

ORDINANCE NO. 2009-\_\_\_\_\_

AN ORDINANCE OF THE BOARD OF SUPERVISORS OF PIMA COUNTY, ARIZONA AMENDING THE PIMA COUNTY CODE, TITLE 20, MINORITY AND WOMAN OWNED BUSINESS ENTERPRISE CODE

WHEREAS, Pima County has a Minority and Woman Owned Business Enterprise (MWBE Program that has been in effect since 1997; and

WHEREAS, the County is authorized by Pima County Code Title 20 to administer the minority and woman-owned business enterprise (MWBE) program which is a narrowly tailored remedial plan intended to correct identified disparities between the availability of local MWBEs and the participation of local MWBEs in County purchases and contracts; and

WHEREAS, County conducted disparity studies prior to the initial adoption of its MWBE program, and completed a second disparity study in 2002, after which the County MWBE program was extended for an additional five years; and

WHEREAS, in October 2007, in conjunction with the City of Tucson, Pima County commissioned D. Wilson Consulting Group, LLC., to conduct the third-generation disparity study to determine whether there is justification for the continuation of a race and gender conscious MWBE Program; and

WHEREAS, on September 15, 2008 D. Wilson Consulting Group, LLC submitted the Third Generation Disparity Study, which concluded, in part, that significant statistical disparity exists in MWBE participation within identifiable areas of the Pima County's contracting activity, by specific gender and racial/ethnic minority category during the study period of 2002 through 2006; and

WHEREAS, on October 9, 2009, the Board accepted the factual predicate established by the Third Generation Disparity Study and concluded that it is in the best interest of the County to extend the current MWBE program for an additional five year period and granted its approval to draft amendments to the Code, Board of Supervisor's Policies and department procedures to conform to the findings of the Comprehensive Disparity Study; and

WHEREAS, findings in the County's third generation disparity study recommend and the Board of Supervisors agree that there is still a need for a MWBE program, however, it must be narrowly tailored to the MWBE groups that have been significantly underutilized or become significantly underutilized as determined by continuous monitoring of availability and utilization of MWBE firms; and

WHEREAS, based on recommendations in the third generation disparity study the Board of Supervisors have approved the creation of a race and gender neutral Small Business Enterprise Program to encourage contracting with all small businesses, including MWBE businesses; and

WHEREAS, the Board of Supervisors, based upon the factual predicate established in the third generation disparity study, hereby implements amendments to Pima County Title 20.

BE IT ORDAINED BY THE BOARD OF SUPERVISORS OF PIMA COUNTY, ARIZONA:

SECTION 1. Ordinance No 1997 and Title 20, Sections 20.04.10 through 20.36.10 of the Pima County Code are hereby amended to read as follows:

**Title 20 THE MINORITY-OWNED BUSINESS ENTERPRISE, WOMAN-OWNED BUSINESS ENTERPRISE AND SMALL BUSINESS ENTERPRISE PARTICIPATION PROGRAMS**

## **Chapter 20.04 GENERAL PROVISIONS**

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### **20.04.010 Adoption of findings.**

The Pima County board of supervisors has reviewed and adopted the factual predicate established by the disparity study conducted by BBC Research & Consulting, the findings report, transcripts, and exhibits produced as a result of post-disparity study public hearings and other evidence of record. (Ord. 1997-44, 1997)

Upon completion of the updated disparity study conducted for the period from January 1, 2002 through December 31, 2006, on October 7, 2008 the Board of Supervisors reviewed and adopted the factual predicate established by the study conducted by D. Wilson Consulting Group, LLC., dated September 22, 2008, including Section 10.0 "Findings and Recommendations". (Ord. 2008-265, 2008)

### **20.04.020 Declaration of policy.**

It is the policy of Pima County government to ensure full and equitable economic opportunities to persons or businesses that compete for business with Pima County government, including minority-owned business enterprises (MBE), woman-owned business enterprises (WBE) and small business enterprises (SBE). The Pima County Minority-owned and Woman-owned Business Enterprise Program is a narrowly tailored remedial plan intended to correct identified disparities. The goal of the race and gender neutral Small Business Enterprise (SBE) program is to expand employment opportunities and promote the local economy by fostering the formation and growth of local small businesses and to encourage contracting with all small local businesses, including MWBE businesses.(Ord. 2008-265, 2008, Ord. 1997-44, 1997)

### **20.04.030 Scope.**

A. The race and gender-conscious measures of this title shall be afforded only to local, qualified, available and certified, minority and woman-owned small business enterprises, and only in instances where the study team conducting the Pima County Disparity Study concluded, based on combined quantitative and qualitative evidence, that there is a strong basis in evidence sufficient to establish a prima facie case of discrimination:

1. In the A&E professional services industry, remedies may be extended to African American, Asian Pacific American, Subcontinent Asian American, Hispanic American, Native American and Non-minority Women-owned small business enterprises.
2. In the non-A&E professional services industry, remedies may be extended to African-American and Asian Pacific-American small business enterprises.
3. In the construction industry, remedies may be extended to African American, Asian Pacific American, Subcontinent Asian American, Native American, and Non-minority Women-owned small business enterprises.

B. The race and gender-neutral measures of this title shall be afforded only to local, qualified and available, small business enterprises.

C. The scope of coverage may be changed before the sunset date of this title consistent with post-enactment evidence, so long as such evidence meets applicable requirements. (Ord. 2008-265, 2008, Ord. 1997-44, 1997)

#### **20.04.040 Individual contract or project goals for construction or A&E contracts.**

A. When applicable, as described in the divisions of this title, the procurement director shall add a requirement to the bid or proposal instructions that a percentage of the dollar value of all work on such contracts or projects shall be assigned, as a goal, to MBEs, WBEs and/or SBEs. The goal percentage assigned to each such contract is flexible and will vary from contract to contract, according to the availability of qualified and willing MBEs, WBEs and/or SBEs. Where there is no MBE, WBE and/or SBE availability, or insufficient availability to ensure competition, the procurement director will recommend that no goal be set on an individual contract or project. Individual goals are subject to the good faith and waiver provisions of this title. The procurement director shall recommend the establishment of a methodology for the setting of individual contract or project goals, which shall include but not be limited to the following conditions:

1. The present availability of qualified MWBE/SBE firms in the relevant trade or line of business;
2. The ability of qualified MWBE/SBE firms to readily expand capacity to meet additional demand;
3. The adverse impact upon non-MWBE/SBE firms;
4. The findings and conclusions contained in the disparity study and other reports undertaken by the county and other institutions, organizations, and governmental entities relating to the Pima County marketplace;
5. A forecast of all eligible contracts to be awarded within the fiscal year;
6. Review and analysis of the reports generated by the procurement department.

