

**COUNTY BUSINESS ENTERPRISE ACT OF 2009<sup>1</sup>**

**DIVISION 6. - COUNTY BUSINESS ENTERPRISE ACT OF 2009 (*current as of 11/21/2011*)**

**Sec. 1-81. - Short title.**

This section shall be known and may be cited as the "County Business Enterprise Act of 2009."

(Ord. No. 2009-40, § 1, 6-23-09)

**Sec. 1-81.1. - Objectives and definitions.**

(a)

Program objectives.

(1)

To ensure that small Broward County-based firms are provided sufficient opportunities to meaningfully participate in the award of County-funded contracts; and

(2)

To ensure that only business entities fully meeting the eligibility criteria stated herein are permitted to participate in this program.

(b)

Program definitions.

(1)

Affiliation means that, as determined by the Program Director (as defined below) or designee, the entity applying for certification under this section controls, has the power to control, or is controlled by another entity or entities, or an identity of interest exists between the entity applying for certification and another entity or entities. In determining whether an affiliation exists, the Program Director shall consider factors including, but not limited to, common ownership, common management, common control, and contractual relationships (to the extent they demonstrate affiliation). Affiliated entities must be considered together (in terms of gross receipts and the personal net worth of the owners) in determining whether a business is eligible for certification under this section.

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<sup>1</sup> Editor's note— Ord. No. 2009-40. § 1, adopted June 23, 2009, amended former Div. 6, §§ 1-81—1-81.5, in its entirety to read as herein set out. Former Div. 6 pertained to similar subject matter and derived from Ord. No. 2007-32, § 1, adopted Sept. 25, 2007.

(2)

Bidder means an individual or business entity that responds to a competitive solicitation advertised pursuant to the Broward County Procurement Code.

(3)

Continuous operating presence means a business entity with a current business tax receipt issued by Broward County, which has a physical business address located within the geographical limits of Broward County in an area zoned for the conduct of such business, and which has, as determined by the Program Director, sufficient full-time employees in Broward County to perform all required work in connection with contracting opportunities covered by this section.

(4)

Contractor means one who participates, through a contract or subcontract (at any tier), in a County contract or other County procurement opportunity.

(5)

County Business Enterprise or CBE means a business entity certified by the County as meeting all of the following criteria:

a. Does not (combined with any and all affiliated entities) have in excess of \$5 million in average annual gross revenue calculated over the previous three (3) calendar years. These maximum average gross revenue figures shall be indexed annually commencing October 1, 2009, using the Council for Community and Economic Research's ACCRA Cost of Living Index as applied in Broward County;

b. No person with an ownership interest (direct or indirect, legally beneficial) in the entity (or in any affiliated entity) has a personal net worth exceeding \$750,000; and

c. Has a continuous operating presence in Broward County.

(6)

Personal net worth means the net value of the assets of an individual after total liabilities (not including contingent liabilities) are deducted. For purposes of CBE certification, an individual's personal net worth does not include the individual's ownership interest in any CBE applying for or certified by the County or the individual's net equity in his or her primary place of residence.

(7)

Subcontracting possibilities means that a contract contains discreet scopes of work that a prime contractor, in the normal and customary course of business, would utilize subcontractors to perform. Subcontracting possibilities may not be created by forcing a prime contractor to subcontract work that would normally be performed by the prime contractor in the context of the particular contract.

(c)

Discriminatory actions forbidden. No person or entity shall be denied CBE certification on the basis of race, color, sex, religion, national origin, disability, age, marital status, political affiliation, sexual orientation, pregnancy, or gender identity and expression.

(Ord. No. 2009-40, § 1, 6-23-09)

**Sec. 1-81.2. - Administrative requirements.**

(a)

Required CBE Contract Language. Each County contract that contains CBE requirements (and each subcontract the prime contractor executes in connection with that County contract) shall include the following assurance: "No party to this contract may discriminate on the basis of race, color, sex, religion, national origin, disability, age, marital status, political affiliation, sexual orientation, pregnancy, or gender identity and expression in the performance of this contract. The contractor shall comply with all applicable requirements of the Broward County CBE Program in the award and administration of this contract. Failure by the contractor to carry out any of these requirements shall constitute a material breach of contract, which shall permit the County to terminate the contract or to exercise any other remedy provided under the contract, under the Broward County Code, or under applicable law, all of which remedies being cumulative."

(b)

CBE Program Leadership. The Program Director of the CBE program shall be the Director of the Broward County Office of Equal Opportunity.

(c)

Establishment of CBE Directory. The Program Director shall maintain a directory listing all certified CBEs. The listing shall include the entity's address, phone number, and the type(s) of work the entity has been certified to perform as a CBE. The directory shall be revised monthly, and shall be made available to contractors and the public upon request.

(d)

Whenever adjustments to criteria for CBE eligibility and adjustments to the cumulative CBE goal (as referenced below) are made, they shall be promptly published by the Program Director on the Small Business Development Division websites <http://www.broward.org/smallbusiness>.

