

**** THIRD READING – AS READ INTO THE RECORD ****

Item #: 15

Moved by: BROOKS

Seconded by: SHAFER

Prepared by: Qur'an N. Folsom

Reviewed by: Marcy Ingram

ORDINANCE NO. 471

ORDINANCE AMENDING SHELBY COUNTY GOVERNMENT'S LOCALLY OWNED SMALL BUSINESS ORDINANCE NO. 324, ADOPTED ON MARCH 26, 2007, TO ESTABLISH PROCEDURES TO ENHANCE THE AMOUNT OF LOCALLY OWNED SMALL BUSINESS PARTICIPATION IN THE COUNTY'S PROCUREMENT PROCESS. SPONSORED BY CHAIRMAN MELVIN BURGESS, COMMISSIONER WALTER L. BAILEY, JR., COMMISSIONER MARK BILLINGSLEY, COMMISSIONER STEVE BASAR, COMMISSIONER WILLIE F. BROOKS, JR., COMMISSIONER JUSTIN J. FORD, COMMISSIONER EDDIE S. JONES, JR., COMMISSIONER REGINALD MILTON, COMMISSIONER TERRY ROLAND, COMMISSIONER HEIDI SHAFER AND COMMISSIONER VAN D. TURNER, JR.

WHEREAS, The Board of Commissioners of Shelby County passed Ordinance No. 324, adopted on March 26, 2007, to establish the guidelines for increasing the number of contracts between the County and locally owned small businesses (Commonly referred to as "LOSB") owners; and

WHEREAS, The Board of Commissioners of Shelby County deems it necessary and desirable to continue the operation of the Locally Owned Small Business Purchasing Program for the Shelby County Government.

NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF SHELBY COUNTY, TENNESSEE, That:

SECTION 1. The Board of County Commissioners may establish by Ordinance special purchasing procedures for at least twenty percent (20%) of the annual purchases of goods and services by the Shelby County Government to be awarded to locally-owned small businesses.

For purposes of this sub-part the eligibility criteria for "locally owned small businesses is:

Sub-paragraph A. Any business with average annual total sales or receipts within its last three fiscal years prior to its application to the Locally Owned Small Business Purchasing Program of less than \$1,000,000 a year; except architecture and engineering firms, security companies, computer companies, roofing and contractors and vendors in the construction industry. Any architecture and engineering firm , roofing and contractors and vendors in the construction industry with average annual total sales or receipts within its last three fiscal years prior to its application to the Locally Owned Small Business Purchasing Program of less than \$5,000,000 a year; Any security company or computer company with average annual total sales or receipts within its last three fiscal years prior to its application to the Locally Owned Small Business Purchasing Program of less than \$15,000,000 a year; and

Sub-paragraph B. Such business shall be headquartered and physically located in Shelby County and owned by one or more residents of Shelby County with a real, substantial, and continuing ownership of at least fifty-one percent (51 %) of the business.

Sub-paragraph C. The business must be eligible to operate in Shelby County and shall be authorized to do so under the laws of the state of Tennessee.

SECTION 2. BE IT FURTHER ORDAINED, That the Locally Owned Small Business Purchasing Program for Shelby County shall be governed by the following rules and regulations:

A. DEFINITIONS:

- i. "Business" shall mean and include individuals, sole proprietorships, unincorporated groups or associations, partnerships, corporations, joint ventures, and every other form of business entity.

ii. "Commercially useful function" shall mean the fulfillment of a subcontract by a bidder responsible for the materials, supplies, and services used in the performance of the contract. To determine whether a subcontractor is performing a commercially useful function, the amount of work subcontracted shall be evaluated with respect to normal industry practices including whether the amount the subcontractor is to be paid under the contract is commensurate with the work it is actually to perform. The subcontractor does not perform a commercially useful function if its role is limited to a non-essential participant in a contract through which funds are passed in order to convey the appearance of meaningful and useful subcontractor participation.

iii. "Joint venture, consortium, and partnership" shall mean a business entity that is formed to contract with Shelby County through the Locally Owned Small Business Purchasing Program. The business entity shall have written documentation demonstrating that the eligible locally owned small business as defined herein has a real, substantial, and continuing ownership interest of at least fifty-one percent (51%), and shall be responsible for the daily management and control of the project. The business must be a certified locally owned small business.

B. LOCALLY OWNED SMALL BUSINESS PURCHASING PROGRAM RULES AND REGULATIONS:

- i. The certification process includes the following steps:
 - a) The business shall submit a complete certification application to the Equal Opportunity Compliance Office (EOC);
 - b) The EOC shall review the application and make a determination and advise the applicant of eligibility within 30 days of the receipt of the completed application and advise the applicant in writing as to its eligibility. LOSB certificates shall be sent to eligible applicants.
 - c) In the event the EOC determines that the business is not eligible, the written communication to the business shall include a detailed explanation for the denial.
 - d) To appeal the denial, the business must submit a written request to the EOC within 10 business days of receiving the denial notification.

