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ORDINANCE NO. _____

**AN ORDINANCE AMENDING CITY CODE SECTION 2-9B-21 RELATING TO
PRE-AWARD COMPLIANCE PROCEDURES AND AMENDING SUBSECTION
(A) OF CITY CODE SECTION 2-9B-25 RELATING TO SANCTIONS.**

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

PART 1. Section 2-9B-21 of the City Code is amended to read:

§ 2-9B-21 PRE-AWARD COMPLIANCE PROCEDURES.

- (A) In all Solicitations for which a Goal has been established for Contracts, the City shall indicate its Goals and/or Subgoals for the use of MBEs/WBEs. All Solicitation and Contract documents for which a Goal or Subgoals have been established shall contain: 1) a description of this chapter and Program; 2) the requirements related to achieving the Goals or Subgoals; 3) if Goals or Subgoals are not achieved, the requirement of documentation of the Bidder's/Proposer's Good Faith Efforts, including the Good Faith Efforts of Minority Persons and Women Bidders/Proposers, to achieve the Goals or Subgoals. When the City has established Subgoals, Bidders/Proposers who do not achieve each of the Subgoals must document Good Faith Efforts to achieve the Subgoals that were not met.
- (B) Achievement of Goals or Subgoals or documentation of Good Faith Efforts applies to every Contract for which Goals or Subgoals are established. The rules shall prescribe an accelerated and simplified procedure for Contracts solicited and awarded on an emergency basis. The Bidder/Proposer shall submit a compliance plan detailing its achievement of the Goals or Subgoals or its Good Faith Efforts to meet the Goals or Subgoals. The MBE/WBE lists provided by the City to a Bidder/Proposer shall establish the minimum universe from which a Bidder/Proposer may solicit Subcontractors to meet the Goals or Subgoals. The compliance plan shall be due at the time set out in the Solicitation documents, which time shall not be less than four hours after the deadline for submission of Bids.
- (C) Any agreement between a Bidder/Proposer and a MBE/WBE in which the Bidder/Proposer requires that the MBE/WBE not provide subcontracting quotations to other Bidders/Proposers is prohibited.

- 41
- 42 (D) MBE and WBE Subcontractors must be competitive with non-MBE/non-
- 43 WBE Subcontractors on price, quality, and delivery. MBEs and WBEs shall
- 44 respond to relevant requests for quotations.
- 45
- 46 (E) Where the Bidder/ Proposer cannot achieve the Goals or Subgoals, its
- 47 compliance plan shall document its Good Faith Efforts to achieve the Goals
- 48 or Subgoals. SMBR will determine whether the Bidder/Proposer has made
- 49 such Good Faith Efforts. In making this determination, SMBR will
- 50 consider, at a minimum, the Bidder/ Proposer's efforts to do the following:
- 51
- 52 (1) Soliciting through at least two reasonable, available, and verifiable
- 53 means~~[reasonable and available means the interest of]~~-MBEs/WBEs
- 54 within the SLBP~~[with a Significant Local Business Presence]~~ who
- 55 have the capability to perform the Contract work ~~[of the Contract]~~.
- 56 The Bidder must solicit this interest within sufficient time to allow the
- 57 MBEs/WBEs to respond to the Solicitation. The Bidder/Proposer
- 58 must take appropriate steps to follow up initial Solicitations with
- 59 interested MBEs/WBEs. The Bidder/Proposer must state a specific
- 60 and verifiable reason for not contacting each certified Firm with a
- 61 Significant Local Business Presence. For some Contracts, based on
- 62 criteria to be determined by SMBR in consultation with the User
- 63 Department and set forth by rule pursuant to Section 2-9B-6
- 64 (*Adoption of Rules*), SMBR shall make the initial contact with MBEs,
- 65 WBEs and DBEs, as the case may be, in which case a
- 66 Bidder/Proposer's efforts under this Subsection (E)(1) shall not be
- 67 considered.
- 68
- 69 (2) Providing interested MBEs/WBEs with adequate information about
- 70 the plans, specifications, and requirements of the Contract, including
- 71 addenda, in a timely manner to assist them in responding to a
- 72 Solicitation.
- 73
- 74 (3) (a) Negotiating in good faith with interested MBEs/WBEs that
- 75 have submitted Bids to the Bidder/ Proposer. A MBE/WBE that has
- 76 submitted a Bid to a Bidder/ Proposer but has not been contacted
- 77 within five business days of submission of the Bid may contact
- 78 SMBR to request a meeting with the Bidder/Proposer. SMBR will
- 79 schedule a meeting between the MBE/WBE and the Bidder/Proposer
- 80 to facilitate negotiation. If such a meeting does not occur and the

81 MBE/WBE submitting the Bid to the Bidder/ Proposer is not selected,
82 the Bidder/Proposer must explain the reason for not selecting the
83 MBE/WBE and provide written documentation supporting the stated
84 reason. Bid shopping is prohibited. Written documentation of
85 negotiation may include the names, addresses, and telephone numbers
86 of MBEs/ WBEs that were considered; a description of the
87 information provided regarding the plans and specifications for the
88 work selected for subcontracting; and evidence as to why additional
89 agreements could not be reached for MBEs/WBEs to perform the
90 work.

