

CITY COUNCIL
ATLANTA, GEORGIA

15-O-

AN ORDINANCE BY

AN ORDINANCE TO AFFIRM AND AMEND DIVISIONS 12 AND 9 OF CHAPTER 2, ARTICLE X OF THE CITY OF ATLANTA CODE OF ORDINANCES, KNOWN AS THE EQUAL BUSINESS OPPORTUNITY PROGRAM ("EBO PROGRAM") AND SMALL BUSINESS OPPORTUNITY PROGRAM ("SBE PROGRAM") RESPECTIVELY; TO ACKNOWLEDGE AND INCORPORATE THE DISPARITY STUDY PERFORMED BY KEEN INDEPENDENT RESEARCH LLC; TO AMEND THE SUNSET PROVISIONS OF THE EBO AND SBE PROGRAMS; AND FOR OTHER PURPOSES.

WHEREAS, the City of Atlanta (the "City") desires to be proactive in ensuring that economic opportunities in the Atlanta Region are equally available to all individuals and businesses, regardless of race, gender or ethnicity; and

WHEREAS, through Ordinance No. 09-O-1876 the City enacted its current Equal Business Opportunity Program (the "EBO Program") and the Small Business Opportunity Program (the "SBE Program") in 2009 based on a disparity study conducted by Dr. Ian Ayres ("2009 Disparity Report"); and

WHEREAS, the Disparity Report found statistically significant disparities between the availability versus the utilization of qualified minority- and women-owned businesses in the Atlanta Region ("Underutilization"). The 2009 Disparity Report concluded that the Underutilization, along with related anecdotal evidence, provide strong evidence to justify narrowly-tailored equal-opportunity measures in City contracting. Such measures safeguard the City from becoming a passive participant in racial, ethnic and gender discrimination; and

WHEREAS, the EBO Program implements narrowly-tailored measures to promote full and equal competitive opportunities for all persons and businesses engaged in City contracts, regardless of race, gender and ethnicity; and

WHEREAS, the EBO Program provided for a ten year graduation period for certified minority- and women-owned businesses. After said period, minority- and women-owned businesses may remain certified if they meet small business entity standards; and

WHEREAS, the City expressly recognized the necessity for periodic reviews of the EBO Program and SBE Program's efficacy so that beneficial adjustments can be identified and implemented; and

WHEREAS, the City authorized an updated disparity study, conducted by Keen Independent Research LLC ("**2015 Disparity Report**"), to evaluate the effectiveness of the EBO and SBE Programs on reducing Underutilization; and

WHEREAS, the 2015 Disparity Report revealed that, under the EBO and SBE Programs, the City has reduced Underutilization of minority-owned businesses in general, but that certain minority groups and women face continued Underutilization in City-funded contracts, and continued contracting disparities and barriers in the Atlanta Region; and

WHEREAS, the 2015 Disparity Report reinforces the conclusion of the 2009 Disparity Report that there is strong evidence to justify narrowly-tailored equal-opportunity measures in City contracting; and

WHEREAS, based on the findings of the 2015 Disparity Report, and based on the City's commitment to non-discrimination and equal business opportunity in contracting, it is in the City's best interest to continue the EBO and SBE Programs for an additional five years in order to: (i) allow certified minority and women-owned businesses to fully benefit from the EBO Program and "graduate", pursuant to City Code of Ordinances § 2-1453(h); (ii) ensure that the City contracts with businesses that are committed to offering equal business opportunities to its subcontractors and service providers without regard to business ownership by race, gender or ethnicity; (iii) prevent the City from becoming a passive participant in racial, ethnic and gender discrimination; and (iv) ensure that all businesses have a fair and equitable opportunity to do business with the City; and

WHEREAS, the City recognizes that small business enterprises are essential to a competitive free enterprise system, but may need assistance competing for City contracts despite being highly qualified to perform the necessary work; and

WHEREAS, it is in the City's best interest to continue its SBE Program whose purpose is to: (i) promote the economic welfare of the people of the City of Atlanta; (ii) promote full and equal business opportunity for all persons doing business with the City; and (iii) promote commerce by assisting small business enterprises that wish to actively participate in the City's procurement process; and