- e) If the denial is not reversed, the business may appeal to the chairman of the Board of Commissioners of Shelby County or to a commissioner delegated by the Board Chairman for a determination. The decision of the Board or its designee shall be final.
 - f) Certified businesses must re-certify annually. An application for re-certification must be submitted in compliance with the certification rules.
- ii. The Administrator of Purchasing in conjunction with the Administrator of the EOC shall identify certain goods and services contract opportunities to be set aside for prime contracts valued at \$15,000 or less for purchasing from locally owned small businesses. After adhering to all other bidding and purchasing requirements of the County, not inconsistent with this part, if no bids are received from locally owned small businesses, then the County may solicit bids for goods or services from all other sources.
 - iii. Locally owned small businesses that are also certified as minority or woman-owned business enterprises shall be counted towards both the locally owned small businesses and minority and woman-owned business enterprise contract goals.
 - iv. The Administrator of Purchasing, in conjunction with the Administrator of the Equal Opportunity Compliance Office shall annually review the Shelby County Capital Improvement Program to determine projects with a construction cost of \$250,000.00 or more. Subcontracts valued at least ten percent (10%) of the construction costs of such project shall be awarded to locally owned small businesses as defined herein, except as set forth in sub-paragraph (vi) of this section, either as part of the conditions of the solicitation for general contractors bidding on these projects, or as separate bids issued by the County for subcontracts that may be assigned to general contractors.
 - v. A contractor's failure to meet the locally owned small business subcontractor goal at bid opening shall be grounds for rejecting the bid unless the contractor can show evidence of a good faith effort. Good faith effort elements are quantified to determine whether a prime contractor has made an effort to meet the locally owned small business contract goals. In order to be considered a responsive bidder, the prime contractor must achieve a minimum score of 80 points to demonstrate a sufficient good faith effort.

The point assignment and requirements to document evidence of good faith efforts are as follows:

- a. **Advertising (5 points):** Opportunities for locally owned small businesses shall be advertised in three print or digital media outlets during the three weeks prior to the bid opening. A subcontracting opportunity must be published in general circulation media, multicultural-focused media, trade association publications, or trade-related publications, and local publications at least twice, unless the solicitation waives this requirement.
- b. **Attend the Pre-bid Meeting (5 points):** Attendance at the pre-bid meetings is mandatory to comply with the good faith effort requirement. The contractor's name on the pre-bid meeting sign-in sheet will serve as documentation.
- c. **Bidder's Outreach to identify locally owned small businesses (15 points):** Communication with locally owned small businesses through personal, frequent, and persistent contact by promptly returning telephone calls, facsimiles, and emails must be documented. Correspondence logs shall list the names of the businesses, the contacted representatives, and dates of contact. Copies of correspondence with the contacted businesses, including the responses received, shall be provided. Documentation can also include facsimile transmittal confirmation slips or written confirmation of receipt via email with the date of transmission. The contractor shall be required to contact at least three businesses.
- d. **Contact Follow-up (15 points):** Prompt return of telephone calls, facsimiles, and emails after the initial solicitation is required. The follow-up shall consist of a telephone call, facsimile, or email during normal business hours at least two weeks prior to the bid opening. The prime contractor must maintain correspondence logs that list the subcontractors who were contacted, including the results of the contact. The log includes the names of the businesses and contact person, telephone number, dates of contact, and notes regarding the outcome of contact. The record shall also identify the scope of work each contacted subcontractor was asked to bid.
- e. **Identify Items of Work (15 points):** Subcontracts shall consist of discrete items or projects that locally owned small businesses may find economically feasible to perform. The documentation shall include a list with descriptions of the specific items of work solicited from eligible businesses, as well as notices and advertisements targeting locally owned small business subcontractors.