B. These specific goals are to be clearly stated as part of the contract specifications put out for bid.

C. Individual project or contract goals shall apply not only to the initial contract award amounts, but also to subsequent contract modification and change orders that serve to increase the dollar value of the initial contract.

D. As an aid to the determination of individual contract or project goals, the procurement director may consider the advice of a compliance officer, may establish goals committees, and/or at his or her discretion, may recommend contracting with an independent consultant. (Ord. 2008-265, 2008, Ord. 1997-44, 1997)

## **Chapter 20.08 DEFINITIONS**

### 20.08.010 Definitions.

#### **20.08.010 Definitions.**

For the purposes of this title and policies related to the Minority-Owned Business Enterprise, Woman-Owned Business Enterprise and Small Business Enterprise Participation Programs, the following terms shall have the following meanings:

A. "Affiliate" shall mean any business enterprise which is affiliated with the MBE or WBE or with the minority or woman upon which certification is based. Business enterprises are affiliates of each other when

1. One either directly or indirectly controls or has the power to control the other;
2. A third business enterprise controls or has the power to control both; or
3. An "identity of interest" between or among business enterprises exists (including family

relationships) such that affiliation may be found.

In determining whether affiliation exists, consideration shall be given to all appropriate factors, including but not limited to common ownership, common management, contractual relationships, and shared facilities.

B. "Bid" shall mean and include a quotation, proposal, solicitation or offer by a bidder or contractor to perform or provide labor, materials, supplies, or services to Pima County government for a price.

C. "Bidder" shall mean any business that submits a quotation, bid, or proposal to provide labor, materials, supplies or services to Pima County government.

D. "Business Enterprise" shall mean a corporation, partnership, individual, sole proprietorship, joint stock company, joint venture, professional association, or any other legal entity, operated for profit that is properly licensed and/or otherwise authorized to do business.

E. "Certification" shall mean completion by a business enterprise of an application procedure to be developed and maintained by the procurement director, and formal authorization by the procurement director to participate as an MBE, WBE and/or SBE.

F. "Certified MBE, WBE or SBE" shall mean: an MBE, WBE or SBE which meets the requirements of this Title, and has been granted status as a certified small business enterprise by the Procurement Director.

G. "Commercially useful function" Commercially Useful Function shall mean: the performance of real and actual services in the discharge of any contractual endeavor. An MBE, WBE or SBE subcontractor is considered to perform a commercially useful function when it is responsible for the execution of a distinct element of work under a contract and carries out its responsibilities by actually performing, managing and supervising the work involved with its own resources. In determining whether an MBE, WBE or SBE subcontractor is performing a commercially useful function, factors including but not limited to the following will be considered:

- (1) The amount of work subcontracted;
- (2) Whether the amount the MBE/WBE/SBE is to be paid is commensurate with the work it will actually perform;
- (3) Whether the business will perform work in the trade area where experience and expertise has been demonstrated and for which it is seeking to be or has been certified;
- (4) Whether the business actually performs, manages and supervises the work for which it has been contracted to perform;
- (5) Whether the business purchases goods and/or services from a non-minority owned business enterprise or a non-woman owned business enterprise and simply resells goods to the County, County contractor, or other person doing business with the County for the purpose of allowing those goods to be counted towards fulfillment of MBE, WBE or SBE utilization goals; and
- (6) Standard industry practices.

H. "Controlled" for purposes of determining whether a business is a MBE, WBE, or a SBE shall mean: the minority, woman or small business owner(s) shall possess and exercise the legal authority and power to manage business assets, good will and daily operations in the primary trade area for which certification is sought apart from administrative functions and they shall actively and continuously exercise this managerial authority and power in determining the policies of and directing the day-to-day operations of, the business. If the owners who are not a minority, woman or small business owner are disproportionately responsible for the operation of the business, then the business is not controlled by a minority, woman or small business owner.

I. "County" shall mean Pima County government.

J. "Disparity" shall mean an indication of underutilization or overutilization of a MWBE group. The disparity ratio used in the third generation disparity study measures the difference between the proportion of available firms and the proportion of dollars those firms received. As the proportion of contract dollars received becomes more statistically significant than the proportion of available MWBEs, an inference of discrimination can be made. A disparity ratio of one(1) indicates no disparity (i.e., utilization equals availability). A disparity ratio of less than one(1) indicates that the percentage of utilization for WBEs or a particular minority group is less than the percentage of that group's availability. A disparity ratio greater than one (1) indicates that the percentage of utilization for women or a particular minority group is more than the percentage of that group's

availability.

K. "Eligible Contract" shall mean any contract for goods and services unless otherwise precluded by law; except that eligible contract does not mean sole source contracts, petty cash purchases, emergency purchases, contracts for professional services, contracts for architectural and engineering services, construction projects, or contracts for noncompetitive purchases, including business with hospitals, insurance companies, churches, governments, professional associations, publishing companies, and utilities.

L. "Eligible Project" shall mean any construction contract undertaken by the county unless otherwise precluded by law. Eligible project does not include any construction project in which the estimated contract value is below fifty thousand dollars (\$50,000) or any construction project that requires a disadvantaged business enterprise or other goal pursuant to federal law.

M "Fixed Office" shall mean a fixed and established place where work is carried on of a clerical, administrative, professional or production nature directly pertaining to the business being certified. A temporary location, or movable property, or one that is established to oversee a county project does not qualify as an office.

