practical issues, as well as possible areas for fraud and abuse issues (e.g., sham MBEs), in implementing local preferences in public contracting.

I. Introduction

Government contracting is consistently an area where there is intense competition among contractors. Entry into the competition for government dollars is an area where contractors need legal assistance to handle the intricacies of the contracts and bidding involved. Many contractors hire attorneys to help them navigate these intricacies. Public contracts with diversity goals throw additional details into the mix that many general practitioners of the law are unprepared to handle.

A background and history of the programs, the development of the legal and regulatory foundations of the programs, as well as the numbers that illustrate the need for the program will assist the legal practitioner by creating a framework for understanding the requirements of the programs.

A. Background on Preference Programs

Starting in 1958, disadvantaged business programs were first considered by Congress. The 1958 Small Business Act §8(a) required assistance to “socially and economically disadvantaged” small businesses. Section 8(a) was used to obtain contracts from federal agencies and subcontract to firms that agreed to locate in or near “ghetto” areas and provide jobs to disadvantaged residents. In 1978, the 8(a) program was converted into a minority business development program with the passage of Public Law 95-507. Since that time, some modest progress in expanding diversity in the construction industry has occurred, but, generally speaking, the numbers of minority and disadvantaged people and businesses in the industry are still nominal.

In the beginning, the 8(a) program was limited to traditional minorities and excluded all non-minorities and female owned businesses. The program has evolved to include some non-
minority males and female applicants who can demonstrate that they are “socially and economically disadvantaged.”

“Socially disadvantaged” and “economically disadvantaged” are given distinct definitions under the program. “Socially disadvantaged” individuals are defined as individuals who have been subjected to racial, ethnic, or cultural bias within the American society due to their identity as a member of a group without regard to their individual qualities.1 “Economically disadvantaged” refers to socially disadvantaged individuals whose ability to compete freely has been limited or impaired due to lesser capital and credit opportunities compared to others in the same or similar industries who are not socially disadvantaged.2

In 1983, the first U.S. Department of Transportation (DOT) Disadvantaged Business Enterprise (DBE) Program was established. In 1987, the program was expanded to add women to the groups presumed to be socially disadvantaged. When the DOT is providing funding for state and local transportation projects, the requirements of the DBE program apply. The program was intended to remedy and mitigate the effects of past discrimination in the awarding of government contracts by including more small business groups on federally assisted highway, transit, airport and transportation-safety projects. The program embraces the concept of engaging women, veterans, and minority and small business owners in the transportation industry as contractors and skilled workers.

In 1994, the Federal Acquisition Streamlining Act (FASA) was enacted. It was the first legislation enacted to achieve a goal of awarding five (5) percent of all federal contracting dollars to Women Owned Small Businesses.3 In 1994, women owned businesses received only a little more than one (1) percent of the billions awarded in government contracts, despite constituting almost one-third of all business owners.4 In 2000, the 8(a) program was amended to include Women Owned Small Businesses. That portion of the program was not implemented until 2004 when the U.S. Women’s Chamber of Commerce filed a lawsuit and obtained an injunctive order requiring the SBA to immediately implement the program.5

Efforts to diversify construction unions are taking place around the country, as the building trades’ workforce ages and more projects include goals to increase the number of women and people of color on work sites. For example, the City of Boston recently raised its diversity benchmarks for public and large private developments: at least 51% of construction work-hours must go to city residents, 40% to people of color, and 12% to women — although
many projects have fallen far short of these numbers. Nationwide, 9 percent of jobs in the construction field are held by women, but only 3% are in the trades, as opposed to administrative, sales, and other office positions.\textsuperscript{6} However, in 2017, according to U.S. DOT reports, 23 states and two U.S. territories that received federal tax dollars for their projects did not meet annual DBE program goals.\textsuperscript{7}

\textbf{B. Legal and Regulatory Foundations}

At the federal level, social programs, preferences and other incentives designed to provide a socio-economic impact are set out in the various statutes and acts passed by Congress and signed into law by the President. These acts are then expanded upon by the various regulations such as the Federal Acquisition Regulation ("FAR"), which after being published in the Federal Register, provides more definitive guidance than is found in the applicable act. There is often another layer of regulations passed by individual agencies which provide further regulatory guidance for work that falls within its particular jurisdiction or to further clarify additional guidelines in application of a particular program such as DBE or MBE. Many agencies provide explanations on their websites of programs that are applicable to their various procurement and construction programs.

Socio-economic programs are also used at the state and local levels of government throughout the United States in order to foster economic growth. At this level, it is important to become familiar with state statutes and regulations to determine whether a particular economic program is applicable such as a DBE or MBE program. Additionally, states can enact laws that will provide guidance for state "preference programs" for things like maximizing use of various materials produced in state, local bidder's preferences and more.

In addition to the applicable state statutes governing the procurement activities, at the local government level one has to analyze what type of governmental authority is the procuring agency. Counties will very likely have additional regulations and procedures associated with their construction procurements. Municipalities will likely have various charters, ordinances and procedures that have to be taken into account in analyzing any procurement question.

\textbf{C. The Numbers Tell a Story}

As a background to the programs, it is notable that the legal and regulatory foundations for social programs grew in large part out of the disproportionate share of white men in the construction industry. Indeed, the most recent studies still show that only 9.1\% of workers in the
U.S. Construction Industry Sector are women. As of Dec. 31, 2016, approximately 939,000 women were employed in various occupation sectors of the construction industry. The following is a breakdown of women by occupation sector in the construction industry:

<table>
<thead>
<tr>
<th>Occupation Sector</th>
<th>Number of Women</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sales &amp; Office</td>
<td>423,000</td>
<td>45%</td>
</tr>
<tr>
<td>Professional &amp; Management</td>
<td>293,000</td>
<td>31%</td>
</tr>
<tr>
<td>Natural Resources, Construction &amp; Maintenance</td>
<td>196,000</td>
<td>21%</td>
</tr>
<tr>
<td>Service Occupations</td>
<td>14,000</td>
<td>1.5%</td>
</tr>
<tr>
<td>Production, Transportation &amp; Material Moving</td>
<td>13,000</td>
<td>1.4%(^9)</td>
</tr>
</tbody>
</table>

These figures are notable because the number of women has not increased over time despite these incentive programs. The figures went up for a short period but then decreased; in 2005, there were 1,079,000 women in construction, which increased to 1,119,000 in 2007, and then decreased steadily to 872,000 in 2013. The numbers started to increase slowly after that but have not risen to the numbers in the past decade. Similarly, racial minorities continue to lag behind in representation in the industry. While racial minorities make up about 15% of the workforce, Blacks and Asians are only nominally represented. Accordingly, the incentive programs appear to still have an important role to play in the construction industry.

II. Nuts & Bolts of Compliance with Incentive Programs

A. Public Works

As mentioned in the section above, each of the socio-economic incentive programs that are designed to increase opportunities for disadvantaged businesses have certain requirements. As one of the objectives of the various programs is to use public funds to increase opportunities for certain classifications of businesses, it is important to have a reporting requirement built into the process in order to track the level of participation and evaluate the success of each particular program.

Each program has a defined scope, eligibility for certification and recognition in the program, and requirements for program participation. One absolute on all of the programs, with the exception of the U.S. DOT program, is that the contractor who is applying for certification is required to be a U.S. citizen. The Small Business Administration ("SBA") oversees numerous
programs such as the 8(a) Business Development program, the HUB-Zone program, Women-Owned Small Business program, Service-disabled Veteran-Owned program and Mentor-Protégé program.\textsuperscript{10} Many of the agencies, such as the Department of Defense\textsuperscript{11} and the General Services Administration\textsuperscript{12}, have portions of the websites devoted to providing information to encourage small business participation.

