
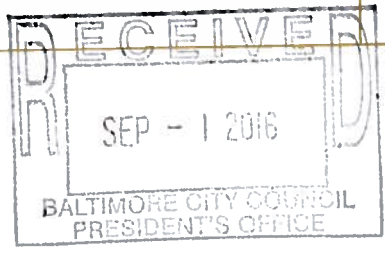


FROM	NAME & TITLE	Henry Raymond, Director <i>HR</i>	CITY of BALTIMORE MEMO	
	AGENCY NAME & ADDRESS	Department of Finance 469 City Hall		
	SUBJECT	Finance Response to City Council Bill #16-0723		

TO The Honorable President and
Members of the City Council
Room 400, City Hall



DATE:
August 30, 2016

The Department of Finance supports the adoption of Small Local Business Enterprise Preferences and the successful implementation of the preferences as a component of a good overall procurement strategy, and anticipates that the City Council will carefully consider the following observations and recommendations regarding the first reader copy of Bill #16-0723.

We have offered some overall comments that are addressed in more detail in the particular sections below.

The draft ordinance contains no exclusions for emergency, urgent or sole source contracts, or solicitations that are advertised prior to the effective date of the ordinance. There is also no explicit exemption for existing contracts and renewal terms. While there is some ability of the contracting agency to determine that these contracts are not appropriate for the various programs created by the ordinance, the exclusions should be clearly laid out.

The budget implications are too numerous to determine at this point. However, a 10% price preference will easily add millions to the value of City contracts. Additionally, as at least four separate programs are suggested in the draft ordinance, additional staff resources and additional time for the bidding process will be necessary.

Specific comments are as follows:

§28-12

Subtitle 28 already states that “Nothing in this subtitle abrogates the authority of the Board of Estimates to award contracts under Article VI, § 11 of the City Charter.”

Due to the heavy reliance on procurement activities to achieve the stated purpose of the Bill, it is requested that the following language be included in order to clarify that the Bill does not attempt to supersede the City Charter:

NOTHING IN THIS SUBTITLE ABROGATES THE AUTHORITY OF THE DEPARTMENT OF FINANCE TO INSURE THAT COMPETITIVE BIDDING IS USED, AND COMPETITIVE PRICES ARE OBTAINED, IN PURCHASING MATERIALS, SUPPLIES, EQUIPMENT AND SERVICES, TO THE FULLEST PRACTICABLE EXTENT, UNDER ARTICLE VII, § 17 OF THE CITY CHARTER.

Fav w/ comments

§28-96 (B)

The definition of “Affirmative Procurement Initiative” includes a list of requirements that are described as “procurement tools” that include bonding and insurance waivers. Bonding requirements are set by the Director of Finance, pursuant to the City Charter. This cannot be modified by ordinance. Insurance requirements are also determined by the Department of Finance, Office of Risk Management in accordance with best standards and professional judgement. Language suggested herein below in response to §28-114 recommends additional language that allows for recommendations of waiver from the MWBOO Chief.

In accordance with recommendations noted herein, modified language for §28-96 (B) is suggested as follows:

“AFFIRMATIVE PROCUREMENT INITIATIVE” MEANS A PROCUREMENT TOOL AUTHORIZED BY PART IV OF THIS CHAPTER TO BE USED TO ENHANCE CONTRACTING OPPORTUNITIES FOR SMALL LOCAL BUSINESS ENTERPRISE FIRMS, INCLUDING BID INCENTIVES, PRICE PREFERENCES, SHELTERED MARKET, MANDATORY SUBCONTRACTING, AND COMPETITIVE BUSINESS DEVELOPMENT DEMONSTRATION PROJECTS.

§28-96 (G)

The Department recommends that the definition of Professional Services not be included in this Bill, as it should be defined pursuant to Board of Estimates resolution. Additionally, architecture and engineering services have already been defined by resolution of the Board of Estimates as Professional Services. The term used to designate services which are not Professional Services should be “Services” as that is the most expansive definition as utilized by the City Charter. Redefining this term would greatly inhibit the Department’s ability to fulfill its Charter responsibility to maximize competitive bidding opportunities, in the largest number of City contracts possible.

The definition for “Services” should be “ALL SERVICES PROCURED BY THE CITY, UNLESS DETERMINED TO BE PUBLIC WORKS OR PROFESSIONAL SERVICES.”

§28-96 (I)

Delete this section as noted above.

§28-97 (A)(1)

The Department recommends that the Bill utilize standard procurement language from the City Charter.

