

Minority Owned Business Preference Proposal – legislation is being proposed that mimics the 5% residential preference ‘rule’ which was passed as a charter amendment to the city’s procurement process.

1. Staff finds the legislation is operational and a policy decision with some notes seen below.

2. Defining and Certifying MOB: The suggestion is to use the state certification for Minority Owned Business – and that business should be registered in advance. This would be cleaner and less prone to finagling as opposed to the city needing to come up with a registration regime.

Website: [Small Diverse Business Verification | Department of General Services | Commonwealth of Pennsylvania](#)

Ms Baraket and Mr. Guridy noted certification is a relatively easy thing to do. The city staff would run some clinics in the future. Ms Gerlach noted that state certification might also be able to bump up the game and opportunities of the parties/businesses.

3. Should MBE preference be extended? Consideration might be given to including not only Minority Business Enterprises (MBE) but also Women Business Enterprises (WBE), Small Business Enterprises (SME), etc. There were some councilpersons in agreement with this, Mr. Guridy mentioned his place of operation extends to veteran enterprises and others, which he thought was on the state certification list. A charter amendment explicitly referred to policies regarding minority and resident preferences – and not others – the history of the charter and administrative code changes is noted below for your reading pleasure. I assume such extensions would need to be reviewed by the Solicitor’s office

4. Clarify in section E of the proposal that the contract would go to lowest bidder.

Notes:

1. It was suggested the city create a system to track contracts in regard to demographic, race and other variables going forward.

2. The Finance Director gave a note a caution about getting too far out over your skis in regard to procurement procedures, his note is below.

Note to acknowledge from the Finance Director: I would note that this policy is extremely light on fact finding. As I suspected, the Equal Protection Clause is likely at play here. Governmental laws that treat race differently must meet a constitutional standard. In *City of Richmond v. J.A. Croson.*, 448 U.S. 469 (1989), the Supreme Court invalidated a City law setting aside 30% of contracts for minority businesses. The City of Richmond was required to demonstrate prior discrimination in minority owned construction contracts to meet their compelling interest. They were also required to show that their remedial action to combat this was narrowly tailored to offset its particular findings of discrimination.

Broad claims that racial injustice was rampant was not sufficient to show a compelling interest in racial preference for construction bids. I note that failure to go into this measure without “whereas” clauses defining the scope of the injury to the enumerated race classes is not a sound platform.

“Proper findings in this regard are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects. Such findings also serve to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself. Absent such findings, there is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics. “[I]f there is no duty to attempt either to measure the recovery by the wrong or to distribute that recovery within the injured class in an evenhanded way, our history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate 'a piece of the action' for its members.” *Fullilove*, 448 U.S., at 539, 100 S.Ct., at 2806 (STEVENS, J., dissenting). Because the city of Richmond has failed to identify the need for remedial action in the awarding of its public construction contracts, its treatment of its citizens on a racial basis violates the dictates of the Equal Protection Clause.”

City of Richmond v. J.A. Croson Id.

While I agree that this provision is *narrow*, it cannot be *narrowly tailored* if there is no scope of injury to tailor it to.

HISTORY OF CHARTER AND ADMINISTRATIVE CODE PROVISIONS:

The proposal, drafted by the Solicitor’s Office notes the authority below for the proposal:

WHEREAS, Section 815B Competitive Process, of the Allentown Home Rule Charter authorizes City Council to adopt and amend, by Ordinance, a Code for the establishment, regulation, and maintenance of a competition system, governing the policies necessary to effectively administer a system of competitive purchasing for the City government; and

WHEREAS Section 815B Competitive Process, of the Allentown Home Rule Charter authorizes City Council to establish policies regarding minority preferences; and

THEREFORE, Allentown City Council with the support of the administration implements the following minority-owned business preference for competitive purchasing in the City of Allentown.

