

IMPORTANT NOTICE: THESE PROPOSED REGULATIONS FOR THE EQUAL BUSINESS OPPORTUNITY PROGRAM ARE SUBJECT TO FURTHER REVIEW BY METRO LEGAL FOR COMPLIANCE WITH THE METRO CODE.

CHAPTER 4.46 – EQUAL BUSINESS OPPORTUNITY PROGRAM

R4.46.030 Duties of the Business Assistance Office (BAO) in administering the Equal Business Opportunity (“EBO”) Program

R4.46.030.01 Duties of the Business Assistance Office. In administering the EBO program, the BAO shall have the following authority and duties for the encouragement of non-discrimination in Metropolitan Government contracting/procurement:

- A. Establishment of written procedures, informal guidelines, and forms as may be necessary to effectuate the EBO program.
- B. Monitoring compliance with the requirements of the EBO at all points in the process.
- C. Certification of businesses as MBEs or WBEs, in accordance with the applicable provisions of the EBO program.
- D. Development and maintenance of public databases of certified MBEs and WBEs.
- E. Attendance at pre-bid, pre-proposal, pre-construction, and pre-work conferences.
- F. Provide to business entities of all forms, applications, documents, and papers necessary to participate in and comply with the EBO program.
- G. Provide information to potential bidders including names and contact information of certified MWBEs for each eligible project, to reinforce and support outreach efforts by potential bidders.
- H. Notification by certified mail to an applicant who has been denied certification as an MWBE.
- I. Notification to the Purchasing Agent of any determination of non-compliance regarding the requirements of the EBO program.
- J. Monitoring, for data gathering and informational purposes, utilization of MWBEs on eligible projects.
- K. Maintaining documents, forms, records, or data regarding the EBO program including: (a) documents, forms, records, or data regarding the dollar amounts subcontracted to or expended for services performed by subcontractors and suppliers on eligible projects, including the race and gender ownership of each subcontractor and supplier; and (b) documents, forms, records, or data regarding certified MWBEs.
- L. Development and implementation of outreach and assistance programs to promote equal contracting opportunities for all businesses that wish to do business with the Metropolitan Government.
- M. Monitoring compliance with requirements for mentor-protégé or joint venture arrangements, as applicable.
- N. Investigation of alleged violations of the EBO program or any aspect thereof.

- O. Recommendation of whether any of the penalties set forth in Metro Code Section 4.46.100 should be applied to a participant.

R4.46.030.02 Additional Duties of the Business Assistance Office. The BAO is also tasked with assisting contractors and subcontractors in implementing the EBO program. As a standard procedure, such assistance includes:

- A. Recommending the establishment and communication of aspirational and/or contract goals in the relevant Metropolitan Government solicitations;
- B. Facilitating and attending pre-proposal/bid conferences to explain the EBO program and the programmatic elements applicable to the particular bid or contract;
- C. Identifying MWBEs in BAO databases and providing or producing a list of available MWBEs upon request;
- D. Remaining available to assist bidders in developing their MWBE plans;
- E. Monitoring MWBE participation levels on projects throughout the duration of a contract;
- F. Reporting annually to the Metropolitan Government and the public, based on available data, the progress made by Metropolitan Government toward satisfying the EBO program purposes and policy objectives;
- G. Receiving and analyzing external and internal information, including statistical data regarding the barriers encountered by MWBE firms in attempting to obtain contract opportunities at the Metropolitan Government, and the relative effectiveness of various program elements in addressing those barriers;
- H. Monitoring and supporting the implementation of the EBO program and proposing modifications to appropriate Metropolitan Government officials as necessary to fully achieve the purpose and objectives of the program;
- I. Providing public education internally and externally regarding the purposes and objectives of the EBO program;
- J. To the extent permitted by the Metropolitan Code, collaborating with partners such as financing institutions, educational institutions, local chambers, government agencies, and trade organizations in Mentor-Protégé programs, Joint Venture projects, one-on-one business assessment and coaching services, and any innovative and creative program or project(s) to increase MWBE capacity in areas where there are limited numbers of MWBE firms available to do the work in both Prime and Subcontracting categories;
- K. Increasing and facilitating business networking opportunities for MWBE firms, and providing seminars and technical assistance to MWBE firms to enhance their ability to effectively compete for contracts;
- L. Investigating alleged violations of EBO program and providing written recommendations to appropriate authorities regarding remedial action and sanctions and penalties when necessary.