The U.S. DOT has its own program for Small and Disadvantaged Business certification of program.\textsuperscript{13} To qualify for the U.S. DOT SDBE program a contractor applying for certification must meet the following criteria:

- an individual personal net worth cannot exceed $1.32 million;\textsuperscript{14}
- the small business must meet the SBA Size, annual gross income cannot exceed $23.98 million;\textsuperscript{15}
- the small business must be owned by a minority, at least 51%;\textsuperscript{16} and
- the small business must be independent of any other company\textsuperscript{17}.

The U.S. DOT program is the one certification program that allows both U.S. citizens and lawfully admitted permanent residents to become certified.

A contractor should look at each of these federal programs to determine whether or not they meet all of the eligibility criteria for certification and recognition in the program. Some of the federal programs are self-certifying and others require official certification by a governmental agency. The attorney should be able to assist the contractor in both answering questions on eligibility and certification criteria and assist with the process as needed.

Most states have various disadvantaged, minority-owned, women-owned or other small business programs. The requirements for the programs and certifications can vary widely. For example, the state of Ohio has several programs that it uses to assist its businesses and foster economic growth. The Ohio Department of Administrative Services ("OHDAS") administers and provides assistance for several certification programs. OHDAS oversees certification for minority-owned business under the "Minority Business Enterprise" program that includes various ethnic groups, but, does not include women.\textsuperscript{18} However, women are included as part of the "Encouraging Diversity, Growth and Equity" ("EDGE") program that includes defined groups at a social disadvantage to include: (1) race and ethnic origin; (2) female gender; (3) chronic physical or mental disability; or (4) business owner's long-term residence in an
environment isolated from the mainstream of American society. The EDGE program has participation limitations of a 10 year time limit or the owner achieving a net worth in excess of $750,000. OHDAS also oversees a "Veteran-Friendly Business Enterprise" program which includes criteria of at least 51% ownership by veterans and at least 10% of the employees being veterans or on active-duty, with additional criteria for certification. The Ohio Department of Transportation manages the certification program that runs in tandem with the U.S. DOT program. By contrast, Oklahoma has different regulatory approach. The Oklahoma Department of Commerce manages the state certification program for women-owned and minority-owned businesses. The Oklahoma Department of Transportation manages the state certification program that relates to the U.S. DOT programs.

B. Private Contracts

While incentive programs are generally in public works, some private contracts have started to adopt similar programs. Many contractors have embraced the call for diversity and inclusion in the construction industry. Companies that understand the need for diversity and inclusion and develop policies and culture to support it are better poised to compete. In addition to a wider talent pool to draw from, these companies can benefit from improved employee retention and work relationships based on respect for differences, environments that foster innovation, and a more diverse supply chain.

For example, Pepper Construction has recently shifted its focus "from checking boxes to making a real impact in our local communities. The first step is re-framing the conversation. Instead of focusing on diversity, which emphasizes quantities, we’re focusing on inclusion in an effort to emphasize quality instead of the quantity of effort."

“There has been an obvious shift from accounting for hours to hit targets to building a network and relationships well in advance of the project. We’re starting to get it. Larger GCs are mentoring smaller minority GCs and showing them how to be successful. We’re teaming up on projects and both of us are growing from the experience. These efforts are providing training, mentorships and more opportunities for smaller more diverse companies.”

(Id.)

According to an article by Associated Builders and Contractors (ABC): “There is a marked demographic shift in construction company ownership towards minorities and women.
By the end of 2020, more than 50 percent of businesses entering the construction industry will be minority- or female-owned.”  

At the same time, prime contractors want to ensure that they have qualified subcontractors with this anticipated growth. For example, Skanska created a Construction Management Building Blocks (“CMBB”) program, a free, multi-week course designed to give minority- and women-owned business enterprises (“MWBEs”) the tools and knowledge needed to secure contracts and create jobs. Now in its 10th year, the program is initiated, organized and taught by Skanska USA in areas of need across the country. To date, Skanska has run programs in Cincinnati, Atlanta, Nashville, Austin, Detroit, Memphis, Tampa, Houston and more – with approximately 1,000 companies completing the course. Similarly, Balfour Beatty has made strides toward diversity and inclusion on its projects. Brian Cahill, Divisional President in California said, “Investing in the local community is a vital business imperative at Balfour Beatty. This includes lasting economic and community benefits that extend to diverse businesses and workers and advancing women in the industry.”

Similarly, many companies have taken action to approach diversity and inclusion by hiring at the manager/director role. For example, PCL Construction hired a Manager of Diversity and Inclusion to oversee and manage community outreach, certified subcontractor relationships, and local hiring requirements to meet the goals of PCL and its clients, as well as aligning with corporate initiatives to maintain and foster an open and inclusive working environment across PCL project sites.

The efforts in private contracts are not as measurable as in the public sector. Moreover, diversity and inclusion requirements are often owner-driven and project- or sector-specific. It is critical to know and understand the requirements of each particular project and to ensure that any qualifications or requirements are properly met.

C. Legal Pitfall Areas

General practitioners can run into several areas of legal pitfalls when attempting to assist companies in obtaining DBE/WBE/MBE certification. The most common pitfalls are in the initial company formation, the documentation surrounding the funding and negotiations involved
in either creating or purchasing the company intended to be certified, and in the representations the company must make in order to obtain certification.

1. **Company formation and documentation**

If a company is being started from scratch with the intent of creating a company eligible for certification, and it is a sole member LLC or sole shareholder corporation, the methods of creating the company are straightforward, except for the funding of the company, which will be discussed more fully below.

If the attorney is assisting with the creation of a multiple owner company, the formation of the company must be done more carefully. The minority/female owner must have a minimum of 51% ownership interest in the company. Further, the attorney must have an awareness of the control issues that are central to DBE/WBE/MBE certification issues. The minority or female owner must be in complete control of the company, have the power to direct or cause the direction of the management of the firm, the day-to-day and longer terms decisions of the firm on all matters of management, policy and operations. In addition, the minority or female must hold the position as the highest officer in the company, control the board of directors or serve as managing member or general partner with control over all business decisions.

If the company is formed with a multiple director or officer structure, a major potential pitfall for the attorney is in addressing the degree to which the board or officers control the company. The standard business practice—outside of DBE/WBE/MBE certification—is to recommend that control of the company rest with a multi-member group, with each officer or director having one vote, and majority rules. However, this formation would result in the company being disqualified from certification. With a structure that requires a majority vote of a multi member group, the minority or female owner could be outvoted, and that is a violation of the DBE/WBE/MBE program provisions that require the minority or female owner be in control of all corporate decisions. The company is then ineligible to reapply for certification for one to three years, potentially creating a claim against the attorney for legal malpractice.

The Board of Directors, managers, owners or shareholders can be non-minority males. However, these persons may not possess the power to control the business or overrule the minority or female owner. Further, the minority or female owner can delegate certain responsibilities and duties to these persons, but the non-female, non-minorities cannot be disproportionately responsible for the operation of the firm.
2. **Contract terms/negotiations in purchase of interests in potential DBE/WBE/MBE companies**

In determining whether an existing business is eligible for certification after a female or minority person acquires a majority interest in the business, the certifying entity is going to examine the entire manner in which the female or minority owner acquired his or her interest. In particular, the entity will examine proof of independent capitalization, voting rights, power differential between the owner and other directors, and officers, and the degree to which the new minority or female owner may appear to be dependent upon key employees, particularly where the key employee is the former owner or another non-minority male.

