Legislation Details (With Text)

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Type:	Ordinance Amendment			**Status:**	Approved
File created:	5/4/2017			**In control:**	Contract Compliance Committee
On agenda:	5/10/2017			**Final action:**	6/7/2017
Title:	PROPOSED ORDINANCE AMENDMENT				

PERMITTING ESTABLISHED BUSINESS PARTICIPATION IN MWBE PROGRAM

BE IT ORDAINED, by the Cook County Board of Commissioners, that Chapter 34, Finance, Article IV, Procurement Code, Division 8, Minority- and Woman- Owned Business Enterprises, Subdivision I, General Provisions, Sections 34-263, 34-265, 34-267, 34-272, 34-277, 34-279, and 34-280 of the Cook County Code are hereby amended as Follows:

Sec. 34-263. - Definitions.

***

Applicant means a person who submits documents and information seeking certification, continued certification, or re-certification as an MBE or WBEPCE to the Office of Contract Compliance.

***

Certified firm means a firm that has been accepted by the County as a certified MBE or WBE or Established Business.

***

Established Business means a Local Business that is not a Small Business and was certified as an MBE or WBE within the past twelve (12) months:

(1) Which is at least 51 percent owned by one or more Minority Individuals or Women, or in the case of a publicly owned business, at least 51 percent of all classes of the stock of which is owned by one or more such Minority Individuals or Women;

(2) Whose management, policies, major decisions and daily business operations are independently managed and Controlled by one or more such Minority Individuals or Women; and

(3) Which has its principal place of business and a majority of its regular, full-time workforce located within the County's Marketplace.

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Protected Class Enterprise or PCE shall means a business meeting the definition of Minority Business Enterprise, and Women's Business Enterprise, or Established Business as set forth in this section.

***

Small Business means a small business as defined by the U.S. Small Business Administration, pursuant to the business size standards found in 13 CFR Part 121, as related to the nature of the

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work the Person seeks to perform on Contracts. A Person is not an eligible small business enterprise in any calendar fiscal year in which its gross receipts, averaged over the Person's previous five fiscal years, exceed the size standards of 13 CFR Part 121.

***

Sec. 34-265. - Program administration.

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(b) Using Agencies shall cooperate with the CCD in the administration of the Program, specifically including assisting the CCD with setting Contract Specific Goals and assisting in the identification of available MBEs and WBEsPCEs.

***

Sec. 34-267. - Program goals.

***

(d) Notwithstanding the above, Established Businesses may participate in the Program as authorized under Section 34-279.

***

Sec. 34-272. - Calculating PCE participation.

In calculating a PCE's participation, only dollar amounts commensurate with a PCE's performance of a Commercially Useful Function may be counted.

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(e) One hundred percent of the cost of the supplies, equipment or goods obtained from a PCE Manufacturer, or Distributor, or Regular Dealer shall be counted, unless otherwise provided pursuant to Section 34-279.

(f) One hundred percent of the fees or transportation charges for the delivery of supplies, equipment, materials or goods shall be counted only if the payment of such fees is a customary industry practice and such fees are commensurate with fees customarily charged for similar services, unless otherwise provided pursuant to Section 34-279.

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Sec. 34-277. - Prohibited provisions.

Any agreement between a Contractor and a MBE or WBEPCE in which the Contractor requires that the MBE or WBEPCE not provide subcontracting quotations to other Contractors is prohibited.

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Secs. 34-279. - Established business participation in the Program.

(a) An Established Business may participate in the Program, as follows:

(1) For a one-year period after the business has become an established business, only 75 percent of such business's participation in a County contract shall account for the MBE or WBE, as applicable, program goals;

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(2) For a one-year period starting on the one- year anniversary of the date the business became an established business, only 50 percent of such business's participation in a County contract shall account for the MBE or WBE, as applicable, program goals; and,

(3) For a one-year period starting on the two- year anniversary of the date the business became an established business, only 25 percent of such business's participation in a County contract shall account for the MBE or WBE, as applicable, program goals.

(b) An Established Business shall not be eligible to participate in the Program starting on the three-year anniversary of the date the business became an established business.

(c) The CCD shall provide notice to participating Established Businesses of the allowed level of participation by such businesses in the Program.

Sec. 34-280. - Program review and sunset.

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Effective Date: This Proposed Ordinance Amendment shall be in effect 90 days from passage and approval.

BE IT FURTHER ORDAINED, by the Cook County Board of Commissioners, that Chapter 34, Finance, Article IV, Procurement Code, Division 8, Minority- and Woman- Owned Business Enterprises, Subdivision II, Participation in Cook County Public Works Contracts, Sections 34-290 through 34-298, 34-300.1, and 34-300.2 of the Cook County Code are hereby amended as Follows:

Sec. 34-290. - Definitions.

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Applicant means a person who submits documents and information seeking certification, continued certification, or re-certification as an MBE or WBEPCE to the Office of Contract Compliance.

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(1) Which is at least 51 percent owned by one or more Minority Individuals or Women, or in the case of a publicly owned business, at least 51 percent of all classes of the stock of which is owned by one or more such Minority Individuals or Women;

(2) Whose management, policies, major decisions and daily business operations are independently managed and Controlled by one or more such Minority Individuals or Women; and

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Sec. 34-291. - Program administration.

