



City of Chicago



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Meeting Date: 6/25/2021

Sponsor(s): Lightfoot (Mayor)

Type: Ordinance

Title: Amendment of Municipal Code 2-92-660, 2-92-770 and 2-92-780 regarding Minority-owned and Women-owned (MBE-WBE) business participation in City construction contracts including modification of definitions of personal wealth and small business

Committee(s) Assignment: Committee on Contracting Oversight and Equity



CONFIDENTIAL

OFFICE OF THE MAYOR
CITY OF CHICAGO

LORI E. LIGHTFOOT
MAYOR

June 25, 2021

TO THE HONORABLE, THE CITY COUNCIL
OF THE CITY OF CHICAGO

Ladies and Gentlemen:

At the request of the Chief Procurement Officer and the Corporation Counsel, I transmit herewith an ordinance amending the Municipal Code regarding Minority-owned and Women-owned business enterprises (M/WBE) participation in the City's construction contracts.

Your favorable consideration of this ordinance will be appreciated.

Very truly yours,

A handwritten signature in black ink, appearing to read "Lori E. Lightfoot".

Mayor

ORDINANCE

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF CHICAGO:

SECTION 1. Article VI of Chapter 2-92 of the Municipal Code of Chicago is hereby amended by deleting the language struck through and by inserting the language underscored, as follows:

2-92-660 Findings of discrimination.

The City Council, after considering evidence presented to the Budget Committee, including evidence presented at trial in Builders Association of Greater Chicago v. City of Chicago, Number 96 C 1122 (N.D. Ill.), during May and June 2003 (the "B.A.G.C. Trial"); statistical evidence, not available during the B.A.G.C. Trial, of continuing discrimination against Blacks, Hispanics and women in the Chicago construction marketplace; the report of the Mayoral Task Force on M.B.E./W.B.E. as well as additional anecdotal evidence of discrimination against minorities and women in the Chicago construction marketplace; and the testimony of experts and anecdotal witnesses; and receiving and considering written reports and submissions, adopts the following findings as a strong basis in evidence supporting a narrowly tailored, remedial affirmative action program in city the City's construction contracting:

(a) ~~the City of Chicago~~ seeks to provide a level playing field and equal access for all contractors and subcontractors to participate in city the City's contracting opportunities;

(b) the eCity has a significant impact upon the area economy through its contracting functions;

(c) prior to the adoption of Executive Order 85-2, city the City's contracting often operated as a closed shop, such that minorities and women received fewer than the number of city the City's contracts and ~~subcontractors subcontracts~~ and contract and subcontract awards than would have been expected absent discrimination;

(d) eCity departments reduced the disparities between the availability of minority and women firms and their utilization by implementing Executive Order 85-2;

(e) the eCity engaged in a substantial good faith legislative effort in 1990, involving 18 days of hearings and debate, which identified strong historical, statistical, scholarly and anecdotal evidence of past and present discriminatory practices in the Chicago-area market, including but not limited to construction, which placed minorities and women in a position of social and economic disadvantage and imposed discriminatory barriers to the entry and continued viability of minorities and women in the Chicago market and to their participation on city the City's contracts;

(f) based on the strong evidence presented during the hearings, the City Council on July 31, 1990, enacted an affirmative action ordinance designed to remedy discrimination in city the City's contracting against minorities and women;

(g) the Builders Association of Greater Chicago challenged the constitutionality of Sections 2-92-420 through 2-92-570 in 1996, as applied to construction contracts;

(h) strong evidence was introduced at the B.A.G.C. Trial that past and current discriminatory practices continue to place racial and ethnic minorities and women in a position of social and economic disadvantage, limiting opportunities for them to form and control construction businesses, as well as reducing the level and availability of employment opportunities for minorities and women in the trade unions which serve the Chicago construction marketplace;

(i) strong evidence was introduced at the B.A.G.C. Trial that such current and past discriminatory practices, and the continuing effects of such discrimination, have impeded the

growth and success of the businesses which minorities and women do form, as well as the level and availability of the employment opportunities in the construction trade unions;

(j) the evidence at the B.A.G.C. Trial demonstrated that these discriminatory practices include direct and indirect racial, ethnic and gender slurs and harassment; discrimination by lending institutions and other sources of capital; reduced opportunities for minority and women subcontractors to bid or quote to majority prime contractors; exclusion from and discriminatory treatment by the construction trade unions; exclusion from business and professional networks critical to entrepreneurial success; and discrimination by surety bonding companies, insurance companies and other entities integral to the contracting marketplace;

(k) following the B.A.G.C. Trial, Judge James B. Moran held that the eCity has a compelling interest in implementing a remedial race- and gender-conscious affirmative action program in the Chicago construction market, but that the eCity's 1990 ordinance is insufficiently narrowly tailored in 2003 as applied to construction contracts;

(l) there is ample availability of ready, willing and able minority- and women-owned firms to participate in eCity and private sector construction contracting and subcontracting opportunities;

