

ICAP COMPLIANCE BRIEFING

FOR DEVELOPERS, GENERAL CONTRACTORS AND SUBCONTRACTORS
(EXCEEDING \$1M IN CONTRACT VALUE)

SUMMARY

The Industrial Commercial Abatement Program (“ICAP”) is a New York City property tax abatement offering taxpayers a partial tax savings for a term of 8-25 years. ICAP projects with a total cost exceeding \$2,500,000 must satisfy certain requirements in furtherance of seeking project approval from the New York City Department of Small Business Services, Division of Labor Services.

QUICK TAKEAWAYS

1. Contractors shall not commence any new construction without acknowledgment of their DLS approval status from Herrick.
2. Contractors must make a good faith effort (and are strongly encouraged) to award construction contracts to New York City certified M/WBE’s.
3. DLS now requires the viewing of a Pre-Award video.
4. ICAP project Contractors must provide site access to representatives of DLS and DOF.

DEFINITIONS

Construction Employment Report (“CER”)

Department of Finance (“DOF”)

Department of Labor Services (“DLS”)

Equal Employment Opportunity (“EEO”)

Family and Medical Leave Act (“FMLA”)

Less Than \$1 Million (“LT\$1M”)

Minority Women Business Enterprises (“M/WBE”)

Pre-Award Conference (“PAC”)

Sexual Harassment Policy (“SHP”)

Supply and Services Employment Report (“SSER”)

Copyright © 2023 by Herrick, Feinstein LLP. All Rights Reserved. This publication is intended as a general guide only. It does not contain a general legal analysis or constitute an opinion of Herrick, Feinstein LLP or any member of the firm on legal issues described. This publication does not constitute legal advice, an opinion of ICAP eligibility, nor guaranty of Herrick, Feinstein LLP. It should not be relied upon for investment, tax or real estate transaction purposes. It is recommended that readers not rely on this general guide in structuring individual transactions, projects, or matters but that professional advice be sought in connection with individual transactions, projects, or matters. References here to “Herrick,” “Herrick, Feinstein,” “Herrick, Feinstein LLP,” “the firm” and terms of similar import refer to Herrick, Feinstein LLP operating in various jurisdictions.

DETAILED GUIDELINES

M/WBE SUBCONTRACTORS

ICAP requires the solicitation of three M/WBE NYC certified Subcontractors for each construction trade.

- Herrick will work with the General Contractor to obtain M/WBE contract bids and will document solicitation efforts on the Construction Compliance Report.
- DLS can assist in qualifying Subcontractors as M/WBE's and can fast track cross certifications with other NYC or NYS agencies.
- Although actual M/WBE participation is not currently a requirement, DLS may exercise discretion in project approval if it's determined that the Developer did not make a good faith effort or did not procure "meaningful" participation in the project for M/WBE's.
- It is **strongly recommended** to award a "meaningful" number of contracts to M/WBEs.

ANTI-DISCRIMINATION REQUIREMENTS

Developers, General Contractors and Subcontractors may not discriminate against any applicant for employment or against any employee for any employment decisions including but not limited to recruiting, hiring, upgrading, demotion, downgrading, transfer, training, rates of pay or other forms of compensation, layoff termination and all other terms and conditions of employment on the basis of the New York City protected classes.

Developers, General Contractors and Subcontractors may not discriminate in the selection of its Contractors based on the NYC protected classes.

Additionally, Developers, General Contractors and Subcontractors must specify in all solicitations or advertisements of employees placed by or on behalf of Contractors that all qualified applications will receive consideration for employment with regard to the NYC Protected Classes.

ANTI-DISCRIMINATION REQUIREMENTS (CONTINUED)

New York City recognizes the following 10 protected classes for the anti-discrimination requirements:

NYC'S 10 PROTECTED CLASSES:

Race	Creed
Color	National Origin
Sex	Age
Disability	Marital Status
Sexual Orientation	Citizen Status

EQUAL OPPORTUNITY EMPLOYMENT

Contractors will send to each labor organization or representative of workers with which it has a collective bargaining agreement or other contract or memorandum of understanding, written notification of their equal opportunity commitments in connection with any work related to the project.

ANTI-SEXUAL HARASSMENT REQUIREMENTS

Contractors will send to each labor organization or representative of workers with which it has a collective bargaining agreement or other contract or memorandum of understanding, written notification of their equal opportunity commitments in connection with any work related to the project.

FAMILY MEDICAL LEAVE ACT

Developers and Contractors are required to adhere to the FMLA which prohibits the unlawful discrimination on the basis of sex as well as the promotion of equal opportunity for men and women in the terms and conditions of employment. Employees are permitted to balance their work and family life by taking reasonable unpaid leave under certain conditions.