If the decision by the white male owner to sell to a female or minority is made **solely** for the purpose of acquiring DBE/WBE/MBE certification, the company will be disqualified from certification. If the attorney assisting in the acquisition or the application for certification is not aware of that fact, and any corporate restructuring documents, such as the minutes of the meeting at which the decision to sell the majority interest in the company and restructure is made, reflect that the restructuring is done for the purpose of securing certification, the company is automatically disqualified from certification. Again, this may create a claim against the attorney for legal malpractice. Situations have occurred where the owners of the company discuss and put in the minutes of the corporate meeting that they are electing to sell interest in their company so that the company will be eligible for certification. Their attorney was unaware of the issue and submitted the application with the minutes showing the decision to sell was made solely for the purpose of certification. The company was automatically denied certification and ineligible to re-apply for the next year, and the attorney faced a potential malpractice claim. In the future, that company has to disclose in all applications for certification that it was once denied certification and why.

In some cases, there are perfectly legitimate reasons for the sale of the majority interest in the company that do not involve only a desire to seek certification. For instance, the male owner may simply be planning for retirement, and the new owner happens to be female and/or a minority, or the male owner is gifting his interest in the company to his daughter so she can take over as he retires. In both cases, the opportunity for certification as a DBE/WBE/MBE may be a factor, but it is not the sole factor. Therefore, in both cases, the transition must be documented and handled appropriately to avoid the appearance of a sham transaction designed only to secure
certification. In particular, the gifting of the stock, for less than a fair market value, may compromise the daughter’s ability to prove she paid “adequate consideration” for her ownership interest in the company. Proper documentation at the time of the ownership acquisition of the male owner’s intent to retire, and a written plan for his participation post acquisition, as well as a written plan for his withdrawal from participation in the company must be in place at the time of the female or minority owner’s acquisition of the interest in the company.

In all companies applying for DBE/WBE/MBE certification, funding will be an issue that needs to be carefully addressed by the attorney. The contributions of money or expertise by the minority or female owner to acquire their interest in the business must be “real and substantial.”30 For instance, a promise to pay funds at a later date, or an unsecured note payable to the business or a non-minority male co-owner, or just having been a valued employee of the company are all insufficient contributions under the DBE/WBE/MBE programs.31 On the other hand, notes from a financial institution or organization that lends funds in the normal course of business of their business, whether those are unsecured or secured by the person’s ownership interest in the business, are considered sufficient to show adequate contributions to acquisition of the business.32

Additional issues are created where the minority or female owner is attempting to rely upon their expertise as part of their contribution to ownership, or where they have acquired their interest by gift, or through trust assets. In order for expertise to be a basis for a contribution, the expertise must be in a specialized field, critical, indispensable and specific to the type of work the business performs and documented in the records of the business, and the individual must also have a significant financial investment in the business.33

If the minority or female owner acquires their interest in the business through a gift, as mentioned above, there is a presumption that the ownership and control of the minority or female is illusory. The minority or female must overcome this presumption by “clear and convincing evidence” and show both that the gift was made for reasons other than obtaining certification and that the minority or female actually controls the management and operations of the business notwithstanding the participation of the non-minority male who provided the gift.34 In the case of funding through a trust, the minority or female must essentially show that they also control the trust, or a minority or female controls the trust, or in the case of a revocable living trust that the same minority or woman is the sole grantor, beneficiary, and trustee.35
As previously stated, a non-minority male may not have the power to veto any major decision by the new minority or female owner. Only decisions such as the dissolution of the firm or company, or taking the business into bankruptcy can be subject to a ‘majority rule’ by a Board of Directors. This provision needs to be part of the contract terms of the acquisition from the beginning of the negotiations for the purchase of the business.

When conducting negotiations representing either side in a business acquisition where there is a potential for the company to be eligible for certification as a DBE/WBE/MBE, an attorney must be aware of the fact that all key decisions must be within the exclusive power of the female or minority business owner, and be sure that all parties are aware of this. Many male, non-minority owners are unaware of how literal, serious and formal this requirement is. They seem to believe they can find a way around this requirement, and circumventing that requirement just will not be allowed during the certification process, or even after certification is granted. Firms and companies with certification are required to notify the certifying agencies of any changes in the company that would affect certification.

3. **Representations**

Owners and attorneys alike must be very aware of the fact that representations made when applying for certification under DBE/WBE/MBE programs are assertions made under oath. False representations subject persons making those representations to penalties.

As mentioned above, many male, non-minority co-owners want to provide for more control for themselves than the regulations allow. In many, many cases, the legal practitioner will be asked about the possibility of ensuring there is some control for the male, non-minority owners through clauses in documents that the owners hope to avoid giving to the certifying entity. In the alternative, male, non-minority owners may want their wives involved as part of the Board of Directors, or perhaps want an “under the table” agreement that they have more control than that provided in the corporate documents.

Where a company misrepresents its business status, there is a presumed loss to the government of the **entire amount** paid under any contract awarded on the basis of that misrepresentation. The misrepresentation of disadvantaged business status may also give rise to criminal liability either under the criminal False Claim Act as will be more fully discussed below, or under a theory of wire fraud.

4. **False Claims Act**
The Federal False Claims Act, known as the Lincoln Law, is a federal law that combats fraudulent claims for payment made to federal programs. In the span of about 30 years, the federal government has collected back $38.9 billion from cases brought under the act. Special attention is given to whistleblowers who are the ones that report such cases. The act has previewed financial incentives for them, which have now also increased with the doubling of the penalties. The Department of Justice adjusted the monetary penalties on the False Claims Act in the last few years to account for inflation. As a result, the civil penalties have doubled as of August 2016.

To avoid problematic situations with false claims, contractors should be well aware of the False Claims Act provisions and what can trigger a case under this legislation. The key aspects of the False Claims Act for contractors involve federal projects where liability may arise when a person who, in any way, takes part in a fraudulent or false claim. The main prohibited actions relevant for contractors include:

1. Presenting a false claim for payment or approval in full knowledge of the falsity
2. Making a false record or statement material to a false or fraudulent claim
3. Committing fraud regarding the type or amount of property to be used by the government
4. Making a false record to avoid or decrease a payment or property transmit to the government

As for the False Claims Act penalties, previously the amounts were set at $5,500 to $11,000 per claim. The inflation adjustment brought these to $10,781.40 and $21,562.80 per claim, almost a twofold increase. The doubling came into effect on August 1, 2016, but it concerns claims after November 2, 2015. Additionally, contractors are liable to repay three times the amount of the damages suffered by the federal body in relation to the false claims.

Some actions by contractors can constitute a breach under the False Claims Act and can be prosecuted in a more serious legal manner. Examples include defective work by contractors that has been signed off in a certification to the government stating it complies with contractual obligations and other cases of non-compliance with the contract that have been certified officially to federal authorities as complying to contractual obligations.

One of the main ways the False Claims Act is implemented is through incentivizing relators, or whistleblowers, a process that is known as *qui tam* litigation. It allows citizens to
bring up lawsuits on behalf of the federal government. A large part of all cases under the act have been brought by whistleblowers. Penalties are used as a financial incentive for relators who report fraud against the federal government. Up to 30% of case fines can be rewarded to whistleblowers. Relators often work at the companies who are engaging in the fraudulent actions. Typically, they first attempt to address the cases internally and turn to reporting externally if this does not succeed. The False Claims Act whistleblower protection ensures their rights in such cases.

