

ORDINANCE NO. BL2008-161

An ordinance amending Title 4 of the Metropolitan Code to establish a procurement nondiscrimination program.

WHEREAS the Metropolitan Government of Nashville and Davidson County engaged Griffin & Strong, P.C., a law firm in Atlanta, Georgia, with expertise in conducting Disparity Studies and working with local governments in the implementation of programs to reduce unlawful discrimination based upon race, gender, or ethnicity, and

WHEREAS upon reviewing the results of the Disparity Study the Metropolitan Government has concluded that it has become a passive participant in unlawful discrimination against minorities and women in some of its procurements, and

WHEREAS the Metropolitan Government desires to remedy the underutilization of minorities and women that has resulted from its passive participation in discrimination in a way that is narrowly tailored to achieve the result in the specific categories identified, and

WHEREAS Griffin & Strong, P.C. has recommended a plan to achieve this result in a manner that in its opinion will comply with the requirements of the U. S. Constitution and federal statutes,

NOW, THEREFORE, BE IT ENACTED BY THE COUNCIL OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY:

Section 1. That Title 4 of the Metropolitan Code of Laws is hereby amended by adding the following new Chapter 4.46:

**Chapter 4.46. Procurement Nondiscrimination Program**

**4.46.001 Short Title.**

This program shall be known as the “Metropolitan Government of Nashville and Davidson County Procurement Nondiscrimination Program.”

**4.46.010 Policy and Objectives.**

- A. Policy Statement. It is the policy of the Metropolitan Government of Nashville and Davidson County to promote full and equal business opportunities for all persons doing business with the Metropolitan Government by increasing the purchase of goods and services from minority and women owned businesses within the area of the Metropolitan Government. It is further the policy of the Metropolitan Government that firms seeking to participate in contracting and procurement

activities with the Metropolitan Government are not prevented from doing so on the basis of the race or gender of their owners and that the Metropolitan Government not be a passive participant in any private scheme of discrimination.

- B. Promotion of Equal Opportunity. The Metropolitan Government strictly prohibits discrimination against businesses based on the race, color, national origin, or gender of their owners or employees in the conduct of any Metropolitan Government affairs. No person shall be denied the benefit of, or otherwise discriminated against, on the grounds of race, color, national origin or gender in connection with the award or performance of any contract paid for, in whole or in part, with funds of the Metropolitan Government.
- C. Program Objectives. The objective of the Procurement Nondiscrimination Program ("the Program") is to promote and encourage full and open competition in all Metropolitan Government procurement and purchasing; encourage all Metropolitan Government personnel involved in procurement and contracting activities to utilize appropriate purchasing procedures; to prevent the Metropolitan Government from becoming a passive participant in any unlawful discrimination; to spur economic development in the public and private sectors of the local economy; and, to rectify that participation in such unlawful discrimination.

#### **4.46.020 Definitions.**

For the purpose of this Chapter, the following words, terms, phrases and abbreviations shall have the following meanings:

*African American:* Means persons having origins in any black racial group of Africa. It includes people who indicate their race as "Black, African American, or Negro," or provide written entries such as African American, Afro American, Kenyan, Nigerian, or Haitian.

*African American Business Enterprise (AABE):* Means a business that is an independent and continuing enterprise for profit, performing a commercially useful function, and that is owned and controlled by one or more African Americans.

*Asian:* Means persons having origins in any of the original people of the Far East, Southeast Asia, the Indian subcontinent or the Pacific Islands.

*Asian Business Enterprise (ABE):* Means a business which is an independent and continuing enterprise for profit, performing a commercially useful function, and which is owned and controlled by one or more Asian individuals.

*Availability:* Means being "qualified" to perform work for the Metropolitan Government. This means that the Bidder does business within an industry group from which agencies of the Metropolitan Government make certain purchases; the firm's owner has demonstrated the belief that the firm is qualified and able to perform the work; the firm is located within the relevant geographical area such that it can do business with agencies

of the Metro Government; and the bidder has demonstrated an interest in obtaining work by filling out a vendor application, has bid, or is going through the certification process.

*Bid:* Means a quotation, proposal, sealed bid or offer to perform or provide labor, materials, supplies or services to the Metropolitan Government for a price.

*Bidder:* Means any individual, sole proprietorship, partnership, joint venture, or corporation that submits a Bid to the Metropolitan Government.

*Benchmarking:* Means the method enabling the Metropolitan Government to track the inclusion of MWBEs in the procurement process. Benchmarks are not quotas or goals, rather, they are percentage ranges based on MWBE availability, current MWBE participation, and previous MWBE participation in the Nashville Metropolitan Statistical Area ("MSA").

*Certification:* Means the qualifying process that assures buyers and local, state, and federal agencies that a particular business is an MWBE that performs a commercially useful function. Certification or Recertification shall mean official recognition and approval by the Metropolitan Government that a business meets the qualification criteria of an MWBE, as set forth in this Program. Certification or recertification relates to qualifications regarding ownership and control, not the quality of the service or product.

