

County Council of Cuyahoga County, Ohio

Ordinance No. O2016-0005

| | |
|---|---|
| Sponsored by: County Executive Budish/Office of Procurement and Diversity and Councilmembers Brady, Brown, Conwell, Hairston, Jones and Miller | An Ordinance enacting Sections 503.02 to 503.07 of the Cuyahoga County Code to expand the Small Business Enterprise Program, and declaring the necessity that this Ordinance become immediately effective. |
|---|---|

WHEREAS, Article VII, Section 701 of the Cuyahoga County Charter mandates that the County “shall develop and implement policies, programs and activities for the expansion and enhancement of economic activity in the County so as to create and preserve jobs and employment opportunities for and available to residents of the County”; and

WHEREAS, it is necessary that this Ordinance become immediately effective in order that critical services provided by the County can continue; and

NOW, THEREFORE, BE IT ENACTED BY THE COUNTY COUNCIL OF CUYAHOGA COUNTY, OHIO:

SECTION 1. Section 503.02 of the Cuyahoga County Code is hereby enacted to read as follows:

Section 503.02

The Small Business Enterprise Program is hereby expanded to allow the Cuyahoga County Office of Procurement and Diversity (“OPD”) to set aspirational Minority Business Enterprise and /or Women Business Enterprise subcontractor participation goals for every Request for Bid, Request for Proposal, and Request for Qualifications issue by the County based upon available information including, but not limited to, the disparity study.

“Minority Business Enterprise” or “MBE” means an individual, domestic corporation, sole proprietorship, partnership, joint venture, entity or company that is at least 51% owned by one or more individuals who are African American, Hispanic American, Native American, Asian-Pacific American or Asian-Indian American; and whose management and daily business operations are controlled by one or more of these owners as determined by OPD.

“Women Business Enterprise” or “WBE” means an individual, domestic corporation, sole proprietorship, partnership, joint venture, entity or company that is at least 51% owned by one or more women and whose management and daily business operations are controlled by one or more of these owners as determined by OPD.

Section 503.03

In consideration of the right and privilege to submit a bid or proposal on construction projects and other contracts with Cuyahoga County, at the time of submitting a proposal or bid, each participant shall be required to present appropriate documentation. The documents described below must be completed and signed by each Participant before a proposal or bid can be considered responsive:

- (1) Covenant of Non-Discrimination: Each Participant must submit a duly executed and attested Covenant of Non-Discrimination (MBE/WBE-1) on a form prescribed by OPD. This written instrument shall contain promises, declarations and/or affirmations made by the Participant. The completed document must contain an original signature and date of signature.
- (2) MBE/WBE Subcontractor Participation Plan: Each Participant must submit a duly executed, affirmed, and certified Subcontractor Participation Plan (MBE/WBE-2) on a form prescribed by OPD for each MBE/WBE subcontractor proposed. Copies and/or facsimiles of MBE/WBE-2 submitted with bids/proposals are acceptable BUT all required signatures must be dated as indicated. Also, please note the following:
 - (a) Certified MBE/WBEs who are bidding as prime contractors **MUST** complete and submit the top portion of Form MBE/WBE-2 to guarantee MBE/WBE credit.
 - (b) MBE/WBEs with multiple geographical locations shall enter the Cuyahoga County address and contact information on Form MBE/WBE-2.
 - (c) Prime vendors are **PROHIBITED** from using MBE/WBE(s) with whom the prime vendor has a familial relationship, joint or co-ownership, common partners, officers, or a shareholder relationship to meet the MBE/WBE Participation Goal. Hence, on Cuyahoga County projects/contracts, any portion of work subcontracted to a MBE/WBE vendor by a prime vendor that meets the above-mentioned criteria will **NOT** count towards the achievement of the established MBE/WBE Participation Goal.

Use of 2nd Tier Subcontractors: In the event that a subcontractor portions out work and utilizes the services of a sub-subcontractor or vendor, the prime contractor shall be required to report this use to OPD. For reporting purposes, the prime

contractor shall report statistical data for the sub-subcontractor or sub-vendor, including race, gender, business size, area of specialization, dollar value, description of services or products purchased, and contact information. No MBE/WBE subcontractor will be permitted to subcontract more than 25% of their subcontract work (based on dollar value) without prior approval by OPD.