Indeed, there has been a steady increase in alleged fraudulent activity, and the U.S. Department of Transportation Office of Inspector General (“OIG”) has recently sharpened its focus on policies related to disadvantaged business enterprises (“DBEs”). It appears that the OIG’s focus has been more than a threat – DBE fraud accounted for 35% of all active grant and procurement fraud cases in early 2016 – up from 25% in 2010 and 29% in 2013.

Contractors who are seeking to be qualified as DBEs or WBEs must ensure that they are indeed qualified and that any prime contractor representing that it is using qualified DBEs is outwardly doing so. In recent years, courts have issued severe punishments to businesses and individuals caught in DBE fraud schemes. In 2012, a federal jury convicted a contractor on 26 out of 30 counts in the largest reported DBE fraud case in U.S. history, including conspiracy to commit fraud and money laundering, 11 counts of wire fraud, six counts of mail fraud, and 11 counts of money laundering. In that case, a company was found to have used a certified DBE company to formally obtain the Pennsylvania DOT contracts but the work was performed by the company personnel, not the DBE, and the company received all of the profits; in exchange for use of the DBE’s name, the DBE was paid a small fee. This scheme went on for 15 years. The sentencing judge commented that, “DBE fraud is pervasive in the construction industry, and persons so inclined to commit the same kind of fraud need to be aware that they face serious consequences...” The USDOT Office of Inspector General has cautioned prime contractors and subcontractors not to engage in fraudulent DBE activity and encouraged them to report any suspected DBE fraud by contacting www.oig.dot.gov/hotline.

An even more harsh result occurred in June 2016, where a California contractor was required to pay $5.4 million to settle a federal False Claims Act suit involving DBE fraud on two military projects. In August 2016, federal prosecutors in South Carolina handed down an 18-count indictment against seven construction executives and two companies for allegedly using
multiple sham DBEs to win more than $350 million in government contracts. If convicted, they face sentences of up to 20 years in prison and fines from $250,000 to $10 million.47

Given the recent attention by federal, state, and local prosecutors to DBE fraud cases and potentially devastating consequences of becoming embroiled in a DBE fraud investigation, contractors and suppliers must consider strong compliance practices for working with DBEs.

III. Pitfalls for Construction Practitioners and Contractors

For companies not directly participating in fraudulent activity, there is still risk of liability exposure under the False Claims Act. The pitfalls include failing to meet the “Commercially Useful Function Requirement,” using a “front company,” and failing to ensure there is not an improper “pass through.”

DBEs are often disadvantaged financially in that DBE participation goals may open the doors to projects that are larger or require more financial commitment than projects in which a particular DBE may otherwise normally engage. In such instances, non-DBEs take on uncertainty and greater risk when supplying or contracting with DBEs if they desire to remain involved in public works projects. This greater risk can include gaps in a DBE’s technical experience or lack of financial means to withstand problems on the project. After all, the primary purpose of DBE policies is to include DBEs in projects from which they might otherwise be excluded. Contractors should be cautious of the temptation to mitigate DBE-related risk by minimizing the DBE’s role, which can open the door to DBE fraud. For most jurisdictions that require specific levels of DBE participation, the DBE must be performing a “commercially useful function” in order for DBE participation credit to apply. The DBE entity must be more than a pass-through entity and cannot exist in name only.

While the specific requirements may vary slightly across jurisdictions, the “commercially useful function” requirement usually focuses on whether the DBE is acting like a non-DBE contractor or non-DBE supplier would under similar circumstances. Examples of the criteria include:

• Whether it is actually managing its own labor and performing work;
• Whether a DBE contractor is providing its own materials;
• Whether a DBE supplier is transporting, storing, or delivering the materials;
• Whether it is paying for its own labor; and
• Whether there are consequences if the DBE fails to perform.
The pass-through scheme is subtler than the front company scheme because it can occur seemingly unintentionally, without the overt intent to commit fraud. Pass-through cases can involve a legitimate, certified DBE that acts as middle man so that a contractor can obtain DBE participation credits on a project. The DBE then “passes through” the majority of the payment it receives from the prime contractor to the non-DBE firms that actually perform the work. While the DBE may perform some work, it does not do so in the same capacity as a non-DBE firm would under similar circumstances – it may not be managing its own labor, providing its own materials, paying for its own labor, or may not be liable for nonperformance. Thus, it would not be serving a “commercially useful function.”

For example, a supplier was accused of participating in a pass-through scheme in an August 2015 federal criminal case that was settled for $5 million. HD Supply Waterworks allegedly conspired with several general contractors to use a Native American-owned DBE as a pass-through. Under the alleged scheme, HD Supply Waterworks performed the work and supplied the materials; the DBE collected its invoices, added its own markup, and then passed those invoices through to the prime contractors, allowing them to claim DBE participation even though the DBE performed no “commercially useful function.”

A business can easily slip into failing to allow the DBE to meet the commercially useful function by relegating the DBE to a passive role without intending to commit fraud. This could occur if the contractor provides assistance to the DBE to minimize the risk but goes beyond causing the DBE to not serve the commercially useful risk without intending to do so or without realizing the risk they are creating.

To this end, the OIG has published a list of 10 red flags that it uses to evaluate whether to investigate a contractor or supplier for DBE fraud:

1. DBE owner lacks background, expertise, or equipment to perform subcontract work
2. Employees shuttling back and forth between prime contractor and DBE-owned business payrolls
3. Business names on equipment and vehicles covered with paint or magnetic signs
4. Orders and payment for necessary supplies made by individuals not employed by DBE-owned business
Prime contractor facilitated purchase of DBE-owned business
DBE owner never present at jobsite
Prime contractor always uses the same DBE
Financial agreements between prime and DBE contractors
Joint bank accounts
Absence of written contracts\textsuperscript{48}

These red flag items should be carefully considered and avoided if at all possible where DBE transactions are involved.

The False Claims Act’s “qui tam” provision empowers private citizens (whistleblowers) to file lawsuits on behalf of the government. If the government takes up the case, or “intervenes,” whistleblowers are eligible to receive between 15% and 25% of the total recoveries. If the government does not join but the case is still successful, whistleblowers are eligible for between 25% and 30% of the recoveries. Thus, there is substantial incentive for whistleblower claims. Most states have implemented their own false claims acts as well with provisions similar to the Federal FCA.

\textbf{IV. Interplay Between Federal, State and Local Laws}

Federal, state, and local construction projects and social programs and preference requirements for MBEs/WBEs/DBEs are often impacted heavily by and must consider other important procurement laws, as companies participating in such programs may have little or no prior experience in government contracting. Several issues for MBE/WBE/DBE contractors and practitioners to consider are discussed below. There are various laws and requirements at both the Federal, state, and local levels that are critical to be aware of, to understand the potential pitfalls and liability, and to ensure that actions are taken to comply with each of the applicable jurisdictions’ obligations to allow a contractor to seek the benefits of participation in and/or certification under one of the social programs/preferences.

\textbf{A. Davis Bacon}

The Davis-Bacon Act of 1931,\textsuperscript{49} now the "Wage Rate Requirements"\textsuperscript{50} (Construction) statute, establishes a minimum wage requirement for workers on federally subsidized public works construction projects in excess of $2,000. Davis-Bacon required that on-site workers be paid no less than the locally prevailing wages and benefits for similar projects.\textsuperscript{51} In addition to the Davis-Bacon Act, there are other laws that Congress has enacted which require federal
agencies to use prevailing wage requirements for construction projects for example the Federal-Aid Highway Act.\textsuperscript{52}

Wage rates are determined by surveys conducted by the Department of Labor (DOL) which examine the number of workers employed and wages for those workers during a peak week. The survey and review is conducted by examining workers who were employed in the same classification. If the DOL is unable to determine a majority wage, then it may use a weighted average. The wage rate surveys and subsequent determinations look at a specific geographical area within a set calendar period, generally one year, to create a general wage determination. It is possible that a wage rate determination can be created for a specific project. The DOL will establish a wage rate for each established trade classification.