*Commercially Useful Function:* Means performance or provision of real and actual services by a Participant under a contract with the Metropolitan Government or under a subcontract with another business enterprise under a contract with the Metropolitan Government. In determining whether a business is performing a commercially useful function, the following non-exclusive factors will be considered:

- i) the nature and amount of work contracted;
- ii) whether the MWBE has the skill and expertise to perform work for which it has been certified;
- iii) whether the MWBE actually performs, manages and supervises the work;
- iv) whether the MWBE intends to purchase commodities and/or services from a non-MWBE and simply resell same to the general or prime contractor for the purpose of allowing those commodities and/or services to be counted towards assessment of a Benchmark or fulfillment of a goal (if implemented);
- v) standard industry practices relating to the use of subcontractors. Consistent with standard industry practices, a MWBE subcontractor may enter into second tier subcontracts provided that no more than twenty-five percent of the work thereunder will be performed by a non-MWBE unless the subcontractor demonstrates to the satisfaction of the Metropolitan Government that the subcontracting arrangement is consistent with standard industry practice.

*Compliance:* Means the condition existing when a Participant has met the requirements of this Program.

*Control or Controlled:* For the purpose of determining whether the owner or owners of a potential MWBE controls the potential MWBE, the Metropolitan Government shall consider all of the facts in the record viewed as a whole, including, without limitation the following:

- i) Whether the potential MWBE is an independent business, which means that its commercial viability does not depend on another firm or firms.
- ii) Whether the potential MWBE is subject to any formal or informal restrictions that limit the customary discretion of the MWBE owner. There can be no restrictions through corporate charter provisions, by-law provisions, contracts or any other formal or informal devices that prevent the owner of the potential MWBE from making any business decision without the cooperation of another individual. This paragraph does not preclude a spousal co-signature on documents.
- iii) Whether the owner of the potential MWBE possesses the power to direct or cause the direction of the management and policies of the business enterprise and to make the day-to-day as well as long term decisions on matters of management, policy and operations.
- iv) Whether the owner of the potential MWBE has an understanding of, and managerial and technical competence directly related to, the type of business in which the business enterprise is engaged and the business enterprises' operations. Generally, experience limited to office management, administration, or bookkeeping functions, unrelated to the principal business activities of the business enterprise is insufficient to demonstrate control.
- v) Whether, if a state or local law requires the owner of a particular type of firm to have a particular license or other credential, the owner of the potential MWBE possesses the required license or credential.

*Covenant of Non-Discrimination:* Means, collectively, one or more contractual affirmative promises (1) to adopt the policies of the Metropolitan Government relating to the participation of MWBEs in the procurement process; (2) to undertake certain good faith efforts to solicit MWBE participation; and (3) not to otherwise engage in discriminatory conduct against MWBEs.

*First Ranked Bidder:* Means an individual, sole proprietorship, partnership, joint venture, or corporation that has submitted a Bid that, subject to review as contemplated in this Chapter, has been tentatively determined pursuant to the requirements of this Title to be the lowest cost bid or highest ranked proposal.

*Goal:* Means race/gender-conscious corrective measures.

*Good Faith Efforts:* Means the voluntary actions of a Participant undertaken in good faith to ensure that it does not discriminate in its contracting practices.

*Hispanic American:* Means people who identify with the terms "Hispanic" or "Latino" and who classify themselves in a specific Hispanic or Latino category such as "Mexican," "Puerto Rican," "Cuban," or "other Spanish, Hispanic, or Latino."

*Hispanic American Business Enterprise:* Means a business that is an independent and continuing enterprise for profit, performing a commercially useful function, and that is owned and controlled by one or more Hispanic American.

*Joint Venture:* Means an association of two or more independent persons, partnerships, corporations (or any combination of them) formed, consistent with the laws of the State of Tennessee, to perform one or more specific contracts limited in scope and duration.

*Minority or Women Owned Business Enterprise ("MWBE"):* Refers to a business enterprise maintaining a significant business presence in the MSA and performing a commercially useful function that is owned by one or more of the following: (1) African Americans, (2) Native Americans, (3) Hispanic Americans, (4) Asian Americans and (5) Women. Racial and gender categories are separated for monitoring and tracking purposes only.

*Metropolitan Government:* Means the Metropolitan Government of Nashville and Davidson County, including any of its operating elements, officers, and/or employees acting with authority, but excluding the Metropolitan Development and Housing Authority, Nashville Electric Service, Metropolitan Transit Authority, the Metropolitan Nashville Public Schools, the Metropolitan Hospital Authority, the Metropolitan Sports Authority and the Metropolitan Nashville Airport Authority.

*Metropolitan Nashville Disparity Study:* Means the Disparity Study prepared by Griffin & Strong, P.C., and submitted to the Metropolitan Government on December 17, 2004.

*MSA:* Means the Nashville Metropolitan Statistical Area.

*MWBE Owned:* Means that African American, Native American, Hispanic American, Asian American or woman owner(s) who are citizens or permanent residents of the United States individually or collectively possess an ownership interest of at least fifty-one percent (51%) of the business.

*Native American:* Means persons having origins in any of the original people of North America, including American Indians, Eskimos and Aleuts.