(a) The CCD, who shall report to the President of the Board of Commissioners of Cook County, shall administer the Program, and whose duties shall include:

(1) Formulating, proposing and implementing rules and regulations for the development, implementation and monitoring of the Program, certification process, recertification process, and no-change affidavits, including time limitations for the submission of documents and information regarding certification applications and contract participation. The CCD is authorized to collect certification and recertification processing fees in the amount of $250.00 per Application; the collection of said processing fees shall be transacted by the CCD through the Bureau of Finance.

(2) Providing information and assistance to MBEs and WBEsPCEs relating to County procurement practices and procedures, and bid specifications, requirements, goals and prerequisites.

(3) Establishing uniform procedures and criteria for certifying, recertifying and decertifying Businesses as MBEs and WBEsPCEs, accepting certifications by other agencies, and maintaining a directory of Certified Firms. Such procedures and criteria shall include non-certification or decertification the willful submission of false or inaccurate material information, the failure to submit complete and accurate material information to the CCD regarding certification, or a Procurement on a timely basis, and shall relate individually and jointly to both PCEs and PCE owners.

(4) Establishing Project Specific Goals, in collaboration with the User Agency, based upon the availability of PCEs to provide the supplies, materials and equipment or services required by the Contract.

(5) Evaluating Contractors' achievement of Project Specific Goals and/or Good Faith Efforts to meet Project Specific Goals.

(6) Working with User Agencies to monitor contracts to ensure prompt payments to MBEs and WBEsPCEs and compliance with Project Specific Goals and commitments, including gathering data to facilitate such monitoring.

(7) Receiving, reviewing, and acting upon complaints and suggestions concerning the Program.

(8) Collecting data to evaluate the Program and other County contracting initiatives.

(9) Monitoring the Program and the County's progress towards the Annual Participation Goals. The CCD shall report on a quarterly and annual basis to the President on the administration and operations of the Program.

(b) The User Agencies that receive appropriate delegation for project management, contract management, and/or construction and/or design contract responsibility shall have the following duties and responsibilities with regard to the Program:

(1) Assisting the CCD with setting Project Specific Goals.

(2) Assisting in the identification of available MBEs and WBEsPCEs, and providing other assistance in meeting the Project Specific Goals.

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(3) Performing other activities to support the Program.

(4) Gathering and maintaining prime contracting and subcontracting data for those contracts which they manage.

(5) Submitting subcontracting data as required to the CCD.

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Sec. 34-292. - Race- and gender-neutral measures to ensure equal opportunities for all contractors and subcontractors.

The County shall develop and use measures to facilitate the participation of all firms in County construction contracting activities. These measures shall include, but are not limited to:

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(b) Segmenting, structuring or issuing contracts to facilitate the participation of MBEs, WBEsPCEs and other Small Businesses;

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Sec. 34-293. - Certification criteria and process.

(a) Only Businesses that meet the criteria for certification as an MBE or WBEPCE may participate in the Program. The applicant has the burden of proof by a preponderance of the evidence.

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Sec. 34-294. - Annual aspirational goals.

The annual aspirational goals for the utilization of MBEs and WBEs on County Public Works contracts and subcontracts shall be 24 percent for MBEs and ten percent for WBEs. Notwithstanding the above, Established Businesses may participate in the Program as authorized under Section 34-300.1.

Sec. 34-295. - Project specific goals.

The CCD, following the compilation and stringent review of the most current data that is feasibly and practicably available relative to the availability of MBEs and WBEs who have the capacity to successfully supply the relevant goods and services, and in consultation with the User Agency, shall establish Project Specific Goals for construction, which shall be incorporated into each bid and RFP. Notwithstanding the above, Established Businesses may participate in the Program as authorized under Section 34-300.1.

Sec. 34-296. - Counting MBE and WBE participation.

(a) The entire amount of that portion of a contract that is performed by the MBE's or WBE'PCEs own forces shall be counted, including the cost of supplies and materials obtained by the MBE or WBEPCE for the work on the contract, and supplies purchased or equipment leased by the MBE or WBEPCE (except supplies and equipment the MBE or WBEPCE purchases or leases from the prime Contractor or the prime Contractor's Affiliate), unless otherwise provided pursuant to Section 34-300.1.

(b) The entire amount of fees or commissions charged by an MBE or WBEPCE for providing a bona fide service, such as professional, technical, consultant or managerial services, or for providing bonds or insurance specifically required for the performance of a contract, shall be counted, provided the fee is reasonable and not excessive as compared with fees customarily charged for similar services, unless otherwise provided pursuant to Section 34-300.1.

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(c) When an MBE or WBEPCE performs as a participant in a Joint Venture, only the portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the Joint Venture's contract that is performed by the MBE or WBEPCE with its own forces and for which it is separately at risk, shall be counted, unless otherwise provided pursuant to Section 34-300.1.

(d) Only expenditures to an MBE or WBEPCE that is performing a Commercially Useful Function shall be counted. To determine whether an MBE or WBEPCE is performing a Commercially Useful Function, the County will evaluate the amount of work subcontracted, industry practices, whether the amount the MBE or WBEPCE is to be paid under the contract is commensurate with the work it is actually performing and other relevant factors. To perform a Commercially Useful Function, the MBE or WBEPCE must be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, installing (where applicable) and paying for the material itself. An MBE or WBEPCE does not perform a Commercially Useful Function if its role is limited to that of an extra participant in the contract through which funds are passed in order to obtain the appearance of MBE or WBEPCE participation. If an MBE or WBEPCE subcontracts a greater portion of the work of a contract than would be expected based on normal industry practice, it is presumed not to perform a Commercially Useful Function. When an MBE or WBEPCE is presumed not to be performing a Commercially Useful Function, the Certified Firm may present evidence to rebut this presumption.