The FMLA makes it unlawful for any employer to:

1. Interfere with, restrain or deny the exercise of any right provided under FMLA;
2. Discharge or discriminate against any person for opposing any practice made unlawful by FMLA or for involvement in any proceeding under or relating to FMLA.

The FMLA applies to all private sector employers who employ 50 or more employees for at least 20 work weeks in the current or preceding calendar year and who are engaged in or affect commerce - including joint employers and successors of covered employers.

Employee Eligibility:

To be eligible for FMLA benefits, an employee must:

1. Work for a covered employer;
2. Have worked for the employer for at least a total of 12 months;
3. Have worked at least 1,250 hours over the prior 12 months; and
4. Work at a location where at least 50 employees are employed by the employer within 75 miles.

Leave Entitlement:

A covered employer must grant an eligible employee up to a total of 12 work-weeks of unpaid leave during any 12 month period for one or more of the following reasons:

1. Birth or placement of a child for adoption or foster care;
2. Care for an immediate family member (spouse, child or parent) with a serious health condition; or
3. Take a medical leave when the employee is unable to work because of a serious health condition.

For the duration of FMLA leave, the employer must maintain the employee's health coverage under any "group health plan." Upon return from FMLA leave, an employee (unless designated as a "Key" employee who is salaried among the highest ten percent of employees within 75 miles of the worksite) must be restored to his or her original or equivalent position with equivalent pay, benefits and other employment terms and conditions. The use of FMLA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee's leave.

ELECTRONIC PRE-AWARD CONFERENCE

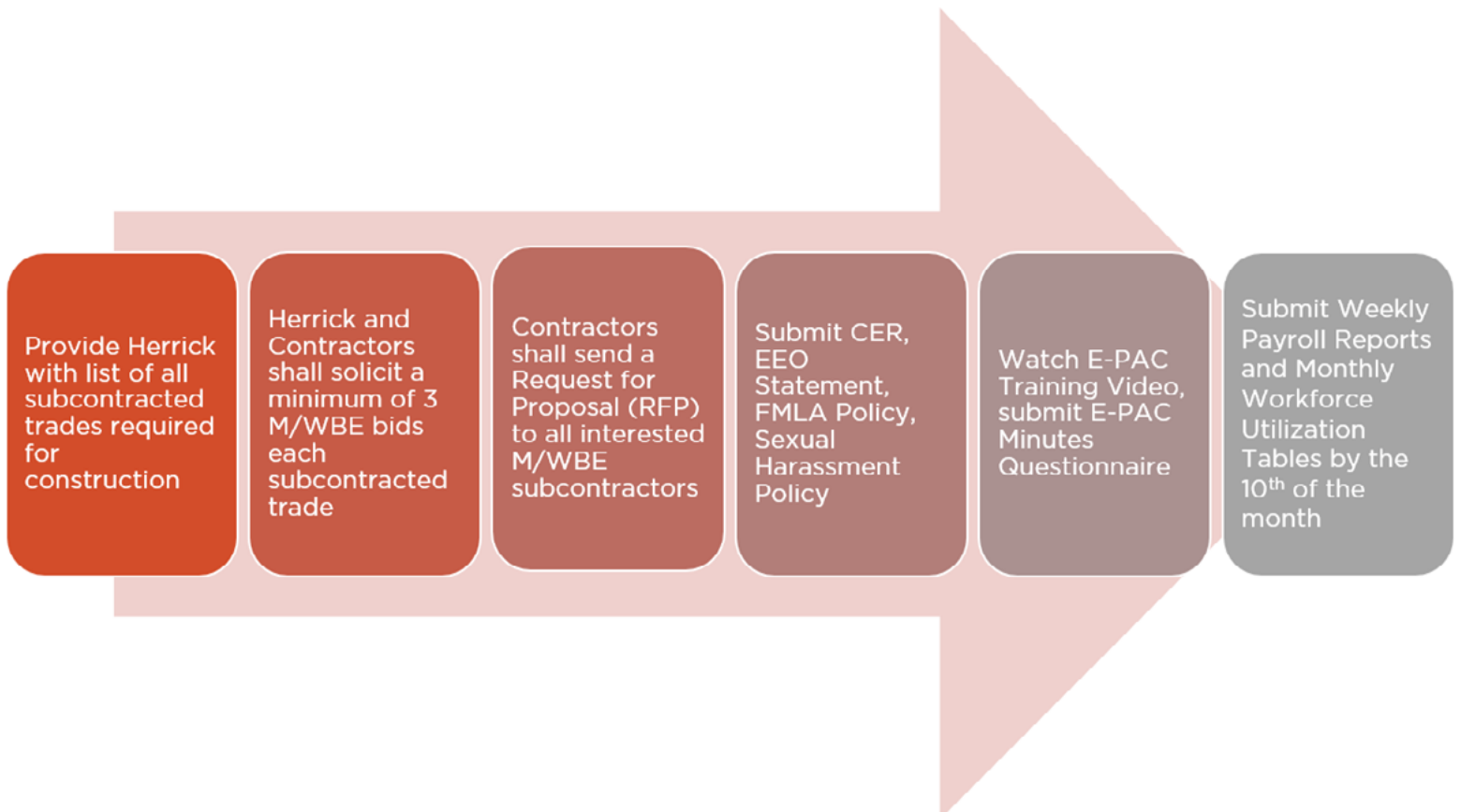
Until February 2023, DLS required Applicants and Contractors to attend a pre-award conference in person. **In place of an actual conference call, DLS has implemented a new video procedure to expedite the PAC process.** The PAC video explains the requirements, liabilities, non-discrimination laws and overall procedure of the ICAP application and compliance process.