The appropriate section of the Charter related to minority preference is noted below – it refers to minority preference only:

Section 815 BIDDING PROCESS

A Competition Principle

All purchases of materials, supplies, equipment and services by the City government shall be made through competitive processes, with evidence available to demonstrate broad solicitation of suppliers and opportunities for participation in the acquisition process; and the value received for the money paid.

B Competitive Policies Code

Consistent with applicable Federal and State laws, the Council shall adopt and may amend, by Ordinance, a Code for the establishment, regulation, and maintenance of a competition system, governing the policies necessary to effectively administer a system of competitive purchasing for the City government. This code may include but is not limited to: 1) establishing varied procedures for types of services or materials to be acquired; 2) setting the dollar limits which would require: a) verbal solicitation of price quotes with a written record; b) written price quotes after informal solicitation; and c) formal public solicitation of written price quotes after public advertising; 3) establishing procedures for determining sole source contract awards; 4) policies regarding minority or local resident preference; and 5) policies and procedures to encourage the use of contemporary purchasing techniques such as reverse auctioning and electronic commerce. (14601 §1 7/17/08)

This is the authorizing ordinance of the Charter Change that contains the previous language that existed in the charter. The section entitled Bidding Process was removed and replaced. The discussion during the minutes at the adoption of the legislation notes one of the objectives was to remove specific bidding provisions from the charter allowing the city to adopt provisions more readily in the code with a changing at the minutes of the

ADMINISTRATION

ORDINANCE NO. 14601

FILE OF CITY COUNCIL

BILL NO. 49 - 2008

JULY 2, 2008

AN ORDINANCE

Authorizing the Lehigh County Board of Elections to place the following question on the November 4, 2008 ballot, for the Allentown electorate that would amend the Home Rule Charter, Section 815, Bidding Process, by allowing Allentown City Council to adopt the Competition Principle and New Competitive Policies Code.

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF ALLENTOWN:

Section One: That Section 815 of the Charter be amended to read as follows:

Section 815 Bidding Process

A Competition Principle

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SECTION 815 – BIDDING PROCESS

~~A. Whenever the estimated cost of any construction, erection, installation, completion, alteration, repair of, or addition to, any project subject to the control of the City shall exceed Twenty Thousand (\$20,000) Dollars, it shall be the duty of the City to have such work performed pursuant to a contract awarded to the lowest responsible bidder, after advertisement for bids. Every such contract shall contain a provision obligating the contractor to the prompt payment of all material furnished, labor supplied or performed, rental for equipment employed, and services rendered by public utilities in or in connection with the prosecution of the work, whether or not the said material, labor, equipment or service enter into and become component parts of the work or improvement contemplated. Such provision shall be deemed to be included for the benefit of every person, partnership, association or corporation who, as subcontractor or otherwise, has furnished material, supplied or performed labor, rented equipment or services in or in connection with the prosecution of the work as aforesaid, and the inclusion thereof in any contract shall preclude the filing by any such person, partnership, association or corporation of any mechanics' lien claim for such material, labor or rental of equipment.~~

~~B. Whenever the estimated costs of any purchase of supplies, materials or equipment or the rental of any equipment, whether or not the same is to be used in connection with the construction, erection, installation, completion, alteration, repair of, or addition to, any project subject to the control of the City, shall exceed Twenty Thousand (\$20,000) Dollars, it shall be the duty of the City to have such purchase or rental made pursuant to a contract awarded to the lowest responsible bidder, after advertisement for bids, such advertisement to be inserted in a newspaper of general circulation in Lehigh County.~~

~~1. ——— The City shall not evade the provisions of subsection (a) or (b) as to advertising for bids by purchasing materials or contracting for services piecemeal for the purpose of obtaining prices under Twenty Thousand (\$20,000) Dollars upon transactions which should, in the exercise of reasonable discretion and prudence, be conducted as one transaction amounting to more than Twenty Thousand (\$20,000) Dollars. This provision is intended to make unlawful the practice of evading advertising requirements by making a series of purchases or contracts, each for less than the advertising requirement price, or by making several simultaneous purchases or contracts, each below said price, when, in either case, the transactions involved should have been made as one transaction for one price.~~