(e) One hundred percent of the fees or transportation charges for the delivery of materials or supplies required on a job site shall be counted only if the payment of such fees is a customary industry practice and are commensurate with fees customarily charged for similar services, unless otherwise provided pursuant to Section 34-300.1.

(f) One hundred percent of the cost of the supplies, equipment or goods obtained from a PCE Manufacturer shall be counted, unless otherwise provided pursuant to Section 34-300.1.

(g) Sixty percent of the cost of the supplies, equipment or goods obtained from a PCE Distributor or Regular Dealer shall be counted, unless otherwise provided pursuant to Section 34-300.1.

(h) If a PCE ceases to be certified for any other reason than graduation from the M/WBE Construction Program during its performance on a contract, the dollar value of work performed under a contract with that firm after it has ceased to be certified shall not be counted for the remaining term of the Contract.

(i) In determining achievement of Project Specific Goals, the participation of an MBE or WBEPCE shall not be counted until that amount has been paid to the MBE or WBEPCE.

Sec. 34-297. - Contract pre-award compliance procedures.

(a) For all solicitations, the bidder/proposer shall submit a Utilization Plan detailing all subcontractors from which the Contractor solicited bids or quotations, and if Project Specific Goals have been established, its achievement of the Goals or its Good Faith Efforts to do so. The Utilization Plan shall be due at the time the bid/proposal is due. In the event a bid or proposal leads to a Contract with the County, the Utilization Plan as approved by the CCD shall be incorporated as a material commitment on the part of the Contractor to each relevant PCE, and the contractor and the County. Failure to include a Utilization Plan shall render the bid or proposal not Responsive.

(b) Any agreement between a Contractor and an MBE or WBEPCE in which the Contractor requires that the MBE or WBEPCE not provide subcontracting quotations to other Contractors is prohibited.

(c) Where the Contractor cannot achieve the Project Specific Goal(s), the CCD will determine whether the Contractor has made Good Faith Efforts to meet the Goal(s). Parties submitting bids or proposals for Procurements may in all instances request a partial or full waiver of one or more established Project Specific Goal for PCE participation. In making this determination, the Director will consider, at a minimum, whether the Contractor has:

(1) Solicited through all reasonable and available means (e.g., attendance at pre-bid meetings, advertising and written notices) the interest of all MBEs and WBEsPCEs certified in the scopes of work of the contract. The Contractor shall provide interested MBEs and WBEsPCEs with timely, adequate information about the plans, specifications, and requirements of the contract to allow MBEs and WBEsPCEs to respond to the solicitation. The Contractor must follow up initial solicitations with interested MBEs and WBEsPCEs.

(2) Selected portions of the work to be performed by MBEs and WBEsPCEs in order to increase the likelihood that the Project Specific Goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate MBE and WBEPCE participation, even when the Contractor would otherwise prefer to perform these work items with its own forces. It is the Contractor's responsibility to make a portion of the work available to MBEs and WBEsPCEs and to select those portions of the work or material needs consistent with the availability of MBEs and WBEsPCEs to facilitate their participation.

(3) Negotiated in good faith with interested MBEs and WBEsPCEs. Evidence of such negotiation includes the names, addresses, and telephone numbers of MBEs and WBEsPCEs that were contacted; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and why agreements could not be reached with MBEs and WBEsPCEs. The Contractor may not reject MBEs and WBEsPCEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. That there may be some additional costs involved in finding and using MBEs and WBEsPCEs is not in itself sufficient reason for a Contractor's failure to meet the Project Specific Goals, as long as such costs are reasonable. The ability or desire of a Contractor to perform the work of a contract with its own organization does not relieve it of the responsibility to make Good Faith Efforts on all scopes of work that could be subcontracted.

(4) Made efforts to assist interested MBEs and WBEsPCEs in obtaining bonding, lines of credit, or insurance as required by the County or the prime Contractor, where appropriate.

(5) Made efforts to assist interested MBEs and WBEsPCEs in obtaining necessary equipment, supplies, materials, or related assistance or services, where appropriate.

(6) Used the services of the Office of Contract Compliance, available minority/women community organizations, minority/women contractors' groups, government-sponsored minority/women business assistance offices and other appropriate organizations to provide assistance in the recruitment and placement of MBEs and WBEsPCEs.

(7) Maintains or commits to establish and maintain a mentor-protégé agreement with one or more PCEs that is enforceable and that, in the judgement of the CCD, has performance standards and outcomes that are clearly established and effective in terms of assisting the PCE in acquiring additional skills, experience, and relationships helpful to the long-term success of the PCE consistent with the provisions of Section 34-271(d).

(d) In determining whether a Contractor has made Good Faith Efforts, the performance of other Contractors in meeting the Project Specific Goals may be considered. For example, when the apparent successful Contractor fails to meet the Project Specific Goals but others meet it, it may be reasonably questioned whether, with additional reasonable efforts, the apparent successful Contractor could have met the Project Specific Goals. Similarly, if the apparent successful Contractor fails to meet the Project Specific Goals, but meets or exceeds the average MBE or WBEPCE participation obtained by other Contractors, this may be evidence that the apparent successful Contractor made Good Faith Efforts.

(e) A signed letter of intent from each listed MBE or WBEPCE, describing the work, materials, equipment or services to be performed or provided by the MBE or WBEPCE and the agreed upon dollar value shall be due at the time of bid proposal or within three days after such submission.

