



City of Philadelphia

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

BILL NO. 210632

Introduced June 24, 2021

Councilmembers Green, Thomas, Henon, Parker, Brooks and Domb

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

AN ORDINANCE

Amending Chapter 17-1600 of The Philadelphia Code, entitled "Economic Opportunity Plans," by establishing new definitions and clarifying the manner in which credit is given for M/W/DSBE participation, all under certain terms and conditions.

THE COUNCIL OF THE CITY OF PHILADELPHIA HEREBY ORDAINS:

SECTION 1. Legislative Findings. The Council finds that:

- A. The Code, and any subsequent city regulations, addressing the calculation of minority, woman and disabled business enterprise ("M/W/DBE") participation need to be clarified by allowing for the distinction between a manufacturer, a supplier and a non-stocking supplier/broker of items identified as part of commercially acceptable functions found within Economic Opportunity Plans;
- B. The need for this distinction is to prevent an adverse impact to the M/W/DSBE business community whenever meaningful participation in the form of a manufacturer, a supplier or a non-stocking supplier/broker is miscalculated to the detriment of M/W/DSBEs;
- C. M/W/DSBEs performing commercially useful work have higher administrative costs of doing business (e.g., wages and benefits for labor, rent or mortgage payments for office and warehouse space, inventory costs, insurance premiums, etc.) than those businesses who act as a pass-thru, thus creating a competitive disadvantage for those M/W/DSBEs;
- D. This clarification will advance public trust in the integrity of this program and encourage value-added M/W/DSBE participation which will advance opportunities for M/W/DSBEs to grow as both subcontractors and prime contractors.

SECTION 2. Chapter 17-1600 of The Philadelphia Code is hereby amended as follows:

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TITLE 17. CONTRACTS AND PROCUREMENT

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CHAPTER 17-1600. ECONOMIC OPPORTUNITY PLANS.

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§17-1601. Definitions.

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(8) *Manufacturer* – A business that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the bid specifications.

(9) *Supplier* – A business that engages, as its principal business and under its own name, in the purchase and sale or lease of materials as a regular dealer by owning, operating, or maintaining a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the bid specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business.

(10) *Broker* – A business that brokers, operates as a non-stocking supplier, expedites transactions, or serves as a manufacturers' representative, who may include packagers or other persons who arrange transactions and are not regular dealers/suppliers. Such brokers may not have a warehouse and inventory relevant to the bid specifications with customary inventory turnover or, operate an ad hoc delivery structure, often only having an office with very few if any employees.

(11) *Commercially Acceptable Function* – A business performs a Commercial Acceptable Function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially acceptable function as a supplier, the business must be independently responsible for negotiating price, determining quality and quantity, ordering the material, taking title to the material, paying for the material itself and taking responsibility for transporting the material to the job site.

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§ 17-1603. Economic Opportunity Plan: Contents.

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(1) For a Covered Project or Contract subject to City Council approval (other than a Covered Project or Contract subject to subsection 8-200(2) or Section 8-201 of the Home Rule Charter), an Economic Opportunity Plan prototype shall be produced by the certifying agency in conjunction with Council, and serve as the primary form for submission and compliance procedures in accordance with the provisions of this Chapter:

* * *

(i) Commercially Acceptable Function and Credit Towards Participation Goals.

(.1) A contractor that enters into a subcontract with an M/W/DSBE shall be considered to have made a Best and Good Faith Effort only if its M/W/DSBE subcontractor performs a Commercially Acceptable Function. Evidence of a Commercially Acceptable Function shall be the M/W/DSBE engaging in meaningful work or supply effort that provides for a distinct element of the subcontract (as required by the work to be performed and described in the bid specifications), where the distinct element is worthy of the dollar amount of the subcontract and where the M/W/DSBE carries out its responsibilities by actually performing, managing and supervising the work involved; M/W/DSBE subcontractors must perform at least twenty percent (20%) of the cost of the subcontract (not including the cost of materials, equipment or supplies incident to the performance of the subcontract) with their own workers. M/W/DSBE suppliers must negotiate the price of the materials, determine the quality and quantity of the materials, order the material, take title to and pay for the material itself, and be responsible for the transport of the material to the job site. In addition, an M/W/DSBE supplier must verify its ability to make delivery of supplies, to maintain inventory, as well as verify its number of employees and its line of credit. An M/W/DSBE does not perform a commercially acceptable function if its role is limited to that of an extra participant in the contract through which funds are passed in order to obtain the appearance of a Best and Good Faith Effort.

(.2) Credit will be provided towards the participation goals only for work and/or material supply that is commercially acceptable; the amount of credit provided will depend upon an evaluation of the amount of work subcontracted, the method of material supply, industry practices and any other factors relevant to an assessment of Commercially Acceptable Function. An M/W/DSBE's work or material supply will not receive credit unless the M/W/DSBE is certified in a NAICs code applicable to the kind of work or supply effort the business is to perform under the contract. The following will be taken into consideration:

(.a) Supply and Install. A contractor using an M/W/DSBE to supply and install equipment or materials will receive credit for the entire transaction provided the M/W/DSBE actually performs the work of installation with its own workers and obtains the materials by negotiating price, determining quality and quantity, ordering the material, and paying for the material itself. The use of a joint check for payment of the material may be allowable provided there is no circumvention of the M/W/DSBE's responsibilities.

(.b) Non-Stocking Supply. A contractor using an M/W/DSBE non-stocking supplier (i.e., a broker, a firm that does not manufacture or regularly deal in the materials or

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equipment of the general character required under the contract) to furnish equipment or materials will only receive credit for the fees or commissions charged, not the entire value of the equipment or materials furnished. Credit will be given only for fees that are reasonable and not excessive as compared with fees customarily allowed for similar services. No credit will be given for any portion of the cost of the materials and supplies themselves toward the participation goals.

(.c) Material Supply. A contractor using an M/W/DSBE to supply materials or equipment will receive credit for the entire value of the supply effort if the materials or equipment are supplied by an M/W/DSBE who is a regular dealer in the material or equipment required by the bid specifications and the M/W/DSBE regular dealer negotiates the price of the material or equipment, determines quality and quantity, orders the material or equipment, takes title to and pays for the material or equipment itself and takes responsibility for transporting the material or equipment to the job site.

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SECTION 3. This Ordinance shall be effective immediately.