

ARTICLE 136  
The Smallwood Act

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136.01 PURPOSE

As a vibrant small business community is the foundation for creation of new jobs and a flourishing local economy, the City of York finds it to be in the public interest of the residents of the City to establish The Smallwood Act. The purpose of the Smallwood Act is to stimulate new employment opportunities for City residents, to assist in the growth and development of existing City businesses, to attract other small businesses to move their headquarters and operations into the City, and to achieve greater levels of equitable participation among its local small businesses in City procurement contracts. Moreover, City of York finds it to be in the public interest that the City promotes a marketplace that is free from the effects of discrimination on the basis of race and/or gender, and where all of its local businesses, regardless of ownership status, have a fair and equitable opportunity to compete successfully for contracts within the City's economic mainstream. City of York further finds that significantly underutilized minority and women-owned businesses, on average, tend to be smaller than similarly situated non-minority businesses, this Act may also indirectly help to lessen any marketplace barriers adversely affecting the formation, growth, and marketplace participation of minority and women-owned businesses. To this end, Council enacts this Article.

136.02 NON-DISCRIMINATION POLICY

It is the policy of the City not to enter into a contract or to be engaged in a business relationship with any business entity that has discriminated in the solicitation, selection, hiring or treatment of vendors, suppliers, subcontractors or customers on the basis of race, color, national origin, religion, ancestry, sex, age, marital status, familial status, sexual orientation, gender identity or expression, disability, or genetic information, or on the basis of any otherwise unlawful use of characteristics regarding the vendor's, supplier's or customer's employees or owners; provided that nothing in this policy shall be construed to prohibit or limit otherwise lawful efforts to remedy the effects of discrimination that have occurred or are occurring in the relevant marketplace for the City. All procurement contracts resulting from public solicitations shall include a prohibition against discrimination in the performance of the contract. For those contracts that involve the expenditure of federal funds, if the Agency is required by federal law, regulation

or policy, to include a nondiscrimination clause, the Agency shall comply with the federal contract compliance requirements.

### 136.03 DEFINITIONS

The following words and terms, when used in this article, shall have the following meanings:

- a) “Affirmative Procurement Initiatives” (“APIs”) means program tools and solicitation incentives that are used to encourage greater prime and subcontract participation by Small Business Enterprise (SBE) firms, including, but not limited to, price preferences, evaluation preferences, subcontracting goals, SBE Reserve for prime contract informal bids, SBE vendor rotations for price quotations, and SBE joint venture incentives.
- b) “Agency” means a department, board, commission, authority or office of the City of York government.
- c) “Annual Gross Receipts” means the total amounts the Entity received from all sources during its annual accounting period, without subtracting any costs or expenses.
- d) “Centralized Bidder Registration System” (“CBR”) means an electronic system of hardware and software programs, managed by the Department of Business Administration, by which the City requires all prospective respondents to register. Bidders, vendors, prime contractors, and subcontractors that are ready, willing, and able to sell goods or services to the City are to register. All prime contractors and their subcontractors that are awarded prime contracts or subcontracts on a City contract shall be required to register in the CBR. The CBR System assigns a unique identifier to each registrant that is then required for the purpose of submitting solicitation responses and invoices to the City, and for receiving payments from the City. The CBR-assigned identifiers are also used by the Equal Business Opportunity Committee (EBOC) for measuring relative availability and tracking utilization of SBE firms and all other firms at the prime and subcontract levels by industry or commodity codes and for establishing annual goals and contract-by-contract subcontracting goals. The details regarding fields of information captured and the functionalities of the CBR system shall be reflected in the Business Administration procedures and guidelines.
- e) “EBOC” means the Equal Business Opportunity Committee.
- f) “Entity” means any corporation, limited liability company, partnership, association, sole proprietor or other organization registered to do business in Pennsylvania.
- g) “Full time Equivalent” (“FTE”) is calculated as an employee's scheduled hours divided by the employer's hours for a full-time workweek. When an employer has a 40-hour workweek, employees who are scheduled to work 40 hours per week are 1.0 FTEs. Employees scheduled to work 20 hours per week are 0.5 FTEs.
- h) “Local Business Enterprise” (“LBE”) means an Entity meeting the location and residency requirements to be eligible for certification as set forth in this Article and any regulations adopted pursuant hereto.