Please note that if you have been issued a PAC certificate in the past three years, you do not need to complete the video again.

After watching the video in its entirety, you will be directed to fill out a questionnaire with some basic information. Shortly after this is completed, you should receive a certificate of completion which should be forwarded to the Project Administrator at Herrick.

PROCEDURES

ICAP COMPLIANCE REQUIREMENTS FOR DEVELOPER, GENERAL CONTRACTOR AND SUBCONTRACTORS WITH CONTRACTS EXCEEDING \$1,000,000



PROCEDURES (CONTINUED)

General Contractors **cannot** award any subcontracts or commence construction until the above requirements are fulfilled.

Subcontractors **cannot** award any second-tier Subcontracts or commence construction until the above requirements are fulfilled.

- The above requirements also apply to second-tier Subcontractors with a contract value equal to or greater than \$1,000,000.
- Any Subcontractor or second-tier Subcontractor with a contract value that, **due to a change order**, reaches \$1,000,000 shall also fulfill the above requirements.

ICAP COMPLIANCE REQUIREMENTS OF SUBCONTRACTORS WITH A CONTRACT VALUE LESS THAN \$1,000,000

Complete and submit a LT\$1M Certificate to DLS

Subcontractors with a contract value less than \$1,000,000 cannot commence construction until their LT\$1M Certificate is completed and submitted to DLS.

ICAP COMPLIANCE REQUIREMENTS OF SUPPLY AND SERVICE PROVIDERS

	Contract value equal to or greater than \$100,000	Contract value less than \$100,000
50 employees or more	Complete and submit a SSER	No action needed
Less than 50 employees	Complete and submit a Less Than 50 Employees Certificate	No action needed

Supply and Service providers are any subcontractor that only manufactures and/or supply material to the project and have no laborers onsite.

- M/WBE solicitations are not required for Supply and Service providers.

CONTRACTOR OBLIGATIONS

Contractors must acknowledge and covenant to the following rules and obligations:

- Contractors must permit DLS access to the project site, records and certified payroll reports;
- Contractors acknowledge that DLS has the right to suspend work on the project for a contractor's failure to allow DLS access to their workforce;
- Contractors will not engage in moving employees from one job site to another in order to create the appearance of compliance;
- Contractors submit to the jurisdiction of DLS for the purpose of determining ICAP compliance;
- Any Contractor that is engaged with a Subcontractor who is found noncompliant by DLS or DOF shall terminate or suspend the noncompliant entity;
- Contractors shall comply with the directives of DLS and DOF including imposition of applicable financial penalties
- Contractors will provide Developer and Herrick copies of all contracts, plans and other construction documents upon request;
- General Contractor will provide Developer and Herrick periodic project status updates upon request; and
- Subsequent to the completion of the project, General Contractor shall promptly provide the Developer with a breakdown of the final construction costs.

Copyright © 2023 by Herrick, Feinstein LLP. All Rights Reserved. This publication is intended as a general guide only. It does not contain a general legal analysis or constitute an opinion of Herrick, Feinstein LLP or any member of the firm on legal issues described. This publication does not constitute legal advice, an opinion of ICAP eligibility, nor guaranty of Herrick, Feinstein LLP. It should not be relied upon for investment, tax or real estate transaction purposes. It is recommended that readers not rely on this general guide in structuring individual transactions, projects, or matters but that professional advice be sought in connection with individual transactions, projects, or matters. References here to "Herrick," "Herrick, Feinstein," "Herrick, Feinstein LLP," "the firm" and terms of similar import refer to Herrick, Feinstein LLP operating in various jurisdictions.