Other Information and Data: OPD may request additional information and data prior to a contract award. This information may include, but is not limited to, information regarding business ownership of all subcontractors to be utilized on the project, all of which shall reflect the race, gender, location, size, and area of specialization and structure of the identified businesses.

Aggressive “Good Faith Efforts” to include MBE/WBEs in the procurement process are required of all Participants. These Good Faith Efforts should be in addition to the Participant’s regular and customary solicitation process of contact with potential subcontractors and/or vendors.

Written Notice to MBE/WBEs: To demonstrate good faith efforts, a Participant shall deliver written or electronic notice to potential, MBE/WBEs. MBE/WBEs should be contacted not less than one (1) week before the bid or proposal due date. Names, addresses, and telephone numbers for available MBE/WBEs may be obtained by contacting OPD or reviewing the database on the website at <http://opd.cuyahogacounty.us/>.

The written or electronic notice sent to potential subcontractors or vendors shall contain the following:

- (1) Sufficient information about the plans, specifications, and relevant terms and conditions of the solicitation. This should include information about the work which will be subcontracted or the goods which will be obtained from subcontractors and suppliers;
- (2) A contact person knowledgeable of the project scope documents, within the Participant’s office, to answer questions about the conditions of the contract;
- (3) Information as to the Participant’s bonding requirements; and
- (4) The deadline for price quotations.

Evaluation of Good Faith Efforts: In evaluating good faith efforts, OPD will determine whether the Participant has made reasonable good faith efforts to obtain MBE/WBE participation as part of its bid or proposal. OPD may evaluate not only the different kinds of efforts made by a Participant, but also the quantity and intensity of those efforts. One method of evaluation will be whether the MBE/WBE goal has been met. Prime Contractors and any Participant herein shall be required to affirm and certify that information is correct in their

bid/proposal and that they will meet or exceed the MBE/WBE Subcontractor Plan submitted with their bid/proposal. Prime Contractors also shall be required to report statistical data for its employees and proposed subcontractors that include race, gender, business size, area of specialization, dollar value, description of services or products purchased and contact information. Such information shall be certified and affirmed by the Prime Contractor when it submits the bid/proposal.

OPD will consider a completed Good Faith Effort Certification (MBE/WBE-3) as evidence of a Participant's good faith in trying to obtain MBE/WBE participation in a bid or proposal.

Required Documentation: To demonstrate good faith efforts, Participants shall keep detailed records of all correspondence and responses thereto, logs of all telephone calls made and received regarding the project or contract, confirmation receipts for fax transmissions, receipts from registered or certified mail, copies of advertisements in publications and other media, and other relevant papers required by this Program.

Good Faith Effort Certification: Participant must submit a completed Good Faith Certification (MBE/WBE-3) ONLY if the MBE/WBE Participation Goal is not met. In the MBE/WBE-3 form, Participant must certify that it interviewed and seriously considered MBE/WBEs and provide supporting documentation of that fact. Additional documentation demonstrating a good faith effort must accompany this document. The completed document must contain an original signature, notarizations, and date of signature.

Award of Contract: Proposals/ bids may be rejected and projects re-submitted for the sole purpose of attaining goals where inadequate "good faith effort" has been demonstrated. Cuyahoga County reserves the right to determine the action to be taken on the contract if a goal is not met, including rejecting any or all bids or proposals. If an awarded contract is later amended for additional dollars, MBE/WBE subcontractor participation should still reflect the percentage of dollars originally contracted for.

When evaluating a bid to determine the lowest and best bid, the County may consider, in addition to all of the other factors, whether a bid is MBE/WBE compliant; provided, however, that such MBE/WBE compliance shall not be considered if the difference between the MBE/WBE-compliant bid and the lowest responsive bid is more than the price preference specified below.

| Lowest Bid Received Range (\$) | Price Preference (%) & Limit | Price Preference (\$) |
|--------------------------------|--------------------------------|-----------------------|
| 0 – 500,000 | 10% | 0 – 50,000 |
| 500,001 – 1,000,000 | 10% up to max \$80,000 (10-8) | 50,000 – 80,000 |
| 1,000,001 – 3,000,000 | 8% up to max \$210,000 (8-7) | 80,000 – 210,000 |
| 3,000,001 – 5,000,000 | 7% up to max \$250,000 (7-5) | 210,000 – 250,000 |
| >5,000,000 | \$250,000 maximum (≤ 5) | 250,000 maximum |

Section 503.04

All participants are subject to the Monitoring and Post-Award Reporting, Grievance Process, Sanctions and Penalties for Non-Compliance provisions of Cuyahoga County Code Section 503.01.