- f. **Negotiate in Good Faith (15 points):** Validation that bids, quotes, or proposals prepared by eligible businesses based on the subcontractor's standing within its industry or on membership in a specific group, organization, association, or political or social affiliation shall not be unjustifiably rejected. A written statement with names, addresses, and telephone numbers of subcontractors contacted and the negotiated price and services must be submitted. This list shall include dates of the negotiations and the results, and document the bids received from businesses that could provide a commercially useful function.
- g. **Offer Assistance in Securing Financing, Bonding, Insurance, or Competitive Supplier Pricing (10 points):** Locally owned small businesses shall be offered technical assistance regarding plans, specifications, and requirements of the contract in a timely manner to facilitate responses to solicitations. Contractors shall consider a certified LOSB's bid even if the certified locally owned small business cannot obtain a bond, unless lack of subcontractor bonding would cause the prime to lose its own bonding or prevent the prime from obtaining bonding, and should make efforts to assist interested businesses in obtaining financing, bonds, and insurance required by the County, as well as provide competitive pricing. The contractor shall provide a written description of the type of assistance, the company name, contact person, telephone number, the name of the person who provided the assistance, and that of the supplier who offered competitive pricing. So long as the contractor otherwise complies with this paragraph, it shall be entitled to the ten (10) points even if the LOSB is not able to ultimately obtain a bond.
- h. **Provide Timely Written Notification (20 points):** Solicitation of subcontract bids and material quotes from relevant locally owned small business shall be submitted in writing at least two weeks prior to the bid opening. Relevant businesses are those that could feasibly provide the goods or services required to satisfy the terms specified in the County's solicitation. When soliciting bids, quotes, and proposals, the contractor must provide the project name, the bidder's name, subcontract items, primary contact person's name and telephone number, information on the availability of plans and specifications, and the date on which the subcontractor's written bid is due to the prime contractor. Written notification will include verification of the transmission date, the recipient's name, and the business name. Documentation can also include facsimile transmittal confirmation slips or written confirmation of receipt via email with the date of transmission.
- vi. **Any locally owned small business awarded a subcontract shall not sublet, subcontract, or assign any work or services awarded to it without the prior written consent of the Administrator of the EOC.**

- vii. Quotes for prime contracts valued at under \$5,000.00, shall be solicited from locally owned small businesses on construction, professional services, and commodities and services contracts.
- viii. The Administrator of Purchasing shall identify construction contracts under \$5,000.00, for award to locally owned small businesses. Eligible businesses shall be placed on a rotation list according to their certification date. Businesses shall apply for placement on the list by submitting proof of certification with the County or a reciprocal agency certified with the County. There shall be separate contract rotation lists for each construction specialty. Quotes should be requested from the next two (2) vendors on the rotation list. The contract should be awarded to the lowest bidder and the second company is then moved to the bottom of the list. In the case of a tie bid the vendor with the earliest certification date shall be awarded the contract. If no locally owned small business is found to be responsive, the bid shall be opened to all available businesses.
- ix. Upcoming contracting opportunities will be reviewed by the Administrator of Purchasing in conjunction with the Administrator of the Equal Opportunity Compliance Office to identify items of work that can be unbundled into smaller contracts.
- x. On informal bid solicitations for purchases valued at \$25,000.00, or less, the Administrator of Purchasing shall target the solicitations to certified locally owned small businesses. There must be at least (3) three certified locally small owned businesses that provide the goods or services being procured. If no locally owned small businesses is found to be responsive, then the County may solicit bids for the goods or services from all other sources.
- xi. As to those purchases below the requirement for a formal bid solicitation (currently, under \$25,000.00) and not included in the locally owned small business set aside, the Administrator of Purchasing in conjunction with the Administrator of the EOC shall determine if any locally owned small business offers that product or service. If so, at least one such eligible locally owned small business should be included in the vendors contacted for an opportunity to bid, and the Administrator of Purchasing may designate the award of purchase order for the purchase of such goods and services from the identified locally owned small business.

- xii. The Administrator of Purchasing in conjunction with the Administrator of the EOC shall provide a preference for locally owned small businesses on competitive low bid construction solicitations. Said preferences shall not exceed five percent (5%) of the lowest possible responsive bidder. The preference shall be applied on a sliding scale in the following manner: A preference of up to five percent (5%) shall be allowed for contracts valued at \$500,000.00 and under.
- a) A preference of up to (3%) three percent shall be allowed for contracts greater than \$500,000.00 and under \$1,000,000.00.
 - b) A preference of two percent (2%) shall be allowed for contracts greater than \$1,000,000.00.
 - c) For construction contracts over \$2,000,000.00 a two percent (2%) preference will be given to the bids of general contractors that meet the requirements of Section 1, Subparagraph B and which have locally owned small businesses as subcontractors when such locally owned small businesses collectively have fifty percent (50%) of the total prime contract award.
- xiii. The Administrator of Purchasing shall, when feasible, divide a single bid package for any purchase of goods and services into two or more smaller projects. The Administrator of Purchasing in consultation with the Equal Opportunity Compliance Office shall determine when the smaller bid packages may result in a greater number of bids by locally owned small businesses.
- xiv. The Administrator of Purchasing, upon approval of the County Commission, may establish special insurance and bonding requirements for certified locally owned small businesses so long as they are not in conflict with the laws of the state of Tennessee.
- xv. As a prequalification criterion, a manufacturer doing business with the County shall document that they have locally owned small business distributors authorized to sell its product line at the regional or national level on contracts valued under \$25,000.00.
- xvi. The Administrator of Purchasing, with the approval of the Mayor, shall adopt, promulgate, and may from time to time amend rules and regulations not inconsistent with the provisions of this

Ordinance effectuate and implement the Locally Owned Small Business Purchasing Program within the intent of this Ordinance.

