



U.S. Department of Justice

Ronald C. Machen Jr.  
United States Attorney

*District of Columbia*

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*Judiciary Center  
555 Fourth St., N.W.  
Washington, D.C. 20530*

December 12, 2014

Mary Patrice Brown  
O'Melveny & Myers LLP  
1625 Eye Street, N.W.  
Washington, D.C. 20006

William M. Sullivan, Jr.  
Pillsbury Winthrop Shaw Pittman LLP  
1200 Seventeenth Street, N.W.  
Washington, D.C. 20036

Re: Forrester Construction Company, Non-Prosecution Agreement

Dear Counsel:

The United States of America, acting through the United States Attorney's Office for the District of Columbia ("Office"), and Forrester Construction Company ("Forrester Construction" or the "Company"), a Maryland corporation, by and through its attorneys and duly authorized representatives, hereby enter into this Non-Prosecution Agreement (the "Agreement").

Forrester Construction is aware that this Office, the Federal Bureau of Investigation, the District of Columbia Office of Inspector General, and the U.S. Small Business Administration Office of Inspector General have been conducting an investigation into possible violations of federal and local law from 2008 through 2012, relating to the rules and regulations of the District of Columbia Certified Business Enterprise ("CBE") program and the U.S. Small Business Administration 8(a) program ("8(a)"), completed by or competed for by joint ventures formed by Forrester Construction and CBE and 8(a) participants ("the Projects").

As detailed in the Statement of Facts, attached as Exhibit A, Forrester Construction acknowledges that it improperly entered into Action of Management Committee agreements and letter agreements with the CBE participants to the joint ventures that were not disclosed to the District of Columbia during the contract procurement process. Forrester Construction acknowledges that the CBE participant to each joint venture did not maintain majority control of the Projects as required by the CBE rules and regulations.

In exchange for a non-prosecution agreement, the parties have agreed to the following terms and conditions:

**Non-Prosecution for Certain Conduct**

1. This Office agrees not to prosecute Forrester Construction or any of its current employees as of the date of the first subpoena, officers, directors, or principals for any conduct relating to the Projects or other projects or matters disclosed to this Office by Forrester Construction as of the date of this Agreement. This paragraph does not provide any protection against prosecution for illegal activities, if any, committed in the future by Forrester Construction or its current employees, officers, directors, or principals.

2. Forrester Construction expressly understands that the protections provided to Forrester Construction by this Agreement shall not apply to any successor entities, whether the successor's interest arises through a merger or plan of reorganization, unless and until such successor formally adopts and executes this Agreement. The protections arising from this Agreement will not apply to any purchasers of all or substantially all of the assets of Forrester Construction, unless such purchaser agrees in writing to be bound by the terms of this Agreement.

**Acceptance of Responsibility**

3. Forrester Construction accepts and acknowledges responsibility for its conduct as described in the Statement of Facts. Forrester Construction does not condone the improper conduct alleged, and has taken, and will continue to take, affirmative steps to prevent such conduct from occurring in the future, including the corporate remediation measures set forth in paragraph 7 below.

4. Forrester Construction agrees that neither it nor its principals, directors, or executive officers, nor any person authorized to speak for them, will make, cause others to make, or acknowledge as true any factual statement inconsistent with the Statement of Facts. Forrester Construction agrees that, if it issues a press release or other prepared public statement in connection with this Agreement, Forrester Construction shall first consult with this Office within three (3) days of issuing the press release for comment by this Office. Any such public statement inconsistent with the Statement of Facts shall, subject to the cure rights below, constitute a breach of this Agreement. The decision whether any public statement by any such person contradicted the Statement of Facts and whether it shall be imputed to Forrester Construction for the purpose of determining whether Forrester Construction has breached this Agreement shall be made by the Office. If the Office determines that a public statement by any such person contradicts in whole or in part the Statement of Facts, the Office shall so notify Forrester Construction and Forrester Construction may avoid a breach of this Agreement by publicly repudiating such statements within five (5) business days after notification. This paragraph is not intended to apply to any statement made by any former Forrester Construction employees, officers, directors, or principals. Further, nothing in this paragraph precludes Forrester Construction from taking good faith positions in litigation involving a private party that are not inconsistent with the Statement of Facts.

