

City of Philadelphia



(Bill No. 030125)

AN ORDINANCE

Repealing Chapter 17-500 of The Philadelphia Code, entitled “Goals for the Participation of Minority, Female and Disabled Owned Businesses in City Contracts,” and enacting a new Chapter 17-500 of The Philadelphia Code to establish City Contract participation goals for Disadvantaged Owned Business Enterprises, which are businesses owned by socially and economically disadvantaged individuals, and which presumptively include businesses owned by women, minorities and the disabled.

WHEREAS, Seven years after the Philadelphia City Council’s enactment of 17-500, establishing goals for the participation of minority, women and disabled owned businesses in City contracts, the United States Supreme Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S. Ct. 706, 102 L.Ed.2d 854 (1989) enunciated a strict standard of review for race-based affirmative action programs; and

WHEREAS, In a subsequent legal challenge to the City’s affirmative action programs, *Contractors Ass’n v. Philadelphia*, 893 F. Supp. 419 (E.D. Pa. 1995), *aff’d* 91 F.3d 586 (3d Cir. 1996), the Eastern Federal District Court held that they were violative of the Equal Protection Clause because the City’s program was not narrowly tailored, the goals chosen were arbitrary and the Council’s findings failed to prove racial discrimination in the construction industry sufficient to warrant the use of a race-based remedy for Black construction firms; and

WHEREAS, A disparity report on minority business utilization entitled “Philadelphia Consortium—Business Utilization Study” was commissioned by the City and completed by D.J. Miller and Associates, Inc. in April 1998. That report concluded that “past effects of discrimination continue in the present, thereby slowing the growth and development of Minority and Women owned Business Enterprises;” and

WHEREAS, The City of Philadelphia should provide an equal opportunity for all businesses, including those owned by minorities, women and/or disabled persons, to participate in all contracts which require City approval, at any level, and assure that public funds administered by the City, are not used to promote, reinforce or perpetuate discriminatory practices; and

WHEREAS, CHAPTER 17-500 of The Philadelphia Code, with the exception of certain reporting requirements, officially sunset on January 1, 1998; and

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WHEREAS, A February, 2001 report prepared by City Councilman Angel Ortiz entitled “The Illusion of Inclusion” concluded that minority and women-owned businesses were still being underutilized in the performance of City contracts; and

WHEREAS, It is totally appropriate and necessary for the City of Philadelphia to reestablish its Goals For The Participation Of Minority, Female, Disabled Owned and Disadvantaged Business Enterprises in City Contracts, in a manner that will conform with federal court decisions but will still move in the direction of eradicating past and present discrimination in the City contracting process; now therefore

THE COUNCIL OF THE CITY OF PHILADELPHIA HEREBY ORDAINS:

SECTION 1. Chapter 17-500 of The Philadelphia Code is hereby repealed in its entirety.

SECTION 2. Chapter 17-500 of The Philadelphia Code is hereby enacted to read as follows:

*CHAPTER 17-500.
GOALS FOR THE PARTICIPATION OF DISADVANTAGED OWNED
BUSINESS ENTERPRISES IN CITY CONTRACTS.*

§17-501. Legislative Findings and Policy.

(1) Findings.

The Council makes the following findings:

(a) Past discrimination in the City’s contracting process by prime contractors against minority and women’s business enterprises has resulted in significant underutilization of these business enterprises in contracts awarded by the City. A disparity report on minority business utilization conducted by D.J. Miller and Associates entitled “Philadelphia Consortium—Business Utilization Study,” concluded that discrimination occurred in all types of City contracts with the effect of significant underutilization of minority and women’s business enterprises.

(b) The provisions of this Chapter are necessary to overcome the effects of past discrimination and to prevent ongoing discrimination in the City’s contracting process, while assuring that high quality goods and services are obtained through the competitive bidding process.

(c) A general goal of this Chapter is to provide narrowly tailored remedies to past discrimination.

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(2) *Policy.*

It is the policy of the City to foster an environment of inclusion in which all businesses are free to participate in business opportunities and to flourish without the impediments of discrimination. Businesses participating in all City contracts shall do so on a fair and equitable basis. Vendors on City contracts shall not discriminate against any business because of race, color, religion, national origin, sex, sexual orientation or disability.