(f) The CCD shall timely review the Utilization Plan before award, including the scope of work

and the letters of intent from MBEs and WBEsPCEs. The CCD may request clarification in writing of items listed in the Utilization Plan, provided such clarification shall not include the opportunity to augment listed participation or Good Faith Efforts.

(g) If the CCD determines that the Utilization Plan demonstrates that the Project Specific Goals have been achieved or Good Faith Efforts made, with the concurrence of the User Agency, the CCD and User Agency shall recommend award to Purchasing Agent.

(h) If the CCD finds that a Contractor did not make sufficient Good Faith Efforts, the CCD shall communicate this finding to the Purchasing Department and recommend that the bid/proposal be rejected. A Contractor may protest this determination pursuant to the County's bid protest procedures.

Sec. 34-298. - Contract administration procedures.

(a) Upon award of a contract by the County that includes Project Specific Goals, the Project Specific Goals become covenants of performance by the Contractors and incorporated in the contract.

(b) The Contractor shall provide a listing of all subcontractors to be used in the performance of the contract, and detailed subcontractor information to the County with each request for payment submitted to the County or as otherwise directed by the County. The CCD and the User Agency shall monitor subcontractor participation during the course of the contract. The County shall have full and timely access to the Contractor's books and records, including, without limitation, payroll records, tax returns and records and books of account, to determine the Contractor's compliance with its commitment to MBE and WBE participation and the status of any MBE or WBEPCE performing any portion of the contract. This provision shall be in addition to, and not a substitute for, any other provision allowing inspection of the Contractor's records by any officer or official of the County for any purpose.

(c) The Contractor cannot make changes to the Utilization Plan or substitute MBEs or WBEsPCEs named in the Utilization Plan without the prior written approval of the CCD, in consultation with the CPO and the User Agency. Unauthorized changes or substitutions shall be a violation of this subdivision and a breach of contract, and may constitute grounds for rejection of the bid or proposal or cause termination of the executed contract for breach, the withholding of payment and/or subject the Contractor to contract penalties or other sanctions. Upon such written approval by the CCD, the revised Utilization Plan shall be incorporated into the Contract as an amendment by the CPO. The CCD shall promulgate policies and procedures with respect to changes to a Utilization Plan.

(1) All requests for changes or substitutions of an MBE or WBEPCE Subcontractor(s) named in the Utilization Plan shall be made to the CCD, CPO and the User Agency in writing, and shall clearly and fully set forth the basis for the request. A Contractor shall not substitute an MBE or WBEPCE subcontractor or perform the work designated for an MBE or WBEPCE subcontractor with its own forces unless and until the CCD, in consultation with the CPO and the User Agency, approves such substitution in writing. A Contractor shall not allow a substituted subcontractor to begin work until the CCD, CPO and the User Agency have approved the substitution.

(2) The facts supporting the request must not have been known nor reasonably should have been known by either party before the submission of the Utilization Plan. Bid shopping is prohibited. The Contractor must negotiate with the MBE or WBEPCE subcontractor to resolve the problem. Where there has been a mistake or disagreement about the scope of work, the MBE or WBEPCE can be substituted only where an agreement cannot be reached for a reasonable price for the correct scope of work.

(3) Substitutions of the subcontractor shall be permitted only on the following bases:

(i) Unavailability after receipt of reasonable notice to proceed.

(ii) Failure of performance.

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(iii) Financial incapacity.

(iv) Refusal by the subcontractor to honor the bid or proposal price.

(v) Mistake of fact or law about the elements of the scope of work of a solicitation where agreement upon a reasonable price cannot be reached.

(vi) Failure of the subcontractor to meet insurance, licensing or bonding requirements; or

(vii) The subcontractor's withdrawal of its bid or proposal.

(4) The final decision whether to permit or deny the proposed substitution, and the basis of any denial, shall be communicated to the parties in writing by the CCD.

(5) Where the Contractor has established the basis for the substitution to the satisfaction of the County, the Contractor shall make Good Faith Efforts to fulfill the Utilization Plan. The Contractor may seek the assistance of the Office of Contract Compliance in obtaining a new MBE or WBEPCE. If the Project Specific Goal(s) cannot be reached and Good Faith Efforts have been made, the Contractor may substitute with a non-Certified Firm.

(6) If the County requires the substitution of an MBE or WBEPCE subcontractor listed in the Utilization Plan, the Contractor shall undertake Good Faith Efforts to fulfill the Utilization Plan. The Contractor may seek the assistance of the Office of Contract Compliance in obtaining a new MBE or WBEPCE subcontractor. If the Goal(s) cannot be reached and Good Faith Efforts have been made, the Contractor may substitute with a non-Certified Firm.

(d) If a Contractor plans to hire a subcontractor on any scope of work that was not previously disclosed in the Utilization Plan, the Contractor shall obtain the approval of the CCD to modify the Utilization Plan and must make Good Faith Efforts to ensure that MBEs and WBEsPCEs have a fair opportunity to bid on the new scope of work.

(e) Changes to the scopes of work shall be documented by the User Agency at the time they arise to establish the reasons for the change and the effect on achievement of the MBE or WBEPCE goal.

(f) Prior to contract closeout, the CCD shall evaluate the Contractor's fulfillment of the contracted goals, taking into account all approved substitutions, terminations and changes to the contract's scope of work. If the County determines that Good Faith Efforts to meet the MBE or WBEPCE commitments were not made, or that fraudulent misrepresentations have been made, or any other breach of the contract or violation of this subdivision, a remedy or sanction may be imposed, as provided in the contract.

