

Government of the District of Columbia
Office of the Chief Financial Officer



Natwar M. Gandhi
Chief Financial Officer

MEMORANDUM

TO: The Honorable Phil Mendelson
Chairman, Council of the District of Columbia

FROM: Natwar M. Gandhi
Chief Financial Officer 

DATE: March 5, 2013

SUBJECT: Revised Fiscal Impact Statement – “Small and Certified Business Enterprise Development and Assistance Amendment Act of 2012,” Enrolled version for reconsideration

REFERENCE: Bill 19-1046, Enrolled version, shared with the Office of Revenue Analysis on February 28, 2013

This revised fiscal impact statement reflects the version of the bill passed by the Council on Second Reading on December 18, 2012, and vetoed by the Mayor on February 11, 2013, and replaces the statement issued on December 18, 2012.

Conclusion

Funds are not sufficient in the FY 2013 through FY 2016 budget and financial plan to implement the bill. The bill will cost \$5,901,469 in FY 2013 and \$31,357,222 over the four-year financial plan period.

The bill states that implementation of the provisions that have a cost is subject to the inclusion of these provisions in an approved budget and financial plan.

Background

The bill updates the D.C. Official Code provisions¹ governing the Certified Business Enterprise (CBE) Program and makes various changes to the Program. The bill amends and restates many elements of the D.C. Official Code that describe the responsibilities of the Department of Small and Local Business Development (DSLBD) to manage and monitor the CBE Program and to report semi-annually on its activities to the Council. It also makes several substantive changes to the Program, including:

¹ The Small, Local, and Disadvantaged Business Enterprise Development and Assistance Act of 2005, effective October 20, 2005 (D.C. Law 16-33; D.C. Official Code § 2-218.01 *et seq.*)

- Providing new classifications and definitions, including for “government-assisted projects” and “high unemployment jurisdictions;”
- Eliminating the District of Columbia Small and Local Business Opportunity Commission, and transferring to the Office of Administrative Hearings (OAH) the responsibility to hear appeals by businesses whose CBE certification has been revoked or suspended by DSLBD;
- Amending the eligibility requirements for Small Business Enterprises and Local Manufacturing Business Enterprises;
- Granting DSLBD the authority to certify joint ventures for all public, public-private, and private projects;
- Allowing Joint Venture Certifications to endure for the life of individual contracts, and limiting the purpose of certification to ensure that joint ventures are not certified simply to meet subcontracting requirements and equity and development participation requirements;
- Creating a one-point bid preference and a one-percent bid price reduction for Service-disabled Veteran-owned Business Enterprises, and creating new two-percent bid price reductions for Veteran-owned Business Enterprises and Local Manufacturing Business Enterprises;
- Creating value-added bid preferences and percentage reductions in price for local businesses that meet certain criteria, such as employing residents of high unemployment jurisdictions in the District, providing health insurance to employees, and hiring returning citizens;
- Creating value-added bid preferences and percentage reductions in price for CBEs that hire graduates of DC Public School, DC Public Charter Schools, and the Community College of the District of Columbia’s job training programs;
- Requiring District agencies to set aside all procurements under \$250,000 for Small Business Enterprises (SBEs) or CBEs, and ensuring that all follow-on or renewable acquisitions from a District agency remain with an SBE or CBE, if the original contract or procurement was awarded to an SBE or CBE;
- As amended, requiring 50 percent SBE or CBE utilization across all Construction Specification Institute (CSI) Code Divisions on construction contracts and government-assisted construction projects, and requiring DSLBD to process waiver requests in cases where the 50 percent cannot reasonably be met (the original bill required 35 percent SBE and CBE utilization across all CSI code divisions, and current law requires 35 percent SBE and CBE utilization, but not for each CSI code);
- Amending procedures for waiving CBE Program requirements and allowing DSLBD to define in rules fines and fees associated with the Program;
- Amending rules and penalties for equity and development participation by CBEs;
- Requiring the Mayor to debar from consideration for award of contracts and to deem ineligible for government-assisted projects any beneficiary, SBE, CBE, or certified joint venture who willfully breaches a subcontracting plan or fails to meet equity and development participation requirements twice in five years;
- Eliminating some program requirements for DSLBD; and
- Re-establishing the Small Business Development Micro Loan Fund as the Small Business Development Fund, as the repository for all fines, fees, and penalties assessed under this bill.

Financial Plan Impact

Funds are not sufficient in the FY 2013 through FY 2016 budget and financial plan to implement the bill. The bill will cost \$5,901,469 in FY 2013 and \$31,357,222 over the four-year financial plan period.

Fiscal Impact of the Original Bill (AINS Version)

A major implementation cost is building DSLBD's compliance monitoring capacity, which is inadequate for meeting DSLBD's compliance requirements under current law. The agency estimates that for FY 2013 it faces a compliance caseload of approximately 700 cases, which include a variety of activities such as monitoring District agencies' CBE subcontracting requirements, monitoring developers' CBE equity and development participation agreements, and ensuring that CBEs maintain compliance with their certification requirements. The bill adds to this compliance caseload, in particular by increasing DSLBD's joint venture certification responsibilities and requiring DSLBD to monitor development projects for compliance with the 35 percent CBE rules within each CSI Code Division. To fully implement the compliance aspects of the bill, DSLBD will need to grow its compliance staff by 12 people, which includes an attorney to conduct hearings and legal enforcement proceedings, as well as assist with regulation drafting.