R4.46.030.03 Outreach and Forecasting. Metropolitan Government considers information dissemination and communication with MWBEs as an integral part of the EBO program.

The BAO shall act as a resource for information on MWBEs. The BAO accordingly may undertake to foster among MWBEs a better understanding about business opportunities with

the Metropolitan Government and provide information on taking advantage of the EBO program, and is authorized to provide the following assistance:

- A. Disseminate at community events, trade shows, and other appropriate business functions, and publish at regular intervals, in print and in electronic media (including publications or electronic media targeted to MWBEs and small businesses) information describing the EBO program and the functions of the BAO. In addition, the BAO may disseminate information in print and/or electronic form, may provide individualized counseling, and/or may conduct seminars regarding the certification process.
- B. Establish a procedure to engage in continuous recruitment and outreach efforts directed at business assistance organizations to increase the pool of businesses available to do business with the Metropolitan Government. The BAO may identify suppliers through business development organizations and participation at various trade shows, supplier diversity groups and work with various national and local supplier development counsels and organizations.
- C. Disseminate at community events, trade shows, and other appropriate business functions, and publish at regular intervals, in print or in electronic media information identifying ongoing contracting opportunities with the Metropolitan Government and providing contact information by which businesses may obtain additional information from the BAO. BAO may provide this information in languages other than English, where appropriate. To the extent feasible, the BAO may share data regarding issued solicitations, and subcontracting opportunities on projects, with other businesses and agencies or jurisdictions in the Program Area.
- D. Assist businesses seeking to participate in the Metro procurement process by disseminating information in print or electronic form, by providing technical assistance as appropriate, and/or by conducting seminars regarding the process for complying with the Equal Businesses Opportunity Program. The BAO may sponsor "How to do business with the Metropolitan Government" seminars and invite a wide array of businesses.
- E. Actively encourage businesses to attend the pre-bid conferences.
- F. Create workshops for businesses located within the Program Area on how to compete in the private sector, including advice on marketing, soliciting, and preparing a bid. BAO may establish a program which will incorporate business and entrepreneurial training and assistance mentoring, matchmaking, individual consulting and regular training workshops and seminars. To accomplish the same, BAO may reach out to and collaborate with regional higher educational institutions.
- G. Develop communications and other written materials that are meant to encourage and provide information to contractors to increase their utilization of subcontractors. In addition, BAO may sponsor networking events that allow businesses to meet each other and that create an opportunity for contractors to discuss with subcontractors upcoming needs.
- H. May develop a resource directory to be provided to interested businesses, with information regarding assistance in bonding and financing, financial management, accounting, construction management and technical assistance.
- I. Develop and update its website to provide general information on doing business with the Metropolitan Government, on the bid process, on how to get certified, to provide a calendar of events, bid lists, bid status reports, to post solicitation notices, contract awards, and to provide downloadable forms and other appropriate information.

- J.** Develop and implement such other and further outreach activities and programs as the Purchasing Agent may from time to time recommend.

R4.46.050 MWBE Certification Processes

R4.46.050.01 Application for certification. MWBEs who wish to be recognized as certified by the BAO must submit a written certification application on a form approved and provided by the office of contract compliance. In lieu of this action, the BAO may also accept certificates from other certifying entities consistent with Metro Code 4.46.050(B).

R4.46.050.02 Certification Standards. The BAO shall determine the eligibility of MWBEs to be certified according to the following standards:

- A. The owner of an MWBE must be an African American, Asian American, Hispanic American, Native American or female as defined in Metro Code 4.46.020.
- B. The business enterprise seeking certification must be a for-profit entity that is independent and continuing.
- C. The MWBE owner(s) listed on the certification application must "own" and "control" the business, as those terms are defined in Metro Code 4.46.020;
- D. The MWBE must be able to demonstrate that it is or will be performing a commercially useful function; and
- E. The MWBE must be located in the Metropolitan Nashville Statistical Area.

R.46.050.03 Certification Denial. The BAO will review and evaluate applications or certificates, and may reject an application based on one or more of the following:

- A. The applicant does not meet the requirements for certification as an MWBE as set forth herein.
- B. The application is not satisfactorily completed within a reasonable period of time, as determined by the office.
- C. The application contains false information.
- D. The applicant does not promptly provide required information in connection with the certification review conducted by the BAO.

