Legislation Details (With Text)

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Title: A substitute ordinance relating to the emerging business enterprise program.

Sponsors: ALD. MCGEE JR.

Indexes: ECONOMIC DEVELOPMENT, EMERGING BUSINESS ENTERPRISES

Attachments: 1. 3/7/06 Ald. McGee press release, 2. Fiscal Note, 3. City Attorneys Opinion - 7/21/06, 4. City Attorneys Opinion - 11/22/05, 5. City Attorneys Opinion - 2/11/04, 6. City Attorneys Opinion - 4/3/90, 7. Letter from Roy Evans dated 7/25/06

Date	Ver.	Action By	Action	Result	Tally
5/9/2006	0	COMMON COUNCIL	ASSIGNED TO		
5/16/2006	0	COMMUNITY & ECONOMIC DEVELOPMENT COMMITTEE	HEARING NOTICES SENT		
7/18/2006	1	CITY CLERK	DRAFT SUBMITTED		
7/25/2006	0	COMMUNITY & ECONOMIC DEVELOPMENT COMMITTEE	HELD TO CALL OF THE CHAIR	Pass	5:0
5/14/2008	1	COMMUNITY & ECONOMIC DEVELOPMENT COMMITTEE	RECOMMENDED FOR PLACING ON FILE	Pass	4:0
5/20/2008	1	COMMON COUNCIL	PLACED ON FILE	Pass	13:0

060073
SUBSTITUTE 1

ALD. MCGEE
A substitute ordinance relating to the emerging business enterprise program.

360-01-1 rn
360-01-1 cr
360-01-2 rn
360-01-3 rn
360-01-4 rn
360-01-5 rn
360-01-6 rn
360-01-7 rn
360-01-8 rn
360-01-9 rn
360-01-10 rn
360-01-11 rn
360-01-12 rn
360-01-13-e rn
360-01-13-e cr

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360-01-13 rn
360-01-13 am
360-01-14 rn
360-01-15 rn
360-01-16 rn
360-01-17 rn
360-01-18 am
360-05-3 am
360-05-12 am
360-05-15 cr
360-06-1 cr
360-06-5 am
360-07 rc
360-08-3 rn
360-08-3 cr
360-08-4 rc
360-09 rn
360-09 cr

This ordinance modifies the emerging business enterprise program of ch. 360 of the code to provide a definition of disadvantage due to discrimination; modifies the net income provisions for certification of emerging business enterprises; provides new percentage participation goals for emerging business enterprises in all city contracts; revises sanctions for the provision of false, misleading or fraudulent information; and establishes procedures for administrative review and appeals.

“Disadvantage resulting from past discrimination” is defined to mean an applicant’s experience of substantial difficulty in attaining employment, business training or business success at least in part due to discrimination on the basis of sex, race, religion, color, national origin or ancestry, age, disability, lawful source of income, marital status, sexual orientation or familial status as these terms are commonly understood or otherwise defined in s.109-3, and where such discrimination is supported by clear and convincing evidence.

A small business concern is redefined so that firms with more than $2.5 million in annual gross receipts are not included. Exceptions to this amount, within the limits of federal standards, may still be made for cause.

The ordinance clarifies the responsibilities of the manager of the emerging business enterprise administration for reporting to the common council. Reports are to be made by the manager to the appropriate committee of the common council not less than quarterly. The manager’s responsibilities for administrative review of decisions made in the administration of the program are also clarified.

The categories of contracting are modified and separate percentage EBE goals are established for each contract and for each contracting department’s annual expenditures for all contracts. The following percentage goals are changed from 18% to: 25% for construction; 10% for goods and services; 10% for professional services; and 15% for supplies.

Certification requirements and procedures are clarified. A list of certified emerging business enterprises is to be maintained. Certified enterprises are accorded procedural rights including administrative review of adverse decisions made by contracting departments and, in certain circumstances, adverse decisions affecting subcontractors. A process is established for appeals to

the common council that includes the right to be heard by the appropriate standing committee of the common council.

