

PROPOSED

ORDINANCE NO. 2009-

1
2 AN ORDINANCE OF THE BOARD OF COUNTY
3 COMMISSIONERS OF BROWARD COUNTY, FLORIDA,
4 PERTAINING TO COUNTY PROCUREMENT AND
5 CONTRACTING OPPORTUNITIES FOR COUNTY
6 BUSINESS ENTERPRISES; REPEALING IN ITS ENTIRETY
7 SECTION 1-81 OF THE BROWARD COUNTY CODE OF
8 ORDINANCES RELATING TO COMMUNITY
9 DISADVANTAGED BUSINESS ENTERPRISES AND
10 REPLACING IT WITH THE COUNTY BUSINESS
11 ENTERPRISE ACT OF 2009, RELATING TO AND
12 GOVERNING COUNTY BUSINESS ENTERPRISES;
13 PROVIDING ELIGIBILITY CRITERIA AND CERTIFICATION
14 PROCESS FOR COUNTY BUSINESS ENTERPRISES;
15 ESTABLISHING A CUMULATIVE GOAL FOR COUNTY
16 BUSINESS ENTERPRISE PARTICIPATION IN COUNTY
17 CONTRACTING OPPORTUNITIES; PROVIDING CRITERIA
18 FOR SETTING CONTRACT GOALS AND RESERVES;
19 PROVIDING CRITERIA TO DETERMINE WHETHER
20 CONTRACT GOALS HAVE BEEN MET; PROVIDING THAT
21 COMMUNITY DISADVANTAGED BUSINESS ENTERPRISE
22 GOALS IN PENDING CONTRACTS BE MET; PROVIDING
23 FOR SEVERABILITY; PROVIDING FOR INCLUSION IN THE
24 CODE; AND PROVIDING FOR AN EFFECTIVE DATE.

(Sponsored by the Board of County Commissioners)

17 WHEREAS, the Board of County Commissioners has determined that meaningful
18 participation by small, Broward-based firms in County contracting opportunities benefits
19 the health, safety, and welfare of County residents; and

20 WHEREAS, the benefit to health, safety, and welfare is even greater when such
21 participation is by firms whose owners have a net worth not exceeding a stated amount,
22 thereby ensuring a more level playing field in the pursuit of County small-business
23 contracting opportunities and increasing economic opportunity among larger segments of
24 the County's population; and

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1 WHEREAS, providing programs to ensure meaningful participation in County
2 contracting opportunities by such firms will ultimately result in increased competition
3 among firms seeking to do business with Broward County, leading to lower prices and
4 better quality work; and

5 WHEREAS, based on analysis of industry data and other relevant factors
6 performed by the County's Small Business Development Division, the appropriate level of
7 participation by such firms in the County contracting opportunities covered by this
8 Ordinance is twenty-five percent (25%); and

9 WHEREAS, the County has determined that repealing in its entirety Section 1-81 of
10 the Broward County Code of Ordinances relating to Community Disadvantaged Business
11 Enterprises, and replacing it with the County Business Enterprise Act of 2009, relating to
12 and governing County Business Enterprises, is appropriate at this time.

13
14 BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF
15 BROWARD COUNTY, FLORIDA:

16
17 Section 1. Section 1-81, of the Broward County Code of Ordinances, titled
18 "Community Disadvantaged Business Enterprise Act of 2007," is hereby repealed and
19 replaced in its entirety with the following:

20
21 [UNDERLINING OMITTED]

22 COUNTY BUSINESS ENTERPRISE ACT OF 2009
23 **Sec. 1-81. Short title.** This section shall be known and may be cited as the
24 "County Business Enterprise Act of 2009."

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

2 (a) Program objectives.

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

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

8 (b) Program definitions.

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

20 (2) *Bidder* means an individual or business entity that responds to a
21 competitive solicitation advertised pursuant to the Broward County
22 Procurement Code.

23 (3) *Continuous operating presence* means a business entity with a current
24 business tax receipt issued by Broward County, which has a physical

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1 business address located within the geographical limits of Broward
2 County in an area zoned for the conduct of such business, and which
3 has, as determined by the Program Director, sufficient full-time employees in
4 Broward County to perform all required work in connection with contracting
5 opportunities covered by this section.

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

8 (5) *County Business Enterprise* or *CBE* means a business entity certified by the
9 County as meeting all of the following criteria:

10 a. Does not (combined with any and all affiliated entities) have in
11 excess of \$5 million in average annual gross revenue (\$9 million
12 for firms that earn a majority of their average annual gross
13 revenue from construction services), calculated over the previous
14 three (3) calendar years. These maximum average gross revenue
15 figures shall be indexed annually commencing October 1, 2009,
16 using the Council for Community and Economic Research's ACCRA
17 Cost of Living Index as applied to Broward County;

18 b. No person with an ownership interest (direct or indirect, legal or
19 beneficial) in the entity (or in any affiliated entity) has a personal net
20 worth exceeding \$1 million; and

21 c. Has a continuous operating presence in Broward County.

22 (6) *Personal net worth* means the net value of the assets of an individual after
23 total liabilities (not including contingent liabilities) are deducted. For
24 purposes of CBE certification, an individual's personal net worth does not

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1 include the individual's ownership interest in any CBE applying for or
2 certified by the County or the individual's net equity in his or her primary
3 place of residence.

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

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

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

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

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1 contract, under the Broward County Code, or under applicable law, all of which
2 remedies being cumulative."

3 (b) CBE Program Leadership. The Program Director of the CBE program shall
4 be the Director of the Broward County Office of Equal Opportunity.