*Native American Business Enterprise (NABE):* Means a business that is an independent and continuing enterprise for profit, performing a commercially useful function and which is owned and controlled by one or more Native Americans.

*Non-Compliance:* Means the condition existing when a Participant has failed to meet the requirements of this Program.

*Notice:* Means written communication delivered to the recipient by hand, including express delivery, electronically or by certified mail.

*Participant:* Means an individual or entity that enters into a contract with the Metropolitan Government to provide goods or services within the scope of the Program, or a subcontractor or supplier to such an individual or entity.

*Program:* Means the Procurement Nondiscrimination Program.

*Purchasing Agent:* Shall have the meaning given in section 8.108 of the Metropolitan Charter.

*Purchasing Sector:* Means the UNSPSC category for the specific procurement of construction, non-professional services and professional services.

*Race/Gender-Conscious:* Means any governmental or legislative policy or programmatic action that uses race or gender as criteria for participation.

*Race/Gender-Neutral:* Means any governmental or legislative policy or a programmatic action in which race or gender is not among the criteria for participation.

*Satisfactorily Completed or Satisfactory Completion:* Means all of the tasks called for in a contract or subcontract have been accomplished and documented as required by the Metropolitan Government.

*Significant Business Presence:* Means that a business enterprise with an established place of business in the MSA at which one or more of its employees is regularly based and that such place of business has a substantial role in the business' performance of a commercially useful function as herein defined. A location utilized solely as a post office box, mail drop or telephone message center or any combination thereof, with no other substantial work function, shall not constitute a significant business presence.

*Supplier:* Means a warehouse or manufacturer of materials, supplies or equipment that contracts directly with a Bidder to provide such materials, supplies or equipment on a project that involves a trade or service. For purposes of measuring the total contract dollars awarded or paid to suppliers on projects, only amounts paid to suppliers of goods customarily and ordinarily used based upon standard industry or trade practices shall be counted.

*Underutilization:* Means the percentage of dollars spent by the Metropolitan Government with MWBE's is less than participation of MWBE's than reasonably expected based on the availability of MWBE's within the MSA.

*UNSPSC:* Means the United Nations Standard Products and Services Code used to identify the Purchasing Sector.

*Women Business Enterprise (WBE)*: Means a business that is an independent and continuing enterprise for profit, performing a commercially useful function, and which is owned and controlled by one or more women.

**4.46.030 Office of Minority and Women Business Assistance.**

- A. In the department of finance, division of purchases, a minority and women business assistance section is created and shall be designated as the Office of Minority and Women Business Assistance ("Business Assistance Office" or "BAO").
- B. Duties. The BAO shall be primarily responsible for the administration and enforcement of the Program. It shall encourage equal business opportunities to achieve the policies and objectives of the Program by:
- (1) Preparing written rules, regulations and procedures consistent with this Program for submission to and approval by the Procurement Standards Board as provided in Section 4.08.020 of this code.
  - (2) Publishing and making public said rules, regulations and procedures at least thirty (30) days prior to their effective date.
  - (3) Verifying certification of MWBEs.
  - (4) Maintaining outreach and assistance programs to promote equal contracting opportunities for MWBEs that wish to do business with the Metropolitan Government.
  - (5) Maintaining a current database of certified and available MWBEs and making this database accessible to interested parties; that will include the types of services provided by the business enterprise and contact information for the business enterprise. A list from the database will be made available to Participants to assist them in their efforts to meet the Benchmarks of the Program. The list prepared from the database will specify which firms the Metropolitan Government has determined to be certified in accordance with the Metropolitan Government definitions for MWBEs.
  - (6) Monitoring utilization of MWBE participation on projects for data gathering and informational purposes.
  - (7) In consultation with the Purchasing Agent, recommending reasonable MWBE Benchmark ranges and, should Goals become necessary pursuant to Section 4.46.110 of this Code, recommending reasonable Goals to the Director of Finance and the Director of Law.
  - (8) Developing and supplying to each Bidder as part of each Bid solicitation forms for (a) the Covenant of Non-Discrimination, Statement of Successful Subcontractors, (b) Statement of Written Notification to MWBEs, (c) Statement of Interested Subcontractors/Vendors, (d) Statement of Bid Proposals/Price Quotations and (e) Letter of Intent to Perform as a Subcontractor/Joint Venturer. The BAO shall revise these forms as necessary consistent with the purpose and requirements of this Chapter.