The DOL has general oversight responsibilities to ensure coordination of administration and consistency of enforcement of the Davis-Bacon and related acts which it implements through various regulations and procedures.\textsuperscript{53} The contracting agencies have day-to-day responsibility to administer and enforce the Davis-Bacon provisions in their own covered contracts to include proper Davis-Bacon wage determinations are applied to all such construction contracts.

For federal agency construction projects that are governed by the Federal Acquisition Regulation the implementation of the laws which apply to construction projects are found in FAR Subpart 22.4 – Labor Standards For Contracts Involving Construction. FAR Clause 52.222-6 – Construction Wage Rate Requirements is the primary clause for applicable Wage Rate Requirements.

“Little Davis-Bacon Acts,” which are state prevailing wage laws, have been enacted by over thirty-two states and the District of Columbia, requiring the payment of prevailing wages for state and local government construction projects. Program administration for Little Davis-Bacon Acts is handled by the state where the work is located.\textsuperscript{54} Generally, all public entities who that engage in procurement, including local or county administrative offices, are responsible for compliance with state law.

\textbf{B. Prevailing Wage Rate Issues}

Whether performing a federal construction project or a construction project for a state or local government, the primary issue with prevailing wage rate is one of compliance. It is imperative that contractors and their counsel understand the bedrock principle that if the construction project is funded by the federal government, then either the Wage Rate
Requirements/Davis-Bacon or some other wage rate law will apply and those rates must be paid to the workers who are working on that Project. Failure to pay those rates will lead to complaints, fines and other possible penalties, one of which is debarment from competing for federal contracts. The same is true of any prevailing wage rate laws that are enacted at the state and local levels. The key is public monies being used in whole or in part to finance the construction project.

It is important that the client and the attorney be familiar with the potential issues and resources to research the answers to avoid any compliance issues. Some of the issues or questions that may arise on federal, state or local construction projects that ultimately roll up into compliance that can be encountered are as follows:

1. Is the project exempted from the wage rate laws? For federal projects, only if the construction project is under $2,000 or a specific exemption applies. For state or local projects, the contractor should determine what applies in the specific jurisdiction.

2. How is the term worker defined for application of the wage rate laws? On federal projects, a mechanic or laborer employed directly "on-site." The definition of what is "on-site" may be problematic in certain situations and will actually include personnel who are not "on-site". For state or local projects, the contractor should determine what applies in the specific jurisdiction.

3. Are subcontractor employees required to be paid in accordance with wage rate laws? Yes, they are. If there is a prevailing wage rate statute in the jurisdiction it will apply to all working on the project, unless specifically exempted.

4. Should an issue arise how does the contractor defend against a claim that prevailing wage rates were not paid on a particular project? Document, document, and collect documents from subcontractors (and keep them for at least as long as the audit period and statute of limitations).

C. Miller Act

As no contractor has a right to lien the property of the federal government for work performed on a federal construction project, Congress enacted the Miller Act, which requires that a performance and payment bond be provided by the contractor on all construction or public work projects on federal property or where the federal government is the owner. The Miller Act requires that a performance and payment bond be provided for any contract of more than
$100,000 that is awarded for any construction, alteration or repair of any public building or public work of the federal government. The performance bond is to ensure performance of the contract by the contractor and is for the benefit of the federal government. The payment bond is for any claim relating to non-payment that needs to be filed by a subcontractor in direct contract with the contractor or a sub-subcontractor who is in a direct contract with a subcontractor who is in a direct contract with the contractor. If the entity making the claim under the Miller Act does not fall into one of these two categories, then they do not have a Miller Act bond claim. The Miller Act does not limit the authority of an agency to require bonds or security in additional instances.\textsuperscript{57} It is also important to remember that the Miller Act does not prohibit a contractor from requiring subcontractors to provide performance and payment bonds on a public construction project.

Both a subcontractor or sub-subcontractor claimant have a right to request a copy of the bond.\textsuperscript{58} While a subcontractor has no requirement to provide a pre-suit notice to anyone, the subcontractor is required to wait for a full 90 days after the date on which the last work was performed or material was provided before filing the Miller Act lawsuit.\textsuperscript{59} However, a sub-subcontractor does have a requirement to provide a pre-suit notice and must provide a written notice to the contractor within 90 days from the date on which the work was last performed or material was furnished. Once the written notice is provided, the sub-subcontractor may file its Miller Act lawsuit if a full 90 days has passed after the date on which the last work was performed or material was provided. The notice must contain with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or for whom the labor was performed.\textsuperscript{60} Both the subcontractor and sub-subcontractor must bring their lawsuit no later than one year after the day on which the last labor was performed or material was supplied.\textsuperscript{61}

\textbf{D. Little Miller Act}

Every state has some version of the Miller Act commonly referred to as a "Little Miller Act." While the requirements for the Little Miller Act bonds vary from state-to-state, there are certain requirements that should be clearly understood.

First, what is the threshold for the requirement for performance and/or payment bonds? For example, Texas requires that a performance bond be provided for all public work contracts in excess of $100,000.00 and payment bonds be provided for all public work contracts
in excess of $25,000.00 if the governmental entity is not a municipality or specially created joint board under Subchapter D, Chapter 22 of the Texas Transportation Code. Oklahoma requires that a performance and payment bond, or irrevocable letter of credit be provided for all public construction contracts in excess of $50,000.00.

Second, who can claim on the bond and what, if any, notice requirements do they have? Unlike the Miller Act which limits bond claims to only the subcontractor and sub-subcontractor claimants, many of the state statutes will allow claimants further down the construction chain to make claims on the bond as long as they have provided notice in compliance with the statute. Texas requires that any claimant on the payment bond who is not in direct contract with the prime contractor to file a timely notice of retainage agreement and timely second and third month notices of claim for unpaid progress billings. Similar to the Miller Act, Oklahoma's statutory provision requires that any sub-subcontractor or sub-supplier claimant that does not have a direct contract with the contractor furnishing the bond file a written notice of claim with the contractor and surety within 90 days of the date on which the last work was performed or material was provided on the project. Oklahoma also requires that the bonds be filed with the agency authorized by law to enter into a public construction contract.

Third, what is the statute of limitations for a cause of action on the payment bond? The statute of limitations questions generally can be broken down into a defined period of time from either (1) the date of when the last work was performed or material delivered; or (2) the date of when the claim was mailed by the claimant or received by the surety and contractor. The statutory provisions of Texas provide that a suit on the performance bond may not be brought after the first anniversary of the date of final completion, abandonment or termination of the public work contract. A suit on payment bond may not be brought after the first anniversary of the date notice for a claim is mailed. In Oklahoma, payment bond claimants must file suit no later than one year from the day on which the last labor was performed or material was provided for which the claim is made.

