



City of Philadelphia

City Council
Chief Clerk's Office
402 City Hall
Philadelphia, PA 19107

BILL NO. 170094

Introduced February 2, 2017

Councilmember Oh

**Referred to the
Committee on Commerce and Economic Development**

AN ORDINANCE

Amending Title 17 of The Philadelphia Code, entitled “Contracts and Procurement,” by adding measures to bring greater transparency, equitability, and accessibility to the process of procurement of disadvantaged business enterprises while encouraging disadvantaged business enterprises to grow in size and capability; all under certain terms and conditions.

THE COUNCIL OF THE CITY OF PHILADELPHIA HEREBY ORDAINS:

SECTION 1. Title 17 of The Philadelphia Code is hereby amended to read as follows:

TITLE 17. CONTRACTS AND PROCUREMENT.

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

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§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:

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(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:

(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] *such business* 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] *business* as a DBE shall be re-evaluated pursuant to regulations to be promulgated by the MBEC;

and

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(c) Which has been certified as a DBE by the City or by a third-party certification entity recognized and approved by the City. All third-party certification processes must meet a certification standard as determined by the City, and a listing of all recognized and approved third-party certification entities shall be made publicly available and updated continually. Firms that fail to maintain certification as a DBE shall be removed from the City's listing of such entities, and

(d) Which has completed a City affidavit including its company size, gross receipts, tax returns, other certifications, and a capability statement. The affidavit form must also specify the number of executives in the DBE and their race, gender, and disability status. It shall also specify the number of part-time and full-time employees in the DBE and their respective race, gender, and disability status. This form must be updated and submitted annually in order for the DBE to remain in the City's DBE registry; firms that fail to complete the required affidavit annually will be removed from the City's registry. MBEC shall maintain a record of the information submitted on this form in order to properly categorize DBE firms according to the extent to which they act as an impetus for growth of the City's minority workforce, and

(e) Which performs a commercially useful function which involves active participation, management, and supervision of work for a contract. A DBE does not merely serve as an extra entity in a contracted project involving the transfer of funds so that they may appear to participate as a DBE.

(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.

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(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

(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) Prime Contractor shall mean any contractor that is identified on a contract application as the contractor responsible for the work authorized by the contract. Any prime contractor which is not a DBE shall submit an affidavit form to MBEC each time they bid on a City contract (or once in the span of one year if more than one bid is submitted in that period of time) in order to become eligible for City contracts involving DBE subcontractors. This form shall specify the number of executives in the non-DBE firm and their race, gender, and disability status. It shall also specify the number of part-time and full-time employees in the non-DBE firm and their respective race, gender, and disability status. This form shall also require information that will allow the City to affirm a prime contractor's commercial usefulness, independence, merit, and capacity. A listing of such City-approved prime contractors shall be made publicly available and updated regularly.

[(11)] (12) Small Business Enterprise shall mean a business:

(a) 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; and

(b) Which performs a commercially useful function which involves active participation, management, and supervision of work for a contract. A SBE does not

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merely serve as an extra entity in a contracted project involving the transfer of funds so that they may appear to participate as a SBE; and

(c) Which is determined to be an independent business enterprise which does not depend on its relationship with another firm or firms. A pattern of exclusive or primary dealings with a prime contractor or a subcontractor compromises the independence of a SBE.

[(12)] (13) 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.

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§ 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. *DBEs must be certified by the City or by a third-party certification entity recognized and approved by the City. All third-party certification processes must meet a certification standard as determined by the City, and a listing of all recognized and approved third-party certification entities shall be made publicly available and updated continually. Firms that fail to maintain certification as a DBE shall be removed from the City's listing of such entities.*

(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.

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- (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] *enacted* by the MBEC in this regard shall include, but shall not be limited to the following:
 - (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 *and mentor-protégé relationships*; and
 - (vi) *prioritizing the contracting of DBEs based on individual DBEs' effectiveness in addressing disparities in employment opportunities for socially and economically disadvantaged individuals. MBEC shall categorize businesses according to metrics supplied by DBE firms through the affidavit form required by Section 17-502(3)(d). DBE firms shall be classified according to their number and percentage of executives, part-time employees, and full-time employees who identify as a minority, woman, or disabled. They shall also be classified according to their recent growth in hiring minority, woman, and disabled employees and their recent growth in overall capacity. DBE firms shall be rated and categorized in response to their performance in these metrics, with DBEs which have more effectively addressed disparities in employment opportunities for socially and economically disadvantaged individuals being placed in higher categories. Non-DBE firms participating in the procurement process shall be able to view and access a listing of businesses in each category. When selecting a bid for a City contract, MBEC shall prioritize awarding contracts to bids which include DBE firms in higher-rated categories. Priority shall also be given to bids which include DBE firms located in or in close proximity to the City of Philadelphia.*

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(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 noncompliance, 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.