### **Cooperation**

5. Forrester Construction acknowledges and understands that the cooperation it has provided to date in connection with the government's investigation, and its pledge of continuing cooperation, are important and material factors underlying this Office's decision to enter into this Agreement. Accordingly, Forrester Construction agrees to cooperate fully and actively with this Office with respect to any information concerning the Projects or other joint venture projects disclosed to this Office by Forrester Construction as of the date of this Agreement.

### **Monetary Payment**

6. Forrester Construction agrees to pay Two Million One Hundred Fifty Thousand Dollars (\$2,150,000) as part of this Agreement to the United States Treasury in installments of 25% each payable on or before March 1, 2015, March 1, 2016, July 1, 2016, and December 1, 2016. The payment will be made by transferring that sum by wire as directed by this Office, which solely retains, in its discretion, the right to determine the appropriate disbursement of the funds. Forrester Construction agrees that it will not seek any United States tax deduction in connection with any part of this payment.

### **Internal Corporate Remediation Measures**

7. Forrester Construction will institute the following internal corporate remediation measures, as set forth below, and agrees to maintain said remediation measures at least during the term of this Agreement:

- a. Individual employees directly associated with the inappropriate conduct concerning the Projects are no longer employed by Forrester Construction.
- b. Hire or designate a CBE and 8(a) Compliance Officer, a new position not in existence at the time of the matters that are the subject of this investigation. Forrester Construction will maintain this position and fill it with an appropriately trained individual, who will continue to be responsible for developing and promulgating programs, rules, and procedures designed to ensure that, among other things, Forrester Construction and its employees are complying with the requirements of the District of Columbia's CBE program (or any such equivalent on federal government projects) and the U.S. Small Business Administration's 8(a) program, insofar as Forrester Construction undertakes any new projects involving joint ventures with CBEs on contracts with the District of Columbia government ("D.C. government projects"), 8(a) companies on contracts with the federal government ("federal government projects"), or the use of CBEs to fulfill utilization requirements on D.C. government projects (or any such equivalent on federal government projects) (collectively "CBE Projects"). These issues include those relating to the Projects, as well as other issues relating to the CBE and 8(a) rules and regulations, including but not limited to the use of pass-through entities that perform little or no work on a project.
- c. Hire or designate an Ethics Officer, another position that did not exist at the time of the matters that are the subject of this investigation. The Ethics Officer will

assist the CBE and 8(a) Compliance Officer in overseeing compliance efforts, including thoroughly reviewing existing contracts that are not substantially complete and future contracts to ensure compliance with applicable CBE and 8(a) terms. Forrester Construction will maintain this position and fill it with an appropriately trained individual.

- d. Before undertaking work on any new CBE Projects , Forrester Construction will implement a comprehensive training program for all Company personnel regarding compliance with the requirements of the District of Columbia's CBE program and the U.S. Small Business Administration's 8(a) program. Regarding the current, active UDC project, all Company personnel assigned to that project will undergo comprehensive training regarding compliance with the CBE program within thirty (30) days of the signing of this Agreement.
- e. Forrester Construction will:
  - i. Designate an individual to perform training and compliance responsibilities and develop and maintain a permanent educational and training program in relation to the laws and ethics governing the work of Forrester Construction's employees, officers, directors, and principals on CBE Projects.
  - ii. If, during the period covered by this Agreement, Forrester Construction engages in CBE Projects other than the current, active UDC project, all Forrester employees, officers, directors and principals shall receive appropriate training within three (3) months of the date on which construction begins on such CBE Project. Such training shall be repeated on a periodic basis thereafter, not less frequently than semi-annually, for the remainder of the term of this Agreement.
  - iii. Undertake and complete within six (6) months of the date of the signing of this Agreement, a comprehensive review of all of its existing subcontracts that are not substantially complete on CBE Projects, as well as any new subcontracts on CBE Projects entered into within that six-month period to ensure compliance with all applicable CBE Project rules and regulations.
- f. Provide to this Office a report on the progress of the review described in subsection e.iii above at the end of each three-month period within the six-month period described in subsection e.iii.
- g. Maintain an effective compliance and ethics program that fully comports with the criteria set forth in USSG Section 8B2.1, 2014 edition.
- h. Ensure that an effective program be maintained to discipline violators of laws, policies, rules, regulations, and standards related to CBE Projects, and to protect and not penalize those who report violators.