N. "Joint Venture" shall mean: an association of two or more persons, partnerships, corporations or any combination of these entities, established to carry on a single business activity limited in scope and duration to a specific contract with the County. The degree to which a joint venture may satisfy relevant MBE/WBE/SBE participation goals cannot exceed the proportionate interest held by the MBE, WBE or SBE as a member of the joint venture as demonstrated in the written agreement establishing the joint venture. Further, MBE, WBE or SBE economic interest in the joint venture shall be based on sharing of real economic interest in the joint venture and shall include proportionate control over management, interest in capital acquired by the joint venture, and participation in the joint venture's profit or loss.

O. "Local" shall mean that the principal place of business of the enterprise is physically located within the Tucson Metropolitan Statistical Area (MSA) (corresponding with the geographic boundaries of Pima County), with a fixed office, as defined by this title, located within the Tucson MSA. Post office box numbers shall not suffice to establish an enterprise as a local business. Residential addresses are rebuttably presumed not to establish the requirements of this provision.

P. "Minority" shall mean citizens or lawful permanent residents of the United States, and includes any individual in the following groups:

- (1) "African Americans," which includes persons having origins in any of the black racial groups of Africa;
- (2) "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture of origin, regardless of race;
- (3) "Native Americans," which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;
- (4) "Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Juvala, Nauru, Federated States of Micronesia, or Hong Kong.
- (5) "Subcontinent Asian Americans," which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka.

Q. "Minority Owned Business Enterprise (MBE)" shall mean a local small business enterprise which is an independent and continuing business for profit, performing a commercially useful function, owned and controlled by one or more minority persons (Asian-American, African-American, Hispanic-American or Subcontinent Asian-American or Native American) who possess an interest of fifty-one (51) percent or more in the business.

R. "Owned" for purposes of determining whether a business is a MBE, WBE or SBE shall mean that: (1) the minority, woman or small business owner(s) as the context requires, shall possess an ownership interest of at least fifty-one percent of the business; (2) this ownership shall be real

and continuing, and shall go beyond mere indicia of ownership of the business reflected in ownership documents; and (3) the minority, woman or small business owner(s) shall enjoy the customary incidents of ownership and shall share in the risks and profits commensurate with their ownership interests, as demonstrated by an examination of the substance, rather than the form, of ownership arrangements.

S. "Race/gender conscious measure or activity" is one that is focused specifically on addressing identified disparity.

T. "Race/gender neutral measure or activity or program" is one that is, or can be, used to assist all small businesses.

U. "Small Business" shall mean: a minority, woman or non-minority owned business whose annual gross receipts are less than or equal to the gross receipts size standard adopted by the County for purposes of qualifying for MBE/WBE/SBE certification.

V. "Small Business Enterprise (SBE)" shall mean: a small business which is eligible for certification, is certified by the county, is an independent and continuing business for profit, performs a commercially useful function, and is owned and controlled by one or more persons each of whose personal net worth does not exceed seven hundred fifty thousand dollars. Any certified MBE or WBE shall also qualify as a Small Business Enterprise.

W. "Woman-owned Business Enterprise (WBE)" shall mean a local small business enterprise which is an independent and continuing business for profit, performing a commercially useful function and owned and controlled by one or more non-minority women who possess an interest of fifty-one (51) percent or more in the business.

(Ord. 2008-265, 2008, Ord. 1997-44, 1997)

## **Chapter 20.12 EQUAL OPPORTUNITY CLAUSE**

### 20.12.010 Equal opportunity clause.

#### **20.12.010 Equal opportunity clause.**

A. All eligible contracts, contracts for professional services and the services of architects and engineers, and contracts resulting from eligible projects entered into by Pima County government shall incorporate an equal opportunity clause. The requirements contained in this clause will be considered by the procurement director in determining whether a contractor is in compliance with this article. The clause shall read as follows:

Equal Opportunity Clause:

(1) The contractor shall not discriminate against any employee because of race, color, religion, sex, national origin, age, or disability. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, national origin, age, or disability. Such action shall include, but not be limited to, the following: employment up-grading, demotion, or termination; rates of pay or other forms of compensation; and selection for training.

(2) The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices summarizing the provisions of this Equal Opportunity Clause.

(3) The contractor shall, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that the contractor is an equal opportunity employer.

(4) The contractor understands that it is the policy of Pima County government to ensure full and equitable economic opportunities to persons or businesses that compete for business with Pima County government, including minority-owned business enterprises and woman-owned business enterprises.

(5) The contractor shall permit access to any relevant and pertinent reports and documents by the procurement director for the sole purpose of verifying compliance with this title and its related policy and regulations. All such materials provided to the county by the contractor shall be kept confidential to the extent possible.

(6) The contractor shall not obstruct or hinder the county in the fulfillment of duties and responsibilities imposed by this title and its related policy and regulations.

(7) The contractor and each subcontractor shall include a summary of this equal opportunity clause in every subcontract. The contractor will take such action with respect to any subcontractor as is necessary as a means of enforcing the provisions of the equal opportunity clause.

B. The inclusion of this clause may be waived by the procurement director where it is appropriate due to a similar clause requirement by state or federal law. (Ord. 2008-265, 2008, Ord. 1997-44, 1997)

## **Chapter 20.16 GOODS AND GENERAL SERVICES**

### 20.16.010 Goods and general services.

#### **20.16.010 Goods and general services.**

Declaration of Specific Measures Adopted.

A. The County may allocate up to a five percent competitive bid incentive to available SBEs who bid on eligible contracts in the amount of five hundred thousand dollars or less. If the cost of the bid incentive reaches thirty-five thousand dollars during any fiscal year, the County Administrator shall notify the County Board of Supervisors so that the Board may consider whether or not to continue the incentive during the remainder of that fiscal year. Notice of any bid incentive shall appear in County solicitation documents.