WHEREAS, the Mayor's Office of Contract Compliance ("**OCC**") recommends that the City revise the SBE Program's process for determining whether a business qualifies as a "Small Business Enterprise", and it is in the City's best interest to adopt that recommendation.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF ATLANTA, GEORGIA HEREBY ORDAINS AS FOLLOWS:

SECTION ONE: The City of Atlanta Equal Business Opportunity Ordinance ("**EBO Ordinance**" or "**EBO Program**"), set forth in Atlanta Code of Ordinances, Chapter 2 (Administration), Article X (Procurement and Real Estate Code), Division 12 (Equal Business Opportunity), shall be amended to adopt the findings of the disparity study performed by Keen Independent Research LLC, and the resulting 2015 Disparity Report. The EBO Ordinance is

hereby affirmed in its entirety, with the exception of the modifications set forth in Sections Two, Three, Four and Five herein below.

SECTION TWO: Atlanta Code of Ordinances Section 2-1442 entitled "Adoption of the findings and conclusions of the Executive Summary of Dr. Ian Ayres" shall be amended by adding and removing the following underlined and struck content respectively:

Sec. 2-1442. Adoption of the findings and conclusions of the Executive Summary of Dr. Ian Ayres and of the 2015 Disparity Report by Keen Independent Research, LLC.

The City ~~council~~ adopts the findings and conclusions of the Executive Summary of Dr. Ian Ayres (referred to in this ~~subdivision 12~~ as the "Disparity Report" or the "2009 Disparity Report"). The City further adopts the findings and conclusions of the 2015 disparity report prepared by Keen Independent Research, LLC (referred to in this division 12 as the "2015 Disparity Report").

SECTION THREE: Atlanta Code of Ordinances Section 2-1443 entitled "Definitions" shall be amended by adding the following underlined content:

Sec. 2-1443. - Definitions.

Eligible project for AABEs shall mean any city contract as described in section 2-1188 and section 2-1189, excluding sole source procurement under section 2-1191, special procurement under section 2-1191.1, emergency procurement under section 2-1192, and contracts governed by 49 CFR Parts 23 and 26, as amended, that involves a procurement within a given NAICS Code within which the 2009 Disparity Report as supplemented by the 2015 Disparity Report found an underutilization of AABEs.

Eligible project for AABE small business enterprises shall mean any city contract as described in section 2-1188 and section 2-1189, excluding sole source procurement under section 2-1191, special procurement under section 2-1191.1, emergency procurement under section 2-1192, and contracts governed by 49 CFR Parts 23 and 26, that involves a procurement within a given NAICS Code within which the 2009 Disparity Report as supplemented by the 2015 Disparity Report found an underutilization of AABE small business enterprises.

Eligible project for APABEs shall mean any city contract as described in section 2-1188 and section 2-1189, excluding sole source procurement under section 2-1191, special procurement under section 2-1191.1, emergency procurement under section 2-1192, and contracts governed by 49 CFR Parts 23 and 26, that involves a procurement within a given NAICS Code within which the 2009 Disparity Report as supplemented by the 2015 Disparity Report found an underutilization of APABEs.

Eligible project for APABE small business enterprises shall mean any city contract as described in section 2-1188 and section 2-1189, excluding sole source procurement under section 2-1191, special procurement under section 2-1191.1,

emergency procurement under section 2-1192, and contracts governed by 49 CFR Parts 23 and 26, that involves a procurement within a given NAICS Code within which the 2009 Disparity Report as supplemented by the 2015 Disparity Report found an underutilization of APABE small business enterprises.

Eligible project for HABEs shall mean any city contract as described in section 2-1188 and section 2-1189, excluding sole source procurement under section 2-1191, special procurement under section 2-1191.1, emergency procurement under section 2-1192, and contracts governed by 49 CFR Parts 23 and 26, that involves a procurement within a given NAICS Code within which the 2009 Disparity Report as supplemented by the 2015 Disparity Report found an underutilization of HABEs.

