

BEFORE THE BOARD OF COUNTY COMMISSIONERS

FOR MULTNOMAH COUNTY, OREGON

ORDINANCE NO. 898

An ordinance relating to the creation of a Sheltered Market Program and making certain technical corrections to the Public Contract Review Board Rules.

Multnomah County ordains as follows:

Section 1. Purpose

The purpose of this ordinance is to establish a Sheltered Market Program for Multnomah County public works contracts and to make certain technical corrections to the Public Contract Review Board Rules.

Section 2. Findings:

The Multnomah County Board of Commissioners having reviewed the Oregon Regional Disparity Study and Multnomah County contracting data and staff reports, hereby finds:

A. The Sheltered Market Program established herein is intended to rectify the disparity found to exist in the awarding of Multnomah County public works contracts to prime contractors. The Disparity Study found that from July 1, 1991 to June 30, 1994, 90 public works contracts were awarded by the County, worth \$32,879,358. However, only five (5) of those contracts (5.56%) were awarded to non-Caucasian prime contracting firms. Of the five (5) contracts awarded, four (4) contracts were awarded to Asian-American prime contractors. The other contract was awarded to a Hispanic American prime contractor. No contracts were awarded to African-American or Native American prime contractors. The five contracts awarded represented only \$670,130 or two percent (2%) of the contract dollars awarded.

B. The above utilization data is to be contrasted with Disparity Study findings which documented the existence of approximately 221 available minority construction firms interested in doing business with the County and other public agencies in the metropolitan area, or 11.67 % of the total number of available firms.

C. The Study also found that from July 1, 1991 to June 30, 1994, only 1 of 90 public works contracts (1.11%) was awarded to Caucasian Female firms although there were approximately 218 available Caucasian Female firms interested in doing business with the County and other public agencies in the metropolitan area, or 11.51% of the total number

of available firms.

D. The Disparity Study found that from July 1, 1991 to June 30, 1994, 84 out of 90 contracts were awarded to Caucasian male prime contractors.

E. The Study identified that many barriers to participation in public contracting at a subcontractor and prime level exist, leading to statistically significant disparities between the numbers of available minority and women-owned construction firms and the actual utilization of such firms by the County and other public agencies operating in the metropolitan area. Further, the Study documented that substantial portions of the dollars or contracts going to minority or women-owned firms were captured by an even smaller number of individual companies. Thus, participation in Multnomah County contracting by minority and women-owned companies was not diverse or representative. For that reason, among others, the Study concluded that a Sheltered Market Program would "correct the documented disparity and build the capacity of minority and women owned business to bid as primes."

F. Statistics for the past two years indicate no progress. For the period July, 1995 through September, 1997, of 48 prime contracts awarded, only one prime contract was awarded to an African American owned business, one to a woman owned business and none to a Hispanic owned business. While four prime contracts were awarded to Asian owned businesses, three were awarded to the same contractor. Forty-two of 48 prime contracts were awarded to Caucasian male firms.

G. Multnomah County has a compelling governmental interest to ensure that all citizens of the County have an equal opportunity to participate in County contracting. The Sheltered Market Program, directly aimed at fostering the technical training and growth of minority, women-owned and emerging small businesses as prime contractors, is one method by which the County can create and maintain a level playing field for all contractors in the County.

H. The Sheltered Market Program is a narrowly tailored remedy to address the disparity found by the Study. Formal construction contracts between the informal purchasing limit of \$50,000 and the sum of \$200,000 to be awarded by the County will be considered for this program. Certain contracts may be inappropriate for the program because of the specialized nature of the work. It is estimated that contracts in the program will represent less than 2% of the County's total capital budget for 1997-98. It is estimated that between 10 and 20 construction contracts will be awarded annually in this program. The contract size proposed for this program does not exceed the capacity of firms eligible to participate. Moreover, it leaves the remaining contracting dollars on competitively bid contracts fully open to all bidders, including minority and women owned businesses and emerging small businesses.

I. The County's program is consistent with, but broader than, actions taken by the State of Oregon. ORS 279.053 permits the County to engage in bidding and contracting

practices designed to accomplish affirmative action for disadvantaged or minority groups, which is defined to include programs to insure equal opportunity in employment and business for persons otherwise disadvantaged by reason of race, color, religion, sex, national origin, age or physical or mental disability. In carrying out such a policy, ORS 279.053 permits local governments to limit or eliminate competitive bidding on contracts of \$50,000 or less.