Additional implementation costs include:

- Funds for website and database upgrades at DSLBD and the Office of Contracts and Procurement to facilitate new requirements on CBEs and new bid preferences; and
- Funds for OAH to conduct appeals hearings for CBE determinations.

Also, under the bill, agencies will be required to use CBEs for all contracts and procurements below \$250,000 in value, which represents an increase from the current law threshold of \$100,000. The bill maintains the exceptions that exist in current law: 1) agencies may request a waiver from the requirement if there are not at least two CBEs that could reasonably perform the contract functions, and 2) agencies may ignore the requirement if the cost of engaging a CBE would be more than 12 percent higher than the cost of engaging another contractor on the open market. These exceptions imply, and District contracting officers have confirmed anecdotally from their experience, that the District typically pays a small premium for using CBEs in cases where that is required. As a result, this provision of the bill has a fiscal impact. The impact is difficult to quantify, and the Office of Revenue Analysis (ORA) believes that the conservative assumption of a 12 percent cost premium, the upper end of the range allowed by the bill, would be an unlikely outcome in the market for contracts of this size. For our estimate we have used a 6 percent cost premium, or the middle of the possible range of outcomes. The costs of the bill are detailed in the table below.

The fiscal impact estimate excludes the cost of implementing the component of the bill that creates value-added bid preferences and percentage reductions in price for local businesses that meet certain employment criteria.² According to DSLBD, continuous monitoring for employee background and employer benefits would significantly alter DSLBD's CBE certification process, making it very difficult to determine the resources DSLBD would need to implement these provisions. Without a specific plan on how these requirements would be met, the Office of Revenue Analysis cannot provide a cost estimate for this component of the bill.

² These include business characteristics such as provision of free health care to employees or hiring employees who live in high employment jurisdictions.

Fiscal Impact of the Amendment to AINS Version of Bill

The bill was amended on the Dais on December 18, 2012, to increase the SBE or CBE utilization requirement from 35 percent to 50 percent across all CSI Code Divisions on government construction contracts and government-assisted construction projects where the prime contractor is not a CBE. This section discusses the fiscal impact associated with this amendment.

Requiring increased CBE participation is expected to increase project costs by an estimated 3 percent. This estimated cost premium is a result of several factors, including additional costs for prime contractors to insure CBEs without bonding capacity, costs associated with finding and vetting capable CBEs, and potential cost increases from utilizing smaller firms. The budgetary impact of the estimated 3 percent cost increase will vary across different types of projects. For government construction contracts, the premium costs would be borne directly by the District in higher bid prices. For projects to be funded with Tax Increment Financing (TIF) or Payment in Lieu of Tax (PILOT) agreements not yet executed, premium costs would be incorporated into the TIF and PILOT requests and similarly borne by the District.

ORA does not foresee a direct negative fiscal impact from imposing this requirement on projects with other types of government subsidies. Tax abatements, Industrial Revenue Bonds, and grants are linked to the value of real property, the District's bonding authority, and the District's grants budget respectively, so potential increases in project costs would not directly affect the value of subsidies offered by the District. However, the general policy justification for economic development incentives is that government subsidies are needed for such projects because the relatively higher costs of these projects (compared to projected returns) create funding gaps. To the extent that this change would increase construction costs, it would reduce the effectiveness of District subsidy programs.

Revised Fiscal Impact of Small and Certified Business Enterprise Development and Assistance Amendment Act of 2012 -- FY 2013-FY 2016					
	FY 2013	FY 2014	FY 2015	FY 2016	4 Year Total
<i>Impact on DSLBD</i>					
Compliance Staff	\$1,237,754	\$1,269,050	\$1,301,707	\$1,335,806	\$5,144,317
IT Upgrades	\$38,000	\$0	\$0	\$0	\$38,000
Appeals of CBE Determinations	\$7,107	\$7,292	\$7,489	\$7,691	\$29,578
<i>DSLBD Total</i>	\$1,282,861	\$1,276,342	\$1,309,195	\$1,343,497	\$5,211,895
<i>Impact Across All Agencies</i>					
Increase CBE Contract Set-Asides to \$250k ¹	\$832,337	\$853,978	\$877,035	\$900,715	\$3,464,065
Amendment to Increase CBE Utilization to 50% ²	\$3,786,271	\$5,064,931	\$6,308,272	\$7,521,788	\$22,681,261
Total Impact on the Local General Fund³	\$5,901,469	\$7,195,251	\$8,494,502	\$9,766,000	\$31,357,222

Table Notes

¹ Based on OCP contracting data from FY 2013. If the price premium were the full 12 percent, the fiscal impact for FY 2013 would be \$1,664,674.

² Based on Capital Plan and OCP contracting data. Assumed price premium is 3%.

³ All cost elements of the bill are subject to appropriations.

The Honorable Phil Mendelson

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Note on Funding Sources

Finally, DSLBD may be able to use \$1.7 million (\$1.02 million of which was reprogrammed from FY 2012 funds) in its Small Business Micro Loan Fund (the "Micro Loan Fund") to defer the costs of the bill. Under current law, the use of the Micro Loan Fund is strictly limited to making loans to small businesses. The bill expands the allowable uses of its funds to include other financing and operating activities of DSLBD. However, the monies currently in the Micro Loan Fund have been appropriated for the purposes of making loans, and the Office of Revenue Analysis needs further legal analysis to recognize the legality of the use of these funds towards the costs of the bill or to make private loans. The Mayor has requested that the \$1.02 million be funded in FY 2013 from the Contingency Reserve and be paid back from the Micro Loan Fund. The Office of the Chief Financial Officer is currently reviewing this request.