Councilmember Mary M. Cheh

Councilmember Robert C. White, Jr.

Councilmember Anita Bonds

Councilmember Kenyan R. McDuffie

Councilmember Brandon T. Todd

Councilmember Brianne K. Nadeau

Councilmember Trayon White, Sr.

A BILL

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

To amend the Quick Payment Act of 1984 to provide remediation for subcontractors in the event of non-payment by contractors or higher-tier subcontractors; to amend the Procurement Practices Reform Act of 2010 to ensure that small businesses receive contracts set aside for small businesses that are subsequently issued on the open market; and to amend the Small, Local, and Disadvantaged Business Enterprise Development Assistance Act of 2005 by clarifying category definitions within the Certified Business Enterprise program, standardizing program compliance verification with a site visit schedule, creating an anonymous violation reporting mechanism, incentivizing small business subcontracting, and closing loopholes to prevent program abuse and manipulation.

BE IT ENACTED BY THE COUCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Small Business Procurement Reform Omnibus Amendment Act of 2019".

Sec. 2. The Quick Payment Act of 1984, effective March 15, 1985 (D.C. Law 5-164, D.C. Official Code § 2-221.01 *et seq.*), is amended as follows:

46 (a) Section 2 (D.C. Official Code § 2-221.01) is amended as follows:

47 (1) Paragraph (5) is amended by striking the phrase "contractor in performance of
48 the contractor's" and inserting the phrase "contractor or higher-tier subcontractor in performance
49 of the contractor's or higher-tier subcontractor's" in its place.

50 (2) A new paragraph (6) is added to read as follows:

51 "(6) Undisputed amount" means an amount owed by a contractor to a
52 subcontractor for which there is no good faith dispute between the contractor and subcontractor
53 regarding the payment amount due for work completed.".

54 (b) Section 3(d) (D.C. Official Code § 2-221.02) is amended as follows:

55 (1) Subsection (d) is amended as follows:

56 (A) The lead-in language is amended by striking the phrase "shall
57 include:" and inserting the phrase "shall obligate the contractor and any subcontractors to adhere
58 to the following provisions, which shall be included in each agency contract and any
59 subcontracts stemming from the agency contract, including lower-tier subcontracts:" in its place.

60 (B) Paragraph (1) is amended to read as follows:

61 "(1) A payment clause that obligates any contractor or subcontractor to, within 7
62 business days of receipt of any amount paid to the contractor by the District agency or to a
63 subcontractor by an higher-tier subcontractor, subject to enforcement pursuant to subsection (d-
64 1) of this section:

65 "(A) Pay any subcontractors for the proportionate share of the total
66 payment received from the District agency or higher-tier contractor that is attributable to the
67 subcontractor for work performed under the contract; or

68 "(B) Notify the District agency and subcontractor, in writing, of the
69 contractor's intention to withhold all or part of the subcontractor's payment with the reason for
70 the nonpayment.
71 (2) A new subsection (d-1) is added to read as follows:
72 "(d-1)(1) If a subcontractor does not receive a payment or written notice within 7
73 business days as required in subsection (d) of this section, the subcontractor may give written
74 notice of the nonpayment to the contracting officer managing the District contract, which shall
75 include:
76 "(A) The name of the contractor or higher-tier subcontractor, the contract
77 number, the project or task order under which the dispute exists, and the amount in dispute;
78 "(B) A detailed description of the basis of the amount due; and
79 "(C) If known, an explanation of any dispute concerning the contractor's
80 or higher-tier subcontractor's payment;
81 "(2) Within 5 business days of receipt of written notice from a subcontractor, the
82 contracting officer shall contact the contractor to ascertain whether the amount withheld is an
83 undisputed amount;
84 "(3) The contracting officer shall determine in writing, in consultation with the
85 contract administrator and project manager(s), whether the withheld payment is an undisputed
86 amount and issue the determination to the disputing contractor and subcontractor;
87 "(4) If the contracting officer determines that a part or all of the amount withheld
88 is an undisputed amount, the contracting officer shall instruct the contractor to pay the
89 subcontractor the undisputed amount within 5 business days of the determination issuance;