- xvii. On a quarterly basis, the Administrator of Purchasing in conjunction with the Administrator of the EOC shall provide to the Mayor and Board of Commissioners of Shelby County a locally owned small business utilization report. The report shall include a summary of the purchases selected for LOSB participation, as well as a listing of the contracts awarded to locally owned small businesses for the quarter, the total dollar amount of the awarded contracts, and the total amount of purchases for the period.

The locally owned small business utilization reports shall be posted on the Equal Opportunity Compliance webpage. The reports shall be searchable by (1) department, (2) award and payment date, (3) prime contractor and subcontractor ethnicity and gender, (4) certification status, (5) award amount, and (6) industry. Change orders, amendments, and substitutions shall be separately reported by prime contract, department, and industry. Good faith effort waivers to the subcontract goal or failure to meet the subcontract goal shall also be published in the utilization reports. The reports shall be downloadable into Microsoft Word and Excel formats at no cost to the user.

- xviii. The Equal Opportunity Compliance webpage shall maintain a directory listing certified locally owned small businesses. The listings shall include the business's name, National Institute of Government Purchasing (NIGP) or North American Industry Classification System (NAICS) code, and the business's contact information. The directory shall be updated monthly to reflect new certifications or changes to existing certifications. The directory shall be downloadable in Microsoft Word and Excel formats at no cost to the user.

C. ON-SITE COMPLIANCE REVIEW INSPECTIONS

Upon the submission of a written sworn complaint of non-compliance, the EOC may conduct an on-site inspection or desk audit of the project to determine whether the prime contractor has been utilizing the subcontractor in accordance with the contractual agreement for services. During the investigation period, the payment for services may be temporarily suspended pending the outcome of the investigation. The investigation process may take up to 10 business days for completion.

D. PROMPT PAYMENT TO SUBCONTRACTORS

- i. Payments to prime contractors shall be made within fifteen (15) days of the County receiving an undisputed invoice. Prime contractors shall be required to pay their subcontractors within 10 days of receipt of their invoice payment from the County. The prime contractor shall be penalized if the subcontractor is not paid in a timely manner. All contracts with prime contractors shall include the following language:

The penalty for non-compliance with the 10-day timely payment to subcontractor(s) shall include:

- (a) any prime contractor who violates the timely payment term to a subcontractor more than once in a (3) three month period shall lose their EOC qualification number to do future business with the County for (3) three months;
- (b) any prime contractor who violates the timely payment term to a subcontractor more than twice in a (6) six-month period shall lose their EOC qualification number to do future business with the County for (6) six months;
- (c) any prime contractor who violates the timely payment term to a subcontractor more than (3) three times in a one-year period shall lose their EOC qualification number to do future business with the County for one-year.

The prime contractor may appeal the above imposed penalty to the EOC Appeals Board.

BE IT FURTHER ORDAINED, That nothing contained in this Ordinance shall limit the County's ability to comply with the provisions of any federal or state grant where the requirements or conditions of such grant exceed the requirements of this Locally Owned Small Business Purchasing Program.

BE IT FURTHER ORDAINED, That any business and/or principals of the business, as defined herein, that knowingly supply false information in obtaining or attempting to obtain certification as a locally owned small business under this program, in addition to any other penalties prescribed by law, shall be barred from doing business with the County in any manner for a period of (3) three years from the date of notification by the County.

BE IT FURTHER ORDAINED, That any business and/or principals of any business, as defined herein, shall certify under penalty of perjury that the information provided to obtain certification was provided without collusion and that there has been no violation of any federal or Tennessee antitrust laws.

BE IT FURTHER ORDAINED, That the provisions of this Ordinance are hereby declared to be severable, and if any of its sections, provisions, sentences, phrases, or parts be held unconstitutional or void, the remainder of this Ordinance shall continue in full force and effect, it being the legislative intent now hereby declared that this Ordinance would have been passed even if such unconstitutional or void matter had not been included herein.

BE IT FURTHER ORDAINED, That this Ordinance shall take effect in accordance with the Shelby County Charter, Article II, Section 2.06(C).



Mark H. Luttrell, Jr.
County Mayor

Date: 12-27-16

ATTEST:

Clerk of County Commission

FIRST READING: November 14, 2016

SECOND READING: December 14, 2016

ADOPTED

THIRD READING: December 19, 2016