Maryland

GOVERNOR'S OFFICE
OF SMALL, MINORITY & WOMEN
BUSINESS AFFAIRS

LIQUIDATED DAMAGES TRAINING



PRESENTED BY NICHELLE JOHNSON, MBE OMBUDSMAN

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MBE Program Statutes and Regulations

State Finance and Procurement Article §14–303 (b) (6) & COMAR 21.11.03.10(E)

- 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 and a provision that prohibits a unit from assessing liquidated damages for an indefinite delivery contract or an indefinite performance contract if a unit fails to request the performance or delivery of a task for which an MBE subcontractor was:
- (1) Named on the MBE Participation Schedule; or
- (2) Named on the MBE Participation Schedule and qualified based on the subcontractor's existing North American Industry Classification System Code.

Resources (main resources)

- Your main resources will be:
    - GOSBA MBE Toolkit
        - Liquidated Damages Guidance
        - Liquidated Damages Worksheet
        - Liquidated Damages Hourly Rate Calculations

Resource Links (shown in a screenshot of the toolkit web page):

- eMaryland Marketplace Advantage (eMMA)
- MBE Prime Regulation 2014
- Liquidated Damages Guidelines
- Liquidated Damages Worksheet
- Liquidated Damages Hourly Rate Calculations

Resources (BPW Model Policy)

- As required by statute, BPW recently released the Model Policy on Liquidated Damages, which covers:
    - When to include liquidated damages provisions in procurement contracts
    - Criteria for drafting LD provisions and example language
    - Model Plan for Responding to Deficient Performance

https://bpw.maryland.gov/Publications/LDModelPolicy_20231213.pdf

Reminders

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

Liquidated Damage Guidance (overview)

- Recommended language for the Liquidated Damages Provision is provided
- Steps to calculated the recommended dollar values to be inserted in the Liquidated Damages Provision
- Best Practices for assessing liquidated damages

Liquidated Damage Guidance (recommended language)

- **Recommended language for the Liquidated Damages Provision is provided**
- Provision should explain that upon written determination by the State that the Contractor failed to comply with one or more of the specified MBE Program requirements or contract provisions, the Contractor shall pay liquidated damages to the State at rates calculated and included in the provision

Liquidated Damage Guidance (rates)

- Rates are included for:
- Failure to submit each monthly payment report in full compliance with **COMAR 21.11.03.13B**
- 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)**
- 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
- Failure to meet the Contractor's total MBE participation goal and subgoal commitments

Compliance Regulations (COMAR 21.07.01.14)

- COMAR 21.07.01.14
  Liquidated Damages.
    - The Guidelines, Worksheet & Hourly Rate Calculations are found on our website in the MBE toolkit under Resource Links on the left

Excerpt from the Liquidated Damages Worksheet (shown as a screenshot):

- **Section A (Failure to submit monthly reports),**
- **Section B (Failure to include reporting requirements in subcontracts)**
- **Section E (Prompt pay for nonconstruction contracts)**
- Please note that this sheet is protected. The only fields that require information are highlighted in yellow. To begin, you will need to identify:
    - the employees/positions from your agency involved in MBE compliance,
    - the fully-loaded hourly rates for those employees or the mid-level fully-loaded pay rate for the position, and
    - the allocation of hours for each violation.

Calculating Liquidated Damages: Step 1

Step 1: Work Hours

- Utilize the estimated number of work hours expended **per week** in the guidelines
- This includes, 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**

Calculating Liquidated Damages: Step 2

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.

Calculating Liquidated Damages: Step 3

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 = base salary + any State-paid benefits.

- Utilize the LD Calculator in the toolkit to calculate the rate for each employee.
- For example, for the MBE Liaison:
    1. Determine the salary for the applicable position,
    2. Add the dollar amount for the estimated State-benefits and,
    3. Based #1 & #2, 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.

Calculating Liquidated Damages: Step 4

Step 4: Determine the Weekly Rate per employee

- 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.

Weekly hours x Fully loaded hour rate = Weekly Rate

Calculating Liquidated Damages: Step 5

Step 5: Agency Rate

- Determine the agency rate by totaling the weekly rates from Step 4 for **all of the employees** listed on the worksheet.

For example, if the only employees identified in the worksheet are the MBE Liaison and the Procurement Officer, then

Agency rate = Weekly rate for the MBE Liaison + Weekly rate for the Procurement Officer

Calculating Liquidated Damages: Steps 6 and 7

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.

Calculating Liquidated Damages: Step 8

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:

Calculating Liquidated Damages: Summary by Section

- Section A – Utilize the “Daily Rate” (for all employees on the worksheet)
- Section B – Utilize the “Agency Rate”
- Section C – LD amount would be 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 ACTUAL work performed by that MBE firm for the contract.
- Section D – LD amount would be the difference between the DOLLAR VALUE of the total MBE participation commitment on the MBE Participation Schedule and the MBE participation actually achieved by the Prime Contractor.
- Section E – LD amount would be the “Daily Rate” (for all employees on the worksheet)

Reminder

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.