## Community Service

8. Forrester Construction, individually or in collaboration with an industry trade association, will reach out to a cross section of Washington, D.C., metropolitan area businesses that currently are, or contemplate, participating in CBE and/or 8(a) programs sponsored by state, local, or federal government agencies. Forrester Construction will offer to discuss the various CBE and/or 8(a) programs, identify challenges facing participants in those programs, and devise a set of “best practices” for both CBE and/or 8(a) contractors and other contractors.

9. Forrester Construction, individually or in collaboration with an industry trade association, will offer workshops to interested prime and subcontractors, including CBE and 8(a) businesses, to share its knowledge about running a successful construction services company. Topics would include, among others:

- a. Training with respect to the rules and regulations of the District of Columbia CBE program and U.S. Small Business Administration 8(a) program, utilizing materials from the Department of Small and Local Business Development and the U.S. Small Business Administration.
- b. An introduction to construction contracting, including descriptions and discussions of owners, design teams, architects, engineers, general contractors, subcontractors, vendors, and material providers.
- c. Independent inspection agencies.
- d. Frequently used standard contract forms (e.g., AIA, AGC).
- e. Payment and performance bonds.
- f. Punch lists.
- g. Terminology (e.g., RFP, IFB, bid bonds, firm fixed price contracts, cost-plus and guaranteed maximum price contracts, change orders, warranty work, RFI, CCD, PCO).
- h. Preparing a bid and comparing scope (e.g., job site general conditions, home office overhead, fees, and expected profit).
- i. Developing project schedules with software.
- j. Building a schedule.
- k. Project administration and the roles of project managers and supervisors.
- l. Pay applications.
- m. Lien/claim waivers.

- n. Closing out a job.

### **Independent Review and Reporting**

10. Forrester Construction has retained Resolution Experts, P.C. to perform two independent reviews of Forrester Construction's maintenance and execution of, and compliance with, the Internal Corporate Remediation Measures and Community Service provisions identified in paragraphs 7, 8, and 9 above, including but not limited to the hiring or designation of a CBE and 8(a) Compliance Officer and Ethics Officer, as well as the training and compliance programs implemented by Forrester Construction on CBE Projects. As part of its review, Resolution Experts, P.C. will recommend to Forrester Construction such changes to the Company's remediation measures and implementation of community service as are necessary to ensure conformity with this Agreement, and that are necessary to ensure that they are effective.

11. Forrester Construction will require Resolution Experts, P.C. to:

- a. Perform its first independent review on or before June 1, 2015, and file a written report with the results of its first independent review directly with this Office on or before July 15, 2015. The written report shall state whether Forrester Construction is in compliance with the specified terms of the Agreement and identify any changes to the Company's remediation measures and implementation of community service as are necessary to foster Forrester Construction's compliance with this Agreement and any applicable laws or standards.
- b. Perform its second independent review on or before June 1, 2016, and file a written report with the results of its second independent review directly with this Office on or before July 15, 2016. The written report shall state whether Forrester Construction is in compliance with the specified terms of the Agreement and identify any changes to the Company's remediation measures and implementation of community service as are necessary to foster Forrester Construction's compliance with this Agreement and any applicable laws or standards.
- c. Maintain all records relating to its independent reviews, which will be made available to this Office upon request.
- d. Promptly notify this Office and Forrester Construction should Resolution Experts, P.C. obtain evidence that Forrester Construction appears to have violated any applicable law or any specified provision of this Agreement.

12. In the event that Resolution Experts, P.C. is unable to complete any of the independent reviews, this Office shall consult with Forrester Construction, and shall use its best efforts to select and appoint a mutually acceptable replacement as promptly as possible, but in no event later than sixty (60) days following notification of the need for such replacement. However, this Office shall have sole authority to choose any such replacement. Any such replacement selected shall have relevant construction experience and shall be locally based and

shall not charge for any travel other than automobile travel reimbursement at the then applicable government rate.

