



City of Baltimore

City Council
City Hall, Room 408
100 North Holliday Street
Baltimore, Maryland 21202

Legislation Text

File #: 07-0801, **Version:** 0

EXPLANATION: CAPITALS indicate matter added to existing law.
[Brackets] indicate matter deleted from existing law.

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INTRODUCTORY*

CITY OF BALTIMORE
COUNCIL BILL

Introduced by: The Council President

At the request of: The Administration (Minority and Women's Business and Opportunity Office)

A BILL ENTITLED

AN ORDINANCE concerning
Minority and Women's Business Program - Reauthorization

FOR the purpose of reauthorizing and continuing the Minority and Women's Business Program; making certain findings; defining and redefining certain terms; providing for participation goals; modifying certain procedures and requirements; clarifying certain provisions; providing for a special effective date; providing for the automatic termination of this Ordinance; and generally relating to minority and women's business enterprises.

BY repealing and reordaining, with amendments

Article 5 - Finance, Property, and Procurement

Section(s) 28-1(d), 28-2(d), 28-2(j) to (m), 28-3(a), 28-6, 28-16, 28-18, 18-25(a),
28-31, 28-32(c), 28-33(b) and (c), 28-38, 28-41, 28-48(b) and (f), 28-53, 28-54(3),
28-55(b), 28-61(b), 28-62, 28-63(b) and (c), 28-78(a), 28-80, and 28-83(c)

Baltimore City Code
(Edition 2000)

BY adding

Article 5 - Finance, Property, and Procurement

Section(s) 28-2(j)

Baltimore City Code
(Edition 2000)

BY repealing

Article 5 - Finance, Property, and Procurement

Section(s) 28-17, 28-19, 28-77, and 28-79(c)

Baltimore City Code
(Edition 2000)

SECTION 1. BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF BALTIMORE, That the Laws of

Baltimore City read as follows:

Baltimore City Code

Article 5. Finance, Property, and Procurement

Subtitle 28. Minority and Women's Business Enterprises

Part I. Definitions; General Provisions

§ 28-1. Definitions - A to H.

(d) Baltimore City Market Area.

"Baltimore City Market Area" means [the following geographic regions of Maryland for the indicated business category:] BALTIMORE CITY, BALTIMORE COUNTY, ANNE ARUNDEL COUNTY, HOWARD COUNTY, HARFORD COUNTY, CARROLL COUNTY, QUEEN ANNE'S COUNTY, PRINCE GEORGE'S COUNTY, AND MONTGOMERY COUNTY.

[(1) Construction contracts:

Baltimore City
Baltimore County
Howard County.]

[(2) Architectural and engineering contracts:

Baltimore City
Baltimore County
Anne Arundel County.]

[(3) Service contracts:

Baltimore City
Baltimore County
Anne Arundel County.]

[(4) Commodity contracts:

Baltimore City
Baltimore County
Anne Arundel County
Howard County
Montgomery County
Prince George's County.]

§ 28-2. Definitions - I to Z.

(d) Minority business Enterprise (MBE).

"Minority Business Enterprise" or "MBE" means a business enterprise:

- (1) that is owned, operated, and controlled by 1 or more minority group members who have at least 51% ownership;
- (2) in which the minority group members have DAY-TO-DAY operational and managerial control, interest in capital, and RISK AND earnings commensurate with their percentage of ownership;
- (3) THAT IS A SMALL BUSINESS; and
- (4) [(3)] that is located in the Baltimore City Market Area.

(J) SMALL BUSINESS.

- (1) "SMALL BUSINESS" MEANS A SMALL BUSINESS AS DEFINED BY THE U.S. SMALL BUSINESS ADMINISTRATION, PURSUANT TO THE BUSINESS SIZE STANDARDS FOUND IN 13 CFR PART 121, RELEVANT TO THE SCOPE(S) OF WORK THE FIRM SEEKS TO PERFORM ON CITY CONTRACTS.
- (2) A FIRM IS NOT AN ELIGIBLE SMALL BUSINESS ENTERPRISE IN ANY FISCAL YEAR IN WHICH ITS GROSS RECEIPTS, AVERAGED OVER THE FIRM'S PREVIOUS 5 FISCAL YEARS, EXCEED THE SIZE STANDARDS OF 13 CFR PART 121.

