



ORDINANCE NO. 28931

1 AN ORDINANCE relating to equity in contracting: amending Chapter 1.07 of
2 the Tacoma Municipal Code, relating to Equity in Contracting, by
3 amending various sections, and by repealing Section 1.07.050, entitled
4 "Approval as a Certified Business", to replace outdated elements of the
former Small Business Enterprise Program and clarify expectations for
review of the program.

5 WHEREAS in 1998, the City of Tacoma ("City") created the Small
6 Business Enterprise ("SBE") program as a response to the state of
7 Washington's Initiative 200 policy, and
8

9 WHEREAS the SBE program was a race- and gender-neutral attempt to
10 increase the volume of subcontracts for all small businesses, and

11 WHEREAS in 2018, the City's consultant, Griffin & Strong, P.C. completed a
12 Disparity Study of contracts from 2012-2016, that found statistically significant
13 disparities between the available and utilized quantity of Minority Owned
14 Businesses and Women Owned Businesses, and
15

16 WHEREAS the City responded to the findings by creating a task force
17 comprised of community members, contractors, and organized labor, and the
18 task force recommended implementing ideas from the Disparity Study,
19 including a new program that specifically addresses Minority & Women Owned
20 Businesses, and
21

22 WHEREAS in 2019, the City Council passed Ordinance No. 28625,
23 replacing the SBE Program in Chapter 1.07 of the Tacoma Municipal Code with
24 the Equity in Contracting Program, and in early 2020, the program began
25 implementing new requirements on public work and improvement projects, and
26



WHEREAS these changes are part of the process to create more equitable contracting opportunities and will also ensure local employment practices are being adhered to, creating more job opportunities for those living in the City of Tacoma; Now, Therefore,

BE IT ORDAINED BY THE CITY OF TACOMA:

Section 1. That the City Council hereby adopts the Recitals of this Ordinance as its formal legislative findings.

Section 2. That Chapter 1.07 of the Tacoma Municipal Code is hereby amended, by amending various sections, and by repealing Section 1.07.050, "Approval as a Certified Business", as set forth in the attached Exhibit "A."

Section 3. That the City Clerk, in consultation with the City Attorney, is authorized to make necessary corrections to this ordinance, including, but not limited to, the correction of scrivener's/clerical errors, references, ordinance numbering, section/subsection numbers, and any references thereto.

Passed _____

Mayor

Attest:

City Clerk

Approved as to form:

Deputy City Attorney



EXHIBIT "A"

CHAPTER 1.07 EQUITY IN CONTRACTING

Sections:

- 1.07.010 Policy and purpose.
- 1.07.020 Definitions.
- 1.07.030 Discrimination prohibited.
- 1.07.040 Program administration.
- 1.07.050 ~~Repealed. Approval as a Certified Business.~~
- 1.07.060 Program requirements.
- 1.07.070 Evaluation of submittals.
- 1.07.080 Contract compliance.
- 1.07.090 Program monitoring.
- 1.07.100 Enforcement.
- 1.07.110 Remedies.
- 1.07.120 Unlawful acts.
- 1.07.130 Severability.
- 1.07.140 Review of program.

* * *

1.07.020 Definitions.

Terms used in this chapter shall have the following meanings unless defined elsewhere in the Tacoma Municipal Code ("TMC"), or unless the context in which they are used clearly indicates a different meaning.

1.07.020.B

A. "Bid" means an offer submitted by a Respondent to furnish Supplies, Services, and/or Public Works in conformity with the Specifications and any other written terms and conditions included in a City request for such offer.

B. "Bidder" means an entity or individual who submits a Bid, Proposal or Quote. See also "Respondent."

1.07.020.C

"Certified Business" means an entity that has been certified as a Disadvantaged Business Enterprise ("DBE"), Small Business Enterprise ("SBE"), Minority Business Enterprise ("MBE"), Women Business Enterprise ("WBE"), or Minority and Women's Business Enterprise ("MWBE") by the Washington State Office of Minority and Women's Business Enterprise, ~~and meets the criteria set forth in Section 1.07.050 (2) of this chapter and has been approved as meeting that criteria by the Community and Economic Development Department Program Manager.~~

"City" means all Departments, Divisions and agencies of the City of Tacoma.