### **Agreement to Be Made Public**

13. It is understood that Forrester Construction and this Office may disclose this Agreement to the public.

### **Term of Agreement**

14. This Agreement shall be in effect for a period of two (2) years from the date of its execution.

### **Breach of Agreement**

15. If the Office determines, in its sole discretion, that Forrester Construction or any of its employees, officers, directors, or principals have failed to comply with or knowingly violated any provision of this Agreement; have provided deliberately false, incomplete, or misleading information under this Agreement; or have violated any federal criminal laws during the term of this Agreement, Forrester Construction will be deemed to be in breach of this Agreement, subject to the provisions of paragraph 16 below, and Forrester Construction shall, thereafter, be subject to prosecution for crimes committed by and through its employees related to the Projects.

16. The Office shall provide written notice to Forrester Construction of the alleged breach, and Forrester Construction shall then have thirty (30) days from the date of receipt of such notice to demonstrate in writing that no such breach has occurred; to the extent relevant, that such breach was cured; or, that the Office should neither revoke the Agreement nor prosecute Forrester Construction.

17. Forrester Construction further understands and agrees that the Office's exercise of discretion under the preceding paragraphs is not subject to review in any court or tribunal outside the Office, and that any prosecution following such a determination may be premised on any information provided by Forrester Construction and its employees, officers, directors, and principals to the Office and any leads derived therefrom. Forrester Construction agrees that, in any such proceeding, it will not seek to suppress the use of any such information, or any leads derived therefrom, under the United States Constitution, Federal Rule of Evidence 410, or any other rule.

### **Corporate Authority**

18. Forrester Construction hereby warrants and represents that it is authorized to enter into this Agreement on behalf of itself, and that the person signing on behalf of Forrester Construction has been granted authority by the Forrester Construction board of directors to bind Forrester Construction.

**Binding Nature of the Agreement**

19. It is understood that this Agreement is binding on Forrester Construction and this Office, but that this Agreement does not bind any other federal agencies, or any state or local enforcement or regulatory agencies. This Office will bring the cooperation of Forrester Construction and its compliance with its obligations under this Agreement and its remedial actions to the attention of such agencies and authorities if requested to do so by Forrester Construction.

**Notice**

20. Any notice to Forrester Construction under this Agreement shall be given by personal delivery, overnight delivery by a recognized courier service, or registered or certified mail, addressed to Forrester Construction Company, Attn: President, 12231 Parklawn Drive, Rockville, Maryland 20852.

**Complete Agreement**

21. This Agreement sets forth the terms of the Non-Prosecution Agreement between Forrester Construction and this Office. No promises, agreements, or conditions have been entered into other than those set forth in this Agreement. This Agreement supersedes prior understandings, if any, of the parties, whether written or oral.

22. No amendments or modifications to this Agreement shall be valid unless they are in writing and signed by this Office, the attorneys for Forrester Construction, and a duly authorized representative of Forrester Construction.

FOR THE UNITED STATES ATTORNEY'S OFFICE  
DISTRICT OF COLUMBIA

Date: 12/12/2014

  
RONALD C. MACHEN JR.  
United States Attorney

By:   
MICHAEL K. ATKINSON  
DAVID A. LAST  
Assistant United States Attorneys  
United States Attorney's Office  
555 Fourth Street, N.W.  
Washington, D.C. 20530




Agreed and Consent To:

Date: 12/16/14

By:   
MARY PATRICE BROWN  
O'MELVENY & MYERS LLP

Date: 12/16/14

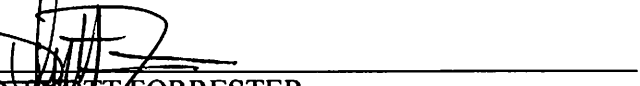
By:   
WILLIAM M. SULLIVAN, JR.  
PILLSBURY WINTHROP SHAW PITTMAN LLP

Counsel for Forrester Construction Company

Date: 12/11/14

By:   
DAVID FORRESTER  
President, Forrester Construction Company

Date: 12/11/14

By:   
D. SCOTT FORRESTER  
Executive Vice President, Forrester Construction  
Company

## EXHIBIT A – STATEMENT OF FACTS

Forrester Construction Company (“Forrester Construction”), a Maryland corporation qualified to do business in the District of Columbia, by the undersigned corporate representatives, hereby stipulates and agrees that the following facts are true. For purposes of this stipulation, it is understood that the undersigned corporate representatives were not direct participants in the events that are described factually hereafter and that their knowledge and information about the events derives from an investigation made by them and others into the circumstances of the events.