(K) [(j)] Sole proprietorship.

"Sole proprietorship" means a business enterprise that is 100% owned, operated, and controlled by 1 individual.

(L) [(k)] Subcontractor.

"Subcontractor" means a business enterprise that has a direct contract with a contractor to perform part of the work on a contract.

(M) [(l)] Supplier.

"Supplier" means a business enterprise that:

- (1) furnishes needed items to a contractor; and
- (2) either:
 - (i) is involved in the manufacture or distribution of the supplies or materials; or
 - (ii) otherwise warehouses and ships the supplies.

(N) [(m)] Women's Business Enterprise (WBE).

"Women's Business Enterprise" or "WBE" means a business enterprise:

- (1) that is owned, operated, and controlled by 1 or more women who have 51% ownership;
- (2) in which the women have DAY-TO-DAY operational and managerial control, interest in capital, and RISK AND earnings commensurate with their percentage of ownership;
- (3) THAT IS A SMALL BUSINESS; and
- (4) [(3)] that is located in the Baltimore City Market Area.

§ 28-3. Legislative findings and policy.

(a) Findings.

(1) The Mayor and City Council makes the findings contained in this subsection, on full consideration of:

- (1) the extensive findings made by an independent task force prior to the enactment of Ordinance 90-610;
- (2) the evidence of significant levels of utilization disparity identified by the 2000 Disparity Study;
- (iii) hearings held by the City Council;

(IV) THE EXTENSIVE FINDINGS OF THE 2007 DISPARITY STUDY, "RACE, SEX, AND BUSINESS ENTERPRISE: EVIDENCE FROM THE CITY OF BALTIMORE"; and

(V) [(iv)] all other relevant facts.

(2) Past discrimination in the City's contracting process by prime contractors against minority and women's business enterprises has resulted in significant underutilization of minority and women's business enterprises in contracts awarded by the City of Baltimore. As determined by the [2000] 2007 Disparity Study, this disparity has been persistent, pervasive, and statistically significant based on available vendor data.

(3) This discrimination has occurred in the major City contracting markets (construction, commodities, architectural and engineering, and services), with the effect of significant underutilization of minority and women's business enterprises.

(4) The provisions of this subtitle 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.

(5) A general goal of this subtitle is to provide a narrowly tailored remedy to past discrimination, a goal that is advanced by:

(1) setting minority and women's business enterprise goals that are flexible and rationally related to the disparity identified in the City's contracting markets;

(ii) instituting race- and gender-neutral remedies in conjunction with the MBE/WBE Program;

[(iii) setting separate annual goals for different categories of contracts;]

(III) [(iv)] setting goals on a contract-by-contract basis;

(IV) [(v)] providing criminal penalties for fraudulent misuse of this subtitle;

(V) [(vi)] requiring regular review of the necessity for this subtitle;

(VI) [(vii)] limiting those minority and women's businesses that qualify under this subtitle to those located in the Baltimore City Market Area;

(VII) [(viii)] requiring regular review of the categories included in the definition of minority group members; and

(VIII) [(ix)] providing for post-bid submission of required information about minority and women's business enterprises as well as other subcontractors.

§ 28-6. Automatic termination.

This subtitle automatically expires on [September 30, 2007] JUNE 30, 2012, unless the City Council, after causing an appropriate study to be undertaken, conducting public hearings, and hearing testimonial evidence, finds that the purposes identified in this subtitle have not yet been achieved, in which case this subtitle may be extended for 5 more years.

Part III. Annual Participation Goals

§ 28-16. Establishment.

(A) 2007 DISPARITY STUDY GOALS.

BASED UPON THE 2007 DISPARITY STUDY, THE ANNUAL PARTICIPATION GOALS ARE:

(1) 27% UTILIZATION OF MINORITY BUSINESS ENTERPRISES; AND

(2) 21% UTILIZATION OF WOMEN'S BUSINESS ENTERPRISES.