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Sec. 34-300.1. - Established business participation in the Program.

(a) An Established Business may participate in the Program, as follows:

(1) For a one-year period after the business has become an established business, only 75 percent of such business's participation in a County contract shall account for the MBE or WBE, as applicable, aspirational and project specific goals;

(2) For a one-year period starting on the one- year anniversary of the date the business became an established business, only 50 percent of such business's participation in a County contract shall account for the MBE or WBE, as applicable, aspirational and project specific goals; and,

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(b)An Established Business shall not be eligible to participate in the Program starting on the three-year anniversary of the date the business became an established business.

(c)The CCD shall provide notice to participating Established Businesses of the allowed level of participation by such businesses in the Program.

Sec. 34-300.2. - Program review and sunset.

***

Effective date: This ordinance shall be in effect 90 days from passage and approval

Sponsors: TONI PRECKWINKLE (President), ROBERT STEELE, JOHN A. FRITCHEY, LUIS ARROYO JR, EDWARD M. MOODY, STANLEY MOORE, DEBORAH SIMS

Indexes:

Code sections:

Attachments:

Date	Ver.	Action By	Action	Result
6/7/2017	1	Board of Commissioners	approve	Pass
6/7/2017	1	Contract Compliance Committee	recommend for approval	Pass
5/10/2017	1	Board of Commissioners	refer	Pass

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Applicant means a person who submits documents and information seeking certification, continued certification, or re-certification as a~~n MBE or WBE~~PCE to the Office of Contract Compliance.

***

Certified firm means a firm that has been accepted by the County as a certified MBE or WBE or Established Business.

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Established Business means a Local Business that is not a Small Business and was certified as an MBE or WBE within the past twelve (12) months:

(1) Which is at least 51 percent owned by one or more Minority Individuals or Women, or in the case of a publicly owned business, at least 51 percent of all classes of the stock of which is owned by one or more such Minority Individuals or Women;

(2) Whose management, policies, major decisions and daily business operations are independently managed and Controlled by one or more such Minority Individuals or Women; and

(3) Which has its principal place of business and a majority of its regular, full-time workforce located within the County's Marketplace.

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Protected Class Enterprise or PCE ~~shall~~ means a business meeting the definition of Minority Business Enterprise, ~~and~~ Women's Business Enterprise, or Established Business as set forth in this section.

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Small Business means a small business as defined by the U.S. Small Business Administration, pursuant to the business size standards found in 13 CFR Part 121, as related to the nature of the work the Person seeks to perform on Contracts. A Person is not an eligible small business enterprise in any calendar fiscal year in which its gross receipts, averaged over the Person's previous five fiscal years, exceed the size standards of 13 CFR Part 121.

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Sec. 34-291. - Program administration.

(a) The CCD, who shall report to the President of the Board of Commissioners of Cook County, shall administer the Program, and whose duties shall include:

(1) Formulating, proposing and implementing rules and regulations for the development, implementation and monitoring of the Program, certification process, recertification process, and no-change affidavits, including time limitations for the submission of documents and information regarding certification applications and contract participation. The CCD is authorized to collect certification and recertification processing fees in the amount of $250.00 per Application; the collection of said processing fees shall be transacted by the CCD through the Bureau of Finance.

(2) Providing information and assistance to ~~MBEs~~ ~~and~~ ~~WBEs~~PCEs relating to County procurement practices and procedures, and bid specifications, requirements, goals and prerequisites.

(3) Establishing uniform procedures and criteria for certifying, recertifying and decertifying Businesses as ~~MBEs~~ ~~and~~ ~~WBEs~~PCEs, accepting certifications by other agencies, and maintaining a directory of Certified Firms. Such procedures and criteria shall include non-certification or decertification the willful submission of false or inaccurate material information, the failure to submit complete and accurate material information to the CCD regarding certification, or a Procurement on a timely basis, and shall relate individually and jointly to both PCEs and PCE owners.

(4) Establishing Project Specific Goals, in collaboration with the User Agency, based upon the availability of PCEs to provide the supplies, materials and equipment or services required by the Contract.

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(5) Evaluating Contractors' achievement of Project Specific Goals and/or Good Faith Efforts to meet Project Specific Goals.

(6) Working with User Agencies to monitor contracts to ensure prompt payments to ~~MBEs~~ ~~and~~ ~~WBEs~~PCEs and compliance with Project Specific Goals and commitments, including gathering data to facilitate such monitoring.

(7) Receiving, reviewing, and acting upon complaints and suggestions concerning the Program.

(8) Collecting data to evaluate the Program and other County contracting initiatives.

(9) Monitoring the Program and the County's progress towards the Annual Participation Goals. The CCD shall report on a quarterly and annual basis to the President on the administration and operations of the Program.

(b) The User Agencies that receive appropriate delegation for project management, contract management, and/or construction and/or design contract responsibility shall have the following duties and responsibilities with regard to the Program:

(1) Assisting the CCD with setting Project Specific Goals.

(2) Assisting in the identification of available ~~MBEs~~ ~~and~~ ~~WBEs~~PCEs, and providing other assistance in meeting the Project Specific Goals.

(3) Performing other activities to support the Program.

(4) Gathering and maintaining prime contracting and subcontracting data for those contracts which they manage.

(5) Submitting subcontracting data as required to the CCD.

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Sec. 34-292. - Race- and gender-neutral measures to ensure equal opportunities for all contractors and subcontractors.