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

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

14 **Sec. 1-81.3. Goals; Reserves.**

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

23 (b) Contract goals shall be established as follows:

24 (1) Unless the Program Director determines that no CBE goal should be set

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1 on a contract for the reasons set forth below, the Program Director shall
2 establish CBE goals on each contract identified in subpart (a) above in a
3 manner designed to ensure that, for each fiscal year, the cumulative CBE
4 goal then in effect is achieved as closely as practicable.

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

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

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

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

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

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1 (c) Reserves. When all conditions identified in subpart (2) below are met, a
2 specific portion of a project may be reserved for participation by CBEs.

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

14 (2) Required Conditions for Establishing CBE Reserve. No CBE reserve may
15 be established unless all of the following conditions are met:

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

19 b. The Program Director has determined, after consultation with the
20 Purchasing Division, that unbundling or dividing a project into
21 separate contracts for the purpose of reserving one (1) or more of
22 the unbundled contracts to CBE firms is commercially practicable
23 and is not expected to materially increase the overall cost of the
24 project; and

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1 c. Because of actual and projected CBE participation during the
2 relevant fiscal year, the Program Director has determined that a
3 reserve is necessary to meet the cumulative CBE goal.

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

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

8 (b) In order to meet the CBE goal of a contract, the bidder must submit the
9 following information:

- 10 (1) The names and addresses of each certified CBE that will participate in the
11 contract;
- 12 (2) A description of the work that each certified CBE will perform;
- 13 (3) The dollar amount of the participation each certified CBE will receive
14 under the contract, together with the percentage of the total contract
15 represented by that dollar amount;
- 16 (4) Written documentation, in form acceptable to the County's Small Business
17 Development Division, of the bidder's commitment to use each certified CBE
18 whose participation the bidder submits to meet the contract goal; and
- 19 (5) Written confirmation (in form acceptable to the County's Small Business
20 Development Division) from each certified CBE that it will participate in the
21 contract as provided above.

22 (c) The bidder must present the above information as follows:

- 23 (1) Under sealed bid procedures, the information must be provided with the
24 sealed bid response; or

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

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

9 (e) Each contract setting a CBE goal shall provide that:

10 (1) A prime contractor may not terminate for convenience a certified CBE
11 listed as a subcontractor in the prime contractor's bid or offer without
12 the County's prior written consent.

13 (2) When a certified CBE subcontractor is terminated for any reason, including
14 for cause, the prime contractor shall make good faith efforts to find another
15 certified CBE to perform the work due to be performed by the original CBE.

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

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

24 (g) Determination of Good Faith Effort by Bidder.

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1 (1) A bidder shall not be determined non-responsive and shall not be denied
2 award of a contract due to the failure of a bidder to meet the assigned
3 contract goal if the bidder timely (as provided in subparts (c) and (d)
4 above) provides documentation demonstrating, as determined by the
5 Program Director, the bidder's good faith effort to meet the goal. In
6 making such determination, the Program Director shall consider the
7 quality, quantity, and extent of the various efforts that the bidder has made
8 to meet the goal.

9 (2) The efforts to be considered by the Program Director include, but are not
10 limited to:

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

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

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

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1 manner.

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

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

20 (3) In determining whether a bidder has made a good faith effort, the County
21 may take into account the response of other bidders in meeting the
22 contract goal. For example, when the apparent successful bidder fails to
23 meet the contract goal, but others meet it, it is proper to question whether,
24 with additional reasonable efforts, the apparent successful bidder could

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1 have met the goal. If the apparent successful bidder fails to meet the
2 goal, but meets or exceeds the average CBE participation obtained by
3 other bidders, this may be viewed, in conjunction with other factors, as
4 evidence of the apparent successful bidder having made a good faith
5 effort.

- 6 (4) Monitoring CBE Participation. The Program Director shall implement
7 procedures to monitor actual CBE participation.

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

- 9 (a) Certification Standards for CBE Firms.

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

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

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

- 22 (c) Standards for Determining Ownership and Control of a Business Entity.

23 (1) The County Administrator shall establish and adopt standards to determine
24 whether a business entity applying for CBE certification meets the

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1 ownership and control criteria. The standards shall also identify the
2 appeals process to be utilized for denials or revocations of CBE
3 certification. The standards shall be adopted within one hundred and
4 eighty (180) days of the effective date hereof and may be subsequently
5 amended by the County Administrator to effectuate the purposes of the CBE
6 program.

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

13 (d) CDBE Goals in Executory Contracts. All CDBE goals in effect upon the
14 enactment hereof shall remain in full force and effect.

15 Section 2. SEVERABILITY.

16 If any portion of this Ordinance is determined by any Court to be invalid, the
17 invalid portion shall be stricken, and such striking shall not affect the validity of the
18 remainder of this Ordinance. If any Court determines that this Ordinance, or any portion
19 hereof, cannot be legally applied to any individual(s), group(s), entity(ies), property(ies),
20 or circumstance(s), such determination shall not affect the applicability hereof to any
21 other individual, group, entity, property, or circumstance.

22 Section 3. INCLUSION IN CODE.

23 It is the intention of the Board of County Commissioners that the provisions of
24 this Ordinance shall become and be made a part of the Broward County Code; and that

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1 the sections of this Ordinance may be re-numbered or re-lettered and the word
2 "ordinance" may be changed to "section," "article," or such other appropriate word or
3 phrase in order to accomplish such intentions.

4 Section 4. EFFECTIVE DATE.

5 This Ordinance shall become effective as provided by law.

6
7 ENACTED

8 FILED WITH THE DEPARTMENT OF STATE

9 EFFECTIVE

PROPOSED

10
11 PURPOSE: The purpose of this Ordinance is to repeal in its entirety Section 1-81
12 of the Broward County Code of Ordinances relating to Community Disadvantaged
13 Business Enterprises and replace it with the County Business Enterprise Act of 2009,
14 relating to and governing County Business Enterprises.

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