90 "(5) If the contractor is instructed to pay the subcontractor and the subcontractor
91 is not paid within 5 business days of that instruction, the subcontractor may report the
92 nonpayment in writing to the contracting officer;
93 "(6) If the subcontractor notifies the contracting officer of non-payment under
94 paragraph (5) of this subsection, the contracting officer shall schedule a meeting not later than 10
95 business days after receiving notice from the subcontractor under paragraph (5) of this
96 subsection to discuss the dispute with the agency contract administrator, contract project
97 manager(s), the contractor, and the subcontractor, to establish why the contractor has not paid the
98 subcontractor as instructed under paragraph (4), and formulate a second written determination
99 providing the contractor an additional 5 business days to pay the subcontractor, unless the
100 contractor and subcontractor agree to different terms to remediate the non-payment, before
101 enforcement actions are implemented as follows:
102 "(A) If the subcontractor is unpaid after the second determination is issued
103 and 5 business days pass, the contracting officer shall instruct the contract administrator to
104 withhold from the next District payment to the contractor, an amount equal to the undisputed
105 amount plus interest described in subsection (b)(1) of this section until the subcontractor is paid
106 or for 7 business days;
107 "(B) If payment is not made to the subcontractor within 7 business days of
108 the contracting officer's instruction to withhold payment as described in subparagraph (A), the
109 contracting officer:
110 "(i) Shall order that all further payments to the contractor cease
111 until payment to the subcontractor is verified;

112 "(ii) May require the contractor pay a penalty to the subcontractor,
113 in an amount not exceeding $100 per day, from the date that payment was originally required
114 under subparagraph (A) of this paragraph.".
115 "(iii) May instruct the contract administrator to make payment
116 directly to the subcontractor in the undisputed amount plus interest withheld under subparagraph
117 (A) if the contractor continues to withhold payment."
118 "(7) Any determinations made under this subsection by the contracting officer
119 with regard to contractor non-payment are appealable to the Contract Appeals Board.".
120 Sec. 3. Section 412(c) of the Procurement Practices Reform Act of 2010, effective April
121 8, 2011 (D.C. Law 18-371, D.C. Official Code § 2-354.12(c)), is amended as follows:
122 (a) The existing text is amended by striking the phrase "small business enterprise are
123 believed to be 12% or more above the likely price on the open market." and inserting the phrase
124 "small business enterprise, as defined in section 2302(16) of the Small, Local, and
125 Disadvantaged Business Enterprise Development and Assistance Act of 2005, effective October
126 20, 2005 (D.C. law 16-33; D.C. Official Code § 2-218.02(16)), are believed to be 12% or more
127 above the likely price on the open market; except that, after issuing the contract or procurement
128 in the open market, if the agency receives a bid from a small business which is the lowest bid or
129 12% or less above the lowest bid by a business that is not a small business enterprise, the agency
130 shall select the small business enterprise, unless the CPO issues findings to support another
131 selection, describing why the small business enterprise lacks the capability to perform the
132 contract. Any findings issued by the CPO pursuant to this subsection shall be posted via the
133 Department's website, any location where the solicitation is posted, and issued to the small
134 business enterprise.".

135 Sec. 4. The Small, Local, and Disadvantaged Business Enterprise Development
136 Assistance Act of 2005, effective October 20, 2005 (D.C. Law 16-33, D.C. Official Code § 2-
137 218.01 *et seq.*), is amended as follows:
138 (a) Section 2337 (D.C. Official Code § 2-218.37) is amended by striking the phrase
139 "with principal offices" and inserting the phrase "with principal offices, where managerial
140 functions are performed," in its place.
141 (b) Section 2339a(a) (D.C. Official Code § 2-218.39a(a)) is amended by striking the
142 phrase "pursuant to section 2302(1D)" and inserting the phrase "pursuant to section 2302(1D),
143 and which will directly perform, at minimum, 35% of the work under the contract, unless both
144 joint-venture partners are certified business enterprises." in its place.
145 (c) A new Section 2339b is added to read as follows:
146 "Sec. 2339b. CBE compliance verification"
147 "(a) The Department shall perform a site visit of each certified business enterprise to
148 verify compliance with the Certified Business Enterprise program criteria and requirements at
149 least every 18 months, starting in the year of certification.
150 "(b) The Department shall publish the date of the last site visit conducted pursuant to
151 subsection (a) of this section, for each certified business enterprise on the Department's website.
152 "(c) The Department shall create and maintain an anonymous reporting mechanism for
153 the community to report potential violations of compliance with certification requirements.
154 "(d) The Department shall perform additional compliance site visits, in addition to the
155 visits required by subsection (a) of this section, when three or more complaints are received
156 regarding a single CBE, whether anonymous or not.".

