Guidelines for Liquidated Damages Provision for Contracts Containing Minority Business Enterprise (MBE) Participation Goals

Chapter 154, Law of Maryland 2012 required the Board of Public Works (BPW) to promulgate a regulation that included a requirement that all contracts containing Minority Business Enterprise (MBE) participation goals contain a liquidated damages provision that applies in the event that the contractor fails to comply in good faith with the provisions of Subtitle 11 of Title 21 or the pertinent terms of the applicable contract. See § 14-303(b) (5), State Finance and Procurement Article, Maryland Annotated Code (SFP).

The regulation promulgated by the BPW, effective May 13, 2013, states that: "All contracts containing certified MBE participation goals shall contain a liquidated damages provision that applies if the contractor fails to comply in good faith with the provisions of State MBE laws or the pertinent terms of the procurement contract." Code of Maryland Regulations (COMAR) 21.11.03.10(E).

To assist agencies in drafting the required liquidated damages provision, the Governor's Office of Small, Minority & Women Business Affairs (GOSBA), as part of its mission "to promote and coordinate training regarding the requirements of the [MBE] program," [1] and "to promote, coordinate, and participate in plans, programs, and operations of the State government that promote or otherwise affect the establishment, preservation, and strengthening of [MBEs]," [2] is providing a provision that may be used by agencies in fulfilling the requirements of SFP §14-303(b)(5) and COMAR 21.11.03.10(E).

Procurement Officers should consult with their agency's legal counsel in crafting the clause for a particular contract subject to these requirements.

Recommended Form: Liquidated Damages Provision

> "**Liquidated Damages**. The contract requires the contractor to comply in good faith with the Minority Business Enterprise ("MBE") Program and contract provisions. The State and the Contractor acknowledge and agree that the State will incur damages, including but not limited to loss of goodwill, detrimental impact on economic development, and diversion of internal staff resources, if the Contractor does not comply in good faith with the requirements of the MBE Program and MBE contract provisions. The parties further acknowledge and agree that the damages the State might reasonably anticipate to accrue as a result of such lack of compliance are difficult to ascertain with precision.
>
> Therefore, upon issuance of a written determination by the State that the Contractor failed to comply in good faith with one or more of the specified MBE Program requirements or contract provisions, the Contractor shall pay liquidated damages to the State at the rates set forth below. The Contractor expressly agrees that the State may withhold payment on any invoices as set-off against liquidated damages owed. The Contractor further agrees that for each specified violation, the agreed upon liquidated damages are reasonably proximate to the loss the State is anticipated to incur as a result of such violation.

a. Failure to submit each monthly payment report in full compliance with COMAR 21.11.03.13B (3): $_____ per day until the monthly report is submitted as required.
b. Failure to include in its agreements with MBE subcontractors a provision requiring submission of payment reports in full compliance with COMAR 21.11.03.13B (4): $_____ per MBE subcontractor.
c. Failure to comply with COMAR 21.11.03.12 in terminating, canceling, or changing the scope of work/value of a contract with an MBE subcontractor and/or amendment of the MBE participation schedule: the difference between the dollar value of the MBE participation commitment on the MBE participation schedule for the specific MBE firm and the dollar value of the work performed

by that MBE firm for the contract.

d. Failure to meet the Contractor's total MBE participation goal and subgoal commitments: the difference between the dollar value of the total MBE participation commitment on the MBE Participation Schedule and the MBE participation actually achieved.
e. [DO NOT INCLUDE IN CONTRACTS THAT ARE SUBJECT TO SECTION 15-226 OF THE STATE FINANCE AND PROCUREMENT ARTICLE- CONSTRUCTION CONTRACTS- PROMPT PAYMENT OF SUBCONTRACTORS]. Failure to promptly pay all undisputed amounts to a subcontractor in full compliance with the prompt payment provisions of the Contract: $_____ per day until the undisputed amount due to the subcontractor is paid.

Notwithstanding the use of liquidated damages, the State reserves the right to terminate the contract and exercise all other rights and remedies provided in the Contract or by law."

Recommended Dollar Values to be inserted in the Liquidated Damages Provision:

The suggested agency process for determining the dollar amounts to be inserted in Sections a, b and e of the liquidated damages provision is as follows:

Step 1: Work Hours. The following are the estimated number of work hours expended in a week to identify a violation and complete the necessary steps to bring the contractor into compliance, including, without limitation, personnel hours to review contract files and reports, phone discussions, internal discussions regarding the breach or violation, and preparation of written internal and external documents and correspondence (including emails) regarding the breach or violation:

- Section a (failure to submit one of the monthly payment reports) = 4 hours
- Section b (failure to include subcontractor payment report provision per MBE contractor) = 2 hours
- Section e (failure to pay an undisputed subcontractor payment) = 15 hours

Step 2: Work Allocation. Allocate the estimated number of weekly work hours determined in accordance with Step 1 among the employees who are involved in identifying and completing the necessary steps to bring a contractor into compliance. For example, using the estimate of 4 weekly work hours for Section a of the liquidated damages provision, an agency could allocate 3.5 weekly work hours for the work performed by the MBE Liaison and .5 weekly work hours for the work performed by the Procurement Officer.

