

CLIENT ALERT

January 24, 2019

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CONSTRUCTION AND GOVERNMENT PROCUREMENT

WHAT YOU NEED TO KNOW ABOUT NASHVILLE'S EQUAL BUSINESS OPPORTUNITY PROGRAM

by Rob Dodson

On January 4, 2019, Mayor David Briley approved the enactment of the Metropolitan Government of Nashville and Davidson County Equal Business Opportunity Program (the "Program"). The stated objectives of the program are,

1. to promote and encourage full and open competition in procurement and purchasing;
2. to encourage Metro personnel to utilize appropriate purchasing procedures;
3. to prevent Metro from becoming a passive participant in unlawful discrimination;
4. to spur economic development; and
5. to rectify and active or passive participation in unlawful discrimination.

The following is a summary of significant aspects of the Program. The complete ordinance can be reviewed [here](#).

Administration

The program will be administered by the Office of Minority and Women Business Assistance ("Business Assistance Office" or "BAO").

Scope of the Program

The Program identifies four categories of procurement to which it applies. In essence, the categories encompass virtually all purchasing by Metro. Specifically included are construction, architectural services and engineering services.

BAO's Authority

- Duties. The Program identifies thirteen categories of "duties" of the BAO in administering the Program. The most significant of those duties are,
 1. Preparing Rules and Regulations for the Program;
 2. Verifying certification of MWBEs;
 3. Maintaining a database of certified and available MWBEs;
 4. Monitoring utilization of MWBE participation on projects; and
 5. Investigating Complaints regarding compliance with the Program.
- Monitoring Compliance. The BAO is authorized to monitor the compliance of all Participants. The BAO can collect data from Participants including regarding race, ethnic origin, gender and business location of the following:

1. Business ownership;
2. Supplier information; and
3. Subcontractor information.

- Closeout Activity Reports. All prime contractors and prime consultants are required to provide the BAO with closeout activity reports identifying activities of all subcontractors and sub-consultants.
- Investigation of Discriminatory Practices. The BAO is authorized to investigate complaints by bidders or participants, or it may investigate on its own initiative based solely on its finding of a significant statistical disparity from the *Annual Aspirational Goal*¹ or contract/project goal.
- Evaluation of Compliance. The BAO shall review all bids prior to award for compliance with the Program. A notice of award cannot be issued until the BAO has completed its review.

Bid Requirements

To be considered a responsive bid, the following information must be included:

- Executed Covenant of Non-Discrimination.
- Statement of MWBE Utilization (Statement of Subcontractors). The statement must identify each successful subcontractor's name, UNSPSC Code, race, gender, national origin, business location, work to be performed, dollar value of the project, and percentage attributable to each subcontractor. Additionally, copies of each subcontractors' price quotes must be submitted within 2 days of the submission of the Bid.
- Statement of Interested Subcontractors/Vendors. This statement must provide information regarding each individual who requested information regarding the project or from whom a proposal was solicited. This list must include individuals who did not actually submit a price quote or proposal. The information to be submitted for each identified individual includes, name, UNSPSC Code, race, gender, national origin, business location, and information requested by the individual.
- Statement of Bid Proposals/Price Quotations. The statement must include each individual who submitted a bid or proposal that was not selected for the project. For each individual, the Statement must provide name, UNSPSC Code, race, gender, national origin, business location, work requested to be performed, and price quotation or bid.

Post-Bid Requirements

- Letter of Intent to Perform. Within two business days of a notice of award of a contract by the Purchasing agent, a letter of intent to

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perform, executed by the bidder and each subcontractor or joint venture, must be submitted to the BAO.

- Additional Information Requests from BAO. Prior to the award of a contract, the BAO may request additional information from a bidder. This information may include business ownership of all subcontractors to be utilized on the project reflecting race, gender, ethnic origins, location, and structure of the identified businesses. A bid can be declared non-responsive for failure to provide the information requested.
- Reporting Subcontractor Replacement. All substitutions or replacements of subcontractors must be reported to the BAO prior to the actual replacement. Information required for bidding purposes regarding the replacement subcontractor must be provided to the BAO.

Evaluation of Bids for Compliance

- If the first-ranked bidder fails to meet a project or contract goal, the Purchasing Agent is required to forward the bid to the BAO for evaluation of compliance with the Program. The BAO will evaluate whether the first-ranked bidder has engaged in and adequately documented with its bid, efforts to ensure that its process of awarding subcontracts, etc. meets the criteria of the Program. The BAO shall also evaluate the bidder's "Good Faith Efforts" to comply.
- Good Faith Efforts. In addition to its regular solicitation processes for subcontractors, bidders are required to:
 1. Make efforts to include MWBEs in the procurement process;
 2. Ensure that prospective subcontractors, vendors, etc. are not denied opportunity based on race, gender or ethnicity;
 3. Afford all firms opportunities to participate to the extent of their availability, capacity and willingness to compete;
 4. Demonstrate compliance with the good faith requirements in documentation submitted with their bid;
 5. Maintain for 3 years after completion of the contract, detailed records of all correspondence, logs of all telephone calls made/received regarding Metro solicitations, copies of advertisements, and other relevant papers required by the Program; and
 6. Cooperate with any request or investigation by the BAO in its consideration of the bid.
- Demonstrating Good Faith Efforts. Good faith efforts may be demonstrated by:
 1. Provide a statement to BAO that the bidder delivered written notice to at least three (3) MWBEs if BAO can provide at least three MWBEs for the applicable category;
 2. Deliver written notice to all individuals requesting information on the solicitation;
 3. Attending informational meeting to update potential

- subcontractors, vendors, etc. of opportunities;
4. Dividing the contract into small, economically feasible segments that could be performed by a MWBE, but not solely for the purpose of utilizing MWBEs where such segmentation is not in accordance with common and accepted industry practices;
5. Provide written explanation for rejection of any potential subcontractor, vendor, etc.;
6. Providing a non-discriminatory worksite;
7. Soliciting specific MWBEs;
8. Contacting programs and trade associations known to publicize contracting opportunities;
9. Advertising in trade publication of general circulation in the Program Area;
10. Following up on initial solicitations;
11. Thoroughly investigating, in good faith, the capabilities of potential subcontractors;
12. Providing reasonable assistance to MWBEs in need of equipment, supplies, bonding, letters of credit and/or insurance; and
13. Providing reasonable technical assistance to MWBEs to ameliorate any deficiencies of technical knowledge or advance skill.

Penalties for Non-Compliance

The BAO is authorized to recommend appropriate mechanisms to enforce the Program including withholding of progress payments. The appropriate sanction shall depend on a number of factors including whether the violation was intentional, the number of incidents, prior suspension for non-compliance, refusal to cooperate with investigation, misrepresentations made, and efforts to cure non-compliance.

Effective Date

The Program applies to procurements commenced after **July 19, 2019**.

The Annual Aspirational Goal is a non-mandatory percentage of overall annual participation by MWBEs. This Goal is not to be applied to individual contracts. However, the BAO is authorized to set percentage goals on a project-by-project or contract-by-contract basis.

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FOR MORE INFORMATION CONTACT:



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