91
92 (b) That there may be some additional costs involved in soliciting
93 and using MBEs and WBEs is not a sufficient reason for a
94 Bidder/Proposer's failure to meet the Goals and Subgoals, as long as
95 such costs are reasonable.

96
97 (4) Publishing notice in a local publication such as a newspaper, trade
98 association publication, or via electronic/social media.
99

100 [(4)](5) Not rejecting MBEs/WBEs as being unqualified without sound
101 reasons based on a thorough investigation of their capabilities. The
102 MBE's/WBE's standing within its industry, membership in specific
103 groups, organizations, or associations and political or social
104 affiliations (for example union vs. non-union employee status) are not
105 legitimate causes for rejecting or not soliciting Bids to meet the Goals
106 and Subgoals.
107

108 [(5)](6) Making economically feasible portions~~[It is the~~
109 ~~Bidder/Proposer's responsibility to make a portion]~~ of the work
110 available to MBE/WBE Subcontractors and suppliers and to select
111 those portions of the work or material needs consistent with the
112 available MBE/WBE Subcontractors and suppliers, so as to facilitate
113 meeting the Goals or Subgoals.
114

115 [(6)](7) The ability or desire of a Bidder/Proposer to perform the work
116 of a Contract with its own organization does not relieve the
117 Bidder/Proposer of the responsibility to make Good Faith Efforts. A
118 Bidder/Proposer who desires to self perform the work of a Contract
119 must demonstrate Good Faith Efforts unless the Goals or Subgoals
120 have been met.

121
122 [(7)](8) Bidders/Proposers are not required to accept higher quotes in
123 order to meet the Goals or Subgoals.
124

125 (9) Effectively using the services of Minority Person/Women community
126 organizations; Minority Person/Women Contractors groups; local,
127 state, and federal Minority Person/Women business assistance offices;
128 and other organizations to provide assistance in solicitation and
129 utilization of MBEs, WBEs and/or DBEs.
130

131 (F) The following factors may also be considered by SMBR in determining that
132 a Bidder/Proposer has made Good Faith Efforts. These factors are not
133 intended to be a mandatory checklist, nor are they intended to be exclusive
134 or exhaustive. Other factors or types of efforts may be relevant in
135 appropriate cases:
136

137 [~~(1)~~] ~~Selecting portions of the work to be performed by MBEs/WBEs in~~
138 ~~order to increase the likelihood that the Goals or Subgoals will be met. This~~
139 ~~includes, where appropriate, breaking out Contract work items into~~
140 ~~economically feasible units to facilitate MBE/WBE participation, even when~~
141 ~~the Bidder/Proposer might otherwise prefer to perform these work items~~
142 ~~with its own forces.]~~
143

144 [(2)](1) Making efforts to assist interested MBEs/WBEs in obtaining
145 bonding, lines of credit, or insurance as required by the City or
146 Contractor.
147

148 [(3)](2) Making efforts to assist interested MBEs/WBEs in obtaining
149 necessary equipment, supplies, materials, or related assistance or
150 services.
151

152 [~~(4)~~] ~~Effectively using the services of Minority Person/Women community~~
153 ~~organizations; Minority Person/Women Contractors groups; local,~~
154 ~~state, and federal Minority Person/Women business assistance offices;~~
155 ~~and other organizations to provide assistance in the recruitment and~~
156 ~~placement of MBEs, WBEs and/or DBEs. It is the Bidder/Proposer's~~
157 ~~responsibility to seek guidance from SMBR on any questions~~
158 ~~regarding compliance with this section.]~~
159

160 [~~(5)~~] ~~In determining whether a Bidder/Proposer has made Good Faith~~
161 ~~Efforts, the performance of other Bidders/Proposers in meeting the~~
162 ~~Contract may be considered. For example, when other~~
163 ~~Bidders/Proposers meet the Goals or Subgoals, it may be reasonably~~
164 ~~questioned whether, with additional reasonable efforts, the apparent~~
165 ~~successful Bidder/Proposer could have met the Goals or Subgoals.~~
166 ~~Similarly, if the apparent successful Bidder/Proposer fails to meet the~~
167 ~~Goals, but meets or exceeds the average MBE/WBE participation~~
168 ~~obtained by other Bidders/Proposers, this may be evidence that the~~
169 ~~apparent successful Bidder/Proposer made Good Faith Efforts.]~~
170