J. Although the Sheltered Market Program will assist in remedying the underutilization of minority and women-owned businesses identified in the Disparity Study, that study also highlighted that many of the burdens and problems faced by minority and women-owned companies were also serious obstacles to the business development and participation of emerging small businesses generally. Therefore, it is appropriate to include emerging small businesses, certified as such by the State of Oregon, into the Sheltered Market Program. That addition will foster additional competition within the Sheltered Market and lead to reduced prices on County contracts.

K. Creation of the Sheltered Market Program and exemption of certain County contracts from full competitive bidding is consistent with requirements of ORS 279.015, which requires that exemption of a class of contracts such as the one contemplated be unlikely to establish favoritism or substantially diminish competition and additionally result in substantial cost savings.

L. This program is based on the premise that increased competition through development of additional minority, women-owned and emerging small businesses as a result of the Sheltered Market Program will lead to more bids and lower prices on County projects. This is confirmed not only by the expert opinion of experienced County employees but by statistical analysis of bids on past County contracts. An analysis of contracts awarded between July, 1995 and April, 1997 reveals that where three or more bids were received, the low bid was below the high estimate for the project 39% of the time; when two or fewer bids were received, the low bid was below the high estimate only 24% of the time. Additionally, the average number of bids received on contracts where the bid was below the high estimate was 2.70 while the average number of bids where the bid was above the high estimate was 2.0. This suggests that the increased number of bidders causes increased competition and invites bidders to find ways to reduce their prices

M. Analysis of all public works bids for contracts in the size range of the proposed exemption (\$50,000 to \$200,000) for the period July 1995 through April 1997 shows that only 29% of such contracts received three or more bids while 71% were awarded based on two or fewer bids. As established by the memorandum of Chuck Henley, when a low bid comes in higher than the estimated cost, this is generally because too few bids were received. The experience in transportation contracts shows that when only one bid is received, that bid is rejected as being too high 50 % of the time. When only two bids are received all bids are rejected 21% of the time, but when 3 or more bids are received, the bid is awarded because the low bid compares favorably with the expected price. Thus fewer bids translates not only into higher construction costs but also increased bidding

costs as many projects are required to be advertised more than once to obtain an acceptable price. Increasing the number of viable construction firms able to bid on County contracts will help to increase competition and thus reduce the cost of contracts and advertising and bidding costs.

N. In order to maximize cost savings, the County will focus on the capability and expertise of firms who apply to participate in the Sheltered Market Program and thereafter ensure that contracts eligible for inclusion within the program match up with the skills of those who participate. Cost savings will also occur because the County will not have to formally advertise contracts in the Sheltered Market Program, but can distribute proposed projects to Sheltered Market members for bid.

O. This exemption will not establish favoritism in the award of such contracts or substantially diminish competition. A project estimate will be established by the County for each project selected for the program. Firms that participate in the Sheltered Market Program will compete for the contracts that are available, sealed bids will be solicited from those firms, and contracts will be awarded to the firm submitting the lowest responsible and responsive bid. If no bids are received which are within competitive limits in reference to the engineer's estimate, the project may be reopened for full competitive bidding.

P. Participation in the program is not indefinite. Unless extraordinary circumstances exist, firms will be in the program for a period of three years, after which they will graduate and provide additional competition on other County contracts.

Q. Nor is the program itself indefinite. The proposed amendments provide that the program will be reviewed annually to determine if participation of minority, women, and emerging small businesses bidding on County contracts is increasing and whether there is an increase in the total number of bidders on County contracts generally, and whether the bids more closely approximate the County's project estimates. The analysis will include review of the factors set out Section 4 of HB 2910 as well as other appropriate factors.

