

**RESOLUTION**

**NO. R-22-361**

**CITY HALL: August 4, 2022**

**BY: COUNCILMEMEBER MORENO (BY REQUEST)**

**SECONDED BY:**

**WHEREAS**, the New Orleans City Council adopted Ordinance No. 28587 M.C.S. to amend Chapter 70, Article VI, Division 2 of the Code of the City of New Orleans which establishes an equitable business opportunities program aimed at remediating the historical inequities that persist in the realm of public contracting and ensuring that historically disadvantaged individuals and business entities receive a fairer opportunity to participate in economic opportunities funded by public dollars; and

**WHEREAS**, Section 70-465, as amended, requires the Chief Administrative Officer to promulgate regulations pursuant to City Code section 2-1000 to implement the equitable business opportunities program; and

**WHEREAS**, the Council on March 10, 2022 passed Motion 22-95 expressing the desire to augment the DBE program by encouraging the creation of a formal Mentor-Protégé Program aimed at providing DBEs with coaching and mentorship opportunities, additional resources, access to capital, and technical resources; and

**WHEREAS**, the council on March 10, 2022 passed Motion 22-114 expressing the desire to augment the DBE program by granting DBE status to any person, corporation, or entity, whose principal(s), member(s) and/or officer(s) have been convicted of, or pled guilty to, a felony under state or federal statutes, to the extent not expressly prohibited by Section 2-8 of the Code of the City of New Orleans; La. Rev. Stat. § 38:2227; or other state or federal laws and regulations; and

**WHEREAS**, On May 24, 2022, the City of New Orleans held a public hearing, properly advertised and noticed according to law, on those certain rules and regulations recommended for consideration by the Chief Administrative Officer, and, after seeking public comment, adopted, by resolution, new rules and regulations as set forth in Exhibit “A” attached hereto and hereby made a part of this Resolution; and

**WHEREAS**, the new rules and regulations attached as Exhibit “A” have been promulgated in accordance with Section 2-1000 of the Code of the City of New Orleans; **NOW THEREFORE**

**BE IT RESOLVED BY THE COUNCIL OF THE CITY OF NEW ORLEANS**, That the Council hereby adopts the attached rules and regulations governing the Equitable Business Opportunities Program of the City of New Orleans.

**THE FOREGOING RESOLUTION WAS READ IN FULL, THE ROLL WAS CALLED ON THE ADOPTION THEREOF AND RESULTED AS FOLLOWS:**

**YEAS:**

**NAYS:**

**ABSENT:**

**AND THE RESOLUTION WAS ADOPTED.**

## EXHIBIT A

# General Requirements

### Authority

Pursuant to Section 6-308 of the Home Rule Charter of the City of New Orleans, the City is required to maintain a Disadvantaged Business Enterprise (DBE) program. Section 70-465 of the City Code provides that the Chief Administrative Officer (CAO) has the authority to implement Division 2 of Article IV of Chapter 70 of the Code of the City of New Orleans, and to promulgate Rules, Regulations and policies to implement the provisions of this division.

### Applicability

Pursuant to Section 70-466 of the City Code, except as otherwise provided and subject to all local, state, and federal laws affecting the city's procurement of goods and services or use of funds, this policy shall apply to all contracts of the City, including all departments, agencies, corporations, and attached and unattached boards and commissions, that utilize any public spending, public funding, and/or public incentives, including tax credits, Payment In Lieu of Taxes (PILOT) incentives or waivers through which the City forgoes its normal taxes and fees.

**Exempt Contracts** - This division shall not apply to the following:

1. The procurement of immovable property.
2. The resolution of any legal claim.
3. Cooperative endeavor agreements.
4. Any procurement to satisfy declared emergency needs.
5. Restoration tax abatement credits for owner-occupied residential properties not exceeding six residential units.
6. Any procurement or contract, except those for public works, valued at less than the applicable formal competitive procurement threshold.
7. Any procurement or contract valued at \$15,000.00 or less.

