

AR

99-15

Submitted by: Chairman of the Assembly at the
Request of the Mayor

CLERK'S OFFICE

Prepared by: Employee Relations Department

APPROVED

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Date: 2-9-99

ANCHORAGE, ALASKA

AR NO. 99-15

A RESOLUTION AMENDING ANCHORAGE MUNICIPAL CODE OF REGULATION 7.60
REVISING THE LOCAL REGULATION TO RESTRICT THE DISADVANTAGED AND
WOMAN-OWNED BUSINESS ENTERPRISE PROGRAM TO FEDERAL REQUIREMENTS
UNDER FEDERALLY ASSISTED CONTRACTS.

THE ANCHORAGE ASSEMBLY RESOLVES:

WHEREAS, the United States District Court has entered an
order in the case of *Alaska Mechanical, Inc. v. Municipality of
Anchorage*, which enjoins the Municipality from enforcing
Disadvantaged/Woman-owned Business Enterprise (D/WBE) program
requirements on any but federally assisted projects; and

WHEREAS, the order also enjoined the Municipality from
enforcing any D/WBE requirements on federally funded projects
which exceed the D/WBE requirements of the federal agency funding
the project.

NOW, THEREFORE, THE ANCHORAGE ASSEMBLY RESOLVES:

Regulation 7.60 DISADVANTAGED AND WOMAN-OWNED BUSINESS
ENTERPRISE (D/WBE) REGULATIONS

7.60.001 Purpose.

7.60.002 Applicability.

7.60.003 Definitions.

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7.60.001 Purpose

The purpose of these regulations is to implement AR No. 79 182, to establish procedures for aiding and assisting socially and economically disadvantaged business enterprises (DBEs) and woman-owned business enterprises (WBEs) and to encourage the provision to such businesses of an equitable opportunity to participate in federally assisted municipal contracts in accordance with the policy and intent of AR No. 79-182 to the extent required by an agency or instrumentality of the United States.

Authority--Anchorage Municipal Code 3.40 7.60.030.

7.60.002 Applicability.

The regulations in this chapter shall apply to all DBEs and WBEs participating on federally assisted contracts with the Municipality of Anchorage, and to all contracts, proposals or bids for contracts for goods or services, and to all subcontracts and purchase orders issued thereunder, including federally assisted contracts to which the Anchorage School District is a party, when the contract specifications contain a goal for DBE and/or WBE business participation to the extent that such goal is required by an agency or instrumentality of the United States.

Authority--Anchorage Municipal Code 3.40, 7.60.030

7.60.003 Definitions.

A. Affirmative action means taking specific steps to eliminate illegal discrimination and its effects, to ensure nondiscriminatory practices in the future, and to involve disadvantaged and woman-owned business enterprises fully in federally assisted contracts and programs within the Municipality of Anchorage to the extent that such affirmative action is required by an agency or instrumentality of the United States.

B. Affirmative action plan means a written, results-oriented program in which steps are set forth which will be taken to implement the policy of providing DBEs and WBEs an equitable opportunity to participate fully in federally assisted contracts and subcontracts to the extent that such plan is required by an agency or instrumentality of the United States. An acceptable affirmative action plan must include specific identification of problem areas, specific objectives designed to eliminate identified problem areas, and specific results-oriented procedures which, if implemented in good faith, will ensure the

attainment of the program's objectives.

C. *Applicant*, for purposes of these regulations, means a company which has applied to the municipal D/WBE office for certification to participate in the D/WBE program as either a DBE and/or a WBE company.

D. *Commercially useful function* means that a DBE or WBE firm is responsible for the execution of a distinct element of the work of a contract and carries out its responsibilities by actually performing, managing, and supervising the work involved. To determine whether a DBE or WBE is performing a commercially useful function, the municipality shall evaluate the amount of work subcontracted, industry practices, and other relevant factors.

E. Contract, for purposes of these regulations, means any agreement for construction, goods, supplies or services to which the municipality is a party, including leases and contracts to which the Anchorage School District is a party, when the funding for the contract is wholly or in part from assistance by any agency or instrumentality of the Government of the United States.

F. *Contractor* means the contractor, including subcontractors, performing work and providing goods and services necessary to facilitate public projects.

G. *Control* means the power or authority to manage, direct, superintend, restrict, regulate, govern, administer or oversee, together with the actual exercise of that power or authority. For purposes of the D/WBE program, control of business operations means having the appropriate licenses, expertise, and experience necessary to supervise and perform those operations.

H. *D/WBE officer* means the person with the municipal disadvantaged and woman-owned business enterprise [ASSISTANCE] office (D/WBE office) who is responsible for the administration of the D/WBE program or the D/WBE officer's designee. The D/WBE officer is under the direct supervision of the manager of the office of equal opportunity.