R. In summary, the Sheltered Market Program will ultimately enhance competition in the Portland marketplace.

S. These findings have been made available for public review and comment pursuant to the requirements of ORS 279.015(3).

Section 3. Amendment: Adoption of Rule

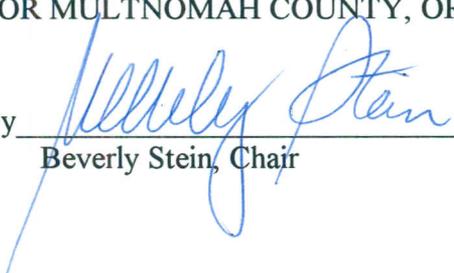
MCC 2.20.250 (B) is amended to read:

The Multnomah County Public Contract Review Board Administrative Rules dated February 27, 1997 and amended in accordance with Exhibit A to Ordinance No. \_\_\_\_\_ dated January 8, 1998, are hereby adopted and replace those rules previously promulgated by the Board.

Dated this 8th day of January, 1998, being the date of its second reading before the Multnomah County Board of Commissioners.



BOARD OF COUNTY COMMISSIONERS  
FOR MULTNOMAH COUNTY, OREGON

By   
Beverly Stein, Chair

REVIEWED:

THOMAS SPONSLER, COUNTY COUNSEL  
FOR MULTNOMAH COUNTY, OREGON

By   
John S. Thomas, Assistant County Counsel

revised 12/30/97

# EXHIBIT A

NOTE: Amendments appear in Division 10 and Division 60 only. New material is highlighted, deleted material is in italics and brackets.

## Division 10 is amended as follows:

### Section 10.120 is amended to add a new Section (5) as follows:

- (5) The Purchasing Manager shall prepare a report to the Board of County Commissioners on an annual basis which provides an evaluation of the procedures for obtaining quotes in this Section. The annual report shall include a recommendation whether the program should be continued. If the Purchasing Manager recommends that the Program be continued, the recommendation shall include any proposed improvements to the Program.

## Division 60 is amended as follows:

### 60.000 AFFIRMATIVE ACTION IN PUBLIC CONTRACTS

#### 60.010 Purpose

- (1) The purpose of this Chapter is to establish procedures to assure that Multnomah County contractors and vendors provide adequate opportunities for minority individuals, women, and MBE, WBE and ESB contractors and subcontractors to participate and compete for business and employment opportunities provided through contracts with Multnomah County, State of Oregon.

#### 60.015 Affirmative Action Contracts

- (1) Public contracts may be awarded pursuant to a specific Affirmative Action plan. This rule sets forth the Multnomah County Affirmative Action Plan.

#### 60.030 Policy

- (1) It is the intent of Multnomah County to provide opportunities for all segments of the business population to participate in the Multnomah County Purchasing Program. In order to assure opportunity, every County contract and/or subcontract for construction, maintenance, or services shall include provisions barring discrimination against or differential treatment of MBE's, WBE's and ESB's *[in contracting for business entities described in AR 60.020 (1) and (5)]*.
- (2) For all contracts designated by the Purchasing Manager, bid specifications shall require compliance with a "good faith effort" program.

**60.031 Good Faith Effort Program**

- (1) The activities described in ORS 200.045 are standards for good faith efforts to provide equitable opportunities for MBEs, WBEs, and ESBs to participate in subcontract opportunities created through Multnomah County contracts.
- (2) The Purchasing Manager shall implement a good faith effort program utilizing the standards described in ORS 200.045 that are determined to be effective to achieve the purpose of this section together with such other standards as are appropriate to such a program. Bid or proposal specifications for contracts requiring good faith effort shall state the requirements necessary to show that a good faith effort has been made and shall require documentation of such effort. The Purchasing Manager shall cooperate with other municipal and state agencies to design, to the maximum extent possible, a program that is uniform between agencies.

**60.032 Evaluation of Good Faith Effort**

- (1) The Purchasing Manager or his/her designee shall determine if the bid complies with bid specifications for good faith effort.
- (2) Failure of bidder to submit good faith effort documentation required by the bid specifications shall be determined "non-responsive" to the bid specifications. Non-responsive bids will be rejected by the Multnomah county Purchasing Manager.

**60.040 Requirement for Certification as Equal Employment Opportunity Employer**

- (1) No vendor shall furnish goods or services to the County in any year, whether by single contract or multiple contracts, for an amount in excess of the limit set for formal bids in AR 10.010 unless such vendor is certified as an Equal Employment Opportunity Employer. No County agency shall enter into a contract by which a vendor shall exceed such limitation unless the vendor is, at the time of such contract, certified by the Purchasing Manager as an EEO Employer.