Section 503.05

Exclusions: This policy shall not apply to the following:

- (1) “Sole Source” procurements under the Cuyahoga County ordinances which by their very nature limit the source of supply to one vendor.
- (2) County purchases from political subdivisions/government entities;
- (3) County purchases off state contracts, off federal contracts, and from joint purchasing programs.
- (4) The acquisition of any interest in real property including lease holdings.
- (5) Direct and indirect employee payments including payroll expenditures, pensions and unemployment compensation and other employee-related expenditures;
- (6) Any other categories and subcategories of goods and services Cuyahoga County may from time to time establish as excluded contracts upon recommendation of the Director of the Office of Procurement & Diversity and approval by the Cuyahoga County Executive and Cuyahoga County Council.

Application for Waiver. If the Contractor, consultant, supplier or vendor does not meet the project goal, the bidder or offer or may seek a partial or total waiver of the project goal. The application for waiver of all or part of the project goal shall include full documentary evidence of the Participant’s good faith efforts to meet the project goal and why the request for waiver should be granted. The application shall be notarized and submitted as a part of the bid or offer. Additional explanation, affidavits, exhibits or other materials may be required by the MBE/WBE Program to substantiate good faith efforts. Waivers may also be granted by OPD for an acceptable explanation as to why the goals should be waived.

Waiver for Detriment to Public Health, Safety or Financial Welfare. The MBE/WBE goal may be waived if the same causes a detriment to public health, safety or the

financial welfare of the County. The MBE/WBE may also be waived by OPD in the event available MBE/WBEs provide price quotes which are unreasonably high in that they exceed competitive levels beyond amounts which can be attributed to cost, overhead and profit.

Section 503.06

OPD may prepare and/or amend forms to carry out the actions described herein. The forms shall be similar or the same as those that other governments, like the State and City of Cleveland, already have in place in an effort to make it simple and easy and encourage greater participation.

Section 503.07

The Director of the Cuyahoga County Office of Procurement and Diversity or designee reserves the right and discretion to reject any bid or proposal for any reason or all bids or proposals for no reason at all without incurring any liability.

SECTION 2. It is necessary that this Ordinance become immediately effective for the usual daily operation of the County; the preservation of public peace, health, or safety in the County; and any additional reasons set forth in the preamble. Provided that this Ordinance receives the affirmative vote of at least eight members of Council, it shall take effect and be in force immediately upon the earliest occurrence of any of the following: (1) its approval by the County Executive through signature, (2) the expiration of the time during which it may be disapproved by the County Executive under Section 3.10(6) of the Cuyahoga County Charter, or (3) its passage by at least eight members of Council after disapproval pursuant to Section 3.10(7) of the Cuyahoga County Charter. Otherwise, it shall take effect and be in force from and after the earliest period allowed by law.

SECTION 3. It is found and determined that all formal actions of this Council relating to the adoption of this Ordinance were adopted in an open meeting of the Council, and that all deliberations of this Council and of any of its committees that resulted in such formal action were in meetings open to the public, in compliance with all legal requirements, including Section 121.22 of the Ohio Revised Code.

On a motion by Mr. Germana, seconded by Mr. Jones, the foregoing Ordinance was duly enacted.

Yeas: Brown, Hairston, Simon, Greenspan, Miller, Germana, Gallagher, Schron, Conwell, Jones and Brady

Nays: None

County Council President

Date

County Executive

Date

Clerk of Council

Date

First Reading/Referred to Committee: February 9, 2016

Committee(s) Assigned: Public Works, Procurement & Contracting

Committee Report/Second Reading: April 12, 2016

Journal CC022

April 26, 2016