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

(1) Paragraph (5) is amended by striking the phrase “contractor in performance of the contractor’s” and inserting the phrase “contractor or higher-tier subcontractor in performance of the contractor’s or higher-tier subcontractor’s” in its place.

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

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

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

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

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

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

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

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

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“(B) Notify the District agency and subcontractor, in writing, of the contractor’s intention to withhold all or part of the subcontractor’s payment with the reason for the nonpayment.

(2) A new subsection (d-1) is added to read as follows:

“(d-1)(1) If a subcontractor does not receive a payment or written notice within 7 business days as required in subsection (d) of this section, the subcontractor may give written notice of the nonpayment to the contracting officer managing the District contract, which shall include:

“(A) The name of the contractor or higher-tier subcontractor, the contract number, the project or task order under which the dispute exists, and the amount in dispute;

“(B) A detailed description of the basis of the amount due; and

“(C) If known, an explanation of any dispute concerning the contractor’s or higher-tier subcontractor’s payment;

“(2) Within 5 business days of receipt of written notice from a subcontractor, the contracting officer shall contact the contractor to ascertain whether the amount withheld is an undisputed amount;

“(3) The contracting officer shall determine in writing, in consultation with the contract administrator and project manager(s), whether the withheld payment is an undisputed amount and issue the determination to the disputing contractor and subcontractor;

“(4) If the contracting officer determines that a part or all of the amount withheld is an undisputed amount, the contracting officer shall instruct the contractor to pay the subcontractor the undisputed amount within 5 business days of the determination issuance;
“(5) If the contractor is instructed to pay the subcontractor and the subcontractor is not paid within 5 business days of that instruction, the subcontractor may report the nonpayment in writing to the contracting officer;

“(6) If the subcontractor notifies the contracting officer of non-payment under paragraph (5) of this subsection, the contracting officer shall schedule a meeting not later than 10 business days after receiving notice from the subcontractor under paragraph (5) of this subsection to discuss the dispute with the agency contract administrator, contract project manager(s), the contractor, and the subcontractor, to establish why the contractor has not paid the subcontractor as instructed under paragraph (4), and formulate a second written determination providing the contractor an additional 5 business days to pay the subcontractor, unless the contractor and subcontractor agree to different terms to remediate the non-payment, before enforcement actions are implemented as follows:

“(A) If the subcontractor is unpaid after the second determination is issued and 5 business days pass, the contracting officer shall instruct the contract administrator to withhold from the next District payment to the contractor, an amount equal to the undisputed amount plus interest described in subsection (b)(1) of this section until the subcontractor is paid or for 7 business days;

“(B) If payment is not made to the subcontractor within 7 business days of the contracting officer’s instruction to withhold payment as described in subparagraph (A), the contracting officer:

“(i) Shall order that all further payments to the contractor cease until payment to the subcontractor is verified;
“(ii) May require the contractor pay a penalty to the subcontractor, in an amount not exceeding $100 per day, from the date that payment was originally required under subparagraph (A) of this paragraph.”.

“(iii) May instruct the contract administrator to make payment directly to the subcontractor in the undisputed amount plus interest withheld under subparagraph (A) if the contractor continues to withhold payment.”

“(7) Any determinations made under this subsection by the contracting officer with regard to contractor non-payment are appealable to the Contract Appeals Board.”.

Sec. 3. Section 412(c) of the Procurement Practices Reform Act of 2010, effective April 8, 2011 (D.C. Law 18-371, D.C. Official Code § 2-354.12(c)), is amended as follows:

(a) The existing text is amended by striking the phrase “small business enterprise are believed to be 12% or more above the likely price on the open market.” and inserting the phrase “small business enterprise, as defined in section 2302(16) of the Small, Local, and Disadvantaged Business Enterprise Development and Assistance Act of 2005, effective October 20, 2005 (D.C. law 16-33; D.C. Official Code § 2-218.02(16)), are believed to be 12% or more above the likely price on the open market; except that, after issuing the contract or procurement in the open market, if the agency receives a bid from a small business which is the lowest bid or 12% or less above the lowest bid by a business that is not a small business enterprise, the agency shall select the small business enterprise, unless the CPO issues findings to support another selection, describing why the small business enterprise lacks the capability to perform the contract. Any findings issued by the CPO pursuant to this subsection shall be posted via the Department’s website, any location where the solicitation is posted, and issued to the small business enterprise.”.
Sec. 4. The Small, Local, and Disadvantaged Business Enterprise Development Assistance Act of 2005, effective October 20, 2005 (D.C. Law 16-33, D.C. Official Code § 2-218.01 et seq.), is amended as follows:

(a) Section 2337 (D.C. Official Code § 2-218.37) is amended by striking the phrase "with principal offices" and inserting the phrase "with principal offices, where managerial functions are performed," in its place.