1. Bid incentive percentage. Unless otherwise indicated, all eligible contracts shall be subject to the bid incentives of this article. In determining the lowest responsive and responsible bid on all eligible contracts, the bid submitted by a certified SBE shall be adjusted by reducing the bid price(s) of such business by up to five percent. This adjustment shall be solely for the purpose of establishing the apparent low bidder. The actual value of the contract awarded shall be the amount of the actual bid submitted by the SBE.

2. Bid incentive for joint ventures. A joint venture shall receive a bid incentive for an eligible contract in accordance with this section if SBE participation equals or exceeds thirty-five percent of the joint venture. The non-SBE partner must be responsible for a clearly defined portion of the work to be performed and share in the joint venture's ownership, control, management responsibilities, risks and profits. The portion of the SBE joint venture's work shall be set forth in detail separately from the work to be performed by the non-SBE joint venture partner. The SBE joint venture's portion of the contract must be assigned a commercially reasonable dollar value. The bidder shall permit the County to review all records pertaining to joint venture agreements before and after the contract award, to the extent reasonably necessary to assess compliance with this title.

B. The County may reserve up to ten percent of the solicitation of all goods, supplies and general services procurements for competition exclusively among certified SBEs. For these procurements, there shall be no bid incentive. Before the County may reserve goods, supplies and general services procurements for competition exclusively among certified SBEs, the County shall consider the availability of certified SBEs who are qualified, willing and able to provide materials or services in connection with the particular procurement. (Ord. 2008-265, 2008)

C. Exemptions from bid incentive requirements on eligible contracts. The applicable bid incentive shall not apply to the following contracts with the County:

1. Contracts that exceed five hundred thousand dollars in total annual value;

2. Contracts with nonprofit agencies;
3. Contracts for the provision of services that are paid for directly by citizens of the County and not from County funds;
4. Contracts, if any, reserved for competition exclusively between SBEs.

D. Subcontracting goals for certain goods and general services purchases. Where subcontracting opportunities arise in the area of goods and general services, the county may set subcontracting goals on such contracts on a project by project basis, according to availability. The provisions of this title related to construction contracts, which establish the terms of setting goals, of determining whether there has been "good faith effort," or "nonresponsiveness," of allowing the waiver of goals, and other relevant provisions, shall apply. (Ord. 2008-265, 2008, Ord. 2003-63, 2003; Ord. 1997-44, 1997)

## **Chapter 20.20 PROFESSIONAL SERVICES CONTRACTS**

### 20.20.010 Professional Services Contracts.

#### **20.20.010 Professional Services Contracts.**

Declaration of Specific Measures Adopted.

A. MBE/WBE/SBE participation assigned weight in the evaluation criteria. In selecting architects and engineers and other professional services, not including the medical and legal fields, the county shall:

1. Develop a consistent method of evaluating and selecting professional services contractors across county departments; and
2. Award points (up to 10 percent of the available points) as part of the evaluation criteria for the participation of certified minority, woman-owned or small business enterprises, joint ventures of MWBE/SBE and non-MWBE firms, and/or affirmative action compliance.
  - a. A&E professional service participation points shall be awarded for certified firms identified in 20.04.030(A)(1) or any certified local SBE;
  - b. Non-A&E professional service participation points shall be awarded for certified firms identified in 20.04.030(A)(2) or any certified local SBE.
3. Make county guidelines available to firms in advance of submitting proposals.

B. Waiver. The award of points as part of professional service evaluation criteria is a narrowly tailored, flexible, and responsive measure, which allows for waiver upon recommendation of the procurement director to the county administrator for enforcement, when less restrictive, equally effective remedial measures are available and utilized. (Ord. 2008-265, 2008, Ord. 1997-44, 1997)

C. Subcontracting goals for certain A & E professional design contracts. Where subcontracting opportunities arise in the area of professional design contracts, the county may set subcontracting goals on such contracts on a project by project basis, according to availability. The provisions of this title related to construction contracts, which establish the terms of setting goals, of determining whether there has been "good faith effort," or "non-responsiveness," of allowing the waiver of goals, and other relevant provisions, shall apply. (Ord. 2008-265, 2008, Ord. 2003-63, 2003; Ord. 1997-44, 1997)

## **Chapter 20.24 CONSTRUCTION CONTRACTS**

### 20.24.010 Declaration of specific measures adopted.

### 20.24.020 Compliance with individual project subcontracting goals.

20.24.030 Good faith efforts and waiver.

**20.24.010 Declaration of specific measures adopted.**

A. Individual Project Subcontracting Goals. The procurement director shall review each eligible project for potential MBE, WBE and, if appropriate, SBE subcontracting participation. Where there is sufficient availability of qualified and willing MBEs or WBEs or SBEs, the procurement director shall recommend individual project subcontracting goals to the county administrator for approval and enforcement. (Ord. 2008-265, 2008, Ord. 1997-44, 1997)

B. Any construction project procurement which does not exceed the aggregate dollar amount of fifty thousand dollars may be restricted, if practicable, to small businesses as defined in rules adopted by the procurement director.

C. Procurement requirements shall not be artificially divided or fragmented so as to constitute a purchase under this section and to circumvent the source selection procedures required by A.R.S. Title 34 or the Pima County Procurement Code or be artificially combined to circumvent this section.

D. For Construction projects that require a disadvantaged business enterprise or other goal pursuant to federal law, the County shall follow the requirements of the relevant federal or state agency.

**20.24.020 Compliance with individual project subcontracting goals.**

A. Procedure:

1. When the county has established subcontracting goals for a project, such goals will be published in the project specifications and the call for bids.

2. All bidders are required to submit a subcontractor equity packet with their bid packet. The subcontractor equity packet will contain either:

a. The information necessary to show that the prime contractor will comply with the subcontracting goals, including a complete listing of MBE/WBE/SBE subcontractors to be used and the proposed MBE/WBE/SBE dollar percentage of each subcontract; or

b. A request for waiver of the goals.

3. MBE/WBE/SBE prime contractors may not count their own participation towards fulfillment of the project's subcontracting goals.

