

**ORDINANCE NO. 20101028-041**

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

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

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

**§ 2-9A-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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- (2) In the event the applicable Goal(s) or Subgoals have not been achieved, then the Director shall evaluate the Bidder's/ Proposer's Good Faith Efforts to achieve those Goals or Subgoals as documented in the compliance plan. The Director shall evaluate the compliance plan based on the criteria established in Subsection (E) of this section. The Director may request clarification in writing of items listed in the compliance plan, provided such clarification is minor and shall not include the opportunity to augment listed MBE/WBE participation or Good Faith Efforts.
- (3) If the Director finds that a Bidder/Proposer did not make sufficient Good Faith Efforts, the Director shall communicate his finding to the Contract Awarding Authority or other appropriate City official. The Director shall recommend to the Contract Awarding Authority that the Bid/Proposal be rejected based on failure to comply with this chapter. The Contract Awarding Authority may reject the Bid/Proposal as not in compliance with this chapter, or may advise the City Manager of additional considerations which may form the basis for accepting the Bid/Proposal as being in the best overall interest of the Program and the City.
- (4) If the Contract Awarding Authority finds that the Bid/Proposal does not comply with this chapter, a Bidder/Proposer may request a protest hearing. The City Manager has the authority to make the final decision, subject to council action, if required. In determining whether compliance with this section has been met, the City Manager may determine that the effort of the Bidder/Proposer substantially complies with the purpose of this chapter and such determination is in the best interest of the Program and the City.

[(H)](I) The rejection of Bids/Proposals in conformance with this section does not affect the ability of the Contract Awarding Authority to continue to 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 2-9A-25 of the City Code is amended to read:

**§ 2-9A-25 SANCTIONS.**

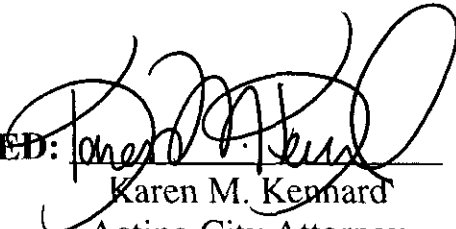
- (A) The following violations of this chapter are unlawful and may result in sanctions:
- (1) providing false or misleading information to the City in connection with an application for or challenge to certification, recertification or decertification as a MBE/WBE;
  - (2) providing false or misleading 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; ~~[or]~~
  - (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 January 1, 2011.

**PASSED AND APPROVED**

\_\_\_\_\_, October 28, 2010

**APPROVED:**

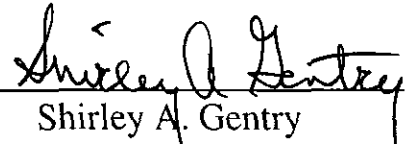
  
Karen M. Kennard  
Acting City Attorney

§  
§  
§



Lee Leffingwell  
Mayor

**ATTEST:**

  
Shirley A. Gentry  
City Clerk