Eligible project for HABE small business enterprises shall mean any city contract as described in section 2-1188 and section 2-1189, excluding sole source procurement under section 2-1191, special procurement under section 2-1191.1, emergency procurement under section 2-1192, and contracts governed by 49 CFR Parts 23 and 26, that involves a procurement within a given NAICS Code within which the 2009 Disparity Report as supplemented by the 2015 Disparity Report found an underutilization of HABE small business enterprises.

Eligible project for FBEs shall mean any city contract as described in section 2-1188 and section 2-1189, excluding sole source procurement under section 2-1191, special procurement under section 2-1191.1, emergency procurement under section 2-1192, and contracts governed by 49 CFR Parts 23 and 26, that involves a procurement within a given NAICS Code within which the 2009 Disparity Report as supplemented by the 2015 Disparity Report found an underutilization of FBEs.

Eligible project for FBE small business enterprises shall mean any city contract as described in section 2-1188 and section 2-1189, excluding sole source procurement under section 2-1191, special procurement under section 2-1191.1, emergency procurement under section 2-1192, and contracts governed by 49 CFR Parts 23 and 26, that involves a procurement within a given NAICS Code within which the 2009 Disparity Report as supplemented by the 2015 Disparity Report found an underutilization of FBE small business enterprises.

SECTION FOUR: Atlanta Code of Ordinances Section 2-1444 entitled "Findings" shall be amended by adding and removing the following underlined and struck content respectively:

Sec. 2-1444. - Findings.

Based on the factual predicate established by and set forth in the 2009 Disparity Report and 2015 Disparity Report incorporated in this ~~subdivision~~ 12 and all other evidence of record, the City finds substantial barriers to full participation of minorities and women in certain areas of the private marketplace in the Atlanta ~~Region~~ MSA and in certain areas of contracting with the City of Atlanta.

SECTION FIVE: Atlanta Code of Ordinances Section 2-1460 entitled "Sunset" shall be amended by adding and removing the following underlined and struck content respectively:

Sec. 2-1460. - Sunset

This ~~sub~~division 12 shall sunset on December 31, ~~2020~~2015.

SECTION SIX: The City of Atlanta Small Business Opportunity Ordinance ("**SBE Ordinance**" or "**SBE Program**"), set forth in Atlanta Code of Ordinances, Chapter 2 (Administration), Article X (Procurement and Real Estate Code), Division 9 (Small Business Enterprise Opportunity Program), is hereby affirmed in its entirety, with the exception of the modifications set forth in Sections Seven, Eight, Nine, Ten, Eleven, Twelve, Thirteen and Fourteen herein below.

SECTION SEVEN: Atlanta Code of Ordinances Section 2-1357 entitled "Definitions" shall be amended by adding a new definition entitled "Affiliates" as shown in underlined text below, which shall be placed above the definition of the term "Atlanta Region", and which shall read as follows:

Affiliates: OCC shall consider all affiliates of a business enterprise in determining whether the business enterprise qualifies for SBE status. In general, concerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists. The determination whether two or more business enterprises are affiliates shall follow the guidelines regarding affiliation as set forth in 13 C.F.R. § 121.103, as amended.

SECTION EIGHT: Atlanta Code of Ordinances Section 2-1357 entitled "Definitions" shall be amended by modifying the definition of "Small business enterprise" by adding and removing the following underlined and struck content respectively:

Small business enterprise (SBE) shall mean a firm located in the Atlanta Region which is an independent and continuing enterprise for profit, performing a commercially useful function, for which the gross revenues or number of employees, inclusive of any ~~a~~Affiliates as defined by 13 C.F.R. Sec. 121.103, does not exceed the size standards as defined pursuant to 13 C.F.R. § 121.201 (as further explained in 13 C.F.R. §§ 121.104 through 121.107), and which has: (1) filed a letter or other documentation from the United States Small Business Administration with OCC that establishes that the firm qualifies as an 8(a) firm or HUBZone firm with the United States Small Business Administration;; (2) obtained certification as a disadvantaged business enterprise ("DBE") in the State of Georgia, including any agency or department of the State of Georgia, or the United States Department of Transportation;; or (3) ~~filed a self-certification~~ submitted evidence ~~with~~ to OCC on a form to be prescribed by OCC affirming

under penalty of perjury that the business does not exceed the size standards referenced in this definition.