B. Subcontractor Equity Packets. Each bidder shall submit a subcontractor equity packet which includes the names, addresses, and contact persons of the MBEs/WBEs/SBEs to be used on the project; the type of work or services to be performed; the value of the commercially useful function to be performed by the MBEs/WBEs/SBEs; the percentage of the value of the commercially useful function to be performed by the MBEs/WBEs/SBEs as compared to the total contract amount; a verified statement from the bidder that the dollar amount of work to be performed by named MBEs/WBEs/SBEs was furnished to the bidder prior to bid opening; documentation reflecting the bidder's affirmative action and equal employment practices; and other relevant information as required. Project goals may be met in the following ways, unless otherwise specified:

1. The bidder may use a certified MBE/WBE/SBE or MBEs/WBEs/SBEs as subcontractors, and the value of the commercially useful function to be performed by such MWBE/SBE(s) shall count toward satisfaction of the applicable goal. The named MBE/WBE/SBE subcontractor(s) may enter into second tier subcontractors, consistent with industry practices; however, if the names MBE/WBE/SBE subcontracts work to a non-MBE/WBE/SBE in proportions outside standard industry practice, the MBE/WBE/SBE shall be presumed not to be performing a commercially useful function; or

2. The bidder may contract with a certified MBE/WBE/SBE supplier(s) and obtain credit towards

participation goals as follows:

- a. If the MBE/WBE/SBE supplier manufactures the goods supplied, then the total dollar amount of the subcontract is credited towards the established MBE/WBE/SBE goal; or
  - b. If the MBE/WBE/SBE supplier is a wholesaler warehousing the goods supplied, or is a manufacturer's representative, then the total contract amount is credited towards the established MBE/WBE/SBE goal; however, only 25 percent of the project MBE/WBE/SBE goal may be met in this manner; or
3. The bidder may engage in a joint venture to satisfy the established MBE/WBE/SBE goal. The degree of MBE/WBE/SBE participation credited towards the goal will be determined according to a consistent methodology developed by the procurement director.

#### **20.24.030 Good faith efforts and waiver**

A. Individual Waiver of Project Subcontracting Goals. If a bidder has not met the established individual project subcontracting goals, such goals may be waived by the county administrator upon recommendation of the procurement director, if there is a timely request for waiver and sufficient demonstration that good faith efforts were made to meet the goal. The kinds of efforts, as well as the quantity and intensity of effort to meet established goals, will be considered. The statement of good faith efforts submitted with the subcontracting equity packet may contain any information the bidder deems relevant and shall include each of the following:

1. Verification of advertisements soliciting bids from MBEs/WBEs/SBEs for three consecutive days in an approved publication or copies of written notifications sent to all MBEs/WBEs/SBEs currently certified with the county within identified subcontracting categories, that interest in the subcontract is solicited. Such advertisements or notices must expressly describe a given project and state that MBE/WBE/SBE participation is sought; incidental reference to the project or listing of the bidder as a plan holder is not sufficient. Such advertisements or notices shall be published or sent so that there is adequate time to respond prior to bid opening.
2. Verification that the procurement department was contacted in order to obtain assistance in identifying available qualified MBEs/WBEs/SBEs.
3. Verification of efforts to subcontract, consistent with industry practice, with MBEs/WBEs/SBEs that the bidder has contacted or who have contacted the bidder, including the names, addresses, and telephone numbers of all MBEs/WBEs/SBEs contacted and date of contact; a description of efforts made to subcontract; a description of the information provided to the MBEs/WBEs/SBEs regarding plans and specifications, and if attempts to subcontract actually occurred, the dates and places of such process and a description of the outcome.
4. Verification that the bidder gave MBEs/WBEs/SBEs necessary access to and adequate time to review all necessary plans, drawings, specifications, and other documents, as well as adequate time to prepare subcontract bids and/or negotiate joint venture agreements.
5. Verification that, reasonably consistent with industry practice or the bidder's past practices on similar projects, the bidder made efforts to attract MBEs/WBEs/SBEs in order to achieve the project goals, including consideration of dividing the work into economically feasible units.
6. A statement describing the reasons why the bidder and MBE/WBE/SBE did not succeed in reaching a subcontracting or joint venture agreement for each MBE/WBE/SBE which contacted the bidder or which the bidder contacted.
7. Verification that the bidder rejected available MBEs/WBEs/SBEs because they submitted bids which were unreasonably high, or they were not qualified. Such verification shall include a statement of the amounts of all bids received from potential subcontractors and all relevant dates.

B. The County may waive a project goal, at least in part, if the MBE, WBE and SBE subcontractor quotes received by the contractor in one trade exceed the quote(s) of the lowest non-MBE/WBE/SBE competing for the same work by the lesser of fifteen percent (15%) or two hundred fifty thousand dollars (\$250,000) and no other trade area is available to meet the established MWBE/SBE goal. A contractor may not compare self-performed costs against an MWBE/SBE subcontractor quote as justification for the rejection of a bid.

C. General Waiver or Reduction of Project Goal. The county administrator, upon recommendation of the procurement director, may waive or reduce the established project goal where it is determined that MBE/WBE/SBE availability is less than projected upon establishing the goal. In

such circumstances, the county administrator shall certify that MBEs/WBEs/SBEs are in fact not available to provide the needed labor and materials at competitive prices. (Ord. 2008-265, 2008, Ord. 1997-44, 1997)

## **Chapter 20.28 ENFORCEMENT AND REPORTING**

### 20.28.010 Powers and duties.

### 20.28.020 Determination of non-responsiveness and opportunity to clarify.

### 20.28.030 Reporting and maintenance of records by contractors.

### 20.28.040 Compliance by county departments required.

### 20.28.050 Continued compliance for the duration of the project.

### 20.28.060 Investigations of compliance, burden of proof, and findings of noncompliance.

### 20.28.070 Sanctions upon a finding of noncompliance by a contractor.

### 20.28.080 Nonretaliation.

#### **20.28.010 Powers and duties.**

A. In addition to all powers and duties described in this title, the county administrator has the authority and duty to recommend the implementation of all new policies and establish procedures, and recommend changes in existing policies and make changes to existing procedures which are necessary to effectuate the provisions of this title and which comply with existing state and federal law.