**Waiver of DBE Participation** – Pursuant to Section 70-461(f) of the City Code, the CAO may waive the equity goal applicable to a particular city contract upon request. A request to waive the equity goal for a particular contract must be submitted to the CAO in writing and must set forth in reasonable detail the reasons for the request. No waiver shall be granted until the Office of Supplier Diversity (OSD) reviews the request and provides the CAO a written recommendation.

### Designation of Representative

Pursuant to Section 70-465 of the City Code, the Chief Administrative Officer (CAO) designates the Office of Supplier Diversity (OSD) to oversee certification, compliance, training, and outreach for local, small and disadvantaged businesses in the City of New Orleans and otherwise manage the Equitable Business Opportunities (EBO) Program in accordance with the City Code.

# Administrative Requirements

## I. DBE Registry

Pursuant to Section 70-458 of the City Code, the OSD shall create and maintain a publicly- available registry of all businesses certified through the state and local DBE program. The certification directory can be accessed at <https://neworleans.dbesystem.com>.

## II. Reporting

Pursuant to Section 70-462 of the City Code, the following reporting requirements shall be adhered to:

- A. The CAO shall submit an EBO program report to the city council by October 15th of each year identifying the city's equity goals and attainment rates for the prior two years.
- B. OSD shall prepare and submit an annual report on all contracts executed by the city pursuant to section 6-308(1) of the Home Rule Charter, sorted by department, to the CAO by October 1st of each year identifying equity goals and attainment rates for the prior two years. The DBE report shall include the following information:
  1. The total number and value of all contracts awarded during the reporting period;
  2. The total number and value of all contracts awarded to DBEs as prime contractors (expressed as a percentage and dollar value of (1));
  3. The total number and value of all contracts awarded by non-DBE prime contractors to DBEs as subcontractors (expressed as a percentage and dollar value of (1));
  4. The overall number and value of all contracts awarded to DBEs during the reporting period (the sum of (2) and (3)); and
  5. Whether the contract is a procurement, professional services, personal services, or construction contract.
  6. Documentation of waivers requested from the provisions of this section for any city contract, with the recommendations of OSD and CAO determination on the waiver request outcome.

## Certification

### I. State and Local Disadvantaged Business Enterprise (SLDBE) Program

Pursuant to Section 70-456 of the City Code, the OSD shall consider an entity or individual certified in the SLDBE program to be eligible to participate as a DBE in the EBO program. To be certified in the SLDBE program, an entity or individual must meet all certification eligibility standards and requirements. The OSD shall make certification decisions based on the facts as a whole.

- A. **SLDBE Program Certification Standards** - In determining whether to certify a firm as eligible to participate as an SLDBE, the following standards shall be applied:

1. The firm seeking certification has the burden of demonstrating, by a preponderance of the evidence, that it meets the requirements of certification related to individual social and economic disadvantage, business size, ownership, and control.
  2. Applicants for certification have the obligation to provide information concerning their economic disadvantage.
  3. Determinations concerning whether individuals and firms have met their burden of demonstrating ownership, control, and social and economic disadvantage (where disadvantage must be demonstrated on an individual basis) are made by considering all the facts in the record, viewed as a whole.
- B. **Requirements for Certification in the SLDBE Program** - In order to qualify for certification as an SLDBE, a firm shall demonstrate all of the following:
1. The firm must be a "for-profit" enterprise, must be domiciled in the United States of America, and must possess the proper certificates and licensure to conduct business within the State of Louisiana.
  2. The firm (including its affiliates) must be an existing small business, as defined by Small Business Administration (SBA) standards.
  3. The firm must be at least 51% owned and controlled by one or more socially and economically disadvantaged persons who are U.S. Citizens or lawfully admitted permanent residents.
  4. The firm must also demonstrate that the business's ability to compete has been restricted due to industry practices, limited access to capital and/or restricted credit opportunities that are beyond its control.
- C. **Certification Renewal** – Renewal of DBE certification in the SLDBE program shall be required annually on the anniversary of the most recent certification approval, unless otherwise specified.

For a SLDBE certification to be renewed and for continued SLDBE program eligibility, the DBE shall submit an "Affidavit of No Change" form to the OSD along with the required business and personal financial statement information and all other requested documentation. The "Affidavit of No Change" form provides notarized attestation from the SLDBE owner that the firm continues to meet the eligibility criteria for the program.