"Contract" means any type of legally binding agreement regardless of form or title that governs the terms and conditions for ~~provision of supplies, services or public works to the City procurement of Public Works and Improvements and/or Non-Public Works and Improvements Supplies and Services.~~ Contracts include the terms and conditions found in Specifications, Bidder or Respondent Submittals, and purchase orders issued by the City. ~~A "Contract" as used in this chapter shall include an agreement between the City and a non-profit entity to perform construction-related services for Public Works. A "Contract" does not include: (1) awards made by the City with federal/state grant or City general funds monies to a non-profit entity where the City offers assistance, guidance, or supervision on a project or program, and the recipient of the grant awards uses the grant moneys to provide services to the community; (2) sales transactions where the City sells its personal or real property; (3) a loan transaction where the City is~~



~~acting as a debtor or a creditor; (4) lease, franchise; (5) agreements to use City real property (such as Licenses, Permits and Easements) and, (6) banking and other financial or investment services.~~

“Contractor” means any Person that presents a Submittal to the City, enters into a Contract with the City, and/or performs all or any part of a Contract awarded by the City, for the provision of Public Works, or Non-Public Works and Improvements, Supplies or Services.

1.07.020.G

“Goals” means the annual level of participation by Certified Businesses in City Contracts as established in this chapter, the Program Regulations, or as necessary to comply with applicable federal and state nondiscrimination laws and regulations. Goals or requirements for individual Contracts may be adjusted as provided for in this chapter or in regulations and shall not be construed as a minimum for any particular Contract or for any particular geographical area.

1.07.020.N

~~“Non Public Works and Improvements” means all competitively solicited procurement of Supplies and/or Services by the City not solicited as Public Works.~~

* * *

1.07.050 Repealed. Approval as a Certified Business.

~~A. The Program Manager shall approve an entity as a Certified Business if all of the following criteria are satisfied:~~

~~1. The entity is certified as a DBE, SBE, MBE, WBE, or MWBE through the state of Washington’s Office of Minority & Women Business Enterprises; and~~

~~2. The entity can demonstrate that it also meets at least one of the following additional requirements:~~

~~a. The personal residence of the owner is located within the City of Tacoma or Tacoma Public Utilities Service Area, or~~

~~b. The entity’s business offices are located in any county of the Tacoma Public Utilities Service Area or any county adjacent to Pierce County, or~~

~~c. When the work is performed outside of Pierce County, the entity’s business offices may be located in an adjacent county in which the work is performed, or~~

~~d. Such additional information as the Program Manager or designee may require.~~

~~3. When another governmental entity has an equivalent business classification process, the City may enter into an interlocal cooperative agreement for mutual recognition of certifications.~~

~~B. Appeals.~~

~~The applicant may appeal any approval determination by the Program Manager under this chapter to the Director. The appeal must be made in writing and must set forth the specific reasons for the appeal. The Director shall make a decision on the appeal request within a reasonable time, which decision shall be final unless further appeal is made to the Hearing Examiner. In that event, the Hearing Examiner Rules of Procedure for Hearings, Chapter 1.23 TMC, shall be applicable to that appeal proceeding.~~

1.07.060 Program requirements.

A. The program shall meet the following requirements:

1. Establishment of Annual Goals.

The Program Regulations adopted pursuant to this chapter shall state reasonably achievable cumulative annual goals for utilization of Certified Businesses in the provision of supplies, services, and public works procured by the City. Cumulative annual goals for the participation of Certified Businesses in City contracts shall be based on the number of qualified Certified Businesses operating within the Tacoma



Public Utilities Service Area. The dollar value of all contracts awarded by the City to Certified Businesses in the procurement of supplies, services, and public works shall be counted toward the accomplishment of the applicable goal.

2. Application ~~of Annual Goals~~ to Contracts.

The Program Manager shall ~~consult with City departments/divisions to~~ establish department/division specific ~~requirements goals~~ for Certified Business participation in City competitively solicited contracts in accordance with this chapter and the Program Regulations.