B. In addition to all powers and duties described in this title, the procurement director has the authority and duty to recommend procedures to the county administrator, and monitor, report, and conduct all necessary investigations to effectuate the provisions of this title. The procurement director shall have access to all relevant information. Further, the procurement director shall receive notice of and have the opportunity to speak at all prebid, preproposal, and preconstruction meetings held by the departments and divisions of Pima County. The procurement director has the authority to delegate his or her duties.

#### **20.28.020 Determination of non-responsiveness and opportunity to clarify.**

A. The county, after investigation and recommendation by the procurement director, shall declare a bid nonresponsive if the bidder fails to meet MBE, WBE or SBE subcontracting goals or if the bidder fails to make sufficient good faith efforts which would lead to the waiver of applicable goals.

B. Upon receiving notice of a potential determination of non-responsiveness, a bidder may request a hearing in accordance with procedures developed consistent with this title for the purpose of clarifying aspects of the bidder's subcontractor's equity packet. (Ord. 2008-265, 2008, Ord. 1997-44, 1997)

#### **20.28.030 Reporting and maintenance of records by contractors.**

Unless otherwise specified in the solicitation, contractors awarded construction contracts without an MWBE/SBE goal shall submit a participation report which summarizes the number and dollar

amount of all subcontract awards during the contract term, which includes the names of and dollar value for all subcontracts. The contractors must submit the reports through the procurement director no later than one month after the contract has been awarded and with the final payment request. If the awarded contract completion time is over one year, the contractor shall submit a participation report annually through the procurement director until the completion of the project.

Contractors awarded contracts incorporating goals shall submit a monthly participation report to the county administrator through the procurement director which summarizes the number and dollar amounts of subcontract awards made during the term of the contract. The report shall be submitted to the procurement department on the last day of each month following the award of the eligible contract or project.

Consultants with A&E contracts must submit a participation report which summarizes the number and dollar amount of all subcontract awards through the procurement director no later than one month after the contract has been awarded and annually throughout the life of the contract. (Ord. 2008-265, 2008, Ord. 1997-44, 1997)

#### **20.28.040 Compliance by county departments required.**

Whenever the county administrator finds after investigation by the procurement director that a contract awarding department or division of Pima County government has willfully failed to comply with the provisions of this title, a written finding of noncompliance shall be issued. The county administrator has the authority and duty to take steps necessary to ensure compliance. (Ord. 2008-265, 2008, Ord. 1997-44, 1997)

#### **20.28.050 Continued compliance for the duration of the project.**

A contractor who has been awarded a contract based upon a given level of MBE/WBE/SBE participation must remain in compliance for the duration of the project and shall not:

- A. Terminate or fail to utilize a certified MBE/WBE/SBE which was originally listed at bid opening, without substituting another certified MBE/WBE/SBE, and giving notice of such substitution to the procurement director, to perform the same or county approved alternate commercially useful function and dollar amount, or without showing good faith attempts to replace such MBE/WBE/SBE;
- B. Fail to allow an MBE/WBE/SBE to perform the commercially useful function, the value of which was originally counted for that MBE/WBE/SBE in awarding the contract;
- C. Unilaterally modify or eliminate all or a portion of the scope of work attributable to an MBE/WBE/SBE upon which the contract was awarded; or
- D. Submit false or misleading documentation, or interfere or fail to cooperate with any monitoring or investigations carried out by the procurement director. (Ord. 2008-265, 2008, Ord. 1997-44, 1997)

#### **20.28.060 Investigations of compliance, burden of proof, and findings of noncompliance.**

- A. The procurement department is empowered to:
  1. Receive and investigate complaints and allegations by MBEs, WBEs, SBEs, third parties, or county personnel; and
  2. Initiate its own investigations regarding compliance with the requirements and obligations of this title.
- B. In the event that the procurement department conducts an investigation, upon written notice of such investigation the affected party:
  1. Must cooperate fully with the investigation.
  2. Has the burden of proving its compliance with the requirements of this title.
- C. When a compliance review by the procurement department indicates grounds for finding that a

contractor awarded any covered contract, or a subcontractor and subcontract thereunder, is not in compliance with applicable terms of this title:

1. The procurement department shall issue a notice of noncompliance to the county administrator;
2. The county administrator shall then give the contractor written notice to correct deficiencies within a reasonable time period;
3. Then, if the contractor who has received a written notice from the county administrator to correct deficiencies fails to comply with requirements within the time allowed, the procurement department shall issue a finding of noncompliance to the county administrator for enforcement of sanctions. (Ord. 2008-265, 2008, Ord. 1997-44, 1997)

#### **20.28.070 Sanctions upon a finding of noncompliance by a contractor.**

The county administrator shall have the authority to impose any or all of the following sanctions on parties found by the procurement director to be in noncompliance with the terms of this title:

- A. Withholding from the contractor in violation ten percent of all future payments on the project until it is determined that the contractor is in compliance;
- B. Withholding from the contractor in violation all future payments on the project until it is determined that the contractor is in compliance;
- C. Subjecting the contractor to the terms of suspension and debarment provisions of the Pima County code. (Ord. 2008-265, 2008, Ord. 1997-44, 1997)

#### **20.28.080 Nonretaliation.**

This title prohibits retaliation against anyone who participates or has participated in the hearing or study process related to the establishment of the MWBE/SBE program, or against anyone who initiates or assists in investigations brought under this title. Such parties will not be adversely affected in the terms or conditions of conducting business. Any employee of Pima County who engages in retaliatory action will be subject to discipline, up to and including termination. Any contractor who engages in retaliatory action shall be subject to the sanctions of this title, up to and including debarment. (Ord. 2008-265, 2008, Ord. 1997-44, 1997)