R46.050.04 Certification Investigation. The BAO shall investigate as appropriate, including on-site investigation if necessary, African American, Asian American, Hispanic American, Native American, and female business ownership arrangements beyond formal documents submitted by such businesses if:

- A. The business is applying for certification with the Metropolitan Nashville Government for the first time;
- B. The business is newly-formed or the business has African American, Asian American, Hispanic American, and/or female ownership of less than 100 percent;
- C. A business which is not an MWBE has an ownership interest in such entity;
- D. The ownership of the business has changed since documents have been submitted to the office of contract compliance;
- E. A review of the documents submitted with the application otherwise raises concerns regarding either ownership or control of the business; and/or
- F. The BAO director deems it appropriate under the circumstances.

R46.050.05 Decertification. The BAO may decertify a business that it finds is not or is no longer a bona fide MWBE. Businesses decertified for reasons other than by voluntary request may not apply for recertification for such time as may be specified, up to one year. A business that is decertified may request that the BAO reconsider the decertification determination. Any of the following reasons, which are not intended to be all-inclusive, are sufficient grounds for decertification:

- A. The business has changed to the extent that it no longer satisfies the ownership, control, and/or other requirements set forth herein;
- B. The business fails to submit within a reasonable time information requested by the BAO;
- C. The business ceases to be a viable enterprise for profit because of involuntary bankruptcy, dissolution or other cessation of commerce.
- D. Information or evidence that was not available to the BAO at the time the firm was certified is now available, and said information, if known at the time of certification review would have resulted in a denial of certification.
- E. Information was concealed or misrepresented by the firm in connection with the certification application or review conducted by the office of contract compliance.
- F. A change in the certification standard or requirements of the city has occurred since the certification of the firm.

R46.050.06 Continuing Duty. Certified MWBEs shall be under a continuing duty to inform the BAO in writing of any changes in the business if, as a result of such changes, the business no longer satisfies the requirements of subsection R46.050.02.

R4.46.060 Goals and Goal-Setting

R4.46.060.01 Annual Aspirational Goals For each five-year period following a Disparity Study, the Procurement Standards Board shall establish a non-mandatory annual aspirational percentage goal for overall MWBE Prime and Subcontract participation based on the MWBE availability by industry in accordance with the most recent Disparity Study findings, along with such data to be collected by the BAO reporting on the utilization of MWBE firms.

Annual Aspirational Goals are not to be routinely applied to individual contracts, but are intended to serve as a benchmark against which to measure the overall effectiveness of the MWBE aspects of the EBO program on an annual basis, and to gauge the need for future adjustments to the mix and aggressiveness of remedies and program elements being applied pursuant to the EBO program.

R4.46.060.02 Use of a Contract Forecasting Plan as part of the Metropolitan Government's Annual Fiscal Year Budget Approval Process, the Chief Diversity Officer or its designee shall submit to the BAO the anticipated expenditures of each Department, and the BAO shall develop MWBE spending targets based upon MWBE availability in the relevant market to perform the work on anticipated projects. The forecasting plan and spending targets shall be public records. The BAO may publicize this report on the Procurement Division website and provide notification of the report to any and all contractors, consultants, and vendors as requested. The BAO, however, shall email a copy of the plan and report to all MWBE firms who are certified

with the Metropolitan Government as of the close of the previous fiscal year so that they will be aware of upcoming opportunities to contract with the Metropolitan Government.

R4.46.060.03 The Goal Setting Committee. The Goal Setting Committee (GSC) shall be established on a project-by-project basis and shall consist of the head of the originating department or designee, the BAO Director, and the Purchasing Agent. Consideration by the Goal Setting Committee and Approval of the Purchasing Agent must be obtained prior to the inclusion of project-by-project goals in any solicitation. In establishing Project Goals, the GSC shall review in advance proposed contract bid specifications to ensure that they are not unnecessarily restrictive and do not adversely affect the ability of MWBE firms to competitively bid without adequate business justification;

R4.46.060.04 Project Goals. All subcontracting goals authorized under the EBO program are intended to be established by the Goal Setting Committee, approved by the Purchasing Agent, and implemented only on a contract-by-contract basis. It is intended that such goal-setting will be based upon careful analysis of the availability of Commercially Useful subcontracting opportunities within a given contract and the relative availability of MWBE firms to perform required tasks on such subcontract opportunities. Such contract-by-contract goal-setting shall be based upon reasonably reliable Subcontractor availability data. Compliance with contract-specific subcontracting goals shall also require compliance with Good Faith Efforts procedures as established herein.