1) In 2005, the Council of the District of Columbia (“D.C. Council”) enacted the Small, Local, and Disadvantaged Business Enterprise Development and Assistance Act (the “Act”), D.C. Law 16-33, to “stimulate and foster the economic growth and development of businesses based in and serving the District of Columbia, particularly certified business enterprises.” D.C. Code § 2-218.13(a)(1). As part of the Act, the D.C. Council created the Department of Small and Local Business Development (“DSLBD”), a District of Columbia government agency, and charged it with carrying out the policies of the Act and fulfilling the goals and responsibilities of the Act.

2) One of the ways the DSLBD worked to achieve the Act’s goals was through the certified business enterprise program (the “CBE Program”). The purpose of the CBE Program was to “maximize opportunities for certified business enterprises to participate in . . . the District’s contracting and procurement process.” *Id.* § 2-218.13(a)(2)(A). The CBE Program provided contracting preferences to any business located within the District of Columbia that qualified for participation in the CBE Program. The DSLBD maintained responsibility for certifying companies as certified business enterprises (“CBEs”) under the CBE Program.

3) To qualify for certification as a “certified business enterprise” under the CBE Program, a company had to meet the requirements of one or more of the following categories: local business enterprise, small business enterprise, disadvantaged business enterprise, resident-owned business, longtime resident business, local business enterprise with principal offices located in an enterprise zone, veteran-owned business enterprise, or local manufacturing business enterprise. D.C. Code §§ 2-218.02(1B), 2-218.31 *et seq.* After certifying a company as a CBE, the DSLBD assigned the company contracting preference points depending on its eligibility for particular preference categories. *See* D.C. Code § 2-218.43.

4) Joint venture arrangements were eligible to become certified joint ventures under the CBE Program if one joint venture member was a CBE company. D.C. Code § 2-218.39(a). Certified joint ventures provided benefits for both CBE companies and non-CBE companies. For CBE companies, certified joint ventures expanded the range of District of Columbia contracts on which the CBE entity could qualify. For non-CBE companies, certified joint ventures allowed non-CBE companies, which were ineligible for contracting preferences, to team with CBE companies so that the joint venture would receive the contracting preferences for which the CBE member was eligible.

5) If approved by the DSLBD, the certified joint venture would receive preferences in the evaluation of its response to a District of Columbia request for proposals or bids for a specific project on which the joint venture was certified, subject to the maximum total preference limitation to which the CBE partner was entitled. As required by law for a construction contract, if a certified joint venture received a preference and won the contract, the CBE partner had to “perform at least 50% of the contracting effort, excluding the cost of materials, goods, and supplies, with its own organization and resources,” and if the joint venture employed subcontractors, 35% of the subcontracted effort, excluding the cost of material, goods, and supplies, was required to be performed by CBEs. *See* D.C. Code § 2-218.46(b)(2)(A).

6) Between 2008 and 2009, Forrester Construction formed multiple joint ventures with CBEs for the purpose of bidding on construction contracts in the District of Columbia. Three of the joint ventures formed by Forrester Construction and one of the CBEs, EEC of D.C., Inc. (“EEC”), were awarded construction contracts from the District of Columbia, which, including change order amounts, were in the following amounts: (a) an approximately \$64-million contract for construction of a new headquarters building for the Department of Employment Services; (b) an approximately \$5.4-million contract for construction of a Senior Wellness Center in Ward 1; and (c) an approximately \$56-million contract for the renovation and modernization of the existing Anacostia Senior High School building. Forrester Construction also formed joint ventures with another CBE and those joint ventures were also awarded construction contracts from the District of Columbia, which were, over a period of approximately three years, in an aggregated amount in excess of \$20 million. Collectively, the joint venture construction projects involving Forrester Construction and the two CBE partners are referenced herein as the “Projects.” In each instance, the joint venture formed by Forrester Construction and the respective CBE partner received the maximum amount of contracting preferences for which the CBE partner was eligible, which provided Forrester Construction and the respective CBE partner with a competitive advantage during the bidding process.

