



Legal Q and A: DBE Contractor Issues on Federal Projects, Construction Broadsheet, featuring Erik Ortmann, November 21, 2021

Attorney Erik Ortmann, partner and co-chair of the construction practice group at Kaufman Dolowich Voluck LLP in Woodbury, New York, has more than 25 years of experience representing private and public owners, municipalities, general contractors, construction managers, design professionals, trade contractors and suppliers with respect to all aspects of construction law.

Q. I am a general contractor, and as part of a federal contract, I have to use DBEs (Disadvantaged Business Enterprises) for certain trades. A sub DBE has a problem manning the project. Can I lend them a few of my employees? If not, what can I do to help that company?

A. Generally, the prime contractor cannot lend employees or help DBE subcontractors in any significant way. The certified DBE firms must independently and actually perform, manage and control their subcontracts, serving what is termed a "commercially useful function." Assisting a certified firm with equipment, manpower or management might be considered a violation of the regulations and indicate that the certified firm is not serving a commercially useful function. Providing small tools and minor, occasional assistance might be permissible. In some cases, sharing of equipment – i.e. specialty equipment, cranes, scaffolding – may be necessary. In any case where significant or consistent assistance is anticipated, an effort should be made to obtain clearance from the contracting agency.

Q. I am a minority contractor, building my own construction contracting business. Can I hire someone to oversee field operations, or do I need to do that myself? What does the federal government consider being "in control" of my business?

A. This is a grey area. As referenced in the question, certifying agencies need to see proof that the applicant owner actually owns and controls the business. Having another person oversee field operations might be perceived as the applicant not having actual control. The key is often in providing an explanation and/or proof that even if the owner has hired someone to manage the field, the owner is still the final decision maker on major field decisions and has a practice of keeping tabs on field operations on a regular basis. Showing that the owner/applicant has experience in the business, and, ideally, in the field would be helpful. The idea is that the owner could manage field operations but has chosen not to do so, as there are other tasks that the owner must perform. Please read the rest of the column at the link below