(.1) In each such report, MBEC shall certify whether or not each covered Agency or Quasi-Public Agency has provided to MBEC within the preceding six months the necessary information for MBEC to prepare such report.

(.2) Council shall not approve any City participation in or contribution to any development or other project in which a Quasi-Public Agency participates or provides contributions unless MBEC shall have certified, in its most recent semi-annual report, that the Quasi-Public Agency has provided to MBEC the necessary information for MBEC to prepare such report.

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(n) Categorize and prioritize the contracting of non-DBE prime contractor businesses based on individual non-DBE prime contractors' effectiveness in addressing disparities in employment opportunities for socially and economically disadvantaged individuals. MBEC shall categorize non-DBE prime contractors according to metrics supplied by such firms through the affidavit form required according to the definition in Section 17-502(11). These firms shall be classified according to their number and percentage of executives, part-time employees, and full-time employees who identify as a minority, woman, or disabled. They shall also be classified according to their recent growth in hiring minority, woman, and disabled employees and their recent growth in overall capacity. Further, such firms shall be rated and classified according to the number of waivers they have applied for and/or received per year in the past five (5) years, if any. Non-DBE prime contractor businesses shall be rated and categorized in response to their performance in these metrics, with businesses which have more effectively addressed disparities in employment opportunities for socially and economically disadvantaged individuals being placed in higher categories. All firms participating in the procurement process shall be able to view and access a listing of businesses in each category. When selecting a bid for a City contract, MBEC shall prioritize awarding contracts to bids which include non-DBE prime contractors in higher-rated categories. Priority shall also be given to bids which include non-DBE prime contractors located in or in close proximity to the City of Philadelphia.

(o) Provide a process by which private companies may enlist the services of MBEC to identify DBEs from its registry of DBEs to participate in private projects in Philadelphia. At the request of companies which do not themselves have the capacity to do so, have completed an initial application process through MBEC, and have met application requirements established by MBEC, MBEC shall monitor DBE participation for private contracts so as to increase engagement of Philadelphia's minority workforce in the private sector.

(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 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.

(3) All MBEC determinations for DBE procurement and participation shall preempt all other legal authority.

§ 17-507. Contract Payments to Subcontractors.

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(1) A contractor must pay its DBE subcontractors in a timely fashion for satisfactory work. *Subcontractors are to be paid at the same time as the prime contractor with whom they partnered for a contract in accordance with the terms previously agreed upon between the DBE subcontractor and the prime contractor in a subcontractor project plan. Payment shall be made when the City makes an incremental acceptance of a portion of a prime contract, and all of the tasks called for in a subcontract have been accomplished and documented as required by the City. Confirmation of the completion of payments to subcontractors shall be announced via a publicly accessible online website or database. This information is to be updated concurrent with payment to subcontractors.*

(2) A payment is timely if it is mailed, delivered, or transferred to a subcontractor *and a prime contractor* no later than [3] *seven (7)* days after the [contractor receives payment from the City] *satisfactory completion of a portion of a prime contract by a subcontractor.*

(3) *A subcontractor project plan shall be submitted by the prime contractor and signed by all subcontractors during the bidding process. This plan shall list the name, address, telephone number, and contact person of each subcontractor or other businesses to be used on the contract, the type of work or service each business will perform, the dollar value and scope of said work, the DBE certification status of each subcontractor, and the compensation amount for each subcontractor task. The plan shall also include the total scope of the work of the entire contract and the total value of the entire contract. The contract agreement form must also include a confession of judgment, as MBEC shall not hear any appeals or complaints regarding contract violations, but shall refer all contract disputes to the court system. This plan shall not be changed or altered after approval of the plan, and payment to subcontractors shall be in accordance with the terms specified in the subcontractor project plan and finalized upon the awarding of the contract.* [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) *The Department of Commerce may investigate the actual utilization of subcontractors during the term of the contract compared with the planned utilization of subcontractors described in the subcontractor project plan. Subcontractors shall report the amount of work they performed and the amount billed. Any discrepancies between the actual amount of work or compensation shall be reviewed by the Department of Commerce, and prime contractors shall pay subcontractors the remaining difference between actual compensation and planned compensation if the actual work matches the planned work.* [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

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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.]