- (9) Investigating written complaints as provided below.
  - (10) Notifying affected parties in writing of their right to review an adverse recommendation of the BAO.
  - (11) Preparing reports as requested by the Purchasing Agent or the Finance Director as well as semiannual and annual reports as required by subsection C & D, below, and Section 4.46.110(E).
  - (12) Performing other tasks as may be required to fulfill the above-stated duties of the Business Assistance Office.
- C. Authorization to Monitor. The BAO shall be authorized to collect from all Participants such data and information as is necessary to monitor this Program. This information may include information regarding business ownership, supplier information, subcontractor information, all of which shall reflect the race, ethnic origin, gender, and business location of the identified businesses. The BAO shall continuously monitor the participation of MWBEs in the procurement of construction, non-professional services and professional services for Metropolitan Government. Such monitoring shall include, without limitation, a statistical analysis of each construction trade, non-professional service and professional services to determine whether there is utilization of MWBEs in a manner that is proportionate to the identified availability range. The BAO will provide written reports to the Purchasing Agent, Finance Director, and Mayor upon request but not less frequently than semiannually.
- D. Duty to Report. The Business Assistance Office shall submit an annual report to the Metropolitan Council regarding the effectiveness of the Program. Such report shall include, without limitation, a summary of the purchases, contracts and subcontracts placed with MWBEs for the period and the relative percentage to the total of purchases and contracts for that period. The reports shall also emphasize quantity and quality of MWBE involvement by dollar volume. The report shall specify the race, national origin, gender, and UNSPSC with each category reported separately. Payments made to non-certified MWBEs shall be included as a separate set of figures for purposes of tabulating the total contract dollars going to MWBEs. The report shall include an analysis of the percentage for the reporting period of MWBE awards of the total awards for each MWBE category and Purchasing Sector and the percentage of availability of MWBEs in the MSA for each MWBE category and Purchasing Sector.
- E. Contractors' Closeout Activity Reports: In accordance with the Rules and Regulations for the Program, prime contractors and prime consultants shall provide closeout activity reports to the BAO identifying activities of all subcontractors and sub-consultants in order to monitor MWBE participation.
- F. Authority to Investigate Discriminatory Practices: Should a Bidder or Participant submit a written complaint of discrimination, the BAO is authorized to investigate the complaint. An investigation may be initiated based solely on a finding of a significant statistical disparity from the Benchmark in the Participant's utilization of MWBEs.



Further, such investigations may be initiated when the BAO receives information that provides a reasonable basis to believe that an individual contractor seeking to contract or contracting with Metropolitan Government may be engaging in discriminatory conduct with relation to the Bid process. The details of that investigation, including findings, shall be recorded and maintained by the BAO.

- G. Evaluation of Compliance: Pursuant to Section 4.46.090, prior to issuing a notice of award the BAO shall review a Bid when the Purchasing Agent has reached an intent to award.

#### **4.46.040 Program Scope and Applicability.**

The following are the categories of Metropolitan Government contracts covered by the Program:

**Category A -- Construction:** Includes any and all contracting relating to buildings, facilities and other erected structures on real estate owned by the Metropolitan Government such as new construction, rehabilitations, remodeling and repairs.

**Category B -- Non-professional Services:** Encompasses the procurement of advertising, printing, non-construction repairs, janitorial services, training seminars and workshops, computer and information systems, security, shipping and mailing, microfiche and microfilm, courier, storage, travel, consulting and other non-professional services.

**Category C -- Professional Services:** Includes the purchase of any or all services covered by Section 4.08.080 for which applicable selection criteria may require a Participant to possess a license or other certificate of competency such as accounting, auditing, architectural, and engineering.

#### **4.46.050 MWBE Designation.**

- A. Certification. Certification is the qualifying process that ensures that a particular business is a MWBE that performs a commercially useful function. Certification assures that interested MWBEs have the proper ownership, control, and management as defined in the Program. Current contact information about the certifying entity shall be maintained by the BAO and provided to interested persons upon request.
- B. Reciprocal Certification. Subject to the approval of the Director of Finance, the BAO may accept certification of a MWBE from another government or private entity having certification standards at least as stringent as those created in this Chapter.

#### **4.46.060 Benchmarks.**

- A. Definition and Purpose. The Metropolitan Government has a compelling interest in providing equal business opportunities for all persons wishing to do business with it. Therefore, the Metropolitan Government will monitor and track MWBE availability and participation in the procurement process through Benchmarks. Benchmarks are

not quotas but a method enabling the Metropolitan Government to compare the participation of MWBE's in the procurement process with expected participation rates based on the availability of MWBE's within the MSA.

- B. Procedure for Establishing Benchmarks. The BAO shall establish and recommend proposed Benchmarks to the Purchasing Agent and Finance Director annually. The BAO shall evaluate the levels of MWBE participation for the Metropolitan Government's overall procurement program. As part of the review, the BAO may consider data regarding MWBE participation for the preceding three fiscal years for a more accurate portrayal of MWBE participation. The BAO shall review available MWBE totals and percentages for the MSA that shall be reported in ranges showing expected MWBE participation rates on Metropolitan Government projects for each Procurement Sector based on MWBE availability within the MSA. MWBE availability shall be determined in accordance with current legal, economic, statistical and social science standards. The Purchasing Agent may employ one or more qualified consultants each year to assist the BAO in determining MWBE availability. Benchmarks during the first year of the Program shall be based on data compiled in the Metropolitan Nashville Disparity Study, a copy of which shall be placed on file in the office of the Metropolitan Clerk.
- C. Comment Period. The Purchasing Agent shall publish proposed Benchmarks in a newspaper of general circulation at least once each week for four consecutive weeks and shall receive public comments submitted within ten (10) days after the final such publication. The Purchasing Agent shall consider all public comments duly submitted, additional recommendations of the BAO, make any necessary changes to the Benchmarks, and submit the proposed Benchmarks to the Finance Director. The Finance Director shall make any revisions the Finance Director feels are necessary and shall then issue the final Benchmarks, a copy of which shall be filed with the Metropolitan Clerk.
- D. Review of Benchmarks. The Benchmarks shall be in effect for a period of one (1) year. BAO shall review Benchmarks semiannually and shall report its findings to the Purchasing Agent and Finance Director. All total contract dollars awarded to MWBEs shall count towards Benchmark percentages.