Modified language is suggested as follows:

“...A SIGNIFICANT OPPORTUNITY TO PARTICIPATE IN CITY CONTRACTS FOR MATERIALS, SUPPLIES, EQUIPMENT, SERVICES, PUBLIC WORKS AND PROFESSIONAL SERVICES.”

§28-98 (3)

This section should be modified to acknowledge existence of the Department of Finance, Bureau of Purchases as the City's current Centralized Purchasing System,, as required by the City Charter. The Bureau utilizes BuySpeed to track registered bidders, awards, contracts, and payments to prime contractors, and has the ability to track payments to subcontractors. BuySpeed tracks registered bidders on an NIGP commodity code basis, and has the ability to track on the basis of firm ownership status under eligibility status in various programs. The Small Business Reserve capability of BuySpeed was developed for, and is currently used by the State of Maryland's Department of General Services.

Modified language is suggested as follows:

PROVIDING ACCOUNTABILITY AND ACCURACY IN SETTING GOALS AND IN REPORTING PROGRAM RESULTS THROUGH THE CITY'S CENTRALIZED PURCHASING SYSTEM, IN THE DEPARTMENT OF FINANCE, BUREAU OF PURCHASES, WHICH MAINTAINS A CENTRALIZED BIDDER REGISTRATION PROCESS CAPABLE OF IDENTIFYING WITH SPECIFICITY THE UNIVERSE OF FIRMS THAT ARE AVAILABLE AND INTERESTED IN BIDDING ON, OR PERFORMING ON, CITY CONTRACTS, AND OF PROVIDING THE MEANS OF TRACKING ACTUAL CITY BIDS, CONTRACT AWARDS, AND PRIME CONTRACT AND SUBCONTRACT PAYMENTS TO REGISTERED BIDDERS, ON THE BASIS OF CERTIFICATION STATUS, AND COMMODITY OR SERVICE CODE.

§28-100 (3)

The City Charter, Art. VII, § 17 specifically requires that the Department of Finance be responsible for ensuring that "competitive bidding is used, and competitive prices are obtained, in purchasing these materials, supplies, equipment and services, to the fullest practicable extent." Therefore, the Department's Bureau of Purchases is responsible for ensuring that contract bid specifications are not unnecessarily restrictive or unduly burdensome, and works closely with using agencies in accomplishing that task. The Department cannot abdicate responsibility assigned to it by the City Charter.

Modified language is suggested as follows:

"THE OFFICE SHALL MAKE WRITTEN SUGGESTIONS TO THE CONTRACTING AGENCY RELATING TO CONCERNS OF SPECIFIC BIDDING RESTRICTIONS THAT IT BELIEVES MAY BE CAUSED BY UNNECESSARILY RESTRICTIVE BID SPECIFICATIONS."

§28-101 (B)

The Department recommends this section be modified and that the committees be established with responsibility for each of the following industry categories, in accordance with the City Charter:

- (1) SERVICES;
- (2) MATERIALS, SUPPLIES AND EQUIPMENT;
- (3) PUBLIC WORKS;
- (4) PROFESSIONAL SERVICES OTHER THAN ARCHITECTURAL SERVICES AND ENGINEERING SERVICES; AND
- (5) ARCHITECTURAL SERVICES AND ENGINEERING SERVICES;

§28-103 (A)(3)(III)

This section as currently drafted states that an SLBE report should have reporting on progress towards achieving stated program goals. However, subsection (III) erroneously states as a goal of the SLBE program “REMOVING BARRIERS TO, AND ELIMINATING DISPARITIES IN, THE UTILIZATION OF AVAILABLE MINORITY BUSINESS ENTERPRISES AND WOMEN BUSINESS ENTERPRISES ON CITY CONTRACTS.”

Modified language is suggested as follows:

REMOVING BARRIERS TO THE UTILIZATION OF AVAILABLE SMALL LOCAL BUSINESS ENTERPRISES ON CITY CONTRACTS.

§28-105 (A)(5)

Revenues for the eligibility purposes should be annual gross revenues for the entire business, as many contracts include items from various commodity and service codes. Alternatively, this reference should be modified to say “NIGP Codes” which are the National Institute of Government Purchasing Codes currently used by the City’s Centralized Procurement System, in which procurements and payments are tracked. See comment on §28-98 (3), above.