### **Chapter 20.32 ELIGIBILITY, CERTIFICATION, GRADUATION, AND APPEAL PROCESS**

[20.32.010 Declaration of purpose.](#)

[20.32.020 Administrative provisions.](#)

[20.32.030 Eligibility.](#)

[20.32.040 Certification.](#)

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[20.32.060 Interviews, investigations, site visits, monitoring.](#)

[20.32.070 Appeal process.](#)

[20.32.080 Noninterference.](#)

**20.32.010 Declaration of purpose.**

The MWBE/SBE Program within the Procurement Department establishes certification and related provisions of the Pima County minority and woman-owned and small business enterprise (MWBE/SBE) program. (Ord. 2008-265, 2008)

#### **20.32.020 Administrative provisions.**

The procurement department has the following authority and duties:

- A. The authority to accept the certification of another qualifying certification entity.
- B. Administration and enforcement of MBE, WBE and SBE certification.
- C. The development and recommendation of written guidelines to effectuate this chapter.
- D. Certification of enterprises, including contractors, subcontractors, professional or other service providers, vendors, or suppliers as bona fide minority-owned business enterprises (MBEs), woman-owned business enterprises (WBEs) or small business enterprises (SBEs), in accordance with the standards set forth.
- E. The development and upkeep of a database and directory of certified MBEs WBEs and SBEs to be maintained as public record.
- F. The maintenance of statistical data on the availability of African American, Asian, Hispanic, Native American woman-owned and small business enterprises.
- G. The monitoring and reporting of county utilization of African American, Asian, Hispanic, Native American, woman-owned and small business enterprises.
- H. Notification, as provided within this division, of an affected party by certified mail that it has the right to appeal:
  - 1. A denial of eligibility, certification, or recertification as an MBE, WBE or SBE.
  - 2. The enforcement of the decertification or graduation provisions.
- I. Notification to the affected county department of any lapse in certification, denial of recertification, decertification, or graduation of a previously certified MBE, WBE or SBE. (Ord. 2008-265, 2008, Ord. 2000-24 § 3, 2000; Ord. 1997-44, 1997)

#### **20.32.030 Eligibility.**

In addition to the standards encompassed by the certification requirements, MBEs WBEs and SBEs are subject to eligibility standards, including:

- A. The Pima County MWBE/SBE program is limited in its effective scope to the jurisdictional boundaries of Pima County. The MBE, WBE or SBE:
  - 1. Shall establish that it is a local enterprise as defined by this title and is an active participant in the Pima County marketplace; or
  - 2. Shall supply credible evidence by either written documentation or affidavit that such enterprise has suffered from past racial or gender-based discrimination in the course of conducting business with Pima County government, if MBE or WBE.
- B. An MBE, WBE, or SBE may not be certified until after the satisfaction of all of the following:
  - 1. Formation of the business enterprise;
  - 2. Commencement of sustained business activity with revenues generated in the trade or profession described on the certification application; and
  - 3. Commencement of minority, woman or small business ownership, management, and control of daily business operations.
- C. No enterprise shall be eligible to be certified as an MBE, WBE or SBE if ownership and/or control of the enterprise is held by a current employee of Pima County.  
(Ord. 2008-265, 2008, Ord. 1997-44, 1997)

#### **20.32.040 Certification.**

- A. The procurement director shall develop and implement a procedure for the certification of bona fide MBEs, WBEs and SBEs in order to effectuate the purposes of the Pima County MWBE/SBE program. This procedure shall provide that the procurement director may issue county certification to eligible MBEs, WBEs and SBEs with current certification from the Small Business

Administration, state and local governments, and entities that certify MWBEs/SBEs in accordance with an established MWBE/SBE program. Criteria for certification shall include, but is not limited to, the following considerations:

1. Ownership: Minority, woman or small business owner(s) shall be deemed to be owner(s) of all or a portion of a business enterprise if they:
    - a. Own, in his or her own name(s), at least 51 percent in the enterprise;
    - b. Acquired the interest in an arms-length transaction;
    - c. Acquired the interest with his or her own financial resources or has put his or her own financial resources at risk in the operation of the enterprise.
  2. Control and management: a minority, woman, or small business owner shall be deemed to manage and control daily business operations only if such management and control is real, substantial, and continuing, that is:
    - a. The minority, woman or small business owner shall possess the power to direct and cause the direction of the management and policies of the business enterprise and to make day-to-day as well as major decisions on matters of management, policy, and operations;
    - b. The business enterprise shall not be subject to any formal or informal restrictions which limit the customary discretion of the minority, women or small business owners;
    - c. Management and control is demonstrated by a showing of at least one of the following factors:
      - 1) The minority, women or small business owners hold the professional license relied upon by the enterprise; or
      - 2) The minority, women or small business owners have substantial experience in the trade or industry which would be necessary to the primary decision maker of the enterprise; or
      - 3) The minority, women or small business owners regularly make decisions, hold themselves out to the public, and sign important documents and financial instruments in a manner which is indicative of primary management and control of daily business operations.
  3. In cases where the management of an MBE, WBE or SBE is contracted out to individuals other than the owner, those persons who have the ultimate power to hire and fire the managers can, for the purpose of this article, be considered as controlling the business.
  4. All securities which constitute ownership or control of an entity for purposes of establishing it as an MBE, WBE or SBE must be held directly by a minority, woman or small business owner. No securities held in trust or by any guardian for a minor shall be considered held by a minority, woman or a small business owner in determining the ownership or control of a corporation.
  5. Ownership and control shall be measured as though not subject to the community property interest of a spouse.
  6. Bona fide minority group membership shall be established where the individual both claims that he or she has minority status as defined by this title and is so regarded by that particular minority community.
- B. The procurement department shall grant certification to an approved MBE, WBE or SBE for a period of one year or until the certification accepted under 20.32.040A expires, whichever time period is shorter.
1. Following initial certification, an MBE, WBE or SBE which desires to renew its certification shall, thirty days prior to each annual anniversary of the certification, submit a renewal application which shall update and affirm all requirements for recertification. Timely renewal, if approved, shall be effective on the date of the annual anniversary of the certification.
  2. A certification shall terminate automatically and without notice upon the failure of the business enterprise to renew certification.
  3. If an MBE, WBE or SBE is denied certification on the basis of information submitted, the enterprise can appeal the denial as described below, but cannot reapply for certification for a period of six months from the date of notice of denial.
- C. The procurement department may decertify a business that it finds is no longer a bona fide MBE, WBE or SBE.
1. Grounds for decertification include, but are not limited to:
    - a. The enterprise has changed to the extent that it no longer meets initial certification requirements;
    - b. The enterprise fails to submit information requested by the procurement director or fails to cooperate with the investigation process.