SECTION NINE: Atlanta Code of Ordinances Section 2-1357 entitled "Definitions" shall be amended by modifying the definition of "Self-certification" by adding and removing the following underlined and struck content respectively:

Self-certification shall refer to the provision in the previous version of this Ordinance (Ord. No. 2009-78(09-O-1876), § 9, 12-15-09) which required ~~mean~~ an affirmative representation that a business meets the qualification criteria of a small business enterprise, as set forth in this division, on a form to be prescribed by OCC and filed with OCC affirming under penalty of perjury that the business qualifies as an SBE. Self-certification applies only to SBEs which are self-certified under the prior Ordinance (Ord. No. 2009-78(09-O-1876), § 9, 12-15-09) at the time of the adoption of this Ordinance. Any self-certified SBE must comply with the certification requirements of this Ordinance once the SBE's self-certification expires.

SECTION TEN: Atlanta Code of Ordinances Section 2-1358 entitled "Statement of policy" shall be amended by adding and removing the following underlined and struck content respectively:

Sec. 2-1358. - Statement of policy.

In conjunction with the City of Atlanta's Equal Business Opportunity Program, it is the purpose of this small business opportunity program to promote the economic welfare of the people of the City of Atlanta, to promote full and equal business opportunity for all persons doing business with the City of Atlanta, to promote commerce by assisting SBEs to actively participate in the City's procurement process, and to ensure the City of Atlanta utilizes programs that provide it with the best possible resources. In order to encourage competition, the foundation of the free enterprise system, the City of Atlanta's policy will ensure that a fair proportion of the total purchases and contracts or subcontracts for property, commodities, and services come from small businesses so long as the property, commodities and services of small businesses are competitive as to price and quality. The City of Atlanta has set a goal of 35 percent for the small business opportunity program. This is lower than the availability of SBEs in the marketplace. ~~The City of Atlanta believes that, as a preliminary goal, the small business opportunity program should be applied to (i) a portion of contracts under \$25 million in construction, (ii) a portion of contracts under \$10 million in manufacturing, transportation and warehousing, information, finance and insurance, professional scientific and technical services, and administrative support waste management and remediation services, and (iii) most contracts regardless of size in any other industry.~~

SECTION ELEVEN: Atlanta Code of Ordinances Section 2-1359 entitled "Duties of the Office of Contract Compliance" shall be amended by adding and removing the following underlined and struck content respectively:

Sec. 2-1359. - Duties of the Office of Contract Compliance.

Under this division, OCC shall have the following authority and duties for the implementation of the small business opportunity program under this division:

- (1) Administration and enforcement of this division.
- (2) Establishment of written procedures, informal guidelines, and forms as may be necessary to effectuate this division.
- (3) Monitoring compliance with the requirements of this division.
- (4) Certification of businesses as SBEs in accordance with the standards set forth in this division.
- (5) Development of a database of certified SBE's to be maintained as a public record of certified SBEs.
- ~~(65)~~ Investigation of alleged violations of this division, and the issuance of written statements following any determination of such investigation, stating the reasons therefore and any penalty to be imposed.
- ~~(76)~~ Collaborating with the various city departments to ensure maximum outreach to SBEs.
- ~~(87)~~ Determination of whether any of the penalties set forth in section [2-1373] should be applied to a business.
- ~~(98)~~ Attendance at pre-bid, pre-proposal, pre-construction and pre-work conferences.
- ~~(109)~~ Provision to business entities of all forms, applications, documents and papers necessary to comply with this division.
- ~~(1140)~~ Provision of information to potential bidders, upon request by the potential bidder, which shall include names and contact information of certified SBEs, to reinforce and support outreach efforts by potential bidders.
- ~~(1244)~~ Notification by certified mail that a bidder who has bid on and who otherwise would have been awarded a contract has the right to appeal a determination of noncompliance with this division, said appeal to be determined by a contract compliance hearing officer, as provided in section [2-1367], within seven calendar days of receipt of the notice of noncompliance.
- ~~(1342)~~ Notification by certified mail that a challenge has been made to an applicant's SBE status, said challenge to be determined by OCC.
- ~~(1443)~~ Notification by certified mail that OCC has upheld a challenge to an applicant's SBE status and that the SBE status has been revoked, noting that the SBE has the right to appeal such determination, said appeal to be determined by a contract compliance hearing officer, as provided in section [2-1367] within seven calendar days of receipt of the notice of decertification.