Modified language is suggested as follows:

HAVE ANNUAL GROSS REVENUES AS AVERAGED OVER ITS MOST RECENT PAST 3 FISCAL YEARS, OR IF THE BUSINESS HAS NOT EXISTED FOR 3 YEARS, OVER THE COURSE OF THE EXISTENCES OF THE BUSINESS, OF NOT MORE THAN:

- (I) \$10 MILLION FOR CONSTRUCTION FIRMS, SPECIALTY TRADE CONTRACTOR FIRMS, AND MANUFACTURING FIRMS;
- (II) \$5 MILLION FOR ARCHITECTURAL FIRMS;
- (III) \$3 MILLION FOR SERVICE FIRMS AND PROFESSIONAL SERVICES FIRMS OTHER THAN ARCHITECTURAL FIRMS;
- (IV) \$2 MILLION FOR FIRMS PROVIDING MATERIALS AND/OR EQUIPMENT, EXCEPT FOR MANUFACTURING FIRMS.

§28-109

Graduation from the program could occur in many cases, after the SLBE is awarded a single City contract. If the contract remains in the program, the incumbent would be barred from bidding each time. This could also be interpreted as disallowing renewals or increases, if the SLBE has graduated after award. SLBE firms and contracting agencies will find it onerous to determine status independently during a contract term, or during a bidding process. Additionally, the graduation amounts should be tailored towards individual industry thresholds. Sections (A) and (B) include specific graduation dollar values that are not related to eligibility criteria. Emerging SLBEs should also risk revocation of status in the same manner as SLBEs.

Modified language is suggested as follows:

(F) THIS SECTION IS NOT INTENDED TO REQUIRE OR ALLOW THE CITY TO TERMINATE A CONTRACT, OR FAIL TO RENEW A CONTRACT, SOLELY DUE TO THE FINDING THAT THE SLBE STATUS IS PERMANENTLY GRADUATED OR TEMPORARILY SUSPENDED DURING THE CONTRACT TERM, INCLUDING ALL RENEWAL OPTIONS ORIGINALLY AVAILABLE. BIDS OR PROPOSALS SUBMITTED BY A SLBE PRIOR TO GRADUATION OR SUSPENSION MAY BE AWARDED. HOWEVER, A SLBE MAY NOT SUBMIT NEW BIDS DURING A PERIOD IN WHICH IT HAS BEEN PERMANENTLY GRADUATED OR TEMPORARILY SUSPENDED. IN THE EVENT THE SLBE STATUS IS REVOKED, PURSUANT TO SUBSECTION (C) HEREIN, THE BOARD OF ESTIMATES MAY, UPON RECOMMENDATION BY THE CONTRACTING AGENCY, TERMINATE OR FAIL TO RENEW A CONTRACT, IF SUCH ACTION IS IN THE BEST INTERESTS OF THE CITY.

(G) PERMANENT GRADUATION AND TEMPORARY SUSPENSION IS ONLY EFFECTIVE UPON RECEIPT OF WRITTEN NOTICE, AS AN ADVERSE CERTIFICATION OR ELIGIBILITY DETERMINATION.

(H) SUBSECTIONS (C), (F) AND (G) APPLY TO EMERGING SLBE FIRMS IN THE SAME MANNER AS SLBE FIRMS.

§28-114

Bonding requirements are set by the Director of Finance, pursuant to the City Charter. This cannot be modified by ordinance.

Modified language is suggested as follows:

“FROM TIME TO TIME THE CHIEF SHALL MAKE WRITTEN SUGGESTIONS TO THE DIRECTOR OF FINANCE RELATING TO CONCERNS OF SPECIFIC BIDDING RESTRICTIONS CAUSED BY BONDING OR INSURANCE REQUIREMENTS.”

§28-115

An evaluation of this section regarding price preferences requires input from the Law Department on whether the City Charter allows for an award to be made to any other than the low responsive bidder, or whether responsiveness may include compliance with the SLBE program. Therefore, additional comments or suggested language may be available after receipt of the Law Department review of this draft Bill. We have no comments at this time.

§28-116

It is recommended that the evaluation preference be fully removed from the program. The Contracting Agency must recommend the award that it feels is in the City's best interest. While the 10% price preference may be in the City's long term interest, recommending a product, solution or services that is 20% less technically acceptable than another product, without any balancing costs savings would not be in the City's best interests. In most cases, the score difference between a barely adequate technical proposal and a highly qualified technical proposal is less than 20%. This section would create a great risk to the City of increased costs, with a reduction in the quality of products and services provided to agencies.

Additionally, the restrictions in §28-115 (B) for Price Preference are not applied in Evaluation Preferences. The lack of restrictions would allow the bidder with a much higher price and lower technical score to be awarded the contract.

§ 28-117

(A)

This section should clearly exempt current contracts, and renewals of current contracts, from the subcontracting requirement.

40% is a very high percentage to require a contractor to subcontract, on top of the MBE requirements of 27% and WBE requirements of 10%. This could result in a single contract having a total subcontracting goal as high as 77%. Even if the middle range is assigned, that equals 40% subcontracting requirements.