(b) Section 2339a(a) (D.C. Official Code § 2-218.39a(a)) is amended by striking the phrase "pursuant to section 2302(1D)" and inserting the phrase "pursuant to section 2302(1D), and which will directly perform, at minimum, 35% of the work under the contract, unless both joint-venture partners are certified business enterprises." in its place.

(c) A new Section 2339b is added to read as follows:

"Sec. 2339b. CBE compliance verification"

"(a) The Department shall perform a site visit of each certified business enterprise to verify compliance with the Certified Business Enterprise program criteria and requirements at least every 18 months, starting in the year of certification.

"(b) The Department shall publish the date of the last site visit conducted pursuant to subsection (a) of this section, for each certified business enterprise on the Department's website.

"(c) The Department shall create and maintain an anonymous reporting mechanism for the community to report potential violations of compliance with certification requirements.

"(d) The Department shall perform additional compliance site visits, in addition to the visits required by subsection (a) of this section, when three or more complaints are received regarding a single CBE, whether anonymous or not."
(d) Section 2341(a-2)(2) (D.C. Official Code § 2-218.41(a-2)(2)) is amended to read as follows:

“(2) The Mayor may waive, with the approval of the Council, the prohibition set forth in paragraph (1) of this subsection and grant approval for the agency to spend its remaining expendable budget with non-small business enterprises or non-certified business enterprises. A proposed waiver shall be deemed approved by the Council if one of the following occurs:”

“(A) During the 10-day period beginning on the first day (excluding Saturdays, Sundays, and holidays) following its receipt by the Secretary of the Council, no member of the Council introduces a resolution to approve or disapprove the proposed waiver; or

“(B) If a resolution has been introduced in accordance with subparagraph (A) of this paragraph, and the Council does not disapprove the contract during the 45-day review period beginning on the first day (excluding Saturdays, Sundays, and holidays) following its receipt by the Office of the Secretary to the Council.”.

(e) Section 2344 (D.C. Official Code § 2-218.44) is amended as follows:

(1) Subsection (b) is amended by striking the phrase “market.” and inserting the phrase “market. After issuing the contract or procurement in the open market, if the agency receives a bid from a small business which is the lowest price bid or 12% or less above the lowest bid by a business that is not a small business, the agency must select the small business, unless the CPO issues a determination and findings to support another selection.” in its place.

(2) Subsection (c) is amended by striking the phrase “via the Department’s website or” and inserting the phrase “via the Department’s website, any location where the solicitation is posted, and” in its place.

(f) Section 2345(d) (D.C. Official Code § 2-218.45(d)) is amended as follows:
(1) Subsection (d) is amended by striking the phrase “via the Department’s website or” and inserting the phrase “via the Department’s website, any location where the solicitation is posted, and” in its place.

(2) A new subsection (e) is added to read as follows:

“(e) The Office of Contracting and Procurement shall notify the Department of Employment Services of any contract award made to a small business enterprise included on the District of Columbia Supply Schedule within three business days of award in order for the Department to secure a First Source Agreement with the awardee.”.

(i) Section 2346(a) (D.C. Official Code § 2-218.46(a)) is amended by adding paragraphs (4) and (5) to read as follows:

“(4) For the purposes of this section, the contracting officer may authorize additional payment up to 10% of the dollar volume by which the contractor exceeds the subcontracting requirement set forth in paragraphs (1) and (2).

“(5) The subcontracting requirement set forth in paragraphs (1) and (2) shall not be fulfilled if subcontracted to a business entity in which the contractor has an ownership stake.”.

(j) Section 2361(b)(2) (D.C. Official Code § 2-218.61(b)(2)) is amended as follows:

(1) Subparagraph (A) is amended by striking the phrase “certification” and inserting the phrase “certification, under penalty of perjury,” in its place.

(2) Subparagraph (B) is amended as follows:

(A) Sub-subparagraph (i) is amended to read as follows:

“(i) A bona fide local business enterprise, including evidence:

“(l) That more than 50% of employees or owners are District residents, including certified payroll and a list of employees with home addresses;
“(II) That the enterprise’s principal office is located physically in the District, including a copy of a deed or lease and evidence that the location is listed as the address of record with the enterprise’s bank or on the enterprise’s federal tax return;

(III) Of lease renewal, if applicable, throughout the 3-year certification period;”.

(k) Section 2363(c)(4) (D.C. Official Code § 2-218.63(c)(4)) is amended by striking “that the beneficiary or certified joint venture was required but failed to subcontract”.

Sec. 5. Fiscal impact statement.


Sec. 6. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 60-day period of congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.