**60.041 Certification Procedure/Appeal**

- (1) Vendors furnishing goods and services to the County in excess of the limits set forth in AR 60.040 shall apply for and obtain EEO certification from the City of Portland as an EEO employer. The Purchasing Manager shall maintain a list of certified vendors based upon City of Portland certification. A vendor may appeal from a decision to deny certification or revoke certification in accordance with the procedure prescribed in AR 40.090 for denial or revocation of prequalification.

**60.050 Workforce Requirements in Construction Contracts**

- (1) For all contracts designated by the Purchasing Manager as being appropriate for such a program, the Purchasing Manager shall establish specifications to be included in the bid specifications which require for such contracts that contractors make reasonable efforts to increase apprenticeship training and work opportunities for women and minority individuals, and, to ensure that their workforce reflects the diversity of Multnomah County and is reasonably consistent with the availability of qualified women and minority

individuals. The specifications shall state the requirements necessary to show that a reasonable effort has been made, shall require documentation of such effort, and shall provide for remedies to the County for failure to comply with any of the specified requirements.

**60.060 Sheltered Market Program**

(1) There is hereby established a Sheltered Market Program for MBE, WBE and ESB contractors performing public works contracts for Multnomah County. The purpose of the program is to provide prime contracting experience for small contractors in order to increase the number of contractors available to bid on Multnomah County public works projects, and to increase participation of MBE, WBE, and ESB contractors acting as prime contractors on county public works projects to ensure uniform access to public contracting dollars and to improve opportunities for minorities and women acting as business owners in the regional construction industry.

(2) Contractors shall be selected for participation in the Sheltered Market Program based on an application developed by the Purchasing Manager. Criteria for selection shall include the following:

(a) Contractor shall be a state certified MBE, WBE or ESB.

(b) Contractor shall have prior experience performing construction work and shall be currently in business doing construction work.

(c) Contractor shall have gross receipts for the calendar year prior to the application of less than \$1,000,000 or if gross receipts for that year are greater than \$1,000,000, then the average gross receipts for the three calendar years prior to the application shall be less than \$1,000,000. The Purchasing Manager shall have the discretion to waive this requirement if waiver will advance the purposes of the program and if all other criteria are met.

(d) Contractor shall have reported that contractor has experienced barriers in the conduct of contractor's business based on race, gender or size of the business.

The Purchasing Manager may develop additional criteria for selection of contractors for participation in the program which further the purpose of the program.

(3) A contractor may appeal from a decision to deny participation in the program to the Public Contract Review Board in accordance with the procedure prescribed in AR 40.090.

(4) Contracts to be included in the Sheltered Market Program shall be selected by the Purchasing Manager from projects estimated at the time of bidding to result in a contract in excess of \$50,000 and less than \$200,000. The Purchasing Manager may include in the program additional contracts up to \$250,000 if inclusion will further the purposes of the program. In the selection of contracts to be included in the program, the Purchasing

Manager shall consider the number of contractors in the program which have the qualifications and the capacity to perform the work. If necessary to assure that all Sheltered Market contractors have an opportunity to participate, contracts may be offered for bid to only selected contractors within the Sheltered Market Program.

- (5) Contracts selected for inclusion in the Sheltered Market Program shall be offered for bid only to contractors admitted to the Sheltered Market Program. Except as provided in subsection (6) below, the contract shall be awarded to the lowest responsive responsible bidder among those bidding.
- (6) For each project selected for the Sheltered Market Program, the project manager for the program shall forward to the Purchasing Manager a cost estimate for the project. If the lowest responsive responsible bid is more than the cost estimate, the Purchasing Manager shall have the option to award the contract, re-bid the project within the Sheltered Market Program, or open the bidding on the project to all bidders. If bidding is opened to all bidders, the contract shall then be awarded to the lowest responsive responsible bid from among all bids received.
- (7) The Purchasing Manager shall promulgate rules setting forth conditions for continued participation in the program, and for graduation from the program. Participation in the Program shall be limited to three years absent extraordinary circumstances.
- (8) The Purchasing Manager shall prepare a report to the Board of County Commissioners on an annual quarterly basis which provides an evaluation of the program, including information on the subjects set forth in Section 4 of HB 2910. The annual report shall include a recommendation whether the program should be continued. If the Purchasing Manager recommends that the Program be continued, the recommendation shall include any proposed improvements to the Program.