#### **4.46.070 Bid Requirements**

No Bid submitted to the Metropolitan Government for work within the scope of the Program shall be considered responsive unless it includes each of the following documents:

- A. Covenant of Non-Discrimination. Each Bidder must submit a duly executed and notarized Covenant of Non-Discrimination. This written instrument shall contain promises, averments and/or affirmations made by the Bidder:

- (1) to adopt the policies of the Metropolitan Government relating to equal opportunity in contracting on projects and contracts funded, in whole or in part, with funds of the Metropolitan Government;
  - (2) to attempt certain good faith efforts to solicit MWBE participation on projects and contracts in addition to regular and customary solicitation efforts;
  - (3) not to otherwise engage in discriminatory conduct;
  - (4) to provide a discrimination-free working environment;
  - (5) that this Covenant of Non-Discrimination shall be continuing in nature and shall remain in full force and effect without interruption;
  - (6) that the Covenant of Non-Discrimination shall be incorporated by reference into any contract or portion thereof which the Bidder may hereafter obtain; and
  - (7) that the failure of the Participant to satisfactorily discharge any of the promises of nondiscrimination as made and set forth herein shall constitute a material breach of contract.
- B. Statement of Written Notification to MWBEs. Each Bidder must provide a statement that the Bidder has delivered written notice to at least three (3) available certified MWBEs if use of MWBEs is reasonable and if BAO can provide at least three MWBEs for the applicable category. Upon request, names, addresses, and telephone numbers for available MWBEs shall be provided by the BAO for each potential subcontracting or supply category in the solicitation. In addition, a Bidder must deliver written notice to all individuals or entities requesting information on the solicitation. The written 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 to permit development of an understanding of work requirements. This may include information about the work that will be subcontracted or the goods that will be obtained from subcontractors and suppliers;
  - (2) A contact person knowledgeable of the project documents within the Bidder's office to answer questions about the conditions of the contract;
  - (3) Information regarding the Bidder's bonding requirements;
  - (4) The deadline for submission of price quotations.
- C Statement of Successful Subcontractors. Each Bidder shall submit a Statement of Subcontractors. The Statement shall include 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. In addition, copies of each successful subcontractor's price quotes must be submitted by the close of business on the second business day following submission of a Bid.

- D. Statement of Interested Subcontractors/Vendors. Each Bidder shall submit a Statement of Interested Subcontractors/Vendors that shall include each individual or entity requesting information about the project or solicited for participation on the project. The list of subcontractors shall include those persons who did not actually submit a price quotation or a bid, rather just requested information. The statement shall include the individual's or entity's name, UNSPSC Code, race, gender, national origin, business location, and information requested.
- E. Statement of Bid Proposals/Price Quotations. Each Bidder shall submit a Statement of Bid Proposals/Price Quotations. The Statement shall include each potential subcontractor's vendor's name, UNSPSC Code, race, gender, national origin, business location, work requested to be performed, and price quotation and/or bid. The statement shall include only those potential subcontractors not selected that actually submitted a bid or proposal for the project.
- F. Letter of Intent to Perform as a Subcontractor/Joint Venture. In the event that a Bidder or Participant proposes to use subcontractors or joint ventures if awarded a contract with the Metropolitan Government, such Bidder shall be required to submit to the BAO a letter of intent signed by both the subcontractor/joint venturer and Bidder. This form is to be completed and submitted by the apparent successful Bidder by the end of the second business day following issuance by the Purchasing Agent of a notice of award of contract.
- G. Other Information and Data. The BAO may request additional information and data prior to a contract award. This information may include, without limitation, information regarding business ownership of all subcontractors to be utilized on the project, all of which shall reflect the race, gender, ethnic origins, location, and structure of the identified businesses, in order to be eligible for contract award. The BAO with the approval of the Purchasing Agent may declare any Bid non-responsive upon failure or refusal of the Bidder to provide information and data required by this Program and requested by the Metropolitan Government pursuant to this paragraph.
- H. Reporting Subcontractor Substitution or Replacement. The prime contractor shall report any replacements or substitutions of the use of subcontractors to BAO in advance of making the substitution. For reporting purposes, the prime contractor shall report to the BAO statistical data pertaining to the new subcontractor, including race, gender, national origin, and business location.