(Ord. No. 2009-40, § 1, 6-23-09)

**Sec. 1-81.3. - Goals; reserves.**

(a)

Establishment of Cumulative CBE Goal. A cumulative goal of twenty-five percent (25%) participation by CBE firms in all County contracts not subject to other participation goals (e.g., federal DBE program; the County's sheltered market program) is hereby established. This cumulative goal may be adjusted by the Board of County Commissioners effective October 1 of any year. If the Program Director determines that an adjustment to the cumulative goal is appropriate based on available data, the Director shall present written justification for the proposed adjustment to the Board by August 15 of the applicable year.

(b)

Contract goals shall be established as follows:

(1)

Unless the Program Director determines that no CBE goal should be set on a contract for the reasons set forth below, the Program Director shall establish CBE goals on each contract identified in subpart (a) above in a manner designed to ensure that, for each fiscal year, the cumulative CBE goal then in effect is achieved as closely as practicable.

(2)

If no eligible Small Business Enterprise ("SBE") is selected for award of a contract initially solicited under the County's sheltered market program, the Program Director shall review that solicitation to determine whether a CBE goal should be established.

(3)

A CBE goal is not required to be set for each contract, and goals set on any given contract may be higher or lower than the cumulative CBE goal, depending on factors including whether subcontracting possibilities are available and the extent of those opportunities, the capacity and availability of CBEs to perform the work required under the particular contract, and CBE participation on other contracts.

(4)

The criteria used and calculations performed to establish each contract goal, or the rationale for deciding not to establish a goal for a particular contract, shall be maintained in writing by the Program Director or designee.

(5)

Either the Program Director or the Board of County Commissioners may waive the application of any CBE contract goal when either determines that such waiver would be in the best interest of the County.

(6)

In those contracts in which no CBE goal is set, the contract shall contain language stating that, although no CBE goal has been set, the County encourages contractors to give full consideration to the use of CBE firms to perform work under the contract.

(c)

Reserves. When all conditions identified in subpart (2) or (3) below are met, any contract may be reserved for participation by CBEs.

(1)

Solicitations Involving Reserves. When a CBE reserve is established in connection with a County solicitation, CBEs and non-CBEs may respond to the solicitation. If CBEs are available with capacity to perform the reserved work, the reserved work will be awarded to a CBE (consistent with all applicable terms and conditions of the County's Procurement Code). To the extent CBEs with sufficient capacity are not available to perform the reserved work, non-CBEs may be awarded that work. The non-reserved portion of the solicitation shall be open to award to either CBEs or non-CBEs. If no CBEs with capacity to perform the work respond to the solicitation, the full value of the project may be awarded as if no reserve had been established.

(2)

Required Conditions for Establishing CBE Reserve. Except as provided in subpart (3) below, no CBE reserve may be established unless all of the following conditions are met:

a. There is a documented absence of subcontracting possibilities, and such absence is expected to preclude CBE participation in an awarded contract;

b. The Program Director has determined, after consultation with the Purchasing Division, that unbundling or dividing a project into separate contracts for the purpose of reserving one (1) or more of the unbundled contracts to CBE firms is commercially practicable and is not expected to materially increase the overall cost of the project; and c. Because of actual and projected CBE participation during the relevant fiscal year, the Program Director has determined that a reserve is necessary to meet the cumulative CBE goal.

(3)

Establishing CBE Reserve to Provide Prime-contracting Opportunities. In addition to or as an alternative to subpart (2) above, CBE reserves may be established when the Program Director determines that establishing such reserves is appropriate to create opportunities for CBE firms to gain experience as prime contractors.

(Ord. No. 2009-40, § 1, 6-23-09; Ord. No. 2011-05, § 1, 2-22-11)

**Sec. 1-81.4. - Satisfaction of CBE goals; good faith effort.**

(a)

Any bid or offer made by the bidder shall not be considered responsive unless the bidder meets the CBE goal established for the contract or demonstrates good faith effort to meet the CBE goal.

(b)

In order to meet the CBE goal of a contract, the bidder must submit the following information:

(1)

The names and addresses of each certified CBE that will participate in the contract;

(2)

A description of the work that each certified CBE will perform;

(3)

The dollar amount of the participation each certified CBE will receive under the contract, together with the percentage of the total contract represented by that dollar amount;

(4)

Written documentation, in form acceptable to the County's Small Business Development Division, of the bidder's commitment to use each certified CBE whose participation the bidder submits to meet the contract goal; and

(5)

Written confirmation (in form acceptable to the County's Small Business Development Division) from each certified CBE that it will participate in the contract as provided above.

(c)

The bidder must present the above information as follows:

(1)

Under sealed bid procedures, the information must be provided with the sealed bid response; or

(2)

Under requests for letters of interest or requests for proposals, the information must be provided with the initial letter of interest or proposal.

(d)

Notwithstanding the timeframes stated in paragraph (c) immediately above, if the documentation submitted by the bidder demonstrates that the bidder attempted to comply with the CBE goal but failed for some technical reason, such as submitting incomplete information or documentation, the bidder shall not be deemed non-responsive provided the bidder cures the problem within three (3) business days after notification from the County that such problem exists.