- (1514) Notification to the chief procurement officer of any determination of noncompliance with this division, and of any appeal from any such determination.
- (1615) Monitoring, for data gathering and informational purposes, utilization of SBEs on eligible projects.
- (1716) Maintenance of documents, forms, records or data regarding this program as provided in this division, including: (a) documents, forms, records or data regarding the dollar amounts subcontracted to or expended for services performed by subcontractors and suppliers on eligible projects, including the SBE status of each subcontractor and supplier; and (b) documents, forms, records or data regarding certified SBEs.
- (1817) Development and implementation of outreach and assistance programs to promote equal contracting opportunities for all businesses that wish to do business with the city, regardless of SBE status.

SECTION TWELVE: Atlanta Code of Ordinances Section 2-1363 entitled "Certification as a small business enterprise", subsection (a), shall be amended by adding and removing the following underlined and struck content respectively:

Sec. 2-1363. - Certification as a small business enterprise.

- (a) In order to qualify as an SBE, a business must submit (1) a letter or other documentation from the United States Small Business Administration with OCC that establishes that the firm qualifies as an 8(a) firm or HUBZone firm with the United States Small Business Administration, or (2) a letter or other documentation from the State of Georgia or United States Department of Transportation with OCC that establishes that the firm qualifies as a DBE; or (3) a self-certification to the City of Atlanta evidence on a form prescribed by Office of Contract Compliance OCC, affirming under penalty of perjury that the business qualifies as an SBE as defined in section 2-1357. To the extent that any business qualified as an SBE under the self-certification procedure set forth in prior section 2-1363(a)(2), that business shall remain a certified SBE until the certification expires pursuant to section 2-1364, and thereafter shall be is required to seek recertification under section 2-1364 in order to remain "certified".

SECTION THIRTEEN: Atlanta Code of Ordinances Section 2-1364 entitled "Recertification" shall be amended by adding and removing the following underlined and struck content respectively:

Sec. 2-1364. - Recertification.

Once certified as an SBE with ~~office of contract compliance~~ OCC, the certification is valid for a period of two years from the date of certification. Prior to the expiration of the two-year period and pursuant to regulations issued by OCC, a business that desires to continue to qualify as an SBE must demonstrate its continued eligibility as an SBE under this Ordinance. ~~submit (1) a letter or other documentation from the United States Small Business Administration with~~

~~OCC that establishes that the firm qualifies as an 8(a) firm or HUBZone firm with the United States Small Business Administration, or (2) another self-certification to the city on the prescribed form, affirming under penalty of perjury that the business qualifies as an SBE as defined in section 2-1357.~~

SECTION FOURTEEN: Atlanta Code of Ordinances Section 2-1377 entitled "Sunset" shall be amended by adding and removing the following underlined and struck content respectively:

Sec. 2-1377. - Sunset

This ~~subdivision 2~~ shall sunset on December 31, 2020~~2015~~.

SECTION FIFTEEN: All ordinances or parts of ordinances in conflict herewith are hereby waived for purposes of this ordinance, and only to the extent of the conflict.

A true copy,

Rhonda Dauphin Johnson
Municipal Clerk

ADOPTED by the Atlanta City Council
APPROVED as per City Charter Section 2-403

DEC 07, 2015
DEC 16, 2015

2015-63 (15-O-1556)

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