157 (d) Section 2341(a-2)(2) (D.C. Official Code § 2-218.41(a-2)(2)) is amended to read as
158 follows:
159 "(2) The Mayor may waive, with the approval of the Council, the prohibition set
160 forth in paragraph (1) of this subsection and grant approval for the agency to spend its remaining
161 expendable budget with non-small business enterprises or non-certified business enterprises. A
162 proposed waiver shall be deemed approved by the Council if one of the following occurs:"
163 "(A) During the 10-day period beginning on the first day (excluding
164 Saturdays, Sundays, and holidays) following its receipt by the Secretary of the Council, no
165 member of the Council introduces a resolution to approve or disapprove the proposed waiver; or
166 "(B) If a resolution has been introduced in accordance with subparagraph
167 (A) of this paragraph, and the Council does not disapprove the contract during the 45-day review
168 period beginning on the first day (excluding Saturdays, Sundays, and holidays) following its
169 receipt by the Office of the Secretary to the Council.".
170 (e) Section 2344 (D.C. Official Code § 2-218.44) is amended as follows:
171 (1) Subsection (b) is amended by striking the phrase "market." and inserting the
172 phrase "market. After issuing the contract or procurement in the open market, if the agency
173 receives a bid from a small business which is the lowest price bid or 12% or less above the
174 lowest bid by a business that is not a small business, the agency must select the small business,
175 unless the CPO issues a determination and findings to support another selection." in its place.
176 (2) Subsection (c) is amended by striking the phrase "via the Department's
177 website or" and inserting the phrase "via the Department's website, any location where the
178 solicitation is posted, and" in its place.
179 (f) Section 2345(d) (D.C. Official Code § 2-218.45(d)) is amended as follows:

180 (1) Subsection (d) is amended by striking the phrase "via the Department's
181 website or" and inserting the phrase "via the Department's website, any location where the
182 solicitation is posted, and" in its place".
183 (2) A new subsection (e) is added to read as follows:
184 "(e) The Office of Contracting and Procurement shall notify the Department of
185 Employment Services of any contract award made to a small business enterprise included on the
186 District of Columbia Supply Schedule within three business days of award in order for the
187 Department to secure a First Source Agreement with the awardee.".
188 (i) Section 2346(a) (D.C. Official Code § 2-218.46(a)) is amended by adding paragraphs
189 (4) and (5) to read as follows:
190 "(4) For the purposes of this section, the contracting officer may authorize
191 additional payment up to 10% of the dollar volume by which the contractor exceeds the
192 subcontracting requirement set forth in paragraphs (1) and (2).
193 "(5) The subcontracting requirement set forth in paragraphs (1) and (2) shall not
194 be fulfilled if subcontracted to a business entity in which the contractor has an ownership stake.".
195 (j) Section 2361(b)(2) (D.C. Official Code § 2-218.61(b)(2)) is amended as follows:
196 (1) Subparagraph (A) is amended by striking the phrase "certification" and
197 inserting the phrase "certification, under penalty of perjury," in its place.
198 (2) Subparagraph (B) is amended as follows:
199 (A) Sub-subparagraph (i) is amended to read as follows:
200 "(i) A bona fide local business enterprise, including evidence:
201 "(I) That more than 50% of employees or owners are District residents, including
202 certified payroll and a list of employees with home addresses;

203 "(II) That the enterprise's principal office is located

204 physically in the District, including a copy of a deed or lease and evidence that the location is

205 listed as the address of record with the enterprise's bank or on the enterprise's federal tax return;

206 (III) Of lease renewal, if applicable, throughout the 3-year

207 certification period;".

208 (k) Section 2363(c)(4) (D.C. Official Code § 2-218.63(c)(4)) is amended by striking "that

209 the beneficiary or certified joint venture was required but failed to subcontract".

210 Sec. 5. Fiscal impact statement.

211 The Council adopts the fiscal impact statement in the committee report as the fiscal

212 impact statement required by section 4a of the General Legislative Procedures Act of 1975,

213 approved October 16, 2006 (120 Stat. 2038; D.C. Official Code § 1-301.47a).

214 Sec. 6. Effective date.

215 This act shall take effect following approval by the Mayor (or in the event of veto by the

216 Mayor, action by the Council to override the veto), a 60-day period of congressional review as

217 provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December

218 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of

219 Columbia Register.