(e)

Each contract setting a CBE goal shall provide that:

(1)

A prime contractor may not terminate for convenience a certified CBE listed as a subcontractor in the prime contractor's bid or offer without the County's prior written consent, which consent shall not be unreasonably withheld.

(2)

When a certified CBE subcontractor is terminated for any reason, including for cause, the prime contractor shall make good faith efforts to find another certified CBE to perform the work due to be performed by the original CBE. The prime contractor acknowledges that any failure to meet its obligation under this paragraph shall constitute a material breach of contract.

(3)

If the prime contractor fails to comply with the requirements of the County Business Enterprise Act of 2009, the County may exercise any administrative remedies provided by the Business Opportunity Act of 2004 or any other right or remedy provided in the contract or under applicable law, with all of such rights and remedies being cumulative.

(f)

In determining whether a certified CBE bidding for a prime contract has met the contract goal, the amount of contract participation by the bidding CBE shall be included in calculating total CBE participation under the contract.

(g)

Determination of Good Faith Effort by Bidder.

(1)

A bidder shall not be determined non-responsive and shall not be denied award of a contract due to the failure of a bidder to meet the assigned contract goal if the bidder timely (as provided in subparts (c) and (d) above) provides documentation demonstrating, as determined by the Program Director, the bidder's good faith effort to meet the goal. In making such determination, the Program Director shall

consider the quality, quantity, and extent of the various efforts that the bidder has made to meet the goal.

(2)

The efforts to be considered by the Program Director include, but are not limited to:

a.Soliciting through activities such as attendance at pre-bid meetings, advertising, or written notices, the interest of certified CBEs (or CBEs eligible for certification) that have the ability and capacity to perform the contract work. The bidder must solicit this interest in a timely manner to allow the CBEs to respond to the solicitation. The bidder must take appropriate steps to follow up initial solicitations of CBE firms.

b.Identifying the portions of the contract that could reasonably be performed by a CBE in order to increase the likelihood that the CBE goals will be achieved. This may include, where appropriate and commercially practicable, separating contract work items into segments more appropriate for participation by CBEs.

c.Providing each interested CBE with adequate information about the plans, specifications, and requirements of the contract in a timely manner.

d.Negotiating in good faith with each interested CBE. Evidence of such negotiation includes the names, addresses, and telephone numbers of CBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why an agreement could not be reached with an interested CBE to perform the work. The fact that there may be some additional costs involved in subcontracting with CBEs is not in itself sufficient reason for a bidder's failure to meet the contract CBE goal, as long as such additional costs are reasonable. The determination of whether additional costs are reasonable shall be made jointly by the Purchasing Director (or designee) and the Program Director (or designee), with any disagreement resolved by the County Administrator or designee.

e.Rejecting a CBE as being unqualified for participation only after diligently investigating the CBE's capabilities and documenting the sound reasons justifying such rejection (with such documentation to be provided to the Program Director).

(3)

In determining whether a bidder has made a good faith effort, the County may take into account the response of other bidders in meeting the contract goal. For example, when the apparent successful bidder fails to meet the contract goal, but others meet it, it is proper to question whether, with additional reasonable efforts, the apparent successful bidder could have met the goal. If the apparent successful bidder fails to meet the goal, but meets or exceeds the average CBE participation obtained by other bidders, this may be viewed, in conjunction with other factors, as evidence of the apparent successful bidder having made a good faith effort.

(4)

Monitoring CBE Participation. The Program Director shall implement procedures to monitor actual CBE participation.

(Ord. No. 2009-40, § 1, 6-23-09)

**Sec. 1-81.5. - Certification and compliance.**

(a)

Certification Standards for CBE Firms.

(1)

The Small Business Development Division (the "Division") shall determine whether an entity is eligible for CBE certification. The Division shall maintain all records of CBE application and certification. Firms currently certified by the Division as CDBEs (under the predecessor to this section) shall be deemed certified CBEs until the date their certification as a CDBE would have expired.

(2)

A business entity applying for CBE certification shall provide to the Division documentation demonstrating that it meets the eligibility criteria, in the form prescribed by the Division.

(b)

Review of CBE Eligibility Criteria. The Program Director shall periodically review and, if necessary, recommend to the Board of County Commissioners adjustments to the criteria for CBE certification.

(c)

Standards for Determining Ownership and Control of a Business Entity.

(1)

The County Administrator shall establish and adopt standards to determine whether a business entity applying for CBE certification meets the ownership and control criteria. The standards shall also identify the appeals process to be utilized for denials or revocations of CBE certification. The standards shall be adopted within one hundred and eighty (180) days of the effective date hereof and may be subsequently amended by the County Administrator to effectuate the purposes of the CBE program.

(2)

Until the standards for determining ownership and control of a business entity are adopted, the determination of ownership and control shall be made in accordance with the administrative procedures governing the Small Business Enterprise Program, under Administrative Order 862, the County's Administrative Order implementing the Business Opportunity Act of 2004.

(d)

CDBE Goals in Executory Contracts. All CD BE goals in effect upon the enactment hereof shall remain in full force and effect.

(Ord. No. 2009-40, § 1, 6-23-09)