**4.46.080 Good Faith Efforts.**

- A. Good Faith Efforts. In addition to regular and customary solicitation processes for contacting potential subcontractors and/or vendors, all Bidders are required to:
  - (1) Make efforts to include MWBEs in the procurement process;
  - (2) Make efforts to ensure that businesses are not discriminated against on the basis of race, ethnicity or gender;

- (3) Ensure that prospective subcontractors, vendors, suppliers and others are not denied opportunities to compete for work for the Metropolitan Government on the basis of their race, ethnicity, or gender;
- (4) Afford all firms, including those owned by racial or ethnic minorities and women, opportunities to participate in the performance of the business of the Metropolitan Government to the extent of their availability, capacity and willingness to compete;
- (5) Demonstrate compliance with these Program requirements with appropriate documentation submitted with their Bids;
- (6) Maintain for a minimum of three years after completion of the contract and final payment detailed records of all correspondence and responses thereto, logs of all telephone calls made and received regarding Metropolitan Government solicitations, copies of advertisements in publications and other media, and other relevant papers required by the Program or Section 4.12.180.

B. Methods of Demonstrating Good Faith Efforts. Bidders shall demonstrate Good Faith Efforts by demonstrating efforts that may include, but are not limited to, the following:

- (1) Attending informational meetings to update potential subcontractors or vendors of subcontracting or supply opportunities.
- (2) Dividing the contract, in accordance with normal industry practice, into small, economically feasible segments that could be performed by a MWBE. Under no circumstances, however, shall a Bidder segment work solely for the purpose of utilizing MWBEs as subcontractors where such segmentation is not in accordance with common and accepted industry practices relating to the utilization of other firms as subcontractors.
- (3) Providing a written explanation for rejection of any potential subcontractor or vendor to the Bidder, including the name of the firm awarded the subcontract or supply agreement. The BAO will maintain these records and make same available to any subcontractor or vendor rejected by the Bidder.
- (4) Providing a non-discriminatory work site. Maintaining a work environment free of harassment, intimidation and coercion at all construction sites, offices and other facilities at which the Bidder's employees are assigned to work. The Bidder shall specifically ensure that all labor supervisors, superintendents, and other on-site supervisory personnel are aware of and carry out the Bidder's obligation to maintain a non-discriminatory work environment.
- (5) Soliciting specific individual MWBEs whose availability as potential sources of goods or services can be reasonably ascertained. This measure includes sending letters or making other personal contacts with specific certified MWBEs including those that the Bidder has contracted with in the past as well as other MWBEs with which the Bidder may be unfamiliar, but whose identities can be ascertained from a directory of certified MWBEs maintained by the BAO.

- (6) Sending letters or making other personal contacts with other programs as well as private trade associations in the MSA which are known to publicize contracting and procurement opportunities for the benefit of their respective associates and/or members.
- (7) Advertising in trade publications of general circulation in the MSA. The advertisement shall identify and describe the specific subcontracting or other opportunity in reasonable detail.
- (8) Following up initial solicitations by contacting potential subcontractors or vendors to determine, with certainty, whether these firms are interested in participating on the contract.
- (9) Thoroughly investigating the potential subcontractor or vendor's capabilities in good faith.
- (10) Providing reasonable assistance to a MWBE in need of equipment, supplies, bonding, letters of credit and/or insurance.
- (11) Providing reasonable technical assistance to MWBEs to ameliorate any deficiencies of technical knowledge or advance skill, where such assistance is undertaken by the Bidder to facilitate the MWBE's successful participation on a project or contract.

#### **4.46.090 Evaluation of Bid for Program Compliance**

- (A) If the Bid submitted by the First Ranked Bidder in response to a solicitation issued by the Purchasing Agent includes the documents required by Section 4.46.070 of this Chapter, the Purchasing Agent shall forward the Bid to the BAO. The BAO shall then evaluate whether it believes the First Ranked Bidder has engaged in and adequately documented with its Bid efforts to ensure that its process of soliciting, evaluating and awarding subcontracts, placing orders, and partnering with other companies has met the criteria of the Program including the use of Good Faith Efforts. Upon a recommendation of compliance by the First Ranked Bidder, the BAO shall notify the Purchasing Agent. The Purchasing Agent shall proceed to award a contract upon concurrence with the BAO recommendation.
- (B) If the BAO's preliminary analysis suggests that the First Ranked Bidder has failed to comply with the good faith or other requirements of the Program, the BAO shall send written notice to the Bidder. The notice shall set forth with particularity the reasons for the questioning of non-compliance and shall schedule a conference at which the issue may be reviewed with the Bidder. The Bidder shall be permitted to present any additional materials relevant to the question of non-compliance for consideration by the BAO. If, after the conference and upon consideration of all relevant materials, the BAO is convinced that the Bidder is in fact compliant with the requirements of this Chapter, the BAO shall notify the Purchasing Agent, who shall proceed with an award of contract upon concurrence with the BAO recommendation. If the BAO concludes that the Bidder is not compliant with the requirements of this Chapter, the BAO shall so notify the Purchasing Agent, who shall, upon concurrence with the conclusion,

reject that Bidder's Bid, identify another Bidder as the First Ranked Bidder, and forward that Bidder's Bid to the BAO. The BAO shall then proceed to evaluate the Bid submitted by the new First Ranked Bidder. The Purchasing Agent shall decide whether a determination of nonresponsiveness shall be made pursuant to Section 4.12.110. Decisions of the Purchasing Agent under this section are subject to protest in accordance with Section 4.36.010, *et seq.*, and the rules and regulations of the Purchasing Division.