R4.46.060.04.1 Project Goal Setting Methodology. The Goal Setting Methodology employed shall be approved by the Procurement Standards Board prior to the establishment of any project-by-project goals.

R.4.46.070 Bids and Non-Discrimination in Bidding

All bidders are required to make efforts to ensure that businesses are not discriminated against on the basis of their race, ethnicity or gender, and to demonstrate compliance with the EBO program requirements. Bidders are required to ensure that prospective subcontractors, vendors, suppliers and other potential participants are not denied opportunities to compete for work on a Metro contract on the basis of their race, ethnicity, or gender, and must afford all firms, including those owned by racial or ethnic minorities and women, opportunities to participate in the performance of the business of Metro to the extent of their availability, capacity and willingness to compete.

Bidders shall conduct their contracting and purchasing programs so as to prohibit any discrimination and to resolve all allegations of discrimination. Bidders shall include a clause in its subcontracts that require the subcontractor to adopt and distribute a written non-discrimination policy that is the same as that of the contractor. The BAO shall review and investigate allegations of discrimination which claim that prohibited forms of discrimination have occurred. Allegations of discrimination that are determined to have merit may be subject to penalties as provided in Metro Code 4.46.100.

R4.46.080 Determination of compliance with the EBO Program during bid process. No bidder shall be awarded a contract unless it is determined that the bidder has satisfied the non-discrimination requirements set forth in the EBO Program.

R4.46.080.01 EBO program compliance, monitoring, and audit. The BAO has the authority to conduct an audit of a bidder's work on eligible projects to confirm the bidder's compliance with the EBO Program.

R4.46.080.02 Good Faith Efforts Considerations

A. In addition to the Good Faith Efforts considerations set forth in Metro Code 4.46.080 (C) and (D), if the MWBE participation submitted by the bidder does not meet the established goal(s) for the contract bidders are required to provide documentation to the BAO, upon request, of the following, as applicable:

- i) Attendance at a pre-bid meeting, if any, scheduled by Metro to inform MWBEs of subcontracting opportunities under a given solicitation;
- ii) Advertisement in general circulation media, trade association publications, and other media in a timely manner;
- iii) Written notification to MWBEs that their interest in the contract is solicited;
- iv) Efforts made to select portions of the work proposed to be performed by MWBEs in order to increase the likelihood of achieving the stated goal;
- v) Good faith efforts to negotiate with MWBEs for specific subcontracts, including without limitation:
 1. The names, addresses, and telephone numbers of MWBEs that were contacted;
 2. A description of the information provided to MWBEs regarding the plans and specifications for portions of the work to be performed;
 3. A statement of why additional agreements with MWBEs were not reached;

B. Concerning each MWBE, the MWBE contacted but rejected as unqualified, and the reasons for the bidder's conclusion; and Efforts made to assist the MWBEs contacted that needed assistance in obtaining bonding or insurance required by the prime contractor or Metro.

R4.46.080.03 Establishment of Good Faith Efforts. In order for a contract to be awarded to a bidder or offeror that has failed to meet MWBE project goals, the BAO will determine whether the bidder actively and reasonably made efforts to meet the established goal(s) for the contract and make such recommendation to the Purchasing Agent.

R.4.46.100 Sanctions and Penalties for Non-Compliance with the EBO Program

The BAO shall recommend to the Purchasing Agent appropriate sanctions to be imposed on a participant for failure to comply with the EBO Program. The Purchasing Agent is authorized to impose sanctions for non-compliance with the EBO Program in accordance with Metro Code 4.46.100. A participant has the right to appeal sanctions imposed by the Purchasing Agent as provided in Metro Code 4.46.100.

The BAO may consider conditions including but not limited to the following regarding its recommendation to the Purchasing Agent regarding the imposition of penalties and sanctions:

- A. Knowing misrepresentation to the Metropolitan Government of the use which a majority-owned contractor intends to make of a minority and female business enterprise (MWBE) as a subcontractor, member of a mentor-protégé relationship, or a joint venture partner, in performing work under a contract with the Metropolitan Government.
- B. Material misrepresentation of the composition of the ownership of a business entity certified as an MWBE.
- C. Repeated failure to provide demonstration of post award utilization including but not limited to:
 - i. Repeated failure to promptly pay MBE and WBE subcontractors after receiving payment from Metro;
 - ii. Repeated failure to provide required MBE and WBE utilization reporting

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