The County shall develop and use measures to facilitate the participation of all firms in County construction contracting activities. These measures shall include, but are not limited to:

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(b) Segmenting, structuring or issuing contracts to facilitate the participation of ~~MBEs,~~ ~~WBEs~~PCEs and other Small Businesses;

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Sec. 34-293. - Certification criteria and process.

(a) Only Businesses that meet the criteria for certification as a~~n~~ ~~MBE~~ ~~or~~ ~~WBE~~PCE may participate in the Program. The applicant has the burden of proof by a preponderance of the evidence.

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Sec. 34-294. - Annual aspirational goals.

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The annual aspirational goals for the utilization of MBEs and WBEs on County Public Works contracts and subcontracts shall be 24 percent for MBEs and ten percent for WBEs. Notwithstanding the above, Established Businesses may participate in the Program as authorized under Section 34-300.1.

Sec. 34-295. - Project specific goals.

The CCD, following the compilation and stringent review of the most current data that is feasibly and practicably available relative to the availability of MBEs and WBEs who have the capacity to successfully supply the relevant goods and services, and in consultation with the User Agency, shall establish Project Specific Goals for construction, which shall be incorporated into each bid and RFP. Notwithstanding the above, Established Businesses may participate in the Program as authorized under Section 34-300.1.

Sec. 34-296. - Counting MBE and WBE participation.

(a) The entire amount of that portion of a contract that is performed by the ~~MBE's or WBE'~~PCEs own forces shall be counted, including the cost of supplies and materials obtained by the ~~MBE or WBE~~PCE for the work on the contract, and supplies purchased or equipment leased by the ~~MBE or WBE~~PCE (except supplies and equipment the ~~MBE or WBE~~PCE purchases or leases from the prime Contractor or the prime Contractor's Affiliate), unless otherwise provided pursuant to Section 34-300.1.

(b) The entire amount of fees or commissions charged by a~~n MBE or WBE~~PCE for providing a bona fide service, such as professional, technical, consultant or managerial services, or for providing bonds or insurance specifically required for the performance of a contract, shall be counted, provided the fee is reasonable and not excessive as compared with fees customarily charged for similar services, unless otherwise provided pursuant to Section 34-300.1.

(c) When an ~~MBE or WBE~~PCE performs as a participant in a Joint Venture, only the portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the Joint Venture's contract that is performed by the ~~MBE or WBE~~PCE with its own forces and for which it is separately at risk, shall be counted, unless otherwise provided pursuant to Section 34-300.1.

(d) Only expenditures to an ~~MBE or WBE~~PCE that is performing a Commercially Useful Function shall be counted. To determine whether a~~n MBE or WBE~~PCE is performing a Commercially Useful Function, the County will evaluate the amount of work subcontracted, industry practices, whether the amount the ~~MBE or WBE~~PCE is to be paid under the contract is commensurate with the work it is actually performing and other relevant factors. To perform a Commercially Useful Function, the ~~MBE or WBE~~PCE must be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, installing (where applicable) and paying for the material itself. A~~n MBE or WBE~~PCE does not perform a Commercially Useful Function if its role is limited to that of an extra participant in the contract through which funds are passed in order to obtain the appearance of ~~MBE or WBE~~PCE participation. If a~~n MBE or WBE~~PCE subcontracts a greater portion of the work of a contract than would be expected based on normal industry practice, it is presumed not to perform a Commercially Useful Function. When a~~n MBE or WBE~~PCE is presumed not to be performing a Commercially Useful Function, the Certified Firm may present evidence to rebut this presumption.

(e) One hundred percent of the fees or transportation charges for the delivery of materials or supplies required on a job site shall be counted only if the payment of such fees is a customary industry practice and are commensurate with fees customarily charged for similar services, unless otherwise provided pursuant to Section 34-300.1.

(f) One hundred percent of the cost of the supplies, equipment or goods obtained from a PCE Manufacturer shall be counted, unless otherwise provided pursuant to Section 34-300.1.

(g) Sixty percent of the cost of the supplies, equipment or goods obtained from a PCE Distributor or Regular Dealer shall be counted, unless otherwise provided pursuant to Section 34-300.1.

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(h) If a PCE ceases to be certified for any other reason than graduation from the ~~M/WBE~~ ~~Construction~~ Program during its performance on a contract, the dollar value of work performed under a contract with that firm after it has ceased to be certified shall not be counted for the remaining term of the Contract.

(i) In determining achievement of Project Specific Goals, the participation of a~~n~~ ~~MBE~~ ~~or~~ ~~WBE~~PCE shall not be counted until that amount has been paid to the ~~MBE or WBE~~PCE.

Sec. 34-297. - Contract pre-award compliance procedures.

(a) For all solicitations, the bidder/proposer shall submit a Utilization Plan detailing all subcontractors from which the Contractor solicited bids or quotations, and if Project Specific Goals have been established, its achievement of the Goals or its Good Faith Efforts to do so. The Utilization Plan shall be due at the time the bid/proposal is due. In the event a bid or proposal leads to a Contract with the County, the Utilization Plan as approved by the CCD shall be incorporated as a material commitment on the part of the Contractor to each relevant PCE, and the contractor and the County. Failure to include a Utilization Plan shall render the bid or proposal not Responsive.

(b) Any agreement between a Contractor and a~~n~~ ~~MBE~~ ~~or~~ ~~WBE~~PCE in which the Contractor requires that the ~~MBE or WBE~~PCE not provide subcontracting quotations to other Contractors is prohibited.

