## COUNCIL MEMORANDUM

Council Meeting Date: January 15, 2015

## LEGISLATIVE ACTION ITEM



SPONSOR:
Ashton J. Hayward, III, Mayor fo
SUBJECT: Ordinance Creating a Minority Business Enterprise and Woman Business Enterprise (M/WBE) Program

## RECOMMENDATION:

That City Council adopt the proposed ordinance creating Section 3-3-7 through 3-3-13 of the Code of City of Pensacola to create a Minority and Woman-Owned Business Enterprise Program.

## AGENDA:


$\qquad$ Consent

Hearing Required: Public $\qquad$ Quasi-Judicial $\qquad$ No Hearing Required $\qquad$ X

## SUMMARY:

In 2011, the City hired MGT of America to perform a disparity study that analyzed the City's purchasing activities and amount of dollars spent with minority firms, directly and through subcontracting with prime contractors. The study was delivered to Council in September 2012 and the study indicated that based on the data examined, there has been a statistically significant underutilization of minority businesses. Included with the study were suggested remedies to increase the participation rate of minorities for City purchasing opportunities. The City hired MGT of America again in February of 2013 to assist the City with implementation of a Minority/Woman-Owned Business Enterprise (M/WBE) program, as recommended in the Disparity Study. As result of this effort, an enabling ordinance has been prepared for City Council adoption that will create a Minority and Woman Business Enterprise Program (M/WBE) for the City. This program will allow for the establishment of goals for M/WBE participation for City contracting, especially construction, and in other direct City purchases where minority and woman owned firms are available. This program will be similar, but more intensive than the City's existing Small Business Enterprise (SBE) program. To assist with the new program, the City is in the process of hiring a Minority Business Enterprise Coordinator who will help the establishment of project goals, certification of M/WBE firms, tracking of participation data, preparation of reports, and outreach efforts to the business community and community at large.

Following final adoption of the ordinance, staff will bring back for City Council approval specific policies of the new program that will include suggested M/WBE goals and new purchasing procedures to help achieve the identified goals.

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## PRIOR ACTION:

Council approved contract with MGT to review SBE program
Council approved contract with MGT to perform a Disparity Study
Council approved contract with MGT for implementation assistance

March 2009
June 2011
February 2013

## FUNDING:

N/A

## FINANCIAL IMPACT:

N/A

## STAFF CONTACT:

Richard Barker, Jr., CFO, Interim City Administrator and George Maiberger, Purchasing Manager

## ATTACHMENTS:

1) Proposed Ordinance

## PRESENTATION:

None

## PROPOSED ORDINANCE NO.

$\qquad$
ORDINANCE NO. $\qquad$
AN ORDINANCE TO BE ENTITLED:


#### Abstract

AN ORDINANCE CREATING SECTIONS 3-3-7 THROUGH 3-3-13 OF THE CODE OF THE CITY OF PENSACOLA, FLORIDA; CREATING AND IMPLEMENTING A MINORITY AND WOMAN-OWNED BUSINESS PROGRAM FOR CITY PROCUREMENT; PROVIDING FOR SEVERABILITY; REPEALING CLAUSE; PROVIDING AN EFFECTIVE DATE.


SECTION 1. Sections 3-3-7 through 3-3-13 of the Code of the City of Pensacola, Florida are hereby created to read as follows:

Sec. 3-3-7. Purpose and scope.
The purpose of this section, consistent with the legislative findings stated below, is to enable the City, through the Mayor or his designee, to undertake specific activities to prevent disparate treatment and its effects against business enterprises that have been certified as MBEs ("MBEs") or WBEs ("WBEs"). The Mayor or his designee is hereby expressly delegated the necessary powers to effectuate the purpose of this section.

Sec. 3-3-8. Findings.
The City Council of Pensacola, after considering:
(1) The Report prepared by MGT of America entitled, "Comprehensive Disparity Study for the City of Pensacola, 2012" ("MGT Study") which found evidence of disparities between availability and utilization of woman-owned and minorityowned business enterprises and in the private sector as well as;
(2) Anecdotal evidence of disparate treatment against MBEs and WBEs by prime contractors.
(3) Hereby adopts the following findings as a strong basis in evidence supporting a narrowly tailored, remedial program in City procurement.

There exists prima facie evidence showing that WBEs, and MBEs owned by African-Americans, Hispanics, Asian-Americans, Native Americans and Women, who have done business or attempted to do business in the private and public industries within the City and the Pensacola metropolitan area, have suffered and continue to suffer from disparate treatment by prime contractors. This disparate treatment has existed in private sector industry contracting in such work areas in which the City has been a passive participant. Because of such disparate treatment, such WBEs and MBEs have lacked equal opportunity to participate in such contracts. Such disparate treatment has prevented WBEs and MBEs from participating both in the City's contracting opportunities and in the private sector at a level which would have existed absent such disparate treatment.

The City seeks to provide a level playing field and equal access for all prime contractors and subcontractors to participate in City procurement. The City also desires to reaffirm its commitment to full and fair opportunities for all firms to participate in its contracts.

The MGT Study made recommendations for a minority and woman-owned business program for City procurement, emphasizing the establishment of project specific goals, implementation of race and gender neutral measures, and enhancements to data gathering.