171 (G) In assessing minimum Good Faith Efforts, SMBR may consider:
172

- 173 (1) Whether the Bidder/Proposer sought guidance from SMBR on any
174 questions regarding compliance with this chapter.
175
176 (2) The performance of other Bidders/Proposers in meeting the Contract
177 Goals. For example, when other Bidders/Proposers meet the Goals or
178 Subgoals, it may be reasonably questioned whether, with additional
179 reasonable efforts, the apparent successful Bidder/Proposer could
180 have met the Goals or Subgoals. Similarly, if the apparent successful
181 Bidder/Proposer fails to meet the Goals, but meets or exceeds the
182 average MBE/WBE participation obtained by other
183 Bidders/Proposers, this may be evidence that the apparent successful
184 Bidder/Proposer made Good Faith Efforts.
185

186 ~~[(G)](H)~~ The Director shall review the compliance plan prior to award,
187 including the scope of work, within a reasonable time so as not to unduly
188 delay award of the Contract.
189

- 190 (1) If the Director determines that the compliance plan demonstrates that
191 the Goals or Subgoals have been achieved, then the Contract
192 Awarding Authority, with the concurrence of the Director, after the
193 Contract Awarding Authority and Director review the letters of intent,
194 shall recommend award to the city council. For all competitively Bid
195 projects, signed letter(s) of intent between the certified low Bidder
196 and the MBE and/or WBE Subcontractor(s) must be received by the
197 Contract Awarding Authority within three business days of
198 notification of the status as certified low Bidder. For procurements
199 conducted through the request for Proposal or request for

200 qualifications process, no later than after final execution of a
201 professional or nonprofessional services agreement but before the
202 issuance of a notice to proceed, the successful Proposer must deliver
203 signed subcontracts between itself and the MBE and/or WBE Sub-
204 contractor(s) and/or Subconsultant(s) for the scope of work reflected
205 in the Proposal as awarded.

206
207 (2) In the event the applicable Goal(s) or Subgoals have not been
208 achieved, then the Director shall evaluate the Bidder's/ Proposer's
209 Good Faith Efforts to achieve those Goals or Subgoals as documented
210 in the compliance plan. The Director shall evaluate the compliance
211 plan based on the criteria established in Subsection (E) of this
212 section. The Director may request clarification in writing of items
213 listed in the compliance plan, provided such clarification is minor and
214 shall not include the opportunity to augment listed MBE/WBE
215 participation or Good Faith Efforts.

216
217 (3) If the Director finds that a Bidder/Proposer did not make sufficient
218 Good Faith Efforts, the Director shall communicate his finding to the
219 Contract Awarding Authority or other appropriate City official. The
220 Director shall recommend to the Contract Awarding Authority that the
221 Bid/Proposal be rejected based on failure to comply with this chapter.
222 The Contract Awarding Authority may reject the Bid/Proposal as not
223 in compliance with this chapter, or may advise the City Manager of
224 additional considerations which may form the basis for accepting the
225 Bid/Proposal as being in the best overall interest of the Program and
226 the City.

227
228 (4) If the Contract Awarding Authority finds that the Bid/Proposal does
229 not comply with this chapter, a Bidder/Proposer may request a protest
230 hearing. The City Manager has the authority to make the final
231 decision, subject to council action, if required. In determining
232 whether compliance with this section has been met, the City Manager
233 may determine that the effort of the Bidder/Proposer substantially
234 complies with the purpose of this chapter and such determination is in
235 the best interest of the Program and the City.

236
237 ~~(H)~~(I) The rejection of Bids/Proposals in conformance with this section does
238 not affect the ability of the Contract Awarding Authority to continue to
239 evaluate and consider the remaining Bids/Proposals that achieve the Goals

or Subgoals or demonstrate Good Faith Efforts and to develop a recommendation to city council for award of the Contract.

~~[(H)]~~(J) The City purchasing officer or relevant Contract Awarding Authority may waive minor informalities in the compliance plan. A minor informality is one that does not affect the competitiveness of the Bid/Proposal.

PART 2. Subsection (A) of Section 2-9B-25 of the City Code is amended to read:

§ 2-9B-25 SANCTIONS.

(A) The following violations of this chapter are unlawful and may result in sanctions:

- (1) providing false or misleading information to the City in connection with an application for or challenge to certification, recertification or decertification as a MBE/WBE;
- (2) providing false or misleading information to the City in connection with submission of a Bid, responses to requests for qualifications or Proposals, Good Faith Efforts documentation, post-award compliance, or other Program operations;
- (3) substituting MBE/WBE Subcontractors without first receiving approval for such substitutions; ~~[(H)]~~
- (4) bid shopping;~~[committing any other violations of the provisions of this chapter.]~~
- (5) contract changes made without an approved Request for Change; or
- (6) committing any other violations of the provisions of this chapter.

PART 3. This ordinance takes effect on _____.

PASSED AND APPROVED

_____, 2010

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§

Lee Leffingwell
Mayor

APPROVED: _____
Karen M. Kennard
Acting City Attorney

ATTEST: _____
Shirley A. Gentry
City Clerk