(c) Where the Contractor cannot achieve the Project Specific Goal(s), the CCD will determine whether the Contractor has made Good Faith Efforts to meet the Goal(s). Parties submitting bids or proposals for Procurements may in all instances request a partial or full waiver of one or more established Project Specific Goal for PCE participation. In making this determination, the Director will consider, at a minimum, whether the Contractor has:

(1) Solicited through all reasonable and available means (e.g., attendance at pre-bid meetings, advertising and written notices) the interest of all ~~MBEs and WBEs~~PCEs certified in the scopes of work of the contract. The Contractor shall provide interested ~~MBEs and WBEs~~PCEs with timely, adequate information about the plans, specifications, and requirements of the contract to allow ~~MBEs and WBEs~~PCEs to respond to the solicitation. The Contractor must follow up initial solicitations with interested ~~MBEs and WBEs~~PCEs.

(2) Selected portions of the work to be performed by ~~MBEs and WBEs~~PCEs in order to increase the likelihood that the Project Specific Goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate ~~MBE and WBE~~PCE participation, even when the Contractor would otherwise prefer to perform these work items with its own forces. It is the Contractor's responsibility to make a portion of the work available to ~~MBEs and WBEs~~PCEs and to select those portions of the work or material needs consistent with the availability of ~~MBEs and WBEs~~PCEs to facilitate their participation.

(3) Negotiated in good faith with interested ~~MBEs and WBEs~~PCEs. Evidence of such negotiation includes the names, addresses, and telephone numbers of ~~MBEs and WBEs~~PCEs that were contacted; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and why agreements could not be reached with ~~MBEs and WBEs~~PCEs. The Contractor may not reject ~~MBEs and WBEs~~ PCEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. That there may be some additional costs involved in finding and using ~~MBEs and WBEs~~PCEs is not in itself sufficient reason for a Contractor's failure to meet the Project Specific Goals, as long as such costs are reasonable. The ability or desire of a Contractor to perform the work of a contract with its own organization does not relieve it of the responsibility to make Good Faith Efforts on all scopes of work that could be subcontracted.

(4) Made efforts to assist interested ~~MBEs and WBEs~~PCEs in obtaining bonding, lines of credit, or insurance as required by the County or the prime Contractor, where appropriate.

(5) Made efforts to assist interested ~~MBEs and WBEs~~PCEs in obtaining necessary equipment, supplies, materials, or related assistance or services, where appropriate.

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(6) Used the services of the Office of Contract Compliance, available minority/women community organizations, minority/women contractors' groups, government-sponsored minority/women business assistance offices and other appropriate organizations to provide assistance in the recruitment and placement of ~~MBEs and WBEs~~PCEs .

(7) Maintains or commits to establish and maintain a mentor-protégé agreement with one or more PCEs that is enforceable and that, in the judgement of the CCD, has performance standards and outcomes that are clearly established and effective in terms of assisting the PCE in acquiring additional skills, experience, and relationships helpful to the long-term success of the PCE consistent with the provisions of Section 34-271(d).

(d) In determining whether a Contractor has made Good Faith Efforts, the performance of other Contractors in meeting the Project Specific Goals may be considered. For example, when the apparent successful Contractor fails to meet the Project Specific Goals but others meet it, it may be reasonably questioned whether, with additional reasonable efforts, the apparent successful Contractor could have met the Project Specific Goals. Similarly, if the apparent successful Contractor fails to meet the Project Specific Goals, but meets or exceeds the average ~~MBE or WBE~~PCE participation obtained by other Contractors, this may be evidence that the apparent successful Contractor made Good Faith Efforts.

(e) A signed letter of intent from each listed ~~MBE or WBE~~PCE, describing the work, materials, equipment or services to be performed or provided by the ~~MBE or WBE~~PCE and the agreed upon dollar value shall be due at the time of bid proposal or within three days after such submission.

(f) The CCD shall timely review the Utilization Plan before award, including the scope of work and the letters of intent from ~~MBEs and WBEs~~PCEs. The CCD may request clarification in writing of items listed in the Utilization Plan, provided such clarification shall not include the opportunity to augment listed participation or Good Faith Efforts.

(g) If the CCD determines that the Utilization Plan demonstrates that the Project Specific Goals have been achieved or Good Faith Efforts made, with the concurrence of the User Agency, the CCD and User Agency shall recommend award to Purchasing Agent.

(h) If the CCD finds that a Contractor did not make sufficient Good Faith Efforts, the CCD shall communicate this finding to the Purchasing Department and recommend that the bid/proposal be rejected. A Contractor may protest this determination pursuant to the County's bid protest procedures.

Sec. 34-298. - Contract administration procedures.

(a) Upon award of a contract by the County that includes Project Specific Goals, the Project Specific Goals become covenants of performance by the Contractors and incorporated in the contract.

(b) The Contractor shall provide a listing of all subcontractors to be used in the performance of the contract, and detailed subcontractor information to the County with each request for payment submitted to the County or as otherwise directed by the County. The CCD and the User Agency shall monitor subcontractor participation during the course of the contract. The County shall have full and timely access to the Contractor's books and records, including, without limitation, payroll records, tax returns and records and books of account, to determine the Contractor's compliance with its commitment to MBE and WBE participation and the status of any ~~MBE or WBE~~PCE performing any portion of the contract. This provision shall be in addition to, and not a substitute for, any other provision allowing inspection of the Contractor's records by any officer or official of the County for any purpose.