~~2. ——— Written or telephonic price quotations from at least three (3) qualified and responsible contractors shall be requested for all contracts that exceed Four Thousand (\$4,000) Dollars but are less than the amount requiring advertisement and competitive bidding or, in lieu of price quotations, a memorandum shall be kept on file showing that fewer than three (3) qualified contractors exist in the market area within which it is practicable to obtain quotations. A written record of telephonic price quotations shall be made and shall contain at least the date of the quotation, the name of the contractor and the contractor's representative, the construction,~~

reconstruction, repair, maintenance or work which was the subject of the quotation and the price. Written price quotations and written records of telephonic price quotations and memoranda shall be retained for a period of three (3) years.

C. Emergency Purchases. The bidding requirements of this section shall not apply to emergency purchases. An emergency purchase shall mean a purchase necessary for the public safety or to avoid a significant financial loss to the City. (This section on emergency purchases was added pursuant to a ballot question passed in May of 1997.)

D. The City shall require as a condition of the award of any contract, pursuant to Subsection (a) or (b) of this section, that the contractor give to the City any bond or Letter of Credit (including bonds for the performance of the contract, and for the prompt payment by the contractor for material, supplies, labor, services and equipment) which are prescribed by law for contracts awarded by cities of the Third Class.

E. All contracts shall be on file in the office of the City Controller and shall be available for public inspection during normal business hours.

F. Resident Preference: A five (5%) percent local resident preference shall be applied for resident businesses or products either manufactured in Allentown or manufactured by entities headquartered in Allentown, but the preference is not to exceed \$2,500. A Resident Business means one which maintains its principal place of business in the City of Allentown or maintains an office which employs at least five (5) employees in the City of Allentown. (The local preference amendment was approved by voters on November 4, 1997.)

LOCAL PREFERENCE HAD BEEN ADDED AS A CHARTER AMENDMENT, IT WAS NOT INCLUDED IN THE ORIGINAL CHATER:

LOCAL PREFERENCE: Shall Section 815, Bidding Process, of the Home Rule Charter, be amended to include a five (5%) percent local resident preference for resident businesses or products either manufactured in Allentown or manufactured by entities headquartered in Allentown, but the preference is not to exceed \$2,500 in awarding bids? A Resident Business means one which maintains its principal place of business in the City of Allentown or maintains an office which employs at least five (5) employees in the City of Allentown. (Approved November 4, 1997- 7,957 to 3,371)

And while the resident preference was removed from the Charter through the amendment process it was adopted as part of the City's Administrative Code – as follows – this is the language the MOB proposal follows:

5. Resident Preference:

a. For the purposes of this section, "Resident Business" means one which maintains its principal place of business in the City of Allentown or maintains an office which employs at least five (5) employees in the City of Allentown.

b. When bids are received from both non-resident and resident businesses, or for a product manufactured in Allentown or manufactured by an entity headquartered in Allentown, and products which are not, and the lowest responsible bid is from a non-resident business or not manufactured in Allentown or by an entity headquartered in Allentown, the contract shall be awarded to the responsible resident business or the product manufactured in Allentown or manufactured by an entity headquartered in Allentown, whose responsible bid is nearest to the bid price of the otherwise low non-resident bidder, if the bid price of the resident bidder is made lower than the bid price of such non-resident business when multiplied by a factor .95. (Residence Preference provision was approved in a Charter Referendum, November 4, 1997)

c. In order to qualify for the preference set forth in Subsection B., above, the resident business or manufacturer must be properly licensed to do business in the City of Allentown and in compliance with all City Ordinances and regulations.

d. This section shall not apply to bids for the construction of public improvements in excess of \$50,000, or where the difference between the lowest non-resident bid and the lowest resident bid is in excess of \$2,500, or where otherwise prohibited by law or state or federal regulation. (13650 §1 3/5/98)