§17-502. Definitions.

For the purpose of this Chapter, the following terms shall have the following respective definitions:

(1) *Agency shall mean any City office, department, board or commission including the Council of the City of Philadelphia. It shall also mean all legal entities which either:*

- (a) receive funds, directly or indirectly, from the City; and either:*
- (b) have entered into continuing contractual or cooperative relationships with the City; or*
- (c) operate under legal authority granted to them by City ordinance.*

(2) *City Contracts shall mean all City contracts, whether competitively bid or negotiated, including but not limited to, any construction contract with a total value in excess of \$150,000 which:*

- (a) is paid for in whole or in part with City funds;*
- (b) is financed either wholly or partially by state or federal funds which are administered by the City or*
- (c) is funded in whole or in part by Financial Assistance.*

(3) *Disabled Person shall mean a person who has a physical or mental impairment which substantially limits one or more of his or her major life activities or has a record of such impairment. Major life activities shall mean functions, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.*

(4) *Disadvantaged Business Enterprise or "DBE" shall mean any Small Business Enterprise:*

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(a) *Which is at least 51 percent (51%) owned and controlled by one or more socially and economically disadvantaged individuals; or*

(b) *In the case of any publicly owned business, one in which at least 51 percent (51%) of the stock is owned by one or more socially and economically disadvantaged individuals; provided, however, that a rebuttable presumption shall exist that any person that has received more than five million dollars (\$5,000,000.00) in three consecutive years of contract work from the City is not a DBE, and; provided further, that any previous certification of any such person as a DBE shall be re-evaluated pursuant to regulations to be promulgated by the MBEC.*

(5) *Disparity Analysis. A study conducted by an independent economic and statistical research entity that compares the ratio of available DBEs to the level of utilization in the performance of various types of contracts. A score of one (1) means that the total utilization is equal to all available DBEs. For purposes of this Chapter, independent shall mean an entity not part of, or affiliated with, any City agency.*

(6) *Financial Assistance. Any grant, loan, incentive or abatement provided by, or with the authority or approval of, the City or a City-related agency, including but not limited to bond financing subsidies, Tax Increment Financing aid, industrial development bonds, use of the power of eminent domain, land or property acquisition, Community Development Block Grant loans or grant, airport revenue bonds, Enterprise Zone designations, and aid from the Philadelphia Workforce Development Corporation or other similar agencies.*

(7) *Individual. A natural person.*

(8) *Minority Business Enterprise Council (MBEC) shall mean the entity within the Department of Finance responsible for the development, implementation, monitoring and enforcing the procedures and goals set forth in this Chapter.*

(9) *Minority Person shall mean a person who is a citizen or lawful permanent resident of the United States and who is:*

(a) *African American (a person having origins in any of the black racial groups in Africa);*

(b) *Hispanic American (a person of Spanish or Portuguese culture with origins in Mexico, South or Central America, or the Caribbean Islands, regardless of race);*

(c) *Asian American (a person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent or the Pacific Islands); or*

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(d) Native American (a person having origins in any of the original peoples of North America).

(10) Person shall mean a corporation, partnership or association, or any combination thereof, as well as a natural person.

(11) Small Business Enterprise shall mean a business which is independently owned and operated and which is not dominant in its field of operation as further defined in the Small Business Size Regulations, adopted by the U.S. Small Business Administration and published in the U.S. Code of Federal Regulations, including the industry size standards set forth in the table contained therein, which regulations are incorporated herein, and made a part hereof by reference.

(12) Socially and Economically Disadvantaged Individuals shall mean those who have either been subjected to racial, sexual or ethnic prejudice because of their identity as a member of a group or to differential treatment because of their disability without regard to their individual qualities, and whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business who are not socially disadvantaged.

(a) In determining who are Socially and Economically Disadvantaged Individuals, the Minority Business Enterprise Council may make a rebuttable presumption that all minority persons, all women and all disabled persons shall be so classified.

(b) The Minority Business Enterprise Council, in determining whether an individual shall be classified as a Socially and Economically Disadvantaged Individual, shall also consider, among other things the extent of the liquid assets and net worth of such socially disadvantaged individuals.