- c. There is a change in ownership such that the enterprise fails to qualify for certification in one or more categories.
2. If an MBE, WBE or SBE is decertified, the enterprise can appeal the denial as described below but cannot reapply for certification for a period of one year from the date of notice of decertification. (Ord. 2008-265, 2008, Ord. 2000-24 § 3, 2000; Ord. 1997-44, 1997)

#### **20.32.050 Graduation**

- A. A certified and otherwise eligible MBE, WBE or SBE achieving gross receipts that exceed the Small Business Administration size standards in its respective industry or whose personal net worth exceeds \$750,000, shall be presumed to have reached a competitive status in the marketplace. Upon achievement of such status, said firms shall be deemed to have graduated from the program and shall thereafter be ineligible for utilization to fulfill enforceable MBE/WBE/SBE participation goals.
- B. Graduation criteria which reflects local market conditions shall be established according to methodology developed and recommended by the procurement director.
- C. If an MBE, WBE or SBE has an affiliate in a different standard industry code (SIC) major group, the annual receipt level which shall be used as the graduation criteria shall be the highest annual receipt level applicable to the MBE/WBE/SBE affiliate. If an MBE, WBE or SBE or any affiliate performs work in more than one SIC major group, the annual receipt level which shall be used as the graduation criteria shall be the highest annual receipt level applicable to the MBE/WBE/SBE affiliate.
- D. Graduation of an MBE, WBE or SBE shall not affect the contribution made by the MBE, WBE or SBE toward satisfaction of a project goal if the work was bid or proposed to be performed by the MBE, WBE or SBE prior to the date of graduation.
- E. The graduation criteria shall be deemed to apply to the minorities, women or small business owners upon whom eligibility for certification is based and all affiliates. No business enterprise shall be certified based upon one or more minorities, women or small business owners who owned or who was an affiliate of an MBE, WBE or SBE which has become ineligible for renewed certification due to achievement of graduation criteria.
- F. A graduated MBE, WBE or SBE may not subsequently reenter the program unless, after the expiration of two calendar years, the firm demonstrates:
1. That its annual gross receipts have declined to levels below those as set forth by specific graduation criteria; and
  2. That during said two calendar years, it was unable to meaningfully participate in Pima County contracting or procurement, or in the public and private sectors of the larger local economy despite its good faith efforts to do so. (Ord. 2008-265, 2008, Ord. 1997-44, 1997)

#### **20.32.060 Interviews, investigations, site visits, monitoring.**

The procurement director may require personal interviews with all persons upon whom eligibility, certification, and graduation decisions are based. Additional, non-MBE, non-WBE or non-SBE bidders involved in joint venture relationships shall allow the procurement director to have access to all records pertaining to the joint venture agreements to the extent reasonably necessary to ensure compliance with this title. The procurement director is empowered to interview other such persons and conduct on-site visits and investigations as may be appropriate to ensure continued compliance with program requirements. (Ord. 2008-265, 2008, Ord. 1997-44, 1997)

#### **20.32.070 Appeal process.**

- A. Upon denial by the administrator of the procurement director of eligibility, certification, or recertification, or upon decertification, or graduation, the administrator shall notify the affected party in writing by registered mail, setting forth the reasons for the decision.
- B. Any enterprise that has been denied certification status as described above may appeal by filing a Pima County MWBE/SBE Program Appeal of Denial form with the procurement

department within ten working days of receipt of notice of denial.

C. Within five working days of receipt of the appeal of denial form, the procurement director shall forward the notice to a hearing officer.

D. The hearing officer shall:

1. Set the hearing date within twenty working days of receipt of appeal;
2. Give notice by certified mail to all affected parties, which provides the following information:
  - a. The time, place, and date of the hearing,
  - b. The identity of the parties, and
  - c. A copy of the "appeal of denial" form which sets out the charges with particularity;
3. Conduct a fair and impartial hearing;
4. Produce a written decision on the appeal which affirms, alters, or reverses the denial at issue; and
5. Give notice of the decision by certified mail sent within seven working days of the close of the hearing. (Ord. 2008-265, 2008, Ord. 1997-44, 1997)

#### **20.32.080 Noninterference.**

The process of determining and appealing eligibility, certification, recertification, decertification, or graduation of the MBE, WBE or SBE status of enterprises shall not be subject to interference, influence, or coercion of any sort by parties including departmental and elected officials. (Ord. 2008-265, 2008, Ord. 1997-44, 1997)

### **Chapter 20.36 MAINTENANCE AND RETENTION OF RECORDS**

#### 20.36.010 Maintenance and retention of records.

#### **20.36.010 Maintenance and retention of records.**

For purposes of monitoring, analysis, and future disparity studies, all county departments shall maintain and retain complete and accurate records relating to procurement from contracting and sub-contracting with both MWBE/SBE firms and non-MWBE/SBE firms. (Ord. 2008-265, 2008, Ord. 1997-44, 1997)

Section 2. This ordinance shall become effective 31 days from the date of adoption.

PASSED AND ADOPTED BY THE Board of Supervisors, Pima County, Arizona, this \_\_\_\_\_ day of \_\_\_\_\_, 2009.

\_\_\_\_\_  
Chairman, Board of Supervisors

\_\_\_\_\_  
Date

ATTEST:

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Clerk of the Board

APPROVED AS TO FORM:



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Deputy County Attorney