

## **PROPOSED BILL WOULD PUT PHILADELPHIA CITY COUNCIL INTO THE MIDDLE OF CONSTRUCTION WORKFORCE DIVERSITY AND DBE PARTICIPATION ISSUES**

**BY: GAETANO P. PICCIRILLI, ESQ. AND MARK L. PARISI, ESQ.**

For contractors who bid on public works contracts with the City of Philadelphia, the consequences of failing to insure workforce diversity and minority participation may become more unpredictable.<sup>1</sup> On June 18, 2009, Councilman W. Wilson Goode, Jr. introduced new legislation (the Goode legislation) aimed at politicizing the consequences of failing to live up to the City's participation requirements.

As many contractors are aware, bidders for city projects are required to include certain percentages of participation from disadvantaged businesses, including minority-owned, women-owned and disability-owned business enterprises (generally known as DBEs), in their bid. DBE participation goals are standard bid requirements for public works jobs. The law requires that contractors who have been awarded contracts for city public works projects use their best and good faith efforts to comply with applicable DBE goals.

Presently, contractors who submit sealed bids for city public works projects, where the cost of the project is expected to exceed \$1 million must agree to abide by the terms of an Economic Opportunity Plan (EOP),<sup>2</sup> otherwise, the bidder is deemed "not responsible" and, thus, not eligible for contract award.<sup>3</sup> Generally, an EOP<sup>4</sup> is intended to spell out the specific steps to be taken by the contractor in satisfying its obligation to exercise "best and good faith efforts"<sup>5</sup> with respect to DBE participation.

Under the current law, contractors are required to submit all data required by the EOP with full and complete disclosure. On larger development projects (in excess of \$50 million), where city or city agency funds account for at least 10% of the funding source, reporting is more rigorous, requiring reports on a quarterly basis. When a contractor fails to comply with an EOP,<sup>6</sup> the City can assess certain penalties,<sup>7</sup> including the withholding of payment, contract termination, suspension (debarment) from bidding or participating in city projects for up to three years, and even the recovery of liquidated damages.

While the Goode legislation does not alter the penalties for failing to comply with EOP requirements, it fundamentally alters the process for possible debarment. The Goode legislation would allow City Council<sup>8</sup> to make a preliminary determination, after a public hearing, that there are "reasonable grounds to believe" that a contractor has failed to comply with EOP requirements. In this context, this is essentially a "probable cause" standard—and a very low standard at that. After such a determination by City Council, the City Finance Director would be required to provide notice and a hearing as to whether the contractor can demonstrate its "best and good faith efforts" to comply with the EOP and, if not, whether debarment is an appropriate remedy.

The Goode legislation is a significant change in local public contracting law in that it places a political body, City Council, in the position of determining whether there is "probable cause" for a debarment hearing. The Goode legislation is not clear on how these matters will be brought to Council's attention, thus, one must assume it will be through the introduction of a bill or resolution—a standard political mechanism—by one of the 17 members of the Philadelphia City Council.

Indeed, the notion that City Council should make the preliminary determination as to a debarment hearing is novel<sup>9</sup> in that a debarment proceeding is traditionally an administrative process. The political process laid out by the Goode legislation is radically different from the current administrative process whereby proceedings are instituted by the City Procurement Commissioner or, where necessary, the Office of Economic Opportunity (the OEO). Thus, city contractors accustomed to dealing with the Procurement Department and/or the OEO on these issues would also have to satisfy Philadelphia's City Council members, who traditionally have varying interests and goals that may be different from those of the contracting or administrative agencies, in addition to the administrative agencies.

The Goode legislation is also significantly different from what a contractor experiences on the state level. Under the Pennsylvania Commonwealth Procurement Code, it

is the Department of General Services or the Department of Transportation, in consultation with the particular using entity (*i.e.*, the Departments of Corrections, Education, etc.) that can bring debarment proceedings against a contractor.<sup>10</sup> The state legislature certainly is not empowered to do so, in stark contrast to the procedure proposed in the Goode legislation.

Moreover, unlike the City's current debarment process and the process set up by the Commonwealth Procurement Code that rely upon experts in the field of public contracting to make initial determinations of non-compliance, the Goode legislation authorizes City Council to make preliminary determinations as to the need for a debarment hearing. The question is not whether the City should be policing compliance with EOPs, but rather whether a political body such as City Council is the right body to do so.

For the standard public works contract,<sup>11</sup> the Goode legislation would add a second policing body to the debarment process in relation to DBE participation on a project-by-project level. It should be noted that the Goode legislation, however, does not change a contractor's requirements in relation to EOPs. It simply allows for City Council to act in cases where the Procurement Commissioner and/or the OEO choose not to do so. The legislation sets up a situation where a contractor no longer has to satisfy just the contracting agency, but also City Council members who may have differing interests and ideas as to the issue of DBE participation. Contractors facing DBE debarment before the Procurement Commissioner or the OEO have always been better served when accompanied by counsel. If City Council is empowered to initiate and pursue debarment as well, counsel will be even more important to assure that the contractor is afforded proper Due Process as opposed to becoming a political casualty.

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<sup>1</sup> This article applies equally to participants, including contractors, in City Development Projects in excess of \$50 million where the city or city agency funds account for at least 10% of the funding source.

<sup>2</sup> See Philadelphia Code, Title 17, § 1602(2).

<sup>3</sup> Subject to certain exceptions found in the City Code at § 17-1602(3).

<sup>4</sup> Prototype EOPs are developed by the Philadelphia Office of Economic Opportunity, City's Procurement Department and the applicable contracting agency and are set forth in the bid specifications and are intended to be uniform in content and structure for all contracts. *Id.* at 1603(2)(a).

<sup>5</sup> Specific requirements of an EOP are spelled out in Philadelphia Code, Title 17, § 1603 (1)(a)(2)(a)-(d).

<sup>6</sup> *Id.* at § 17-605.

<sup>7</sup> *Id.* at § 17-606.

<sup>8</sup> The Goode legislation includes a proposed change to the City's Home Rule Charter that would allow City Council to conduct such hearings.

<sup>9</sup> While the approach may be novel, there is an open question as to whether it is permissible under the law.

<sup>10</sup> Section 531 of the Commonwealth Procurement Code expressly spells out the Commonwealth's debarment process and it allows the head of a purchasing agency, *i.e.* DGS or DOT, have the authority to debar a "person from consideration for the award of contracts." 62 Pa. Cons. Stat. Ann. § 531.

<sup>11</sup> It is important, however, to contrast a City-Funded Development Project from a standard competitively bid public works contract, the subject of this article. A City-Funded Development Project is one where the cost is expected to exceed \$50 million and where city or city agency funds account for at least 10% of the funding source. With a City-Funded Development Projects, City Council must approve both the project and the EOP. In that instance, having City Council enforce the EOP may make practical sense. In a competitively bid contract, however, City Council approves neither the contract nor the EOP. Thus, giving Council the ability to police contract compliance in that instance seems like overreaching.

*For further information, please contact one of our practice group chairs, **Bill Taylor** (215-864-6305) or **Jerry Anders** (215-864-7003).*

#### **About the Authors**

**Mark Parisi** is a partner in the Construction Practices Group. **Gaetano P. Piccirilli** is an associate in the Construction Practices Group. The authors' practices focus on the construction industry, construction defect claims, construction contracts and related claims.

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