- i) “Small Business Enterprise” (“SBE”) means an Entity meeting the size and revenue characteristics to be eligible for certification as set forth in this Article and any regulations adopted pursuant hereto.

#### 136.04 EQUAL BUSINESS OPPORTUNITY COMMITTEE; POWERS AND DUTIES

- a) The EBOC is composed of one designated employee or City of York Human Relations Commission representative, each from the Mayor’s Office, Department of Business Administration, the Department of Economic and Community Development, The City of York Human Relations Commission, and the City Council Business Administration liaison .
- b) The EBOC shall promulgate regulations approved by the Mayor to implement and enforce this policy, and by periodically conducting outreach and distributing educational materials to the City’s contracting and vendor community and related trade associations to advise such contractors, vendors and prospective respondents regarding this policy and the procedures to be followed in submitting complaints alleging violations of this policy and that seek sanctions for such violations.
- c) The EBOC shall:
  - 1. Establish procedures and guidelines for the implementation of the SBE Program and other provisions established pursuant to this Article;
  - 2. Determine which Entities shall be eligible for certification as Small Business Enterprises or Local Business Enterprises under the terms of this Article and establish criteria to identify the qualifications for those Entities that shall be given priority consideration for contracts;
  - 3. Review the procurement plans of each Agency of the City and determine, if necessary, which contracts, or parts thereof, shall be reserved for the programs established under Section 136.08. Where an Agency underutilizes certified Entities in the determination of the EBOC, the EBOC may recommend that the Mayor reserve portions of the Agency’s contracts to be performed in accordance with the programs established under Section 136.08, so that such Agency’s failings may be timely remedied;
  - 4. Consider Agency requests for adjustment of contract goals in particular instances, provided, that the EBOC reports to the Mayor and Council, on a semi-annual basis, recommendations for changes of the contracting goals, on an Agency basis if appropriate, and accompanied by necessary supporting data;
  - 5. Determine appropriate Affirmative Procurement Initiatives (API) for use in Agency contracts;
  - 6. Recommend that an Agency waive bonding and insurance requirements that are in excess of the State’s mandated minimums on contracts for construction, alteration or repair of any public building or public work of the City be

accompanied by a performance bond or insurance protecting the City and by an additional bond for the protection of persons furnishing material and labor, and for other purposes, where such a waiver is appropriate and necessary to achieve the purposes of this Article;

7. Review and challenge bid specifications prior to public issuance of the bid or RFP for all formal contracts above the competitive bidding threshold that are deemed unnecessarily restrictive and that are likely to adversely affect the ability of Small Business Enterprises to compete for the City contract;
8. Recommend that an Agency make advance payments to a certified contractor or to subdivide a contract into smaller parts, to the extent permissible by law, where the EBOC has determined that such payments or such subdivision are necessary to achieve the purposes of the Article. Subdivision may be recommended in order to reduce the burden of bonding and insurance requirements upon SBE firms;
9. Review all contracts recommended for award pursuant to the SBE Program and compare prices received to cost estimates from the issuing Department. The City reserves the right to reject all bids in the event final prices are deemed unreasonable compared to Agency estimates or amounts budgeted for by the City. The EBOC shall report all such instances to the Mayor and Council with a memorandum that explains the basis for the decision to reject all bids, and/or to waive application of the SBE Program in any subsequent bid for the same good or service; and
10. Review contracting problems and make further recommendations that increase SBE and LBE participation with the City government. Recommendations may include, but not be limited to, improved schedules for bid submissions to enhance certified Entity participation in the bidding process, and that ensure prompt payment to contractors, innovative contract advertising procedures, and advising the Mayor on methods to be utilized to ensure bolster contract compliance within the SBE Program.