It is advisable that all contractors and subcontractors familiarize themselves with the provisions of each jurisdiction's statutory requirement so that they can properly provide bonds, and perfect any claims. Although the contractor may be required to provide a statutory performance and payment bond, the contractor should consider whether or not it wishes to have its subcontractors provide a performance and payment bond for the project.
E. Buy America/American

The two primary domestic preference statutes applicable to federally funded projects are the Buy American Act (“BAA”) and Buy America programs (“BAP”). The BAA generally applies to federally funded construction projects when the federal government is the contracting party. The BAP applies when the federal government is providing assistance, usually through a grant. The two most common BAPs are the Federal Highway Administration’s (“FHWA”) Buy America program and the Federal Transit Administration’s (“FTA”) Buy America program which come into play when state and local projects are partially or wholly funded by the grants from the United States Department of Transportation. BAA and the BAPs require the contractor to supply and utilize materials that are manufactured in the United States, but differ on the amount and types of materials that must be manufactured in the United States and how the determination is made as to whether the material qualifies as manufactured in the United States.

The BAA was passed by Congress in 1933 and applies to federal construction projects. It requires that the contractor procure construction material that is manufactured in the United States “substantially all from articles, materials, or supplies mined, produced, or manufactured” in the United States unless there is a waiver. There are exceptions or exemptions to the BAA that allow the contractor to use foreign construction material if a determination is made by an agency head or contracting officer that: (1) it would be impracticable or inconsistent with the public interest to require compliance with BAA; (2) the particular material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality; (3) the cost of domestic construction material is unreasonable; or (4) the federal government is purchasing commercial item information technology. Certain trade agreements will also provide an exception or exemption from BAA requirements under the Trade Agreements Act or other legislation like NAFTA.

The FAR defines “domestic construction material” for BAA purposes using a two-part test: (1) the article must be manufactured in the United States, and (2) the cost of domestic components (i.e., components mined, produced, or manufactured in the United States) must exceed 50 percent of the cost of all components. Therefore, a product may include as much as 49 percent of foreign component cost and still be considered a domestic material as long as the product is manufactured in the United States. Two questions arise from this test: (1) what are the components of the construction material; and (2) what is the cost of each component.
The question of what is a "component" as opposed to a "subcomponent" can sometimes be a very difficult analysis. A “Component” is defined as an article, material, or supply incorporated directly into an end product or construction material. The reviewing authority looks to see how each item is to be used on each project and how it arrives at the project site in determining whether it is a construction material or a component of construction material. A "Subcomponent" is considered to be materials that are incorporated into components. In a review the reviewing authority's "component" analysis the origin of subcomponent does not matter under the BAA. This can lead to a review of the manufacturer process and whether the material was transformed into something else.

The FHWA and FTA BAPs were enacted 1978 when Congress sought to expand domestic procurement coverage to the federally funded highway and transit construction projects. These BAPs are much stricter than BAA provisions in that they require that federal-aid funds may not be used on federal-aid highway construction projects unless all manufacturing processes for the iron and steel, including coatings, occur in the United States.

The FHWA BAP requires that all steel and/or iron materials that are permanently incorporated into a FHWA project must be produced (i.e. manufactured and fabricated) in the United States. There is a minimal use exception that applies for projects using a very minute and limited amount of foreign iron or steel materials. The FHWA may grant a waiver of the BAP requirements if: (1) it would be inconsistent with the public interest to apply the requirement; or (2) the steel and iron materials are not produced in the United States in sufficient and reasonably available quantity or quality. In addition, the Buy America requirements will not apply if the state accepts alternate bids for both foreign and domestic steel and iron materials and the cost of furnishing domestic iron and steel materials increases the cost of the overall project by more than 25 percent.74

The FTA BAP applies to FTA funded federal-aid transit construction projects and is the strictest program of them all. Unless a properly granted waiver is obtained, all iron, steel, and manufactured products used in a construction project must be produced in the United States. This means that construction materials made primarily of iron or steel must be manufactured in the United States unless the construction material is a component or subcomponent of another manufactured product. All steel and iron manufacturing processes
must take place in the United States, except metallurgical processes involving refinement of steel additives.

Under the FTA BAP all manufactured products also must be produced in the United States. This means that all of the manufacturing processes must take place in the United States and all of the products’ components must be of United States origin. The definitions of "component," "subcomponent," and "end-product" should be carefully reviewed and followed as these are very narrowly interpreted by the FTA under the BAP. Although it the BAP legislation and regulations indicate that infrastructure projects not made primarily of iron or steel, such as terminals, depots, garages, and bus shelters, may be considered to be manufactured end products the question of what is and is not a subcomponent should be closely examined if the contractor is undertaking a project of this type. Unless a prior decision has clearly indicated that a waiver is obtainable it is prudent to examine the source of the materials to be used on any FTA project.

The FTA BAP requirements may be waived if: (1) application would be inconsistent with the public interest; (2) the materials are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or (3) inclusion of a domestic item or domestic material will increase the cost of the contract by more than 25 percent. Waivers should be sought before the work begins and the material is ordered.

V. Jurisdictional Issues – Highlights on Practical Tips for Implementation in Local Contracting

Most states and many local jurisdictions have enacted similar requirements and programs to promote diversity in the construction industry and have developed their own programs for disadvantaged businesses. Below, we highlight several states where the authors practice and which are similar to many other jurisdictions as examples for the construction practitioner’s review and assessment.

A. California

California has enacted various programs on a state-wide basis to encourage and assist disadvantaged business enterprises in the construction industry. The California Department of Transportation ("CalTrans"), Department of General Services, and Public Utilities Commission each have programs for DBEs. Companies can seek certification as a DBE or Small Business for these programs. However, each operates somewhat differently.
State of California Certified DBE firms receive increased visibility through inclusion in the California Unified Certification Program (UCP) database of businesses. The database is used as a resource by City buyers, department personnel, prime contractors and other agencies and organizations throughout the state. A certification is valid for three (3) years and recognized throughout the state of California. As of January 2002, certification issued by a participating agency in the Unified Certification Program will be accepted by any other participating public agency. So, if the business is certified in San Diego, it is also certified in Los Angeles, Riverside, Imperial County, as well as with the State government.

For example, CalTrans establishes a three-year goal program for DBEs. The current 2017 fiscal year -2019 program for projects funded in whole or in part by the Federal Transit Administration has proposed a 4.8% goal for DBAs, up from 4% in the last cycle. Under a 2015 study, CalTrans found four MBE/WBE groups exhibited substantial disparity (not limited to the construction sector): non-Hispanic white women owned businesses, Black-American owned businesses, Asian-Pacific American owned businesses, and Native American owned businesses. CalTrans has the California Construction Contracting Program (CCCP) which in partnership with the Small Business Development Center Program provides, at no cost, individual construction and business management counseling and training to small businesses, with an emphasis on construction and professional service contracting.

Similarly, the Department of General Services has established a certification for small businesses. Effective January 1, 2019, the Office of Small Business and DVBE Services (OSDS) will also administer the new Small Business for the purpose of Public Works (SB-PW) certification. The new certification type was created by Senate Bill 605 (Chapter 673, Statute of 2017), passed in October 2017. This certification type is solely for the purpose of Public Works contracts and/or projects. SB-PW expands the opportunities for small businesses to compete in the public works arena. For the purpose of this certification, public works is defined as in Public Contract Code 1101: “An agreement for the erection, construction, alteration, repair, or improvement of any public structure, building, road, or other public improvement of any kind.” Eligibility requirements include:

1. Be independently owned and operated;
2. Not dominant in field of operation;
3. Principal office located in California;
(4) Owners, Officers, Members/Managers, Partners must be domiciled in California;
(5) Average $36 million or less in gross annual receipts over the last three tax years (including affiliates);
(6) A business with 200 or fewer employees (including affiliates)

That said, California has edged further toward race-averse programs, where race is not a consideration – but rather the size of the business as seen above. At the local level, however, there have been more specific efforts, particularly in the major metropolitan areas to include MBEs in their projects. The Transportation Business Advisory Council meets regularly with representatives of various minority and underrepresented populations to assist MBEs in attaining projects for LA County Metro. Similar outreach efforts exist in various sectors of County and City agencies. However, with these different programs comes a host of complexities for contractors to ensure that they have the proper certification and are accurately representing their status to the agency and/or prime contractor to avoid liability.