#### **4.46.100 Sanctions and Penalties for Non-Compliance.**

The BAO shall recommend appropriate mechanisms to enforce the provisions of this Program to the Purchasing Agent. Further, the failure of a Bidder or Participant to comply with the requirements of this Chapter may be grounds for suspension or debarment by the Purchasing Agent pursuant to the standards set forth in Metropolitan Code of Laws § 4.36.020. Sanctions shall not be imposed unless there is evidence of specific conduct on the part of Participant that is inconsistent with or in direct contravention of the applicable provisions of this Program. In determining appropriate sanctions, the Purchasing Agent shall consider the following factors:

- (1) Whether the failure to comply with applicable requirements involved intentional conduct or, alternatively, may be reasonably concluded to have resulted from a misunderstanding on the part of the Participant of the duties imposed on them by this Program;
- (2) The number of specific incidences of failure by the Participant to comply;
- (3) Whether the Participant has been previously suspended;
- (4) Whether the Participant has failed or refused to provide the BAO with any information required or requested by this Program;
- (5) Whether the Participant has materially misrepresented any applicable facts in any filing or communication to the BAO; and
- (6) Whether the Participant has subsequently restructured or taken other action to cure the deficiencies in meeting applicable requirements.

#### **4.46.110 Goals.**

- A. Goals are race/gender-conscious measures that may be established in the event that periodic review of the Metropolitan Government procurement practices reveal a continuing pattern of underutilization of and discrimination against MWBEs by the Metropolitan Government. Goals shall only be considered in the event the Metropolitan Government has exhausted all race/gender neutral remedies and continues to fall below identified Benchmarks in contracting.
- B. Procedure for Adopting Goals. After using Benchmarks and Good Faith Efforts of the Program for 24 months, if the BAO semiannual review shows continuing underutilization of MWBEs and can demonstrate a compelling interest to support imposition of goals in specific subcategories, upon concurrence of the Purchasing

Agent, the BAO shall recommend to the Finance Director and the Director of Law the implementation of goals for selected contracts in the identified subcategories. If the Finance Director and the Director of Law agree that goals are warranted and necessary and that the goals proposed by the BAO and the Purchasing Agent are reasonably likely to result in achieving satisfactory utilization, the BAO shall publish the proposed goals three times over a period of thirty days in a newspaper of general circulation. After such time BAO will hold a ten (10) day comment period to receive written comments from any interested individual or entity regarding implementation of a race/gender-conscious program. Subsequent to this comment period, upon approval of the Finance Director and the Director of Law, the BAO with the concurrence of the Purchasing Agent, shall prepare a resolution for submission to the Metropolitan Council with a proposal to implement goals and the proposed goals.

- C. Goals in Bids/Proposals. Should the Metropolitan Council approve the imposition of goals, the Purchasing Agent may consider the inclusion or underutilization of MWBEs in specific industry subcategory as an additional factor in the evaluation of a Bid. The Purchasing Agent may consider the following types of participation toward achievement of a goal:
  - (1) The total dollar value of the contract may be counted toward the specified goal. This includes the fees and commissions charged for professional services, legal counsel, manufacturers, financial consultants, and insurance agents.
  - (2) The actual portion of MWBE participation in a joint venture is counted toward the goal.
  
- D. MWBE Participation in Meeting Goals. In the event that goals are established, all Participants, including MWBE Participants, shall make good faith efforts to attain goals through all subcontractor work.
  - (1) Prime Contractors: A Participant may subcontract portions of its contract consistent with industry standards. However, should a prime contractor subcontract greater portions of the project than are consistent with industry standards, then the MWBE will not have performed a commercially useful function as defined herein. Therefore, such participation by a MWBE will not be counted towards any goal.
  - (2) Subcontractor Participation: Where a Participant utilizes one or more subcontractors or sub-subcontractors to attain any goal(s) for an underutilized subcategory, the prime contractor may count said subcontractor or sub-subcontractor work toward goals. In no way shall subcontractors' or sub-subcontractors' work or dollar amount be construed to count toward said goal more than once. Only expenditures to MWBE subcontractors that perform a commercially useful function in the work of the project or contract may be counted.



- (3) Supplier Participation: Where a Participant utilizes suppliers to satisfy the goal(s) in whole or in part, the MWBE suppliers must perform a commercially useful function. Supplier participation may be approved upon review of the following factors:
  - (a) the nature and amount of supplies to be furnished;
  - (b) whether the MWBE is a manufacturer, wholesaler or distributor of the supplies and has the capabilities to deliver same in accordance with its certification;
  - (c) whether the MWBE actually performs, manages and supervises the work to furnish the supplies; and
  - (d) whether the MWBE intends to purchase supplies from a non-MWBE and simply resell same to the general or prime contractor for allowing those supplies to be counted towards fulfillment of the goal(s).
  