Whereas, The emerging business enterprise program was created by the city of Milwaukee in 1987 and known as the “Equal Opportunities Enterprise Program’; and

Whereas, The emerging business enterprise program is the successor to programs promoting the participation of minority business enterprises and women-owned businesses in city contracting and procurement; and

Whereas, The goals of 25% minority enterprise and 3% women-owned business participation were initially retained in the emerging business enterprise program: and

Whereas, In 1989 the program was renamed “The Minority Enterprise and Disadvantaged Business Program,” and the goals for all categories of expenditures in the program were set at 18%; and

Whereas, A study entitled “Review of The City of Milwaukee’s Equal Opportunities Disadvantaged Business Enterprise Program 1989-1992” found that the city had met, exceeded, or made continuing progress toward meeting higher goals in the years preceding the program change in 1989; and

Whereas, The city has failed to meet its emerging business enterprise goals for departments other than public works in each of the years 2000 through 2004, the last 5 reported years, and has not maintained significant progress toward the overall 18% goal; and

Whereas, During this same time period, Milwaukee County’s goals of 25% participation for disadvantaged business enterprises in contracts for construction services and for construction related professional services have been exceeded; and

Whereas, The 2003 study by the University of Wisconsin-Milwaukee, entitled, “Stealth Depression: Joblessness in the City of Milwaukee Since 1990,” found that more than 56% of the working male population in the city’s “Enterprise Community” census tracts was unemployed or no longer in the labor force; and

Whereas, Audits of the emerging business enterprise program conducted by the Office of the Comptroller in 1995 and in 2005 encouraged more comprehensive reporting by program administration to the common council; and

Whereas, Reports of the emerging business enterprise program do not appear in the files of the common council for the years 1996 through 2003; and

Whereas, The common council finds that additional oversight of the implementation and progress of the emerging business enterprise program is critical to the success of the program; and

Whereas, The economic prosperity and growth of the Milwaukee region depend upon a vibrant and prosperous inner-city economy; and

Whereas, Many new programs have been established in the past decade promoting entrepreneurship within the city, especially among historically disadvantaged populations and in historically disadvantaged neighborhoods; and

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Whereas, The contracting and procurement policies and practices of the city contribute to the success, or failure, of emerging and disadvantaged business enterprises; and

Whereas, The success of emerging and disadvantaged business enterprises in the city will contribute to a reduction in unemployment and an increase in job creation and job opportunities; now, therefore

The Mayor and Common Council of the City of Milwaukee do ordain:

Part 1. Section 360-01-1 to 17 of the code is renumbered 360-01-2 to 18.

Part 2. Section 360-01-1 of the code is created to read:

360-01. Definitions.

1. AT A DISADVANTAGE RESULTING FROM DISCRIMINATION means an applicant's experience of substantial difficulty in attaining employment, business training or business success at least in part due to discrimination on the basis of sex, race, religion, color, national origin or ancestry, age, disability, lawful source of income, marital status, marital status, sexual orientation or familial status as these terms are commonly understood or otherwise defined in s.109-3, and where such discrimination is supported by clear and convincing evidence.

Part 3. Section 360-01-13-e of the code is renumbered 360-01-13-f.

Part 4. Section 360-01-13-e of the code is created to read:

13-e. At a disadvantage resulting from past discrimination.

Part 5. Section 360-01-18 of the code is amended to read:

18. SMALL BUSINESS CONCERN means a business which is independently owned, operated and controlled and which is not dominant in its local field of operation, and which has had annualized gross receipts [[~~consistent with~~]]>>within the limits of<< the receipts based size standards set forth by the federal small business administration>>, but not more than $2.5 million in gross receipts for the most recently available 12-month period prior to contract application<<. A business which does not meet these requirements may nonetheless be deemed a small business concern if the business establishes by credible evidence that different standards should be applied[[~~in its field of endeavor~~]]>>such as an expectation of narrow margins of profit after overhead costs as customarily experienced in the field of endeavor<<.

Part 6. Section 360-05-3 of the code is amended to read:

360-05. Administration.

3. Develop procedures for certification >>of emerging business enterprises, subject to the approval of the common council and the requirements of s. 360-07<<.