Step 3: Pay Rate. Determine the fully loaded hourly pay rate for each of the employees who were identified in Step 2. The fully loaded pay rate shall include the base salary and any State-paid benefits. For example, for the MBE Liaison, the agency will determine the salary for the applicable position, add the dollar amount for the estimated State-benefits and, based on this information, determine the fully loaded hourly pay rate. Instead of the actual salary, the agency may use the mid-point of the appropriate position classification to estimate the hourly rate. Agencies should consult their human resources department to determine these rates.

Step 4: Weekly Rate. Multiply the number of weekly work hours allocated for each employee in Step 2 by the fully loaded hourly pay rate determined for that employee in Step 3 to obtain the weekly rate for each employee.

Step 5: Agency Rate. Determine the agency rate by totaling the weekly rates from Step 4 for all of the employees. The agency rate in the example would be calculated by adding the weekly rate for the MBE Liaison to the weekly rate for the Procurement Officer.

Step 6: Complete Section b. Insert the agency rate as the dollar amount for Section b of the liquidated damages provision.

Step 7: Daily Rate. Divide the agency rate calculated in Step 5 by 7 to determine the daily rate.

Step 8: Complete Sections a and e. Insert the daily rate as the dollar amount for Sections a and e of the

liquidated damages provision. Notwithstanding the foregoing calculations, it is recommended that the daily liquidated damages amount for Section e not exceed $100 per day. Note: Section e does not apply to contracts that are subject to Section 15-226 of the State Finance and Procurement Article.

Best Practice Compliance Procedures for Assessing Liquidated Damages

Before an agency may seek to recover liquidated damages, the agency must first make a determination that the contractor did not comply in good faith with the MBE Program requirements and pertinent contract provisions ("MBE requirements"). The fact that the contractor failed to comply with MBE requirements, including any goal/subgoal commitments, shall not, in and of itself, constitute a failure to comply in good faith. Some recommended procedures for determining whether the contractor complied in good faith to meet the MBE requirements are provided below:

1. The following, along with any other pertinent information, may be considered by the MBE Liaison in their review as to whether the contractor has complied in good faith in fulfilling its MBE requirements:
    a. The contractor's efforts to monitor and enforce compliance with the MBE participation commitments and requirements;
    b. The contractor's efforts to ensure timely responses to information requests made by the MBE Liaison or Procurement Officer;
    c. The contractor's efforts to maintain accurate records;
    d. The contractor's efforts to provide accurate information;
    e. The contractor's efforts to implement procedures to comply with the MBE requirements;
    f. The contractor's efforts to adopt company policies or procedures that are consistent with the objectives of the MBE Program; and
    g. Whether the failure to meet any of the MBE requirements was primarily the result of the actions of another party (including, but not limited to the State) and was outside the contractor's control.
2. The MBE Liaison will provide the Procurement Officer with information regarding the contractor's efforts to comply with the MBE requirements. Upon consultation with the MBE Liaison and agency counsel, and with the approval of the agency head or designee, the Procurement Officer shall make an initial determination as to whether the contractor has failed to comply in good faith. When an initial determination has been made that the contractor has failed to comply in good faith, the agency head or designee shall provide written notice to the contractor stating the deficiencies noted in the initial determination and provide the contractor with a period of 10 days from receipt of the written notice (or such longer period as may be provided by the procurement agency in writing) to provide a written response to the initial determination, including any pertinent documentation.
3. After considering any response or lack of response from the contractor, the Procurement Officer, in consultation with the MBE Liaison and agency counsel, and approval of the agency head or designee, should determine whether the contractor complied in good faith with the specified MBE requirements.
4. If the agency determines that the contractor failed to comply in good faith with the specified MBE requirements, the agency head or designee shall issue a written notice to the contractor of the agency's determination to recover liquidated damages from the date of the initial determination.
5. If the agency determines that the contractor has complied in good faith with the specified MBE requirements, the agency head or designee shall issue a written notice to the contractor of the agency's determination to not recover liquidated damages.
6. Agencies shall act promptly to determine and assess appropriate liquidated damages; however, delay in assessing liquidated damages does not constitute a waiver of any such damages. Liquidated damages may be assessed after the completion of work under the contract.
7. Agencies shall consider whether it is appropriate to include in the contract a definition of the word "day" for purposes of determining liquidated damages. If the contract does not include a definition of the word "day," it shall have the meaning set forth in COMAR 21.01.02.01(B) (32).

Procurement Officers should consult with their agency's legal counsel in applying these Guidelines and in determining whether the contractor has complied in good faith with MBE Program requirements and pertinent contract provisions with regard to the particular contract.

NOTE: The State does not assess liquidated damages to Indefinite Delivery Indefinite Quantity (IDIQ) contracts for instances where the State did not request the performance of a task for which an MBE subcontractor is named on the participation schedule.

Questions about guidelines for the State's liquidated damages provisions may be directed to:

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100 Community Place, 3rd Floor
Crownsville, MD 21032

410-697-9600
info.goMDsmallbiz@maryland.gov

Footnotes

1. §9-305(b) (2), State Government Article, Maryland Annotated Code.
2. §9-305(b) (3), State Government Article, Maryland Annotated Code.

Document information

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