B. Texas

The main program for certification of disadvantaged business enterprises is the Historically Underutilized Businesses ("HUB") Program that is found in Chapters 2161 and Subchapter E of Chapter 2252 of the Texas Government Code. These statutes require that Texas state agencies that enter into construction contracts make a good faith effort to increase the construction contract awards that the agency expects to make during a physical year to HUBs based upon rules adopted by the Texas Comptroller who replaced the General Services Commission as the responsible agency for implementing HUB programs.76

The term HUB is defined to mean:

(1) a corporation formed to the purpose of making a profit in which at least 51 percent of all classes of the shares of stock or other equitable securities are owned by one or more persons who: (i) are economically disadvantaged because of their identification as members of certain groups, including Black Americans, Hispanic Americans, women, Asian Pacific Americans, and Native Americans, and have suffered the effects of discriminatory practices or similar insidious circumstances over which they have no control; and (ii) have a proportionate interest and actively participate in the corporation's control, operation, and management;
(2) a sole proprietorship created for the purpose of making a profit that is 100 percent owned, operated, and controlled by a person described in (1)(i);

(3) a partnership formed for the purpose of making a profit in which at least 51 percent of the assets and interest in the partnership is owned by one or more persons who: (i) are described in (1)(i); and (ii) have a proportionate interest and actively participate in the partnership's control, operation, and management;

(4) a joint venture in which each entity in the joint venture is a HUB;

(5) a supplier contract between a HUB and a prime contractor under which the HUB is directly involved in the manufacture or distribution of supplies or materials or otherwise warehouses and ships the supplies.77

To qualify as a HUB, the business must also meet the following specific requirements: (1) as a general contractor, it must perform all estimating and contract administration functions with its employees; (2) as a subcontractor, it must perform all of its work with its own employees, or, if the subcontractor uses an employee leasing firm for the purpose of providing salary and benefit administration, with employees who in all other respects are supervised and perform on the job as if they were employees of the subcontractor; and (3) a prime contractor who intends to subcontract specific trades may do so if the dollar value of the subcontracts does not exceed 75 percent of the original value of the contract, and all work in the trade of the prime contractor is accomplished by employees of the contractor, or, if the prime contractor uses an employee leasing firm for the purposes of salary and benefit administration, with employees who in all other respects are supervised and perform on the job as if they were employees of the prime contractor.78 A person who falsely claims HUB status or a general contractor who knowingly hires a person falsely claiming HUB status is liable for civil penalties.

In legislation enacted in 1999, the General Services Commission was mandated to design a mentor-protégé program to foster long term relationships between prime contractors and HUBs and to increase the ability of HUBs to contract with the State and to receive state subcontracts.79 Each state agency that had a biennial appropriation exceeding $10 million was to implement that program. Also, beginning with contracts entered into as a result of requests for bids or solicitations issued after April 1, 2000, each state agency, before entering a contract exceeding $100,000 must determine whether there will be subcontracting opportunities under the contract and, if so, include a HUB subcontracting plan requirement in the bid documents.
obligating the contractor to make a good faith effort to implement the plan it submits as part of its bid or proposal. Contractors who fail to implement the plan in good faith may be barred from further contracting with the agency.80

The Texas Department of Transportation ("TxDOT") has its own unified certification program which allows for the certification of disadvantaged businesses who look to perform work on transportation projects which may be partially or fully funded by U. S. Department of Transportation funds. The guidelines for this program largely follow the requirements for the U.S. Department of Transportation's Federal Disadvantaged Business Enterprise program.81

Counties are authorized to develop programs to improve the extent to which minority and women-owned businesses (defined to include businesses more than 50 percent of which are owned and controlled in management and daily operations by minorities and women, respectively) are awarded county contracts.82 Such programs may include the establishment of a contract percentage goal for those businesses. Municipalities have been statutorily authorized to develop programs to increase the participation of minority and women-owned businesses in public contract awards.83 The client should research to see if the municipality that is competing the particular procurement has a program office dedicated to minority and/or women-owned business enterprises.84

Any combination of counties, municipalities, special districts, or other political subdivisions, by ordinance, resolution, rule, order, or other means, may agree to establish a regional business certification program to be used in connection with their purchasing program.85 A consolidated entity will administer the program and may adopt rules, regulations, or other provisions designed to streamline and centralize the certification process for qualified business, including small and emerging businesses, that allow certified businesses to participate in the contracting and procurement process of any member of the regional certification programs. An example of this type of program is the program run by the North Central Texas Regional Certification Agency ("NCTRCA") which is established by Cities of Dallas, Fort Worth, Lancaster, Mesquite; Dallas and Tarrant County; Dallas-Fort Worth International Airport; Dallas Area Rapid Transit; Fort Worth Transportation Authority; North Texas Tollway Authority; Dallas County Community College District; Tarrant County College District; Dallas County Schools; Dallas Independent School District; and Tarrant Regional Water District.86
C. Kansas/Missouri

1. KANSAS

In 1994, Kansas created a sole source DBE certification program. The Kansas Department of Transportation and the Kansas Department of Commerce partner in the program. Both KDOT and Commerce accepted and processed applications, but only KDOT issued the certification decisions. The program was later expanded to include WBE and MBE certification. The program is known as the Kansas Statewide Certification Program or KSCP. Now, Commerce controls the MBE and WBE programs, and the DBE program for companies not seeking highway work. KDOT controls the DBE program for the companies seeking transportation work.

Requirements for certification in Kansas follow the federal Code. Generally speaking, the process takes 30 to 60 days. Certification is valid for three years, but an annual statement of continuing eligibility is required.

To further assist and develop W/M/DBE companies, Kansas has an Office of Minority and Women Business development to assist businesses in the certification process. The office also assists in areas of procurement, contracting, subcontracting and financing, as well as giving assistance in developing business management skills and practices. KDOT separately contracts for services to support DBE certified businesses, including business consulting, workshops in obtaining certification, safety training and assistance in creating project proposals. DBE Supportive Services is currently provided by Motsinger CPA Tax & Accounting, in Lawrence, Kansas.

2. MISSOURI

Missouri has Missouri State M/WBE certification, and MoDOT DBE certification. Various cities such as the cities of St. Louis and Kansas City, Missouri, and various agencies such as the National Women Business Owners Corporation and the Mid-States Minority Supplier Development Council MBE Program offer certification. Approval for certification from one of the approved cities or agencies allows for a fast track certification approval from the State of Missouri. Certification is not guaranteed, but the process is expedited. Many practitioners will have the client apply for certification with one of the agencies known to be a bit more lenient prior to having the client apply for certification with the State of Missouri. Once State certification is obtained, the practice is generally to then apply for certification with MoDOT,
and apply for the hardest certification last. Kansas City, Missouri, is the most difficult certification to obtain, generally speaking.

