



State of Connecticut COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES

450 Columbus Boulevard, Suite 2, Hartford, CT 06103

Promoting Equality and Justice for all People

January 3, 2023

Sent via email
Atty. Steven B. Kaplan
10 Columbus Boulevard
Hartford, CT 06106
Skaplan@mkrb.com

RE: SBE/MBE Set Aside Contracts

Dear Attorney Kaplan,

Thank you for reaching out to the Commission on Human Rights and Opportunities. This letter will address the concerns raised in your letter dated December 9, 2022 on this issue.

As you are aware, municipalities and quasi-public agencies must require contractors to comply with the Set-Aside Program requirements as laid out in Connecticut General Statutes Sec. 4a-60g(b)(2) and (3) of that statute, respectively. The statute places the burden of including this obligation in notices of bid solicitation or requests for proposals for qualifications with the awarding authority.

From there, the statute shifts its focus. Contractors awarded applicable contracts are in turn required to set aside twenty-five percent of the state-funded portion of the contract for Small Business Enterprises (SBEs) and twenty-five percent of that portion for Minority Business Enterprises (MBEs). In other words, it is the contractor as opposed to the awarding authority or any other entity who is responsible for setting aside portions of the contract for SBEs and MBEs.

The Commission is involved in this process as the agency designated responsible for administering the Set-Aside Program. Administration of the program is principally concerned with review of whether contractors have met their obligations as described above. That review looks at whether the awarding authority included the necessary notices in solicitations and requests, whether contractors established the necessary goals for SBE and MBE participation, and what efforts the contractor took through their subcontracting practices, advertising efforts, recruitment, and other practices to meet those goals, pursuant to Sec. 4a-60 of the General Statutes.

It is important here to stress that these goals are not quotas nor has the Commission ever held them to be such. If a contractor makes good faith efforts to include SBE and MBE participation on a contract, then the Commission will approve a contractor's Set-Aside Plan even if the contractor was unable to meet their goals. Similarly, the Commission looks at all of a contractor's efforts and does not require any specific actions other than those explicitly required by statute such as engaging in competitive bidding procedures.

As part of its administration of the Set-Aside Program, the Commission is also required to conduct trainings and meet with contractors to effectuate the purpose of the Set-Aside Program. In addition to monthly technical assistance trainings, trainings provided to awarding authorities, and responding to specific questions, the Commission has been, from time to time, voluntarily asked to attend pre-bid meetings with contractors to assist them in putting together bid packages in such a way that SBE and MBE participation is encouraged. This assistance is solely consultative rather than directive, offering ideas on how contractors can engage in good faith efforts to increase MBE participation without requiring that any one idea be required.

For example, a bid package for electrical work to be subcontracted out can be broken up in different ways which are either more or less open to MBE participation. There may be few MBE contractors that can compete with larger contractors in doing all of the electrical work on a large project, but an MBE may be able to provide a competitive bid if the bid package was for only a subset of the overall electrical work required. Even if a large contractor could do all of the electrical work themselves, breaking the bid package up into smaller packages is a way to encourage inclusion of MBE contractors on the project. If a non-MBE is ultimately selected as the lowest qualifying bidder, the Commission will still consider the attempt to encourage MBE bidding in this way as part of the contractor's good faith efforts.

This is an example of an inclusionary strategy the Commission has recommended during pre-bid meetings. Ultimately, the contractor bears responsibility for setting goals and making efforts to meet them. Contractors are free to ask for Commission advice on how they can more effectively meet those goals, but contractors are also free to choose not to follow that advice if they so wish. The Commission cannot require contractors to break up packages in any particular way or put in place any requirements at this stage; our role is solely to provide advice and insight on inclusionary practices.

The Commission will not require MBE only contracts that exclude others from submitting bids. To the extent that may have been done in the past, we have advised our staff that it is not our policy.

We hope this letter clarifies the position of the CHRO with respect to these matters.

Sincerely,



Tanya A. Hughes
Executive Director
Commission on Human Rights & Opportunities