7) In each instance, the joint venture submitted a certification packet to the DSLBD requesting certification of the particular joint venture. The packet included, among other items, a copy of the joint venture agreement representing that the CBE partner would be the majority partner of the joint venture and maintain a 51% interest in the joint venture, entitling the CBE partner to 51% of the net operating profits of the joint venture. Each joint venture agreement also established a “Management Committee” for the joint venture, consisting of two representatives from the CBE partner and one representative from Forrester Construction, which provided the CBE partner with majority control of the joint venture. In addition, the CBE partner or the Management Committee was to designate a “Contract Manager” to be primarily responsible for the day-to-day operations of the joint venture and as the individual designated to make a final decision if the Management Committee could not agree on specified “Major Decisions.”

8) After each joint venture for the Projects was submitted to, and certified by, the DSLBD, Forrester Construction and the respective CBE partner signed a memorandum entitled

“Action of Management Committee” or signed a letter agreement, which related to the operations of each joint venture. The memoranda and/or letter agreements effectively increased Forrester Construction’s control over the day-to-day operations of the Projects and reduced the CBE partner’s share of the profits or losses in the Projects, notwithstanding the requirements of the joint venture agreements and the CBE rules and regulations. Forrester Construction and the CBE partner did not disclose these Action of Management Committee memoranda or the letter agreements to the District of Columbia government during the procurement process.

9) Among other details, the Action of Management Committee memoranda and the letter agreements designated an employee of Forrester Construction as the “Contract Manager” for each of the joint ventures, effectively giving Forrester Construction control over the day-to-day operations of the Projects and final decision-making authority relating to specified “Major Decisions” if there were disputes between Forrester Construction and the CBE partner.

10) The letter agreements also provided a calculation of the respective CBE partner’s profits based on the amount of bonding that the CBE partner provided for the project, and noted further that the CBE partner’s net profits would be “reduce[d] proportionately,” based on the percentage of bonding that the CBE partner actually provided. This resulted in a possible decrease in the CBE partner’s profit/loss share to a percentage below its 51% ownership interest.

11) The Action of Management Committee memoranda also revised the respective “scope of work” and services that Forrester Construction and the CBE partner would provide to certain of the Projects. In each instance, the Action of Management Committee memorandum applicable to the particular project identified a small “scope of work” for the CBE partner to complete and provided that Forrester Construction would provide all remaining General Conditions, subcontract work, and all other work required to fulfill the requirements of the project. For example, with respect to the Anacostia Senior High School joint venture, the applicable Action of Management Committee memorandum provided that the “scope of work” for EEC equated to approximately \$2.75 million, while the “scope of work” for Forrester Construction equated to approximately \$46 million. The Action of Management Committee memoranda also established a predetermined profit for the joint venture that specifically excluded any profits earned or losses sustained by either Forrester Construction or the CBE partner for their respective “scope of work.” Moreover, Forrester Construction and the CBE partner agreed that only the predetermined profit, exclusive of each partner’s individual “scope of work,” would be split in the proportions agreed to in the joint venture agreement (*i.e.*, 51% for the CBE partner and 49% for Forrester Construction). All other profits or losses generated through an individual “scope of work” would belong to the respective entity.

12) As a result of the letter agreements and the Action of Management Committee memoranda, the CBE participant for each of the Projects did not maintain majority control of the Projects and did not receive 51% of the profits or losses associated with the Projects, as required by the joint venture agreements and in accordance with the CBE rules and regulations.

Date: 12/12/14



MICHAEL K. ATKINSON  
DAVID A. LAST  
Assistant United States Attorneys

Date: 12/11/14

By: Mary Patrice Brown by [Signature]

MARY PATRICE BROWN  
O'MELVENY & MYERS LLP

Date: 12/11/14

By: William M. Sullivan, Jr.

WILLIAM M. SULLIVAN, JR.  
PILLSBURY WINTHROP SHAW PITTMAN LLP

Counsel for Forrester Construction Company

Date: 12/11/14

By: [Signature]

DAVID FORRESTER  
President, Forrester Construction Company

Date: 12/11/14

By: [Signature]

D. SCOTT FORRESTER  
Executive Vice President, Forrester Construction  
Company