#### 136.05 SMALL BUSINESS ENTERPRISE

- a) A Small Business Enterprise is an Entity which meets the following criteria:
  1. Employs 100 or fewer FTE employees; and
  2. Can show Annual Gross Receipts of less than \$2,000,000 over the three preceding tax years.
- b) These Small Business Enterprise size standards shall be reviewed every two years and are subject to adjustment by the EBOC with approval of Mayor and Council to better serve the purposes of this Article.

## 136.06 LOCAL BUSINESS ENTERPRISE

A Local Business Enterprise is an Entity which meets at least two of the following criteria:

- (a) The principal office or headquarters of the business is located in the City of York;
- (b) More than fifty percent (50%) of the FTE employees of the business are residents of the City; or
- (c) The owners that own and control at least fifty percent (51%) of the business are residents of the City.

## 136.07 CONTRACTING

- a) Each Agency of the City, including those Agencies that contract a portion of their procurement through the Department of Business Administration, shall:
  - 1. Provide annual reports to the EBOC specifying with respect to the contracts and subcontracts subject to the provisions of this section:
    - i. The means by which it intends to implement the programs provided in Article during the next twelve months;
    - ii. A report depicting, at minimum:
      - A. the number of procurements completed by the Agency during the prior year,
      - B. the dollar value of all procurements,
      - C. the dollar value paid to SBEs and/or LBEs,
      - D. the number of procurements for which SBE and/or LBE firms were used as compared to overall procurements,
      - E. the number of waivers requested and received, and
      - F. overall percentage of all contracts and subcontracts during the prior annual period that met the contracting goals for SBE and/or LBE Entities.
    - iii. A description of the Agency's past and current activities under this Article.
- b) Upon receipt of the annual report from each Agency, the EBOC shall review the success of the programs implemented under this Article and consider and recommend appropriate amendments to this Article or the implementing regulations.

#### 136.08 AFFIRMATIVE PROCUREMENT INITIATIVES

- a) Affirmative Procurement Initiatives (“API”) are designed to assist Entities certified under this Article by the EBOC. Affirmative Procurement Initiatives shall be determined for each competitive procurement issued by the City. Such API may include, but not be limited to, price preferences for contracts in which the lowest-price bidder is awarded the contract, evaluation preferences for best value contracts in which low price is not the only factor in contract award, mandatory SBE subcontracting goals, reserves of small prime contracts for bidding solely among certified firms, and SBE/LBE vendor rotations for solicitation of at least three quotes from certified firms on small contracts below the competitive bidding threshold.
- b) In evaluating bids and proposals, Agencies shall award preferences, in the form of fifteen (15) additional points out of a total 100 points or fifteen per cent (15%), for ranking purposes only, to responsive proposals submitted by certified Entities in which an SBE or an LBE will be performing at least 75% of the work required by the contract.
- c) Such Affirmative Procurement Initiatives shall be implemented by each Agency within ninety (90) days of the effective date of this Article.

#### 136.09 CERTIFICATION AND BIDDER REGISTRATION

- a) Notwithstanding any other provisions of the law, no Entity shall be permitted to participate in a program established under this Article unless it has been issued a letter of certification as a Small Business Enterprise or Local Business Enterprise by the City, or by a third party recognized by the City as authorized to issue such certifications.
- b) SBE or LBE certification shall be valid for three (3) years from the date of approval if no change of qualifications has occurred during this period.
- c) Any Entity seeking certification shall make and file with the EBOC a written certification application as may be prescribed, which shall include a sworn affidavit as to the truthfulness of the information provided. The applicant shall be required to furnish documentation regarding SBE or LBE program eligibility criteria, performance capability, annual gross revenues, employment payroll, character, and a financial statement prepared by a public accountant or certified public accountant, as of no more than ninety (90) days prior to the application date. If the information provided in the application changes enough to affect program eligibility, the applicant shall report the changes to the EBOC within sixty (60) days of the change in condition. The EBOC shall immediately review and re-examine the firm’s eligibility for participation in the applicable program in light of the changed circumstances.
- d) If the applicant opposes the certification determination or decertification of a certified Entity by the EBOC, the applicant may appeal the determination in writing to the City Solicitor within thirty (30) days. Any applicant’s request for appeal of certification denial must set forth its reasons and supporting evidence for its appeal. The City Solicitor shall review the appeal and apply an “arbitrary and capricious” or “clearly erroneous” standard of review based upon the total record from the application and/or

decertification process. The final determination regarding the certification denial shall be issued by the City Solicitor within ninety (90) days of receipt of the appeal request. The Entity may appeal the decision of the City Solicitor to City Council.