(B) ANNUAL REVIEW.

[On an annual basis] ANNUALLY, the Board of Estimates, with the advice of the Minority and Women's Business Opportunity Office[,]:

(1) must [establish] REVIEW THE participation goals for Minority Business Enterprises and for Women's Business Enterprises [in each area of contracting and procurement]; AND

(2) MAY RECOMMEND TO THE MAYOR AND CITY COUNCIL ANY MODIFICATIONS THAT IT DETERMINES TO BE NECESSARY OR APPROPRIATE.

[§ 28-17. Criteria.

(a) In general.

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

- (1) the present availability of qualified MBEs and WBEs;
- (2) the utilization of qualified MBEs and WBEs on past contracts awarded by the City;
- (3) a forecast of eligible contracts to be awarded within the fiscal year; and
- (4) review and analysis of the reports generated by the Minority and Women's Business Opportunity Office under this subtitle.

(b) Limitations.

(1) The annual goals must be directly related to the availability of qualified MBEs and WBEs and the identified disparity in the utilization of MBEs and WBEs.

(6) The annual goal for MBEs or WBEs may be no higher than the percentage of availability of MBEs or WBEs.]

§ 28-17. [§ 28-18.] Purpose.

(a) In general.

The purpose of the annual goals is to aid the City in its annual evaluation of the Program's effectiveness.

(b) Goals, not quotas.

Annual participation goals are not and may not be quotas.

[§ 28-19. Council review.

(a) Submission to Council.

Before the annual participation goals take effect, the Board of Estimates must present them to the City Council for its consideration.

(b) Council action.

The City Council may:

- (1) accept the goals set by the Board of Estimates; or
- (2) adopt different goals in accordance with the criteria required by this Part III.
- (c) Council inaction.

If the City Council does not act within 30 days after the Board's goals are presented to it, the Board's goals automatically take effect.]

§§ 28-18 TO 28-20. {Reserved}

Part IV. Contract Participation Goals

§ 28-25. Office review and report.

(a) Office to evaluate.

Annually, the Office must review MBE and WBE participation on all contracts and procurement to evaluate the effect of the Program AND THE CITY'S PROGRESS TOWARDS MEETING THE ANNUAL GOALS.

Part V. [Standards] COUNTING MBE AND WBE PARTICIPATION

§ 28-31. In general.

(A) PART GOVERNS.

MBE and WBE participation toward meeting contract goals must be counted in accordance with this Part V.

(B) DUAL CERIFICATION.

A BUSINESS THAT IS CERTIFIED BOTH AS AN MBE AND A WBE MAY BE COUNTED TOWARDS EITHER THE MBE OR THE WBE CONTRACT GOAL, BUT NOT TOWARDS BOTH. THE PARTICIPATION OF THE CERTIFIED FIRM CANNOT BE SPLIT BETWEEN THE MBE GOAL AND THE WBE GOAL.

(C) PAYMENT REQUIRED.

PARTICIPATION OF AN MBE OR WBE SUBCONTRACTOR CANNOT BE COUNTED TOWARDS THE GOAL UNTIL THE AMOUNT BEING COUNTED HAS BEEN PAID TO THE MBE OR WBE.

§ 28-32. Commercially useful function.

(c) Determination.

(1) To determine whether a certified business enterprise is performing a commercially useful function, the City must evaluate:

(I) the amount of work subcontracted[,];

(II) industry practices[,];

(III) WHETHER THE AMOUNT THE FIRM IS TO BE PAID UNDER THE CONTRACT IS COMMENSURATE WITH THE WORK IT IS ACTUALLY PERFORMING AND WITH THE MBE OR WBE CREDIT CLAIMED FOR ITS PERFORMANCE OF THE WORK; and

(IV) other relevant factors.

(2) WITH RESPECT TO MATERIALS AND SUPPLIES USED ON THE CONTRACT, THE MBE OR WBE IS RESPONSIBLE FOR NEGOTIATING PRICE, DETERMINING QUALITY AND QUANTITY, ORDERING THE MATERIAL, INSTALLING (WHERE APPLICABLE), AND PAYING FOR THE MATERIAL ITSELF.