(m) minority- and women-owned firms receive little or no work on private sector construction projects, despite their capacity, desire and efforts to participate on such projects;

(n) minority and women workers' participation in the relevant construction marketplace declined from 1980 to 1990;

(o) other jurisdictions, including Cook County, Illinois, have experienced drastic reductions in minority and women business participation, to less than their availability, after race- and gender-conscious remedial measures were terminated;

(p) while the eCity has made substantial progress in its efforts to ameliorate discrimination in its own construction contracting practices, private companies that contract on public projects continue to discriminate against minorities and women, and as a result of this discrimination, the eCity has been in the past a passive participant in a system of discrimination against minorities and women in the Chicago construction marketplace, and, in the absence of programs to eliminate such discrimination, would continue to be a passive participant in such a system;

(q) the eCity has a compelling interest in preventing its tax dollars from perpetuating a market so flawed by past discrimination that it restricts existing minority- and women-owned businesses from unfettered competition in the Chicago construction market;

(r) the eCity has a compelling interest in not having its construction projects return to near monopoly domination by white male firms, as was the case prior to Executive Order 85-2 and the eCity's current affirmative action program in procurement;

(s) although the eCity has undertaken since 1990 a variety of race- and gender-neutral measures such as technical assistance and small business loan programs, such programs have not been sufficient to ameliorate the effects of racial and gender discrimination in the construction marketplace;

(t) evidence at the B.A.G.C. Trial demonstrated that flexible race- and gender-conscious remedial measures do not overly burden construction firms owned by majority males;

(u) the remedies adopted herein will be periodically reviewed to ensure that the eCity continues to have a compelling interest in remedying discrimination in the Chicago construction market and that the measures remain narrowly tailored to accomplish that objective; and

(v) following a comprehensive review of the relevant data conducted in 2009, the eCity determined to extend this article to December of 2015 and make other changes to this article, and following a subsequent comprehensive review of the relevant data conducted in 2015, the eCity has determined to further extend this article to December 31, 2020. Due to the coronavirus pandemic and to allow for completion of the comprehensive review of the relevant data, the City

determined to temporarily extend this article to September 30, 2021, and in 2021, following a comprehensive review of the relevant data, the City determined to extend this article to December 31, 2027 and make other changes to this article.

2-92-670 Definitions.

As used in this article, the following terms shall have the following meanings:

(a) "Affiliate" ~~of a person or entity~~ means a person or entity that directly or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person or entity. In determining whether persons or entities are affiliates, the eCity shall consider all appropriate factors, including common ownership, common management and contractual relationships. Affiliates shall be considered together in determining whether a firm is a Small Business Enterprise.

(b) "Broker" means a person or entity that fills orders by purchasing or receiving supplies from a third party supplier rather than out of existing inventory, and provides no commercially useful function other than acting as a conduit between a supplier and a customer.

(c) "Chief pProcurement eOfficer" means the eChief pProcurement eOfficer of the City of Chicago.

(d) "Commercially useful function" means responsibility for the execution of a distinct element of the work of the contract, which is carried out by actually performing, managing and supervising the work involved, or fulfilling responsibilities as a joint venturer.

(e) "Construction contract" means a contract, purchase order or agreement (other than a lease of real property) for the construction, repair or improvement of any building, bridge, roadway, sidewalk, alley, railroad or other structure or infrastructure, awarded by any officer or agency of the eCity other than the eCity eCouncil, and whose cost is to be paid from funds belonging to the eCity.

(f) (Reserved)

(g) "Contract specific goals" means the subcontracting goals for M.B.E. and W.B.E. participation established for a particular contract based upon the availability of M.B.E.s and W.B.E.s to perform the anticipated scopes of work of the contract, and the eCity's progress towards meeting the aspirational goals.

(h) "Contractor" means any person or business entity that seeks to enter into a construction contract with the eCity, and includes all partners, affiliates and joint ventures of such person or entity.

(i) "Department of Procurement Services" or "D.P.S." means the dDepartment of pProcurement sServices of the City of Chicago.

(j) "Economically disadvantaged" means an individual whose personal net worth is less than ~~\$2,000,000.00~~ \$2,379,730.00, adjusted annually for inflation, such annual adjustment to begin January 2008 2022, based on the Consumer Price Index – Urban Wage Earners and Clerical Workers (Chicago All Items) published by the United States Bureau of Labor Statistics.

(j-5) "Established business" means a business which is not a "small business enterprise" as determined according to subsection (t) of this section, or a business whose owners of 50 percent or more are persons who are not "economically disadvantaged" as determined pursuant to subsections (i) and (q) of this section.

(k) "Good faith efforts" means actions undertaken by a contractor to achieve a contract specific goal that, by their scope, intensity and appropriateness to the objective, can reasonably be expected to fulfill the program's requirements.