§17-503. Implementation and Applicability.

This Chapter shall be applicable to all types of City Contracts and all contracts of City Agencies. This Chapter shall be effective until five years after the date it becomes law unless extended by Ordinance.

§17-504. Participation Goals.

(1) The MBEC shall establish contract goals for levels or amounts of DBE participation for each contract, subject to the provisions of this Section, and unless exemptions have been granted under §17-509.

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(2) *Considerations.*

In setting these goals MBEC shall consider:

(a) *the availability in various industry classifications and professions of DBEs that are qualified and willing to provide goods, expertise, and services on the particular contract;*

(b) *the level of utilization of these firms in past contracts awarded by the City;*

(c) *the contract specifications;*

(d) *the adverse impact on non-DBEs; and*

(e) *any other relevant factors, including but not limited to City annual participation goal established under §17-505.*

(3) *Consultation.*

In establishing goals on each contract, the MBEC must consult with the contracting agency, the Procurement Department, or both.

(4) *Publication.*

The contract goals must be clearly published as part of the contract specifications in the invitation to bid or request for proposals.

(5) *Applicability to Alternates, Modifications, etc.*

The contract goals apply to the initial contract amounts, to any alternates, and to all subsequent amendments, supplements, extra work orders, change orders, or other modifications that, whether individually or in the aggregate, increase the dollar value of the contract by more than 10%.

(6) *Contract and Bid Specifications.*

(a) *Bid conditions, requests for proposals, and all other specifications for contracts awarded by the City must require that, where a contract goal is applicable, the bidders and all others seeking City contracts must:*

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(i) *make every effort before the opening of bids to meet the contract goal; and*

(ii) *keep records of its efforts, adequate to permit a determination of compliance with this Chapter.*

(b) *Each contract must:*

(i) *incorporate this Chapter by reference;*

(ii) *provide that the failure of any bidder, contractor, or subcontractor to comply with this Chapter is a material breach of contract; and*

(iii) *require that, during its term, the contractor will:*

(A) *fulfill program commitments submitted with the bids;*

(B) *continue to make every effort to utilize DBEs; and*

(C) *maintain records reasonably necessary for monitoring compliance with this Chapter.*

(c) Where one or more DBE is listed as a participant in the bid of a prospective contractor with the City, and one or more of those DBEs is not used in the contract's performance when such bidder secures the said City contract, the successful bidder shall be required to demonstrate to the satisfaction of the MBEC why such DBE was not used on the contract, or be held in non-compliance with his or her contract by the MBEC. In the event of such determination of non-compliance, the MBEC shall recommend that the City exercise its legal remedies, including, if appropriate, the termination of the contract involved.

§17-505. Annual Participation Goals.

Council shall, by resolution, establish annual City contract participation goals for DBEs, after solicitation of recommendations of the MBEC.

(1) Criteria.

The annual participation goals must be based on, but not limited to:

(a) *the present availability of qualified DBEs;*

(b) *the utilization of qualified DBEs on past contracts awarded by the City;*

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- (c) *a forecast of eligible contracts to be awarded within the fiscal year; and*
- (d) *an updated Disparity Analysis of businesses in the Philadelphia area.*

(2) Limitations.

(a) *The annual goals must be directly related to the availability of qualified DBEs and the identified disparity in the utilization of DBEs.*

(b) *The annual goal for DBEs may be no higher than the percentage of availability of DBEs.*

(3) Purpose.

The purpose of the annual goals is to aid the City in its annual evaluation of the program's effectiveness. Annual participation goals are not and may not be quotas.

§17-506. Minority Business Enterprise Council.