(3) AN MBE OR WBE DOES NOT PERFORM A COMMERCIALY USEFUL FUNCTION IF ITS ROLE IS LIMITED TO THAT OF AN EXTRA PARTICIPANT IN A TRANSACTION, CONTRACT, OR PROJECT THROUGH WHICH FUNDS ARE PASSED IN ORDER TO OBTAIN THE APPEARANCE OF PARTICIPATION. IN DETERMINING WHETHER AN MBE OR WBE IS BUT AN EXTRA PARTICIPANT, THE CITY WILL EXAMINE SIMILAR TRANSACTIONS, PARTICULARLY THOSE IN WHICH MBES OR WBES DO NOT PARTICIPATE.

(4) IF AN MBE OR WBE SUBCONTRACTS A GREATER PORTION OF THE WORK OF A CONTRACT THAN WOULD BE EXPECTED ON THE BASIS OF NORMAL INDUSTRY PRACTICE FOR THE TYPE OF WORK INVOLVED, THE CITY WILL PRESUME THAT IT IS NOT PERFORMING A COMMERCIALY USEFUL FUNCTION.

(5) WHEN, UNDER PARAGRAPH (4) OF THIS SUBSECTION, AN MBE OR WBE IS PRESUMED NOT TO BE PERFORMING A COMMERCIALY USEFUL FUNCTION, THE MBE OR WBE MAY PRESENT EVIDENCE TO REBUT THIS PRESUMPTION. THE MBE OR WBE MUST PROVIDE WRITTEN DOCUMENTATION TO THE CHIEF, WHOSE DECISION IS FINAL.

§ 28-33. Joint ventures.

(b) Nature and extent of interest.

The MBE or WBE member of the joint venture must have an interest in the control, management, RISKS, and operation of the joint venture commensurate with the member's percentage of ownership.

(c) Share of work responsibility.

The certified business enterprise that is a member of the joint venture must be responsible for a DISTINCT, clearly defined portion of the work to be performed WITH ITS OWN FORCES, equal to its share in the ownership, control, and management of the joint venture.

§ 28-38. Insurance companies; travel agents.

A bidder may count towards the contract goals [only 15% of its expenditure to] THE FEES OR COMMISSIONS CHARGED BY a certified business enterprise insurance company or travel agent, AS LONG AS THE FEE OR COMMISSION IS REASONABLE AND NOT EXCESSIVE AS COMPARED WITH FEES OR COMMISSIONS CUSTOMARILY ALLOWED FOR SIMILAR SERVICES.

§ 28-41. Non-affiliation.

(a) Affiliation disallowed.

(1) [A] EXCEPT AS PROVIDED IN PARAGRAPH (2) OF THIS SUBSECTION, A bidder is precluded from using a certified business enterprise to meet a contract goal if the bidder has a financial interest in, has an interest in the ownership or control of, or is significantly involved in the operation of the certified business enterprise.

(2) THIS SUBSECTION DOES NOT APPLY TO A BIDDER WHO IS ITSELF A CERTIFIED BUSINESS ENTERPRISE.

(b) Office criteria to be met.

In order for a NON-CERTIFIED bidder to use a certified business enterprise to meet a contract goal, the non-affiliation criteria established by the Minority and Women's Business Opportunity Office must be met.

Part VI. Utilization Requirements

§ 28-48. Contracts of \$25,000 or more.

(b) Participation affidavit required.

(1) In addition to any other applicable requirements, the bid conditions and requests for proposals must require each bidder to include in its bid a certified business enterprise participation affidavit in which the bidder commits to utilize certified business enterprises in a percentage that equals or exceeds the applicable contract [goal] GOALS.

(2) Any bid that does not include the certified business participation affidavit is [nonresponsive] NON-RESPONSIVE.

(f) Report for final payment.

(1) Before final payment may be made under the contract, the contractor must submit a list of all subcontractors utilized on the contract, both MBE/WBE and non-MBE/WBE.