(l) "Joint venture" means an association of two or more persons or entities, or any combination of types of business enterprises and persons numbering two or more, proposing to perform a single for-profit business enterprise, in which each joint venture partner contributes

property, capital, efforts, skill and knowledge, and in which the M.B.E. or W.B.E. is responsible for a distinct, clearly defined portion of the work of the contract and whose share in the capital contribution, control, management, risks and profits of the joint venture is equal to its ownership interest. Joint ventures must have an agreement in writing specifying the terms and conditions of the relationships between the partners and their relationship and responsibilities to the contract.

(m) "Local business enterprise" means a business entity located within the counties of Cook, DuPage, Kane, Lake, McHenry or Will in the State of Illinois (the "Six County Region"), ~~which has the majority of its regular, full-time work force located within the Six County Region.~~

(n) "Minority" means:

(i) any individual in the following racial or ethnic groups, members of which are rebuttably presumed to be socially disadvantaged:

(A) African-Americans or Blacks, which includes persons having origins in any of the Black racial groups of Africa;

(B) Hispanics, which includes persons of Spanish culture with origins in Mexico, South or Central America or the Caribbean Islands, regardless of race;

(C) Asian-Americans, which includes persons whose origins are in any of the original peoples of the Far East, Southeast Asia, the islands of the Pacific or the Northern Marianas, or the Indian Subcontinent;

(D) American Indians, which includes persons having origins in any of the original peoples of North and South America (including Central America) and who maintain tribal affiliation or community attachment; and

(ii) individual members of other groups, including but not limited to Arab-Americans, found by the eCity to be socially disadvantaged by having suffered racial or ethnic prejudice or cultural bias within American society, without regard to individual qualities, resulting in decreased opportunities to compete in Chicago area markets or to do business with the eCity.

(o) "Minority-owned business enterprise" or "M.B.E." means a small local business enterprise which is at least 51 percent owned by one or more economically disadvantaged minority persons, or in the case of a publicly held ~~corporation~~ business, at least 51 percent of all classes of the stock of which is owned by one or more economically disadvantaged minority persons, whose management, policies, major decisions and daily business operations are independently managed and controlled by one or more economically disadvantaged minority persons.

(p) "Owned" means having all of the customary incidents of ownership, including the right of disposition, and sharing in all of the risks, responsibilities and profits commensurate with the degree of ownership.

(p-5) "Participating established business" means an established business which is eligible to participate in the eCity's minority- and women-owned business enterprise construction procurement program as set forth in Section 2-92-725 of this Code.

(q) "Personal net worth" means the net value of the assets of an individual after total liabilities are deducted. An individual's personal net worth does not include the individual's ownership interest in an applicant, or other ~~city-certified M.B.E. or W.B.E. business that is not publicly held~~, or the individual's equity in his or her ~~primary place of residence~~ any real estate and any related fixtures or furnishings. ~~As to assets held jointly with his or her spouse, an individual's personal net worth includes only that individual's share of such assets.~~ An individual's net worth also does not include the ~~present~~ value of the individual's interest in any vested pension plans, Individual Retirement Accounts, 401(k) accounts, or other retirement savings or investment programs less the tax and interest penalties that would be imposed if the asset were distributed at the present time. As to assets held jointly with his or her spouse, an individual's personal net worth includes only that individual's share of such assets.

(r) "Private sector credit program" means the program provided for in Section 2-92-720 of this chapter.

(s) "Program" means the minority- and women- owned business enterprise construction procurement program established in this article.

(t) "Small business enterprise" means a ~~small business that has gross receipts, averaged over its previous seven fiscal years, that do not exceed one and half times the size standards of the U.S. Small Business Administration set forth as defined by the U.S. Small Business Administration, pursuant to the business size standards found in 13 C.F.R. Part 121, relevant to the scope(s) of work the firm seeks to perform on city the City's contracts. A firm is not an eligible small business enterprise in any city fiscal year in which its gross receipts, averaged over the firm's previous five fiscal years, exceed the size standards of 13 C.F.R. Part 121.~~

(u) "Small local business enterprise" means a business that is a small business enterprise and a local business enterprise.

(v) "Woman" means a person of the female gender, who is presumed to be socially disadvantaged.

(w) "Women-owned business enterprise" or "W.B.E." means a small local business enterprise which is at least 51 percent owned by one or more economically disadvantaged women, or in the case of a publicly owned business, at least 51 percent of all classes of the stock of which is owned by one or more economically disadvantaged women, whose management, policies, major decisions and daily business operations are independently managed and controlled by one or more economically disadvantaged women.

2-92-780 Review and sunset.

This article shall be subject to an interim review by the eChief pProcurement eOfficer to be concluded by December of ~~2017~~ 2026, and shall expire on December 31, ~~2020~~ 2027, unless the eCity finds that its remedial purposes have not been fully achieved and there is a compelling interest in continuing narrowly tailored remedies to redress discrimination against M.B.E.s or W.B.E.s so that the eCity will not function as a passive participant in a discriminatory marketplace.

SECTION 2. After passage and approval, this ordinance shall take effect on October 1, 2021.