(c) The Contractor cannot make changes to the Utilization Plan or substitute ~~MBEs or WBEs~~PCEs named in the Utilization Plan without the prior written approval of the CCD, in consultation with the CPO and the User Agency. Unauthorized changes or substitutions shall be a violation of this subdivision and a breach of contract, and may constitute grounds for rejection of the bid or proposal or cause termination of the executed contract for breach, the withholding of payment and/or subject the Contractor to contract penalties or other sanctions. Upon such written approval by the CCD, the revised Utilization Plan shall be incorporated into the Contract as an amendment by the CPO. The CCD shall

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promulgate policies and procedures with respect to changes to a Utilization Plan.

(1) All requests for changes or substitutions of a~~n~~ ~~MBE~~ ~~or~~ ~~WBE~~PCE Subcontractor(s) named in the Utilization Plan shall be made to the CCD, CPO and the User Agency in writing, and shall clearly and fully set forth the basis for the request. A Contractor shall not substitute a~~n~~ ~~MBE~~ ~~or~~ ~~WBE~~PCE subcontractor or perform the work designated for a~~n~~ ~~MBE~~ ~~or~~ ~~WBE~~PCE subcontractor with its own forces unless and until the CCD, in consultation with the CPO and the User Agency, approves such substitution in writing. A Contractor shall not allow a substituted subcontractor to begin work until the CCD, CPO and the User Agency have approved the substitution.

(2) The facts supporting the request must not have been known nor reasonably should have been known by either party before the submission of the Utilization Plan. Bid shopping is prohibited. The Contractor must negotiate with the ~~MBE~~ ~~or~~ ~~WBE~~PCE subcontractor to resolve the problem. Where there has been a mistake or disagreement about the scope of work, the ~~MBE~~ ~~or~~ ~~WBE~~PCE can be substituted only where an agreement cannot be reached for a reasonable price for the correct scope of work.

(3) Substitutions of the subcontractor shall be permitted only on the following bases:

(i) Unavailability after receipt of reasonable notice to proceed.

(ii) Failure of performance.

(iii) Financial incapacity.

(iv) Refusal by the subcontractor to honor the bid or proposal price.

(v) Mistake of fact or law about the elements of the scope of work of a solicitation where agreement upon a reasonable price cannot be reached.

(vi) Failure of the subcontractor to meet insurance, licensing or bonding requirements; or

(vii) The subcontractor's withdrawal of its bid or proposal.

(4) The final decision whether to permit or deny the proposed substitution, and the basis of any denial, shall be communicated to the parties in writing by the CCD.

(5) Where the Contractor has established the basis for the substitution to the satisfaction of the County, the Contractor shall make Good Faith Efforts to fulfill the Utilization Plan. The Contractor may seek the assistance of the Office of Contract Compliance in obtaining a new ~~MBE~~ ~~or~~ ~~WBE~~PCE. If the Project Specific Goal(s) cannot be reached and Good Faith Efforts have been made, the Contractor may substitute with a non-Certified Firm.

(6) If the County requires the substitution of a~~n~~ ~~MBE~~ ~~or~~ ~~WBE~~PCE subcontractor listed in the Utilization Plan, the Contractor shall undertake Good Faith Efforts to fulfill the Utilization Plan. The Contractor may seek the assistance of the Office of Contract Compliance in obtaining a new ~~MBE~~ ~~or~~ ~~WBE~~PCE subcontractor. If the Goal (s) cannot be reached and Good Faith Efforts have been made, the Contractor may substitute with a non-Certified Firm.

(d) If a Contractor plans to hire a subcontractor on any scope of work that was not previously disclosed in the Utilization Plan, the Contractor shall obtain the approval of the CCD to modify the Utilization Plan and must make Good Faith Efforts to ensure that ~~MBEs and WBEs~~PCEs have a fair opportunity to bid on the new scope of work.

(e) Changes to the scopes of work shall be documented by the User Agency at the time they arise to establish the reasons for the change and the effect on achievement of the ~~MBE or WBE~~PCE goal.

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(f) Prior to contract closeout, the CCD shall evaluate the Contractor's fulfillment of the contracted goals, taking into account all approved substitutions, terminations and changes to the contract's scope of work. If the County determines that Good Faith Efforts to meet the ~~MBE or WBE~~PCE commitments were not made, or that fraudulent misrepresentations have been made, or any other breach of the contract or violation of this subdivision, a remedy or sanction may be imposed, as provided in the contract.

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Sec. 34-300.1. - Established business participation in the Program.

(a) An Established Business may participate in the Program, as follows:

(1) For a one-year period after the business has become an established business, only 75 percent of such business's participation in a County contract shall account for the MBE or WBE, as applicable, aspirational and project specific goals;

(2) For a one-year period starting on the one- year anniversary of the date the business became an established business, only 50 percent of such business's participation in a County contract shall account for the MBE or WBE, as applicable, aspirational and project specific goals; and,

(3) For a one-year period starting on the two- year anniversary of the date the business became an established business, only 25 percent of such business's participation in a County contract shall account for the MBE or WBE, as applicable, aspirational and project specific goals.

(b)An Established Business shall not be eligible to participate in the Program starting on the three-year anniversary of the date the business became an established business.

(c)The CCD shall provide notice to participating Established Businesses of the allowed level of participation by such businesses in the Program.

Sec. 34-300.2. - Program review and sunset.

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Effective date: This ordinance shall be in effect 90 days from passage and approval

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