## **II. Louisiana Unified Certification Program (LAUCP)**

Pursuant to Section 70-456 of the City Code, firms certified with the LAUCP, shall be granted provisional certification as a DBE for EBO program purposes. Such provisional certification shall entitle a business to be considered a valid DBE by the City of New Orleans.

Out-of-state firms that currently hold Unified Certification Program (UCP) certification within their home state shall apply for reciprocity through an LAUCP certifying agency.

## **III. Other Certification Programs**

Pursuant to Section 70-456 of the City Code, the OSD shall only designate certification programs that are substantially consistent with the certification standards and requirements of the SLDBE program or the LAUCP.

The OSD does not recognize self-certifications.

#### **IV. DBE Capacity Building**

The OSD shall develop a Mentor-Protégé Program to enhance the capacity and capabilities of SLDBE firms and thereby increase the opportunities for SLDBE participation on City contracts.

On at least an annual basis, the OSD shall review the Mentor-Protégé Program to evaluate the program's effectiveness.

## **Compliance and Enforcement**

#### **I. Determination of Equity Goals**

Pursuant to Section 70-459 of the City Code, an overall equity goal of thirty-five percent (35%) DBE participation is established for all public spending or private projects that utilize public funding and/or incentives.

#### **II. Equity Goal Setting**

Equity goals for each contract shall be established based on the relative availability of certified DBEs to perform work that is considered a commercially useful function on the contract. Proposed contracts that are routed to OSD without a stated equity goal will have a default goal of 35%.

#### **III. Counting DBE Participation**

Whether and to what extent a Contractor's efforts shall count toward the meeting of their DBE contract goal shall depend on the following considerations:

- A. Only business entities certified as SLDBE or LAUCP-DBE are counted toward the contract DBE participation goal. DBEs must be certified by the bid opening date or proposal deadline date.
- B. The Bidder/Proposer may only count the total dollar value of the subcontract awarded to certified DBE subcontractors/suppliers toward the contract DBE participation goal as long as the DBE subcontractor performs at least 51% of the sub-contracted work with their own forces. The cost of supplies and materials obtained by the DBE for the work on the contract, including supplies purchased or equipment leased by the DBE (except supplies and equipment the DBE subcontractor purchases or leases from the prime contractor or its affiliate), shall be included in the total dollar value. The entire amount of fees or commissions charged by a DBE for providing a bona fide service, such as professional, technical, consultant, or managerial

services specifically required for the performance of the contract, shall count toward fulfillment of DBE goals.

- C. The Bidder/Proposer may count one hundred percent (100%) of a DBE Manufacturer/Supplier's participation and sixty percent (60%) of DBE Non-Manufacturer/Supplier's participation toward its contract DBE participation goal. A manufacturer is a natural person or company that creates, makes, processes, or fabricates a product or something of value, which changes a raw material or commodity from one form to another or creates a new product or commodity.
- D. When the Bidder/Proposer is in a joint venture with one or more DBE business entities, the OSD, after reviewing the joint venture agreement, shall determine the percent of participation that will be counted toward the achievement of the contract DBE participation goal.
- E. A DBE can be a Prime (Bidder/Proposer) and count its participation as one hundred percent (100%) of the contract DBE participation goal, provided that the Prime DBE has met the contract goal and will perform at least thirty percent (30%) of the work with its own forces. Work that a DBE prime subcontracts to a non-DBE firm does not count toward the DBE goal. DBE as Prime contractors that fail to maintain DBE certification throughout the term of the contract are required to use and document Good Faith Efforts to achieve a reasonable amount of DBE participation on the remaining work on the Contract.
- F. A DBE subcontractor can further subcontract their work, but only the work subcontracted to certified DBEs will count towards the goal. DBE subcontractor(s) must perform at least fifty-one percent (51%) of the value of the subcontract with their own forces.
- G. Bidder/Proposer may count toward its contract goal only those DBE subcontractors/suppliers performing a Commercially Useful Function.

"Commercially Useful Function" is defined as a discrete task or group of tasks, the responsibility for performance of which shall be discharged by the DBE firm by using its own forces or by actively supervising on-site the execution of the tasks by another entity for whose work the DBE firm is responsible.