- (4) Joint Venture Participation: Where Participants engage in a joint venture to meet a goal, the prime contractor shall demonstrate that the MWBE joint venturer's participation meets the standards for a commercially useful function. The BAO shall review and approve all contractual agreements and other supporting documentation to determine the percentage of MWBE participation resulting from the joint venture that may be credited towards applicable goals of the project; and shall make the determination based on the following factors:
  - (a) the initial capital investment of each venture partner;
  - (b) the proportional allocation of profits and losses to each venture partner;
  - (c) the sharing of the right to control the ownership and management of the joint venture;
  - (d) actual participation of the venture partners in the performance of work under the project or contract; and
  - (e) other pertinent factors of the joint venture.
  
- (5) The degree to which any goals have been attained by joint ventures between MWBE firms, and between MWBE and non-MWBE firms, shall be calculated as follows:
  - (a) A joint venture consisting of a MWBE and non-MWBE firm functioning as a prime contractor will be credited with MWBE participation based on the percentage of the dollar amount of the work to be performed by the MWBE.
  - (b) In joint venture Proposals in which all joint venture Participants are MWBEs, the joint venture will be credited with MWBE participation for that portion of the dollar amount of the contract which MWBEs perform and that portion subcontracted to MWBE firms.

- (c) In joint venture Proposals, Participants will receive credit toward the goal for the dollar amount purchased from MWBE suppliers.

E. BAO Monitoring: Ending Goals. In the event that goals are established, the BAO shall review and report to the Purchasing Agent semi-annually and to the Metropolitan Council, the Finance Director, and Director of Law annually, the effectiveness of the goals in reducing underutilization of MWBEs. The BAO shall recommend termination of a goal for a Purchasing Sector established by the Metropolitan Council when the semiannual review shows underutilization has ceased. In any event, a goal for a Purchasing Sector shall automatically expire two (2) years after adoption by the Metropolitan Council.

#### **4.46.120 Outreach Program.**

To ensure that opportunities to participate in Metropolitan Government contracts are available to the widest feasible universe of willing, available and qualified businesses, the BAO shall develop and engage in outreach designed to increase public awareness of the Program. This outreach may consist of any of the following:

- (A) Public Awareness of the Program. To increase the effectiveness of the BAO and to increase the awareness of the Program, the BAO shall disseminate at community events, trade shows, and other appropriate business functions, and publish at regular intervals information describing the Program. This information shall also identify ongoing contracting opportunities.
- (B) Outreach to MWBEs. The BAO shall assist MWBEs in obtaining certification by disseminating information, providing individualized counseling, and/or conducting seminars regarding the certification process.

#### **4.46.130 Mentor-Protégé Initiative.**

The BAO shall encourage all contractors and subcontractors to participate in a Mentor/Protégé initiative on a voluntary basis for the purpose of enhancing the potential of all MWBEs by building business capability to expand contracting opportunities within an agreed framework of conditions. The initiative is intended to assist in integration of on-the-job training for all emerging businesses and permit a prime contractor to offer assistance on a limited term agreement, generally one project. Any interested contractor or subcontractor may submit with a Bid a completed Mentor/Protégé Promise demonstrating that such a relationship has been formed. The BAO shall make available a database of potential Mentor and Protege firms. No contractor or vendor shall be penalized or preferred based upon participation or non-participation in this initiative. All administrative functions should be performed by the Protégé personnel. The Protégé is expected to maintain final decision-making responsibilities regarding the scope of its work.

**4.46.140 Severability.**

If any of the provisions set forth in this Chapter, or any section, subsection, paragraph, sentence, clause, phrase, or word thereof shall be found to be invalid, illegal or unenforceable for any reason, the application of the remainder of this Chapter shall not be affected by such invalidity.

**4.46.150 Application.**

This Chapter shall not apply to any contract entered into by the Metropolitan Government or any solicitation issued prior to the effective date of the adopting ordinance.

Section 2. This ordinance shall take effect after the passage of 120 days or upon the earlier certification by the Director of Finance to the Metropolitan Council that the offices and processes contemplated by this ordinance have been established, the welfare of The Metropolitan Government of Nashville and Davidson County requiring it.

Sponsored by: Sam Coleman, Megan Barry, Lonnell Matthews, Vivian Wilhoite, Jerry Maynard, Sandra Moore, Erik Cole, Erica Gilmore, Walter Hunt, Robert Duvall, Eric Crafton, Keith Durbin, Pam Murray, Sean McGuire

Amendment No. 1  
To  
Ordinance No. BL2008-161

Madam President:

I move to amend Ordinance No. BL2008-161 as follows:

1. By amending Section 1 by inserting the words "by a resolution receiving twenty-one (21) affirmative votes" after the words "Should the Metropolitan Council approve the imposition of goals" in proposed section 4.46.110 (C).

2. By deleting Section 2 in its entirety and substituting in lieu thereof the following new Section 2:

"Section 2:•The procurement nondiscrimination program shall be applicable to procurements commenced 120 days following the enactment of this ordinance, or upon the earlier certification by the Director of Finance to the Metropolitan Council that the offices and processes contemplated by this ordinance have been established."

3. By adding the following new Section 3:

Section 3:•This ordinance shall take effect from and after its final passage, the welfare of the Metropolitan Government of Nashville and Davidson County, Tennessee, requiring it.

Sponsored by: Sam Coleman