(1) The MBEC, or any subsequent successor shall:

(a) *Devise a certification procedure to assure that businesses taking advantage of this Chapter are legitimate DBEs.*

(b) *Ascertain, within ninety (90) days of the enactment of this Chapter the total number of DBEs in the Philadelphia Standard Metropolitan Statistical Area. The MBEC shall maintain a listing of all such businesses and make it available to all agencies.*

(c) *Survey such businesses ascertained in (b) to establish past and current participation levels.*

(d) *Establish annual reporting requirements for all agencies to document the percentage of contracts which have been let to DBEs by the reporting agency.*

(e) *Devise such regulations as may be necessary and appropriate for the implementation of the powers and performance of the duties created by this Chapter.*

(f) *Devise regulations and procedures for including the participation of DBEs in prime contracts with the City. The affirmative programs to be reviewed by the MBEC in this regard shall include, but shall not be limited to the following:*

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- (i) *including qualified DBEs on solicitation lists;*
- (ii) *assuring that DBEs are solicited whenever they are potential sources;*
- (iii) *structuring contract requirements, when economically feasible, to permit maximum participation of DBEs;*
- (iv) *implementing a bonding program for participants under this Chapter for construction jobs;*
- (v) *implementing the use of other legally permissible means of fostering the award of prime contracts to DBEs, such as joint ventures;*

(g) *Recommend contractual language which provides that compliance with DBE participation requirements is material to the City contract and further provides for remedies, including but not limited to, termination of the contract in the event of non-compliance, and further provides that prime contractors will agree to the assignment of the proceeds of their subcontracts with disadvantaged business enterprises, by the disadvantaged business enterprises, to financial institutions providing working capital financing for the subproject, when requested by such DBEs and financial institutions, and pursuant to equitable regulations developed by the MBEC.*

(h) *Devise appropriate procedures for monitoring and enforcing compliance with this Chapter.*

(i) *Devise procedures for the waiver of these participation goals in appropriate circumstances.*

(j) *Devise and operate a grievance procedure for the processing of complaints by any person aggrieved by any finding, recommendation, proposal or other action implemented pursuant to this Chapter.*

(k) *Issue a written annual report indicating the progress made toward achieving the goals set out above. Said report shall include, but not be limited to, a summary of City contracts let during the relevant periods, the extent and percentage of DBE participation, and recommendations as to the appropriate future goals. The annual report shall be available for public review.*

(l) *Propose its own operating procedures, staffing needs, physical facilities requirements and operating budget.*

(m) *Issue a report to City Council every six months that outlines the participation of DBEs in contracts of the City and its agencies.*

(2) *The Director of Finance shall, upon the request of the MBEC, assemble and furnish to the MBEC such procurement records and documents of the various agencies as*

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are necessary for the monitoring and compliance investigation by the MBEC. MBEC shall also be empowered to recommend new procurement record keeping procedures for all agencies to facilitate compliance with this Chapter. Nothing in this Chapter shall obligate the disclosure by City officers or employees of information or documents which may be regarded as confidential or privileged under federal, state, or local law.

§17-507. Contract Payments to Subcontractors.

- (1) A contractor must pay its DBE subcontractors in a timely fashion for satisfactory work.*
- (2) A payment is timely if it is mailed, delivered, or transferred to a subcontractor no later than 7 days after the contractor receives payment from the City.*
- (3) Evidence of Compliance.*

Beginning with the second pay request from a contractor to the City, the contractor must provide the City with evidence that all DBE subcontractors have been paid out of the proceeds of the prior payment, unless a bona fide dispute, documented in writing, exists between the contractor and the unpaid DBE subcontractor.

- (4) When the City has paid at least eighty percent (80%) of the contract price to the prime contractor, the prime contractor shall be required to return to the MBEC a sworn affidavit attesting to the amounts of the contract proceeds which have been paid to the subcontracting DBE. If such affidavit is not so returned, the Director of Finance shall withhold further payment to said contractor.*

§17-508. Contract Reports and Documentation.

As a condition of each contract, the contractor must submit the following when requested by the MBEC:

- (1) copies of signed agreements with the DBEs being utilized to achieve the contract goals;*
- (2) reports and documentation verifying payments to the DBEs being used to achieve the contract goals; and*
- (3) reports and documentation on the extent to which the contractor has awarded subcontracts to DBEs under contracts not affected by this Chapter.*

§17-509. Exemptions and Waivers.