Missouri Executive Order 05-30 provided that “all state agencies shall continue to make every feasible effort to target the percentage of goods and services procured from certified M/WBEs to 10% and 5%, respectively.” However, the Division of Purchasing, Design and Construction (FMDC) has the authority to set goals for M/WBE participation for each project based on the availability of M/WBE firms to perform the work.

The State of Missouri has only a six month waiting period to reapply for certification if a business is initially denied certification and either doesn’t appeal or the appeal of the denial was unsuccessful.

MoDOT administers its own DBE Supportive Services Program to assist DBE businesses. The program has entrepreneurship training programs, seminars, business coaching services, as well as a mentor program.

KCMO has the most stringent requirements for certification. Recently the City Council has voted to loosen the requirements a bit. KCMO will only grant certification to companies that have their principal place of business within the City for the preceding six months. This requirement was only recently lowered to six months in business from one year. The business must have a real, physical presence within Kansas City, Missouri. It is not sufficient to simply do business within the City, nor is it sufficient to simply have a physical address or storefront in the City without employees actually working at that physical address. In other words, the business cannot just rent a post office box or rent a space in order to qualify. In addition, the business cannot just rent an office and hire a receptionist to work there. The business owner must actually occupy the space and either work there as the owner, or have employees working full time at that location, other than or in addition to a receptionist.

In addition to the requirement the that business have its principal place of business within KCMO, the human relations department very strictly enforces every other requirement of its ordinance, which does otherwise track closely with the federal rules. As a result, a recent study undertaken to attempt to support the program actually showed that there are not enough W/M/DBE certified companies to support the goals for W/M/DBE participation that have been set by the human resources department for KCMO funded projects. The study has shown that the KCMO program is very susceptible to a legal challenge at this point.
VI. Conclusion

Government contracting is a very lucrative and competitive area for construction companies. Having DBE/WBE/MBE certification or utilizing subcontractors with DBE/WBE/MBE certification can give a contractor a competitive advantage in securing government contracts and government dollars. However, there is a corresponding risk to the legal practitioner for malpractice claims if the attorney attempts to assist a company in obtaining certification and does it improperly. The client company can potentially lose large sums of money in missed contracting opportunities during the time it is prohibited from reapplying after denial of certification. It is important to be very aware of the technicalities and requirements of each program for which the client is applying for certification.

Further, the attorney must be aware of the potential for damages for false claims, false representations, potential violations of the wage rate requirement laws, performance bond issues and issues surrounding the domestic preference statutes, in order to adequately advise clients in the construction business.

The goal of this paper was to provide an overview that would be of assistance in avoiding some common pitfalls, and in highlighting areas where special attention to detail is essential. This is an evolving area of law and the attorney should always refer to the statutes, regulations and ordinances governing the program for which certification is sought prior to submitting applications for certification, or assisting a client in making claims for payments.

1 13 C.F.R. 124.103(a)
3 Federal Acquisition Streamlining Act of 1994, § 7106.
7 https://www.statista.com/topics/974/construction/.
8 https://www.osha.gov/doc/topics/women/.
9 Bureau of Labor Statistics –Current Population survey at http://stats.bls.gov, which is an annual average based on monthly surveys of 60,000 households, equaling 150,000 people, rounded off
to the nearest thousandth.

10 The Small Business Administration has a centralized resource page for the various programs it administers related to federal contracting opportunities at https://www.sba.gov/federal-contracting.


13 The Department of Transportation's Office of Small and Disadvantaged Business Utilization is found at https://www.transportation.gov/osdbu.


19 OHDAS requirements for certification in the EDGE program are found at http://das.ohio.gov/Divisions/Equal-Opportunity/Business-Certification/Encouraging-Diversity-Growth-and-Equity-EDGE-Program.


21 The Ohio Department of Transportation Office of Small and Disadvantaged Business Enterprise is found at http://www.dot.state.oh.us/Divisions/ODI/SDBE/Pages/default.aspx.

22 The Oklahoma Department of Commerce Women and Minority Owned Business Certification programs information is found at https://okcommerce.gov/business/certifications/.

23 The Oklahoma Department of Transportation Disadvantaged Business Enterprise program information is found at https://ok.gov/odot/Doing_Business/Civil_Rights/DBE_Information.html.


26 https://wcoeusa.org/content/balfour-beatty-receives-recognition-exemplary-work-furthering-diversity-industry.

27 49 C.F.R. § 26.69(b)(1)-(3); 13 C.F.R. § 124.105(a)-(d).

28 49 C.F.R. § 26.71(c) and (d)(1)-(3).


30 49 C.F.R. § 26.69(e); 13 C.F.R. § 124.105.

31 49 C.F.R. § 26.69(e).

32 Id.

33 49 C.F.R. § 26.69(f)(1)-(2).

34 49 C.F.R. § 26.68(h).

35 49 C.F.R. § 26.71(d)(1)-(2).


38 Department of Justice, Office of Public Affairs, Press Release, “Department of Justice


Id.

Id.


Nationwide data on state DBE contracting programs is spotty. The National Association of State Procurement Officials doesn’t monitor state DBE programs, and relies on state offices to track fraud and abuse, but those efforts vary at best. A report from the U.S. Government Accountability Office (GAO) in 2011 found that the Federal Highway Administration did not have the right tools to properly monitor states’ DBE programs for transportation construction. The GAO has published a smattering of reports over the past 25 years on women- and minority-owned contracting programs with two main conclusions: more information was needed, and the contracting world in general lacks women and minorities. Similar limited information exists on the fraud claims and the extent that DBE programs are effective as well as what level of DBE firms are engaged in fraudulent activity. However, what is clear is that all firms involved in projects using DBE firms must ensure that the DBE is properly certified and operating to serve not only meet the formal requirements but to ensure that they are all operating without being merely a pass through and that the DBE firm is serving a commercially viable function.


Id.


Although DOL continues to use the common term "Davis-Bacon", Federal Acquisition Circular 2005-73 (April 2014) changed the name of the FAR provisions dealing with Davis-Bacon provisions from “Davis-Bacon” to “Construction Wage Requirements” effective May 29, 2014.

The DBA was enacted based upon a statute passed in the State of Kansas in 1891.

The main DOL webpage for the Wage and Hour Division can be found at https://www.dol.gov/whd.

For example, the state of Texas Prevailing Wage Rate statute is found in Chapter 2258 of the Texas Government Code.


FAR Part 28.


Tex. Gov't Code § 2251. If the governmental entity is a municipality or joint board then a payment bond is required for public work contract in excess of $50,000.00.

61 Okl. St. §§ 1-2.

Tex. Gov't Code §§ 2253.047 and 2253.041.

61 Okl. St. § 2.

Tex. Gov't Code § 2253.078(a).

Id. § 2253.078(b).

61 Okl. St. § 2A.


FAR Part 25.003.

23 C.F.R. § 635.410.


Tex. Gov't Code §§ 2161.0011 and .0182. The Texas HUB Certification statute is set to expire on September 1, 2021, unless renewed.

Tex. Gov't Code § 2161.001.

Tex. Gov't Code, Chapter 2161 and Tex. Admin. Code, Chapter 20, Subchapter D.


Tex. Gov't Code § 2161.251 et seq.


Tex. Loc. Gov't Code § 381.007.


For example, the City of Dallas program can be reviewed at www.dallas-ecodev.org/mwob.html.

Tex. Loc. Gov't Code § 280.004.

The NCTRCA's website is www.nctrca.org.

https://www.kansascommerce.gov/987/Kansas-Statewide-Certification-Program

https://oeo.mo.gov/eligibilityapplication/

KCMO Ord. No. 130041 Sec. 3-461(c)

Id.