(2) The list must include, as to each subcontractor:

(i) its name;

(II) THE SERVICE OR GOODS PROVIDED;

(III) [(ii)] the total amount paid to it; and

(IV) [(iii)] its owner's race/ethnicity and sex.

§ 28-53. All contracts - Bid specifications.

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 bidder must:

(1) make [every effort] GOOD FAITH EFFORTS before the opening of bids OR SUBMISSION OF PROPOSALS to meet the contract goal; and

(2) keep records of its GOOD FAITH efforts, adequate to permit a determination of compliance with this subtitle.

§ 28-54. All contracts - Contract specifications.

Each contract must:

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

- (i) fulfill Program commitments submitted with the bids;
- (ii) continue to make [every effort] GOOD FAITH EFFORTS to utilize minority and women's business enterprises; and
- (iii) maintain records reasonably necessary for monitoring compliance with this subtitle.

§ 28-55. All contracts - Payments to subcontractors.

- (b) When payment considered timely.

A payment is timely if it is mailed, delivered, or transferred to a subcontractor no later than 7 CALENDAR days after the contractor receives payment from the City.

Part VII. Waivers

§ 28-61. Agency's pre-solicitation request.

- (b) Criteria for granting.

The Office may grant the waiver or reduction if the Office determines that:

- (1) the reasonable and necessary requirements of the contract render subcontracting or other participation of businesses other than the bidder infeasible; or
- (2) at least 2 qualified certified business enterprises capable of providing the goods or services required by the contract are unavailable in the Baltimore City [market area] MARKET AREA despite every feasible attempt to locate them.

§ 28-62. Bidder's pre-award request.

- (a) In general.

If a bidder is unable to comply with the contract [goal] GOALS, the bidder may submit a request for a waiver at the time of bid opening.

- (b) Documentation of efforts.

The request for a waiver must include documentation that demonstrates [a] THE BIDDER'S good faith [effort] EFFORTS to [comply with] MEET the [goal requirements] GOALS.

§ 28-63. Contractor's post-award request.

- (b) Request for waiver.

- (1) If, after reasonable good faith efforts, the contractor is unable to find a substitute, the contractor [may] MUST request a post-award waiver.

- (2) A CONTRACTOR MAY NOT SUBSTITUTE AN MBE OR WBE SUBCONTRACTOR OR PERFORM

THE WORK DESIGNATED FOR AN MBE OR WBE SUBCONTRACTOR WITH ITS OWN FORCES UNLESS THE CHIEF, AFTER CONSULTING WITH THE CONTRACTING AGENCY, APPROVES THE SUBSTITUTION IN WRITING. A CONTRACTOR MAY NOT ALLOW A SUBSTITUTED SUBCONTRACTOR TO BEGIN WORK UNTIL THE CHIEF HAS APPROVED THE SUBSTITUTION.

(c) Documentation of reasons.

(1) The request must BE IN WRITING AND document the reasons for the contractor's inability to meet the contract goal.

(2) THE FACTS SUPPORTING THE REQUEST MUST NOT HAVE BEEN KNOWN NOR REASONABLY SHOULD HAVE BEEN KNOWN BY EITHER PARTY BEFORE SUBMISSION OF THE CERTIFIED BUSINESS PARTICIPATION AFFIDAVIT. BID SHOPPING IS PROHIBITED.

(3) THE CONTRACTOR MUST NEGOTIATE WITH THE MBE OR WBE SUBCONTRACTOR TO RESOLVE THE PROBLEM. WHERE THERE HAS BEEN A MISTAKE OR DISAGREEMENT ABOUT THE SCOPE OF WORK, THE MBE OR WBE CAN BE SUBSTITUTED ONLY IF AN AGREEMENT CANNOT BE REACHED FOR A REASONABLE PRICE FOR THE CORRECT SCOPE OF WORK.