Goals program. The City, therefore, finds and declares that it has a compelling governmental interest in prohibiting, preventing, and eliminating race and gender disparate treatment and its effects in City contracts, and for this purpose, adopts the specific program of good-faith efforts goals as set forth in this section 3-3-8. This program will be carefully structured to take into consideration factors such as present availability of such WBEs and MBEs to perform work on such City contracts, and to take into consideration statistical and anecdotal evidence of disparate treatment. The program is to be narrowly tailored to prevent and eliminate disparate treatment and its effects against such MBEs and WBEs with a minimum of burden on other contractors, including:

The program does not impose a quota, set-aside, sheltered market or bid preference, never excludes any party, including non-minority and non-woman-owned business enterprises, from competing for any contract, and never denies contracts for failure to meet project goals, if non-disparate treatment is demonstrated by a showing of a good-faith attempt to comply with project goals established therein. The program provides for graduation from the program of MBEs and WBEs whose size indicates that they have had the opportunity to overcome the effects of disparate treatment.

## Definitions.

- Certification. An application procedure completed by a business enterprise to participate as a small, minority, or woman owned business enterprise under the M/WBE Program.
- Certified Business Enterprise. A small, minority, or women-owned business enterprise that has been certified by the City and/or certifying agencies approved by the City.
- Minority individual. An individual who is a citizen of the United States or a legal resident alien and who satisfies one or more of the following definitions as defined by the United States (U.S.) Census Bureau:
A) African Americans: U.S. citizens or lawfully admitted permanent residents having an origin in any of the black racial groups of Africa.
B) Hispanic Americans: U.S. citizens or lawfully admitted permanent residents of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish or Portuguese cultures or origins regardless of race.
C) Asian Americans: U.S. citizens or lawfully admitted permanent residents who originate from the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands.
D) Native Americans: U.S. citizens or lawfully admitted permanent residents who originate from any of the original peoples of North America and who maintain cultural identification through tribal affiliation or community recognition.
E) Women: U.S. citizens or lawfully admitted permanent residents who are non-Hispanic white females. Minority women were included in their respective minority category.
F) Disadvantaged Individual. An individual defined as disadvantaged for purposes of the federal disadvantaged business enterprise program (DBE) contained in 49 CFR Part 26.
- Minority-owned Business. A business located in the Pensacola Regional Area, that is at least 51 percent owned by one or more minority individuals who are U.S. citizens or legal resident aliens, or in the case of a corporation, partnership, or limited liability company or other entity, at least 51 percent of the equity ownership interest in the corporation, partnership, or limited liability company or other entity is owned by one or more minority individuals who are U.S. citizens or legal resident aliens, and both the management and daily business operations are controlled by one or more minority individuals.
- Pensacola Regional Area. The market area of four Florida counties: Escambia, Santa Rosa, Okaloosa, and Walton as well as Mobile, Alabama.
- Proposal. A response to a Request for Proposal, Request for Information, Request for Qualifications, or City-Requested Informal Quote.
- M/WBE. A certified minority or woman owned business enterprise, as defined herein, located in the Pensacola Regional Area.


## Sec. 3-3-9. Rules and regulations; informal guidelines.

The Mayor or his designee shall have the power and authority to each adopt rules and regulations and/or informal guidelines to effectuate the purpose and operation of this section, including by way of example, but not by way of limitation, the determination of qualification of a business enterprise; the determination of good-faith criteria and efforts with respect to the meeting of contract goals; the determination of informal procurement procedures involving notification of MBEs and WBEs; the procedures, methods and criteria of certification and decertification of MBEs and WBEs; and graduation size standards and other criteria.

## Sec. 3-3-10. Contracts excepted from this article.

In the case of a contract hereunder for which a part of the contract price is to be paid with funds from the United States Government or the State of Florida and for which the United States Government or the State of Florida has made applicable to such contract requirements, terms or conditions which are inconsistent with the terms of this section, the provisions of this section shall not apply to such contract to the extent of such inconsistency.

## Sec. 3-3-11. Program review and sunset.

(1) The City Council shall hear annual reports from the Mayor or his designee detailing the City's performance under the Program.
(2) The City Council will review these reports, including the Annual Participation Goals and the City's progress towards meeting those goals and eliminating disparate treatment in its contracting activities and marketplace.
(3) Within five years after the effective date of this ordinance, the City will review the operation of the Program and the evidentiary basis for the Program in order to determine whether the City has a continuing compelling interest in remedying disparate treatment against MBEs and WBEs in its marketplace, and the permissible scope of any narrowly tailored remedies to redress disparate treatment against MBEs or WBEs.
(4) This subdivision shall sunset on or before March 1, 2020.

SECTION 2. If any word, phrase, clause, paragraph, section or provision of this ordinance or the application thereof to any person or circumstance is held invalid or unconstitutional, such finding shall not affect the other provision or applications of the ordinance which can be given effect without the invalid or unconstitutional provisions or application, and to this end the provisions of this ordinance are declared severable.

SECTION 3. All ordinances or parts of ordinances in conflict herewith are hereby repealed to the extent of such conflict.

SECTION 4. This ordinance shall become effective on the fifth business day after adoption, unless otherwise provided pursuant to Section 4.03(d) of the City Charter of the City of Pensacola.

Passed: $\qquad$

Approved:
President of City Council
Attest:

City Clerk