(5) All disputes regarding alleged violations of the subcontractor project plan and improper compensation for labor performed by a subcontractor shall be heard by the court system, as the subcontractor project plan includes a confession of judgment.

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§ 17-509. Exemptions and Waivers.

(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] *The Finance Director may grant said exemption after receiving approval to do so from City Council. If an exemption is granted, a full explanation of why the exemption has been granted must be made publicly available at the time that the contract has been awarded.*

(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. *This waiver must include a full explanation of why the waiver has been granted, must be approved by City Council before being granted, and must be made publicly available at the time that the contract has been awarded.*

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CHAPTER 17-1700. PROMPT PAYMENT OF CITY VENDORS AND THEIR SUBCONTRACTORS

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§ 17-1703. Prompt Payment of Subcontractors.

(1) Any subcontractor retained by a Vendor under a Procurement Contract should be paid promptly by the Vendor at the completion of its part of the project or upon submission of properly executed invoices. All Procurement Contracts shall include provisions, in form approved by the City Solicitor, obligating the Vendor to carry out the following subcontractor "prompt payment" requirements:

(a) After a Vendor receives payment from the City, and a properly executed invoice, for labor, services, or materials furnished by a subcontractor retained by the Vendor, the Vendor shall pay the subcontractor within the same time period that the City was required to pay the Vendor (the "Prompt Payment Period").

(b) If a Vendor fails to make payments to a subcontractor within the Prompt Payment Period, the Vendor shall pay interest on any outstanding amounts at the rate of one and one-half percent (1.5%) per month or part of a month, beginning at the expiration of the Prompt Payment Period, except as follows:

(i) If the subcontractor has submitted an invoice to the Vendor and the invoice is incorrect, defective or otherwise improper, the Vendor shall within ten (10) days after receiving the invoice notify the subcontractor that it must resubmit a corrected invoice. If the Vendor fails to so notify the subcontractor within such ten (10) day period, the invoice will be deemed correct as to form.

(ii) The Vendor may refuse to pay a subcontractor within the Prompt Payment Period if the Vendor in good faith believes that the subcontractor failed to perform its obligations to the Vendor in a proper manner, but only if the Vendor, within the Prompt Payment Period, provides written notice to the subcontractor detailing the subcontractor's failure to perform properly.

(c) The obligation of the Vendor to pay subcontractors promptly shall be passed along to all subcontractors and sub-subcontractors at any tier.

(2) Alternative Subcontractor Payment Procedure. In lieu of the process outlined in § 17-1703(1), a Vendor must give its Subcontractors the choice of entering into a Subcontractor Payment Directive Agreement where the Philadelphia Industrial Development Corporation ("PIDC") or other funds administrator and the Subcontractor have an agreement to pay all or part of a Subcontractor's approved invoices.

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(3) Agreements between a Vendor and a Subcontractor and a subcontractor and a sub-subcontractor at any tier, may include provisions for the resolution of any disputes arising under these "prompt payment" requirements.

(4) Alternative Subcontractor Payment Procedure for DBE Subcontractors. In the event that a Vendor fails to make payments to a subcontractor within the Prompt Payment Period, the City may directly pay the subcontractor in a timely fashion for satisfactory work. Subcontractors are to be paid at the same time as the prime contractor with whom they partnered for a contract in accordance with the terms previously agreed upon between the DBE subcontractor and the prime contractor in a subcontractor project plan. Confirmation of the completion of payments to subcontractors shall be announced via a publicly accessible online website or database. This information is to be updated concurrent with payment to subcontractors.

(a) A payment is timely if it is mailed, delivered, or transferred to a subcontractor and a prime contractor no later than seven (7) days after the satisfactory completion of a portion of a prime contract by a subcontractor.

(b) All disputes regarding alleged violations of the subcontractor project plan and improper compensation for labor performed by a subcontractor shall be heard by the court system, as the subcontractor project plan includes a confession of judgment.

Explanation:

[Brackets] indicate matter deleted.
Italics indicate matter added.