Contract Monitoring to Avoid Liquidated Damages

Compliance Regulations (COMAR 21.11.03.13 A)

- COMAR 21.11.03.13

A. To ensure compliance with certified MBE participation goals, the procurement agency shall:

1. Verify that the certified MBEs listed in the MBE participation schedule are actually performing work and receiving compensation as set forth in the participation schedule; and
2. Monitor and collect data on contractor compliance with contract MBE participation goals.

Compliance Regulations (COMAR 21.11.03.13 B)

- COMAR 21.11.03.13

Compliance Staff may need to visit the worksite and even interview subcontractors or workers:

B. The contractor shall:

(1) Permit the procurement agency to inspect any relevant matter, including records and the jobsite and

to interview subcontractors and workers;

Compliance Regulations - Payment (COMAR 21.11.03.13)

COMAR 21.11.03.13 [Collection & Review of payment reports]

B (3) Submit monthly to the procurement agency a report listing payments made to each MBE subcontractor in the preceding 30 days and any unpaid invoices over 30 days old received from a certified MBE subcontractor, and the reason payment has not been made; and…

C. Upon determining that a contractor did not make good faith efforts to comply with contract MBE participation goals, the procurement agency shall notify the contractor in writing of its findings and shall specify what corrective actions are required. The contractor is required to initiate the corrective actions within 10 days and complete them within the time specified by the procurement agency.

- COMAR 21.10.08 – Prompt Payment Requirements may intersect with MBE program compliance requirements when payment issues involve an MBE subcontractor.

Compliance Regulations - Payment (COMAR 21.07.01.31)

- COMAR 21.07.01.31:Mandatory provisions for all contracts:

A. This contract and all subcontracts issued under this contract at any tier are subject to the provisions of State Finance and Procurement Article, §15-226, Annotated Code of Maryland, and COMAR 21.10.08. In §§A—D of this regulation, the terms “undisputed amount”, “prime contractor”, “contractor”, and “subcontractor” have the meanings stated in COMAR 21.10.08.01.

B. A contractor shall promptly pay its subcontractors an undisputed amount to which a subcontractor is entitled for work performed under this contract within 10 days after the contractor receives a progress payment or final payment for work under this contract.

C. If a contractor fails to make payment within the period prescribed in §B of this regulation, a subcontractor may request a remedy in accordance with COMAR 21.10.08.

D. A contractor shall include in its subcontracts at any tier for work under this contract wording that incorporates the provisions, duties, and obligations of §§A—D of this regulation, State Finance and Procurement Article, §15-226, Annotated Code of Maryland, and COMAR 21.10.08.

MBE Subcontractor Concerns

Concerns such as:

- Quality of MBE’s Work
- Non-Payment by Prime Contractor on Items for which there is no dispute
- MBE Firm is not being utilized as listed at the time of bid (Determine if Fraud or Compliance issues?)

Compliance

- Compliance requirements:
    - Use of the MBEs listed at time of bid/proposal
    - MBE Subcontractors must perform their items of work, independent from the prime contractor, with their own supervisor and employees
    - Primes can not utilize Third Tier MBE subcontractors without prior approval from the agency
    - MBE must perform **commercially useful function** “….*For execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved; and (ii) With respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and*

installing (where applicable) and paying for the material itself."

Compliance Regulations (COMAR 21.11.03.13 D)

- COMAR 21.11.03.13 [Carry out remedies to non-compliance]

D. If a procurement agency determines that material noncompliance with MBE contract provisions exists and that the prime contractor refuses or fails to take the corrective action required by the procurement agency, then the following sanctions may be invoked:

(1) Termination of the contract;

(2) Referral to the Office of the Attorney General for appropriate action; or

(3) Initiation of any other specific remedy identified by contract.

Remedies to Non-Compliance

COMAR 21.07.01

There are several tools at the agency level to handle these issues, such as

- Letter of non-performance
- Corrective Action Plans
- **Liquidated Damages**
- Contract Termination for Cause or Convenience

MBE Program Advocacy

- Monitoring Contract Compliance is an integral part of the success of the MBE Program
- Any observed issues should immediately be brought to the attention of procurement staff and the MBE liaison by the contract monitor or other compliance staff. Agency assigned legal counsel should be consulted as needed.
- Liquidated damages, should be considered a last resort but is not always effective if utilized at the very end of the contract…unless unavoidable.

Remember

- Liquidated damages and contract termination are your last resorts but should never be off the table, especially if the prime contractor fails to follow MBE program rules and regulations in good faith.
- These measures should follow a concerted effort to allow the prime time to correct their actions per the approved corrective action plan.
- If there are any possible legal issues that arise, procurement staff and liaisons should consult with the agency legal counsel.
- Agency staff may reach out to the MBE Ombudsman for assistance if needed.

Questions after the presentation?

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Document information

Governor's Office of Small, Minority & Women Business Affairs

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