B. Exceptions:

City departments/divisions or the Program Manager may request an exception to one or more of the requirements of this chapter as they apply to a particular Contract or Contracts. Exceptions may be granted in any one or more of the following circumstances:

1. Emergency:

The supplies, services and/or public works must be provided with such immediacy that neither the City nor the contractor can comply with the requirements herein. Such emergency will be deemed documented whenever a waiver of competitive solicitation for emergency situations is authorized under Tacoma Municipal Code Chapter 1.06.257 or as may be hereinafter amended.

2. Not Practicable:

The Contract involves special facilities or market conditions or specially tailored or performance criteria-based products, such that compliance with the requirements of this chapter would cause financial loss to the City or an interruption of vital services to the public. Such circumstances must be documented by the department/division awarding the Contract and approved by the senior financial manager or, for Contracts where the estimated cost is over \$500,000 (excluding sales tax), approved by the Board of Contracts and Awards ("C&A Board").

3. Sole source:

The supplies, services, and/or public works are available from only one feasible source, and subcontracting possibilities do not reasonably exist as documented by the department/division awarding the Contract and approved by the senior financial manager or, for Contracts where the estimated cost is over \$500,000 (excluding sales tax), approved by the C&A Board.

4. Government purchasing.

The Contract or Contracts are the result of a federal, state or inter-local government purchasing agreement and the use of such agreement in lieu of a bid solicitation conducted by the City is approved by the senior financial manager.

5. Lack of Certified Businesses ~~certified contractors~~:

An insufficient number of qualified contractors exist to create any utilization opportunities as documented by the Program Manager.

C. Waiver:

If, after receipt of Submittals but prior to Contract award, it is determined that due to unforeseen circumstances, a full or partial waiver of ~~requirements goals~~ is in the best interests of the City, the Director or Superintendent of the department/division awarding the Contract may request in writing that the City Manager or designee, on behalf of General Government, or the Director of Utilities or designee, on behalf of the Department of Public Utilities, approve such waiver.

Waivers may be granted only after determination by the City Manager or Director of Utilities that compliance with the requirements of this chapter would impose unwarranted economic burden on, or risk to, the City of Tacoma as compared with the degree to which the purposes and policies of this chapter would be furthered by requiring compliance.



1.07.070 Evaluation of submittals.

A. All submittals for a supplies, services, or public works and improvements contracts shall be evaluated for attainment of the Certified Business requirements established for that eContract in accordance with this chapter and the Program Regulations.

B. The determination of Certified Business usage and the calculation of Certified Business requirements per this section shall include the following considerations:

1. General.

The dollar value of the eContract awarded by the City to a Certified Business in the procurement of supplies, services, or public works shall be counted toward achievement of the ~~respective annual~~ goal.

2. Supplies.

A ~~public works and improvements e~~Contractor may receive credit toward attainment of the Certified Business requirement(s) applicable to the Contract for expenditures for supplies obtained from a Certified Business; provided such Certified Business assumes the actual and contractual responsibility for delivering the supplies with its resources. The contractor may also receive credit toward attainment of the Certified Business goal for the amount of the commission paid to a Certified Business resulting from a supplies contract with the City; provided the Certified Business performs a commercially useful function in the process.

3. Services and Public Works subcontracts.

Any ~~bid by~~ Contract awarded to-a Certified Business or a bidder that utilizes a Certified Business as a subcontractor shall receive credit toward ~~requirement~~ attainment of the Certified Business requirement(s) applicable to the Contract based on the percentage of Certified Business usage ~~demonstrated~~ stated in the bid. A contractor that utilizes a Certified Business as a subcontractor to provide services or public works shall receive a credit toward the contractor's attainment of the Certified Business ~~respective~~ requirement applicable to the contract based on the value of the subcontract with the Certified Business. ~~that firm.~~

~~4. Brokers, Fronts, or Similar Pass-Through Arrangements:~~

~~Certified Business acting as brokers, fronts, or similar pass-through arrangements (as such terms are defined in the Program Regulations) shall not count toward the requirement attainment unless the activity reflects normal industry practices and the broker performs a commercially useful function.~~

C. Evaluation of competitively solicited submittals for public works and improvements and for services when a requirement has been established for the contract to be awarded shall be as follows:

1. When contract award is based on price.

The lowest priced bid submitted by a responsive and responsible bidder will be reviewed to determine if it meets the requirement. Certified Businesses may self-count utilization or self-performance on such bids if they will perform the work for the scope the requirement is based upon. The Program Regulations may establish further requirements and procedures for self-utilization or self-performance by a bidder who is a Certified Business.

a. If the low bidder meets the stated Certified Business requirements, the bid shall be presumed the lowest and best responsible bid for contract award.

b. Any bidder that does not meet the stated Certified Business requirements shall be considered a non-responsible bidder unless a waiver of one or more of the requirements of this chapter is granted, in the City's sole discretion, pursuant to the criteria and processes in Tacoma Municipal Code 1.07.060.C.

2. When contract award is based on qualifications or other performance criteria in addition to price, solicitations shall utilize a scoring system that promotes participation by certified contractors. The Program Regulations may establish further requirements and procedures for final selection and contract award, including:

a. Evaluation of solicitations for Architectural and Engineering (A&E) services;



- b. Evaluation and selection of submittals in response to requests for proposals; and
- c. Selection of contractors from pre-qualified roster(s).

1.07.080 Contract compliance.

A. The contractor awarded a contract based on Certified Business participation shall, during the term of the contract, comply with the requirements established in said contract. To ensure compliance with this requirement following contract award, the following provisions apply:

1. Any substitutions for or failure to utilize or termination of Certified Businesses projected to be used must be approved in advance by the Program Manager. Substitution of one Certified Business with another shall be allowed where there has been a refusal to execute necessary agreements by the original Certified Business, a default on agreements previously made or other reasonable excuse; provided that the substitution does not increase the dollar amount of the bid.
2. Where it is shown that no other Certified Business is available as a substitute and that failure to secure participation by the Certified Business identified in the solicitation is not the fault of the respondent, substitution with a non-Certified Business shall be allowed; provided, that, the substitution does not increase the dollar amount of the bid.
3. If the Program Manager determines that the contractor has not reasonably and actively pursued the use of replacement Certified Business, such contractor shall be deemed to be in non-compliance.

B. Record Keeping.

All contracts shall require contractors to maintain relevant records and information necessary to document compliance with this chapter and the contractor's utilization of Certified Businesses, and shall include the right of the City to inspect such records.

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1.07.110 Penalties.~~Remedies.~~

A. Upon receipt of a determination of contractor violation by the Program Manager, the City Manager or Director of Utilities, as appropriate, may take the following actions, singly or together, as appropriate:

1. Forfeit the contractor's bid bond and/or performance bond;
2. Publish notice of the contractor's noncompliance;
3. Cancel, terminate, or suspend the contractor's contract, or portion thereof;
4. Withhold funds due contractor until compliance is achieved; and/or
5. Recommend ~~appropriate action including, but not limited to,~~ disqualification of eligibility for future contract awards by the City (debarment) per Section 1.06.279 TMC;

6. Any other appropriate action, including a monetary penalty as such penalties may be specified in Program Regulations.

B. Prior to imposing ~~exercise~~ of any of the foregoing penalties~~remedies~~, the City shall provide written notice to the contractor specifying the violation and the City's intent to exercise such remedy or remedies. The notice shall provide that each specified remedy becomes effective within ten business days of receipt unless the contractor appeals said action to the Hearing Examiner pursuant to Chapter 1.23 TMC.

C. When non-compliance with this chapter or the Program Regulations has occurred, the Program Manager and the department/division responsible for enforcement of the contract may allow continuation of the contract upon the contractor's development of a plan for compliance acceptable to the Director.



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1.07.140 Review of program.

This chapter shall be in effect ~~through and until December 31, 2024, unless~~ until such point in time that the City Council shall determine, after third party analyses, ~~at an earlier date that the requirements of this chapter are no longer necessary. If this chapter has not been repealed by July 1, 2024, the City Council shall determine by the end of that year~~ whether substantial effects or lack of opportunity of Certified Businesses ~~MWBEs and/or SBEs~~ remain true in the relevant market and whether, and for how long, some or all of the requirements of this chapter should remain in effect.

The Department Director or their designee shall review this chapter with City Council standing committee on a biennial basis in order to determine whether adjustments or revisions are required and present those proposals to the City Council for approval.