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(1) *Individual Contract Exemptions.*

The MBEC, on its own initiative or at the request of the affected agency, may recommend to the Finance Director that an individual contract or contract “package” (i.e., related contracts being bid or awarded simultaneously for the same project or improvement) be made wholly or partially exempt from DBE City contracting goals prior to the advertisement for bids or solicitation of proposals, whenever there has been a determination, reduced to writing and based on the best information available at the time of the determination, that there are an insufficient number of DBEs within the Philadelphia Standard Metropolitan Statistical Area to ensure adequate competition and an expectation of reasonable prices on bids or proposals solicited for the individual contract or contract “package” in question. It shall be within the sole discretion of the Finance Director whether or not to grant said exemption.

(2) *Waivers.*

Where a particular contract requires a contractor to meet a goal established pursuant to Section 17-504 of this Chapter, the contractor shall have the right to request a waiver from such requirements. The MBEC shall recommend that the waiver be granted where the contractor demonstrates that a good faith effort has been made to comply with the requirements set forth in this Chapter and all regulations promulgated pursuant to this Chapter.

§17-510. Enforcement.

The MBEC shall make such findings, recommendations and proposals to the Director of Finance as are necessary and appropriate to enforce this Chapter. If as a result of its monitoring activities, the MBEC determines that the goals and policies set forth in this Chapter, are not being met by any agency or by any person, the MBEC may recommend any or all of the following actions:

(1) If the MBEC determines that a person under contract with the City has failed to comply with contractual provisions requiring DBE participation, the MBEC may recommend that the City exercise its legal remedies, including, if appropriate, the termination of the contract involved.

(2) In the event that the MBEC determines that an agency is entering into contracts in a manner or at a rate which is unlikely to achieve the DBE participation goals developed in accordance with the procedures as set forth in this Chapter, the MBEC may request that the agency furnish to it a compliance plan setting forth in detail how contracts are

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proposed to be awarded prospectively to achieve the goals within the then current fiscal year.

(3) If the MBEC concludes that a compliance plan submitted under subsection (2) above is unlikely to produce the DBE participation goals within the then current fiscal year, the MBEC may recommend that the agency revise its plan to provide additional opportunities for DBE participation. Such recommended revisions may include, but shall not be limited to the following:

(a) assurances of stronger and better focused solicitation efforts to obtain more DBEs as potential sources of supply;

(b) division of job or project requirements, when economically feasible, into tasks or quantities to permit participation of DBEs;

(c) elimination of extended experience or capitalization requirements, when programmatically feasible, to permit participation of DBEs;

(d) identification of specific proposed contracts as particularly attractive or appropriate for participation by DBEs, such identification to result from, and be coupled with, the efforts of subsections (a) through (c) above;

(4) If the MBEC determines non-compliance with the timely payment requirements as set forth in §17-507, the MBEC shall then recommend that the City exercise its legal remedies, including, if appropriate, the termination of the contract involved.

§17-511. Penalties.

(1) A contractor who fails to comply with any provision of this Chapter is subject to any or all of the following penalties :

(a) suspension of contract;

(b) withholding of funds;

(c) rescission of contract based on material breach;

(d) refusal to accept a bid;

(e) disqualification of a bidder, contractor, or other business from eligibility for providing goods or services to the City for a period not to exceed 2 years;

(f) payment of liquidated damages; and/or

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(g) *a fine of \$300 per day for each day of non-compliance.*

§17-512. Grievances.

(1) *Any person aggrieved by any finding, recommendation, proposal or other action implemented pursuant to this Chapter may file a grievance with the MBEC, which shall render a decision within fifteen (15) days from the date the grievance is filed. The grievance shall be filed and determined in accordance with the procedures adopted pursuant to Section 17-506(1)(j). The decision of the MBEC may be appealed to the Director of Finance, who shall render a decision within fifteen (15) days from the date the appeal is taken. The decision of the Director of Finance shall be final.*

(2) *Nothing in this subsection or Chapter shall prevent an aggrieved person from exercising any and all legal rights available.*

Explanation:

Italics indicate new matter added.

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CERTIFICATION: This is a true and correct copy of the original Bill, Passed by the City Council on April 3, 2003. The Bill was Signed by the Mayor on April 24, 2003.



Patricia Rafferty
Chief Clerk of the City Council