

**BILL NO. BL2018-1419** (VERCHER, HURT, & S. DAVIS) – This ordinance, as amended, would modify the Metropolitan Government’s existing procurement nondiscrimination program. The current procurement nondiscrimination program was enacted in 2008 by Ordinance No. BL2008-161. Griffin & Strong, P.C., an Atlanta-based law and public policy consulting firm, conducted a Disparity Study in 2004 which provided a basis for the 2008 program. The study found that the Metropolitan Government had become a passive participant in unlawful discrimination against minorities and women in some procurements. The 2008 program sought to remedy the underutilization of minorities and women in a narrowly tailored way.

Recently, the Metropolitan Government engaged Griffin & Strong to update the 2004 Disparity Study and to design programs to reduce race, gender, and ethnicity discrimination. The resulting 2018 Disparity Study, presented to the Metropolitan Council on September 17, 2018, concluded that firms owned by women and minorities – particularly African-American firms – were significantly underutilized; that there are statistically significant disparities in Metro prime contracting and subcontracting; and that Metro remains a passive participant in unlawful discrimination against minority and women business enterprises (MWBE) in its procurements. For example, the 2018 study found less than 3.5% of local public funding spent on prime contracts went to African-American-owned firms. The study recommended ten (10) program changes, including use of race- and gender- conscious tools, establishment of annual procurement goals with race and gender targets, establishment of a Small Business Reserve program, and improved communications and outreach to the minority and women-owned business communities.

Per these recommendations, the ordinance under consideration would update and expand the existing procurement nondiscrimination program into a more comprehensive Equal Business Opportunity (EBO) program. The objective of the EBO program would be to promote open competition in Metro’s procurement process and to protect Metro from becoming a passive participant in any private scheme of discrimination. This would be accomplished through the use of the Office of Minority and Women Business Assistance (“Business Assistance Office” or “BAO”) within the finance department, which was previously established pursuant to the 2008 nondiscrimination program.

The BAO would assume primary responsibility for administration and enforcement of the EBO program, including current duties such as preparing written rules, regulations, and procedures to be submitted to the procurement standards board; verifying certification of minority and women owned business enterprises (MWBEs); and maintaining a current database of certified and available MWBEs. New duties of the BAO would include recruiting businesses to apply for certification as an MWBE and distributing annual “forecasting” reports.

The EBO program would cover Metro contracts within the categories of construction, non-professional services, and professional services, as currently encompassed, while the category of goods would be added to the scope.

The updated EBO program would allow for an Annual Aspirational goal -- a non-mandatory benchmark for categories of contracts by which Metro could gauge the successfulness of the EBO program. The Annual Aspirational goals would be based upon the most current disparity study. It would also allow for the creation of percentage goals for Minority Business Enterprises and Women Business Enterprises set for specific projects or contracts, with approval of the Purchasing Agent.

Bids submitted to Metro within the scope of the EBO program would be required to contain (1) a Covenant of Non-Discrimination, (2) a Statement of MWBE Utilization, (3) a Statement of Interested Subcontractors/Vendors, and (4) a Statement of Bid Proposals/Price Quotations. Additional documents could be requested post-bid.

All Bidders would also be required to submit proof of Good Faith Efforts to comply with the EBO program. Submission of proof is only required if the Annual Aspirational Goal or applicable project or contract goal has not been achieved. A Bidder would deliver written notice to at least three available certified MWBEs for work as a subcontractor. In addition, the Bidder could demonstrate Good Faith Efforts by, for instance, keeping in contact with potential subcontractors, or advertising in trade publications.

A Bid submitted by a First Ranked Bidder would be submitted to the BAO if the Bid included the required documents and any necessary Good Faith Efforts documentation required. The BAO would then evaluate whether the Bid is in compliance with the program. Upon a recommendation of compliance, the BAO would notify the Purchasing Agent who would then award the contract upon concurrence with the BAO's recommendation.

If the BAO's analysis of the Bid suggests the First Ranked Bidder has failed to comply with the requirements of the EBO program, the BAO would notify the Bidder of the particular reasons for the non-compliance determination. A conference would be scheduled with the Bidder where issues with the Bid could be reviewed and the Bidder would be permitted to present additional materials relevant to the question of non-compliance. If determined the Bidder did in fact comply with the EBO program, the Bid would be sent to the Purchasing Agent for award upon concurrence with the BAO's recommendation. If the BAO concludes the Bidder is non-compliant, the BAO would notify the Purchasing Agent who, upon concurrence with the non-compliance determination and notification to the Department of Law, would reject the Bidder's Bid as nonresponsive and identify a new First Ranked Bidder. The new First Ranked Bidder's Bid would then be evaluated through the same process.

The BAO would also be authorized to impose sanctions upon Bidders or Participants who do not comply with EBO provisions. Participants would have the opportunity to demonstrate good faith efforts to achieve compliance and be able to appeal any sanctions.

No later than August 1, 2021, and every five years afterward, the Division of Purchases would be required to issue a Request for Proposals to update the disparity study. Once updated, the

Metropolitan Government would conduct an official review and public comment period to consider amendments or a “sunset” of the EBO program.

Because the EBO program is a government sponsored program that takes into account race and gender, the United States Supreme Court has required that these programs meet a standard of strict scrutiny. The strict scrutiny standard requires that there be a compelling interest that is addressed by a “narrowly tailored” response. Here, Metro’s compelling interest is to assure that public funds collected from citizens and allocated to government contracting do not serve to finance private prejudice on the basis of race, gender, religion, national origin, ethnicity, age, disability, or any other form of unlawful discrimination. Metro has considered a full range of narrowly tailored race- and gender-neutral and race- and gender-conscious remedial policies presented by Griffin & Strong. Because of the strong basis in evidence, and upon careful deliberation, the updated remedial program for MWBEs based upon the 2018 Disparity Study should be deemed consistent with the constitutional standard. Moreover, the EBO program contained in this ordinance, based upon policy approaches recommended by Griffin & Strong, have been favorably commented upon by the United States Supreme Court in *City of Richmond v. J.A. Croson*, 488 U.S. 469, 509-510 (1989) and other federal decisions. It will be important, for purposes of any proposed amendments, that the legislation adhere as closely as possible to these specific findings and recommendations of the disparity study.

*Fiscal Note: Quantifying the amount of the financial impact of the proposed ordinance would be speculative. By expanding the number of companies that would be considered for the award of contracts with Metro, the increased competition could theoretically result in lower overall costs. However, the potential amount of these lower costs is unknown.*