In determining whether a certified firm is performing a commercially useful function, the factors considered include, but are not limited to the following:

1. Whether the business entity has the skill and expertise to perform the work for which it is being utilized and possesses all necessary licenses;
2. Whether the firm is in the business of performing, managing, and supervising the work for which it has been certified and is being utilized;
3. Whether the DBE subcontractor is performing a real and actual service that is a distinct, meaningful, and verifiable element of the work called for in a contract.

4. Whether the DBE subcontractor performs work that constitutes at least fifty-one percent (51%) of the value of the sub-contract with their own forces, or the DBE only subcontracts a portion of the work of a contract that would be expected on the basis of normal industry practice for the type of work involved.

#### **IV. Good Faith Efforts**

In accordance with Sec.70-461 of the City Code, and unless waived pursuant to this same section, the City shall reject any bid and shall not award, enter into or amend any contract that is not supported by documentation establishing that the Bidder/Proposer has met the contract DBE participation goal or made Good Faith Efforts(GFE) to achieve the contract DBE participation goal.

The OSD shall be responsible for determining whether a vendor has made Good Faith Efforts to achieve the DBE participation goal. In its Good Faith Efforts evaluation, OSD will consider the quality, quantity, and intensity of the different kinds of efforts that the bidders/proposers have made, and will determine if the efforts employed by the bidders/proposers were those that one could reasonably expect a bidder/proposer to take if the bidder/proposer was actively and aggressively trying to obtain DBE participation sufficient to meet the DBE contract goal. In making this determination of a Good Faith Effort, OSD shall consider the following factors:

- A. The specific portions of work identified for DBE subcontractors, including whether the bidder/proposer identified selected scopes or portions of work to be performed by DBEs in order to increase the likelihood of meeting the contract goal for the project, and the bidder/proposer provided the estimated value of each scope or portions of work identified.
- B. Sufficient notification was provided of DBE contracting opportunities, including the following:
  1. The Bidder/Proposer attended all pre-bid and/or outreach meetings scheduled by the City;
  2. The Bidder/Proposer submitted subcontracting opportunities to OSD for publication on the DBE Opportunities webpage; or,
  3. The Bidder/Proposer identified and provided confirmation of all announcements or notifications of subcontracting opportunities, including where and when published.
- C. The Bidder/Proposer provided sufficient documentation of all certified DBE firms that received written notification of work items to be subcontracted and the certified firm's response.
- D. The Bidder/Proposer negotiated in good faith and provided an explanation for any rejected DBE bid or price quotation, and included a copy of the written rejection notice (including the reason(s) for rejection) to the rejected DBE bidder.

When required, if a Bidder/Proposer fails to submit the required GFE documentation, the bid/proposal shall be considered non-responsive.

The OSD may take into account the performance of other Bidders/Proposers in meeting the contract DBE participation goal and may request further information, explanation, or justification from any Bidder/Proposer.

Good Faith Efforts shall be monitored throughout the life of the contract and evaluated on a case-by-case basis in making a determination whether a Bidder or Proposer is in compliance with the DBE program requirements.

## **V. Modification of DBE Utilization by Vendors**

Vendors are required to conform to the contract equity goal established and approved by the OSD. Changes to the established equity goal and the DBE entities committed to on the DBE Responsiveness Form require prior approval by the OSD. The City will not adjust the contract for any increase in cost due to replacement of a DBE Subcontractor/Supplier. The same criteria used for establishing Good Faith Efforts in maximizing the participation of DBEs prior to awarding the contract will also apply to the termination or substitution of DBE subcontractors or suppliers during the performance of the contract. The OSD may grant a post-award modification request for the following:

- A. For a reason beyond the Contractor's control, the Contractor is unable to use the certified DBE submitted on the DBE Responsiveness Form to perform the specified work. In such cases, the Contractor shall use and document Good Faith Efforts to find a similarly qualified, certified DBE business entity to perform such specified work. In instances of DBE Subcontractor/Supplier non-performance, the Contractor shall promptly provide written notice and reasonable documentation to the OSD.
- B. The Contractor reasonably believes that, due to a change of scope, execution of the work in accordance with the directions from the contracting department is unlikely to meet the established percentage or terms. In such cases, the Contractor shall use and document Good Faith Efforts to achieve DBE participation on the remaining work on the Contract to the extent needed to meet the contract goal.
- C. The written notice of non-performance by a DBE from the contractor must include the following:
  - 1. The date the contractor determined the certified DBE to be unwilling, unable or ineligible to perform work on the contract;
  - 2. The projected date that the contractor shall require a substitution or replacement DBE to commence work if consent is granted by the OSD;
  - 3. Documentation of facts that describe and cite specific actions or inactions on the part of the affected DBE that led to the contractor's conclusion that the DBE is unwilling, unable, or ineligible to perform work on the contract;
  - 4. A brief statement of the affected DBE's capacity and ability or inability to perform the work as determined by the contractor;
  - 5. Documentation of contractor's good faith efforts to enable the affected DBE to perform the work;
  - 6. The current percentage of work completed on each contract item by the affected DBE;
  - 7. The total dollar amount currently paid per contract item for work performed by the affected DBE;

8. The total dollar amount per contract item remaining to be paid to the DBE for work completed but for which the DBE has not received payment, and with which the contractor has no dispute; and
9. The total dollar amount per contract item remaining to be paid to the DBE for work completed, for which the DBE has not received payment, and with which the contractor and DBE have a dispute.

## **VI. Vendor Reporting of DBE Utilization**

Contractors are required to post monthly payments and submit regular DBE utilization reports to the OSD. The monthly reports should be made via the online Contract Compliance Monitoring System or other means approved by the OSD.

- A. The initial report outlining DBE participation shall be submitted no later than thirty (30) days after OSD's initial request for said report. Thereafter, DBE Utilization reports are due on or before the fifteenth (15th) day of each month until all DBE subcontracting or material supply activity is completed.
- B. The total dollar amount of the contract shall include approved change orders, amendments and for requirements contracts shall be based in actual quantities ordered.
- C. Reports are required even when no activity has occurred in a monthly period.
- D. If the established percentage is not being met, the monthly report shall include a narrative description of the progress being made in DBE participation.
- E. The Contractor may also attach or upload copies of canceled checks or bank statements that identify payer, payee and amount of transfer to verify payment information as indicated on the form.

## **VII. Prompt Payment**

Contractors are required to pay each first tier subcontractor for all work that the subcontractor has performed to the satisfaction of the City no later than fourteen (14) calendar days after the Contractor has received payment from the City for that work, and each tier of subcontractors must likewise pay the next lower tier of subcontractors within fourteen (14) calendar days after receiving payment. The Contractor shall agree to include these assurances in all subcontracts and require its subcontractors to include these assurances in their subcontracts.

## **VIII. Monitoring Vendor Compliance**

To ensure compliance with EBO requirements, the OSD shall monitor all Contractors' use of DBE Subcontractors/Suppliers during the term of a City of New Orleans contract. Monitoring activities may include, but are not limited to the following:

- A. OSD staff shall hold Pre-bid/proposal meetings to inform potential respondents of EBO program requirements.
- B. The OSD shall issue DBE validations based on review of DBE Responsiveness Forms.
- C. OSD staff shall attend pre-design/construction meetings and remind contractors of the EBO program requirements and DBE commitments.
- D. OSD staff shall perform job site visits, announced and unannounced, to document DBE utilization.
- E. OSD shall perform routine audits of contract payments to all subcontractors and suppliers.

#### **IX. Remedies for Non-compliance**

Compliance with the provisions of Division 2 of Article IV, Chapter 70, of the Code of the City, including the fulfillment of any DBE commitments, is material to the contract. Failure to comply shall subject the Contractor to any corrective action allowed by law or governed by the contract, including but not limited to:

- A. Withholding of all or any portion of payments due to the vendor until the non-compliance is cured;
- B. Liquidated damages;
- C. Termination of any or all of the vendor's contracts with the city; and
- D. Suspension, disqualification, debarment, or determination of non-responsibility.

#### **X. Effective Date**

These regulations shall be effective as provided in Section 2-1000(g) of the City Code.