(4) SUBSTITUTIONS OF A SUBCONTRACTOR ARE PERMITTED ONLY ON THE FOLLOWING BASES:

(I) UNAVAILABILITY AFTER RECEIPT OF REASONABLE NOTICE TO PROCEED;

(II) FAILURE TO PERFORM;

(III) FINANCIAL INCAPACITY;

(IV) REFUSAL BY THE SUBCONTRACTOR TO HONOR THE BID OR PROPOSAL PRICE;

(V) FAILURE OF THE SUBCONTRACTOR TO MEET INSURANCE, LICENSING, OR BONDING REQUIREMENTS; OR

(VI) THE SUBCONTRACTOR'S WITHDRAWAL OF ITS BID OR PROPOSAL.

(5) THE CHIEF'S FINAL DECISION TO PERMIT OR DENY A PROPOSED SUBSTITUTION, AND THE BASIS OF ANY DENIAL, SHALL BE COMMUNICATED TO THE PARTIES IN WRITING BY THE CHIEF.

(6) WHERE THE CONTRACTOR HAS ESTABLISHED THE BASIS FOR A SUBSTITUTION TO THE SATISFACTION OF THE CHIEF, THE CONTRACTOR MUST MAKE GOOD FAITH EFFORTS TO FULFILL THE CERTIFIED BUSINESS PARTICIPATION AFFIDAVIT. THE CONTRACTOR MAY SEEK THE ASSISTANCE OF THE OFFICE IN OBTAINING A NEW MBE OR WBE. IF THE CONTRACT GOALS CANNOT BE REACHED AND GOOD FAITH EFFORTS HAVE BEEN MADE, THE CONTRACTOR MAY SUBSTITUTE WITH A NON-CERTIFIED BUSINESS.

Part IX. Certification

[§ 28-77. MBEs - Minority group eligibility.

(a) In general.

For a business enterprise to be eligible for certification as a minority business enterprise, the minority group members who own and control the business enterprise must be from 1 or more minority groups for which a utilization disparity has been identified.

(b) Annual review.

Annually, the Office must review the relevant data and determine which minority groups are eligible.]

§ 28-78. MBEs and WBEs - General criteria.

(a) General eligibility requirements.

To be eligible for certification as a minority business enterprise or women's business enterprise, the business enterprise must:

- (1) be an independent, operating business;
- (2) BE AT LEAST 51% MINORITY- OR WOMEN-OWNED;
- (3) BE A SMALL BUSINESS;
- (4) [(2)] BEFORE APPLYING FOR CERTIFICATION, have been in operation for at least 12 months [before applying for certification] FOR CONSTRUCTION BUSINESSES AND 6 MONTHS FOR ALL OTHER BUSINESSES;
- (5) [(3)] have been minority- or women-owned for at least 12 months before applying for certification; and
- (6) [(4)] have an operating office in the Baltimore City Market Area.

§ 28-79. MBEs and WBEs - Control.

[(c) 12-month prerequisite.

The operating arrangements and the ownership and control by the minority group members must have been in operation for at least 12 months before applying for certification.]

§ 28-80. MBEs and WBEs - Size standards[; "graduation"].

[(a) Board to set standards.

- (1) With the advice of the Office, the Board of Estimates must establish a maximum size standard for minority and women's business enterprises.
- (2) There must be separate size standards for separate business categories.
- (3) The Board of Estimates must review the size standards annually.]

[(b) Certification contingent.]

A business enterprise may not be certified as an MBE or WBE or, once certified, have its certification renewed if, on the effective date of the application or renewal, the MBE or WBE [exceeds the size standard established by the Board of Estimates under this subsection] NO LONGER IS A SMALL BUSINESS.

§ 28-83. Certification appeals.

(c) Action by Chief.

Within [15] 25 days of receipt of the protest, the Chief must:

- (1) review the protest and all relevant supporting documents; and
- (2) render a written decision that includes the reasons for the decision.

SECTION 2. AND BE IT FURTHER ORDAINED, That the catchlines contained in this Ordinance are not law and may not be considered to have been enacted as a part of this or any prior Ordinance.

SECTION 3. AND BE IT FURTHER ORDAINED, That this Ordinance takes effect on the date it is enacted.

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