Part 7. Section 360-05-12 of the code is amended to read:

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12. Conduct>>administrative reviews as provided in s. 360-07-5, and conduct<< hearings on requests by contracting departments for waivers from the requirements of the program. Upon a denial of a request for a waiver, the affected department may apply for such a waiver to the appropriate standing committee of the common council. The committee shall have the authority to waive any requirements of this chapter upon showing of good cause.

Part 8. Section 360-05-15 of the code is created to read:

15. Provide a report to the appropriate standing committee of the common council not less than quarterly on the status or changes in status of the administration of the program and each of the responsibilities of the manager delineated in subs.1 to 14, together with a statement of challenges and opportunities faced by the program and recommendations, if any, for action by the common council.

Part 9. Section 360-06-1 of the code is repealed and recreated to read:

360-06. Requirements of Contracting Departments. 1. GOALS. The following requirements are adopted by the city for the purpose of increasing the level of emerging business enterprise participation in city contracts. It shall be the responsibility of each contracting department to attain such goals in accordance with the criteria specified under authority of this chapter. Each contracting department, and all other operating departments when contracting based upon authority of a contracting department, shall, consistent with law, utilize emerging business enterprises to meet or exceed the percentages of total dollars expended through prime contracts or subcontracts in each of the following categories:

a. Construction: 25% of each prime contract and 25% of the total annual departmental expenditure for all contracts.

b. The purchase of goods and other services: 10% of each prime contract and 10% of the total annual departmental expenditure for all purchases of goods and other services.

c. The purchase of professional services: 10% of each prime contract and 10% of the total annual departmental expenditure for all purchases of professional services.

d. The purchase of supplies: 15% of each prime contract with a total annual departmental expenditure for all contracted purchases.

Part 10. Section 360-06-5 of the code is amended to read:

5. PERFORMANCE ASSURANCE PROCEDURE. Each contracting department shall develop and implement>>written<< procedures[[~~, unless inappropriate,~~]] to assure that suppliers, employes, agents or other persons providing goods or services to emerging business enterprises participating in city contracts shall be paid in full in a timely manner. Such procedures [[~~shall~~]]>>may<< include joint check payments, bonding requirements and other financial safeguards. Nothing contained in this subsection shall require the city to make payments in excess of the contract price. >>Such procedures shall be contained within or incorporated by reference within contract documents.<<

Part 11. Section 360-07 of the code is repealed and recreated to read:

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360-07. Certification Standards and Procedures. 1. CERTIFICATION REQUIRED. All emerging business enterprise bidders, prime contractors, subcontractors and potential participants in a contract shall be certified by the emerging business enterprise administration in order to participate in the emerging business program established pursuant to this chapter. Certification standards shall be specified by the emerging business enterprise administration, subject to review and approval of the common council. Upon denial of an application for certification, the enterprise may reapply upon a showing of a substantial change in circumstances. Upon de-certification or revocation, the enterprise may, following the expiration of 12 months from the date of de-certification, reapply for certification upon a showing of a substantial change in circumstances.

2. NOTICE. The emerging business enterprise administration shall provide timely notice of all decisions to certify, re-certify or to deny an application for certification or re-certification to the applicant. The administration shall provide notice of all decisions to decertify a previously certified enterprise to the initial applicant, or applicant's successor. Notices shall be written and shall clearly state the grounds supporting the decision of the administration.

3. LIST MAINTAINED. The program administration shall maintain a list of currently certified emerging business enterprises together with a statement of the qualifications of such enterprises including the most recently available amount of annual cash receipts of the enterprise and a listing of the disadvantages of the owner, operator or controller of the enterprise.

4. EFFECT OF CERTIFICATION. The procedural rights of certified emerging business enterprises include the rights of administrative review and appeal provided in sub. 5 and s. 360-09. In addition to the right of review and appeal of adverse certification decisions, a certified enterprise shall, as reflected in contracting documents, be entitled to administrative review and appeal of decisions, whether made by departments or primary contractors, removing or substantially reducing the involvement of the certified enterprise as a subcontractor for an approved contract.