It is recommended that the prime contractor be primarily liable for the contract, by continuing the standard City practice of requiring that the prime contractor complete at least 51% of the work with its own forces. That would allow no more than 49% to be attributable to the subcontractors in total, across all programs.

It is also recommended that the MBE/WBE program goals be required to taken into account when setting SLBE goals, so that the total does not exceed 49%.

Suggested additional language is as follows:

(A)

(2)

A GSC SHALL TAKE INTO ACCOUNT ANY MBE OR WBE GOALS SET ON A SPECIFIC CONTRACT WHEN DETERMINING THE PERCENTAGE OF THE CONTRACT TO BE SUBCONTRACTS TO CERTIFIED SLBES OR CERTIFIED EMERGING SLBES.

(3)

TOTAL SUBCONTRACTING GOALS ON ANY SPECIFIC CONTRACT SHALL NOT EXCEED 49%.

(4)

SOLE SOURCE AND EMERGENCY CONTRACTS ARE EXEMPTED FROM SUBCONTRACTING GOAL REQUIREMENTS.

(B)

To remove the opportunity for collusion among bidders who are certified SLBEs and who utilize another certified SLBE as a subcontractor, who also submits a bid as a prime contractor, this section should disallow this practice. The same opportunity exists in the current MBE/WBE code, and should be addressed in the same manner.

Section (B)(2) further allows large non-SLBE contractors to act as subcontractors to SLBE's who are meeting their SLBE goals with self-performance. This encourages collusion and allows SLBE's to act as brokers with a price and technical advantage.

Suggested language is as follows:

(3) IN ORDER TO DETER COLLUSION AND PROMOTE FAIRNESS, AN SLBE OR EMERGING SLBE CONTRACTOR MAY ONLY SUBMIT A BID AS A PRIME CONTRACTOR OR A SUBCONTRACTOR, ON ANY GIVEN REQUEST FOR BIDS OR REQUEST FOR PROPOSALS. IN THE EVENT AN SLBE OR EMERGING SLBE SUBMITS A BID AS A PRIME CONTRACTOR, AND HAS ALSO AGREED TO BE SUBMITTED AS A SUBCONTRACTOR TO A PRIME CONTRACTOR BIDDING ON THE SAME CONTRACT, THE SLBE'S OR EMERGING SLBE'S BID AS A PRIME CONTRACTOR SHALL BE REJECTED. THIS SECTION SHALL NOT RESTRICT A BIDDER'S RIGHT TO SELF-PERFORMANCE OTHERWISE ALLOWED.

§28-118 (B)(1)

This section should be clarified that a determination that a SLBE may be capable of participating is not conclusive as to responsibility and responsiveness of a bidder after submission of a bid or proposal. This final determination is that of the contracting agency.

Modified language is suggested as follows:

(4) A FINDING MADE REGARDING THE NUMBER OF AVAILABLE CERTIFIED SLBE'S OR EMERGING SLBE'S IN DETERMINING WHETHER A CONTRACT SHOULD BE BID THROUGH THE SHELTERED MARKET PROGRAM DOES NOT CREATE A PRESUMPTION OF A BIDDER'S RESPONSIBILITY. THE DETERMINATION OF CONTRACTING AGENCY OR THE CITY'S PREQUALIFICATION PROCESS THAT A BIDDER IS NOT A RESPONSIBLE BIDDER IS FINAL AND CONCLUSIVE.

§28-118 (C)(2)

The using agency should be able to make the final determination on whether the apparent low bid is too high in price, or not within the agency's budget.

Modified language is suggested as follows:

(2) THE APPARENT LOW BID IS DETERMINED BY THE CONTRACTING AGENCY, WITH CONCURRENCE FROM THE USING AGENCY, TO BE SO HIGH IN PRICE AS TO BE NOT REASONABLE, OR NOT WITHIN THE AGENCY'S BUDGETED AMOUNT.

§28-119

The Demonstration Project appears to greatly increase the responsibilities of contractors, who will be required to train their competitors, at a substantial cost to the City. Because this program's objective appears to be to find additional bidders in an underrepresented market, this requirement may jeopardize the City's ability to obtain contracts for critical goods and services. The Department recommends discussion of different methods to

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achieve this goal, including but not limited to directly offering business administration training to the SLBEs.

The Department of Finance, through its Bureau of Purchases, is happy to work with the City Council as it drafts modifications to this legislation.

cc: Timothy Krus, City Purchasing Agent
Erin Sher Smyth, Deputy City Purchasing Agent