- e) The Office of Business Administration shall establish an automated web-based mandatory Centralized Bidder Registration (“CBR”) System wherein all Entities that seek to sell goods or services to the City as either a prime contractor, prime vendor, or indirectly as a subcontractor shall be required to register the firm’s interest and post a company profile. The CBR system shall capture and define the universe of firms that actively seek to engage in business with the City for purposes of bid solicitations and RFPs, and shall enable tracking of bids, contract awards, and actual payments for each registered firm. At least on an annual basis, each registered bidder shall be prompted and required to update any information contained in its CBR bidder profile.

#### 136.10 PENALTY

- a) The EBOC may revoke or suspend the certification of an SBE or LBE that is found to have violated this Article in any of the following manners:
  - 1. Obtained certification through fraudulent or deceitful means;
  - 2. Failed to provide accurate ownership or other documentation in a timely fashion as required under this Article;
  - 3. Failed to report changes in ownership or other business operations that affect the Entity’s eligibility for SBE or LBE certification;
  - 4. Gross negligence, incompetence, financial irresponsibility, or misconduct in the performance of a contract with the City; or
  - 5. Willful violation of any provision of this Article or regulations adopted pursuant to this Article.
  - 6. Proven racist or discriminatory acts against the protected class of individuals as identified in Article 185.
- b) An Entity found to have secured or maintained its SBE or LBE certification under false pretenses; violated federal or state antitrust statutes; the Pennsylvania Ethics Act; federal or state law regulating hours of labor, minimum wage standards, or prevailing wage standards, discrimination in wages, or child labor violations; any federal or state law prohibiting discrimination in employment; or any federal or state environmental law based on substantial evidence may be subject to suspension or debarment from future participation in City procurements. An Entity that violates any of the foregoing or this Article may further be subject to repayment of the contract value to the City, and criminal prosecution.
- c) In addition to the penalties provided in subsection (b) hereof, the City Solicitor may bring a civil action against an Entity, and/or its directors, officers or principals, when

there is reasonable basis to believe that certification has been obtained by fraud or deceit, or where there is a basis for asserting damages sustained by the City as a result of such fraud or deceit. In addition, the City Solicitor is hereby authorized to work in conjunction with, and with the approval of, the District Attorney's office in proceeding against any individual supplying false information, based upon the Pennsylvania Crimes Code section pertaining to unsworn falsification to public officials.

d) Any person may file with the EBOC a complaint alleging non-compliance, or a violation of this Article, against any applicant for SBE or LBE certification or re-certification, or against any certified Entity pursuant to this Article. The complaint shall be in writing and sworn to by the complainant. The EBOC may, without a hearing, dismiss a complaint which is frivolous or otherwise without merit. Any determination regarding the merits of the complaint shall be subject to a hearing before the EBOC. Upon filing of a Complaint, the EBOC shall cause to be issued and served on the person or organization alleged to have committed the violation, hereinafter called the respondent, a written notice of the complaint and request for cooperation in any investigation, and also advising respondent of any rights to an appeal of a determination at least thirty (30) days prior to the scheduled hearing. Notice shall be served by registered or certified mail, return receipt requested, or by personal service. At the hearing, the Respondent shall have the right to appear personally or by a representative and to cross-examine witnesses and to present evidence and witnesses. The EBOC shall have authority to issue subpoenas requiring the attendance of witnesses and to compel the production of records, papers and other documents. If, at the conclusion of the hearing, the EBOC determines that the Respondent has violated the provisions of this Article, the EBOC shall issue and cause to be served on the Respondent, a decision and order, accompanied by findings of fact and conclusions of law, requiring the Respondent's certification to be revoked or suspended, or to take any other action as it deems appropriate.