5. ADMINISTRATIVE REVIEW. a. An application for administrative review of a decision denying, suspending or revoking certification shall clearly state reasons supporting reversal or modification of the initial determination including objections to factual findings and interpretations of law together with offers of additional information, if any.

b. An application for review or for reconsideration of a decision by a contracting department to deny a primary contract to a certified and otherwise qualified emerging business enterprise shall clearly state the qualifications of the applicant to enter into and fulfill the primary contract.

c. An application for review of a decision removing or substantially reducing the involvement of a certified enterprise as a subcontractor for an approved contract shall clearly state the circumstances surrounding the removal or substantial reduction together with the reason or reasons applicant believes that the decision was unreasonable or will impede the ability of the city to meet the participation goals of s. 360-06. A copy of the application shall be provided to any department, agency, commission or board of the city that has a direct financial interest in the subject of the appeal.

d. An application for administrative review shall be submitted to the manager of the emerging business enterprise administration who shall proceed in accordance with the provisions of s. 320-11-1 and 2 of the code except as otherwise provided in this chapter.

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Part 12. Section 360-08-3 of the code is renumbered 360-08-4.

Part 13. Section 360-08-3 of the code is created to read:

360-08. Sanctions.

3. De-certification or suspension of certification as an emerging business enterprise.

Part 14. Section 360-08-4 of the code is repealed and recreated to read:

4. Suspension or denial of participation in further contracts awarded by the city.

Part 15. Section 360-09 of the code is renumbered 360-10.

Part 16. Section 360-09 of the code is created to read:

360-09. Appeals. 1. NOTICE OF APPEAL. An applicant or certified enterprise, aggrieved by a decision of the manager upon administrative review, may appeal the decision within 10 days of receipt of a written decision. Notice of appeal shall be in writing, delivered to the city clerk and to the program administration, and shall contain a clear statement of the reason or reasons supporting reversal or modification of the manager's decision.

2. HEARING. A hearing shall be scheduled before the appropriate standing committee of the common council within 60 days of the filing of a notice of appeal. The appellant shall be provided written notice of the hearing at least 5 working days prior to the scheduled hearing. The appellant may appear in person or by counsel. The chair of the committee shall preside and direct that oaths be administered and subpoenas be issued as appropriate.

3. EVIDENCE AT HEARING. In an appeal of a decision to deny an application for certification, the burden of proving qualification shall rest with the appellant. In an appeal of decisions adverse to a certified enterprise, the burden of presenting sufficient evidence to sustain the decision upon administrative review shall rest with the manager.

4. RECORD, FINDINGS and RECOMMENDATIONS. A stenographic record shall be made of proceedings before the committee and written transcription shall be provided to any interested party upon payment of the reasonable costs of transcribing all or a portion of the proceedings. The committee shall prepare a report to include findings of fact and recommendations to the common council within 10 working days following conclusion of the hearing.

5. COUNCIL ACTION. a. Upon receipt of the report of the committee, the common council shall convene to consider the findings and recommendations of the committee. A minimum of 5 working days notice of the meeting shall be provided the appellant by certified mail and copied to the city attorney.

b. Failure of the appellant to file exceptions or objections with the city clerk by the close of business on a day that is 3 working days prior to the meeting will constitute a stipulation to the findings of the committee.

c. Exceptions or objections to the committee report shall be clearly stated and, upon filing with the

city clerk by the close of business on a day that is at least 3 working days prior to the meeting, the appellant or appellant's attorney shall be provided an opportunity to be heard before the common council on matters relating to the exceptions and objections.

d. The appellant or appellant's counsel shall be permitted 5 minutes for argument and shall additionally respond to questions of the members of the common council, if any. The city attorney shall be permitted 5 minutes for rebuttal and other argument and shall additionally respond to questions of the members of the common council, if any.

e. A majority of the members of the common council who are in attendance and voting shall determine whether to accept, reject or modify the report of the committee.

APPROVED AS TO FORM

_____
Legislative Reference Bureau
Date: _____
IT IS OUR OPINION THAT THE ORDINANCE
IS LEGAL AND ENFORCEABLE

_____
Office of the City Attorney
Date: _____

LRB06149-2
RLW
7/3/2006