I. *Disadvantaged business enterprise* or *DBE* means a small independent business concern:

1. Which is at least 51 percent owned by one or more socially and economically disadvantaged individuals, or, in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more socially and economically disadvantaged individuals; and

2. Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

J. *Discrimination* means treating any person, class or group of persons separately and/or differently from any other person, class or group of persons, if such separate and/or different treatment is due to the race, color, religion, national origin, ancestry, age, sex or physical or mental disability of such person, class or group.

K. Federal assistance, for purposes of these regulations, means funding to the Municipality of Anchorage in any way by any agency or instrumentality of the Government of the United States for contracts to be let by the Municipality of Anchorage through bids or proposals, when the funding agency or instrumentality for those contracts has requirements of the Municipality of Anchorage regarding minority, disadvantaged and/or woman-owned business participation on those funds.

[K]L. Goal means an expressed objective, usually a percentage of the dollar value of an award or a requirement to take affirmative action, which contractors or recipients are required to make good faith efforts to achieve; or the end results toward which good faith efforts are required to be directed.

[L]M. Joint venture means a commercial enterprise undertaken by more than one business enterprise jointly, limited in its scope and duration to one project, for the purpose of each enterprise's profiting thereby.

[M]N. Manufacturer means a firm that operates or maintains a factory or establishment that produces on the premises the materials or supplies obtained by the municipality or its contractors for a project.

[N]O. Mayor means the mayor of Anchorage or mayor's designee.

P. Minority business enterprise means a business concern which is certified by the Municipality of Anchorage as a DBE where the DBE is at least 51 percent owned and controlled by minority group member(s).

Q. Minority group member is an individual who is a citizen of the United States and is one of the following: (1) Black American; (2) Hispanic American (with origins from Puerto Rico, Mexico, Cuba, South or Central America); (3) Native

American (American Indian, Eskimo, Aleut, native Hawaiian); or
(4) Asian-Pacific American (with origins from Japan, China, the
Philippines, Vietnam, Korea, Samoa, Guam, the U.S. Trust
Territories of the Pacific, Northern Marianas, Laos, Cambodia,
Taiwan or the Indian subcontinent).

[O]R. *Ownership* means possessing complete dominion, title or proprietary right to a thing, the right to transmit it to others, and the right to its use and benefit.

[P]S. *Person* means an individual, partnership, corporation, association or other entity capable of contracting with the Municipality of Anchorage.

[Q]T. *Procurer* means a business concern which provides a bona fide service in the procurement of essential personnel, facilities, equipment, materials or supplies required for the performance of a contract with the municipality, but which is itself not a provider or supplier of those goods and services.

[R]U. *Proprietary* means those items of personal property or those services of any nature which can be supplied by only one contractor because of the singular characteristics of the item or service.

[S]V. *Regular dealer* means a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials or supplies required for the performance of the contract are bought, kept in stock, and regularly sold to the public in the usual course of business. To be a regular dealer, the firm must engage in, as its principal business, and in its own name, the purchase and sale of the products in question. A regular dealer in such bulk items as steel, cement, gravel, stone, and petroleum products need not keep such products in stock, if it owns or operates distribution equipment. Brokers and packagers shall not be regarded as regular dealers.

[T]W. *Services* shall have its ordinary and usual meaning, but shall not include services relating to purchase or provision of insurance or to anticipated or pending litigation in which the municipality is involved.

[U]X. *Small business* means a small business as defined pursuant to section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto except that a small business concern shall not include any concern or group of concerns controlled by the same socially and economically disadvantaged individuals which has over the previous three fiscal years annual average gross receipts in excess of

\$16,015,000.00, or the figure as adjusted from time to time for inflation [BY THE FEDERAL DEPARTMENT OF TRANSPORTATION].

[V]Y. *Socially and economically disadvantaged individual* means those individuals who are citizens of the United States (or lawfully permanent residents) and who are Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, or Asian-Indian Americans and any other individuals found to be disadvantaged by the Small Business Administration pursuant to section 8(a) of the Small Business Act. The municipality makes a rebuttable presumption that individuals in the following groups are socially and economically disadvantaged. The municipality may also determine, on a case-by-case basis, that an individual who is not a member of one of the following groups is socially and economically disadvantaged. [THE DETERMINATION ON A CASE-BY-CASE BASIS WILL BE MADE IN ACCORDANCE WITH THE GUIDANCE PROCEDURES PROVIDED AT 49 CFR 23, AS AMENDED, IN ITS MOST CURRENT FORM.]

1. Black Americans, which includes persons having origins in any of the Black racial groups of Africa;
2. Hispanic Americans, which includes persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
3. Native Americans, which includes persons who are American Indian, Eskimos, Aleuts, or Native Hawaiians;
4. Asian-Pacific Americans, which includes persons whose origins are from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, the Philippines, Samoa, Guam, the U.S. Trust Territories of the Pacific, and the Northern Marianas; and
5. Asian-Indian Americans, which includes persons whose origins are from India, Pakistan, and Bangladesh.

[W]Z. *Subcontractor* means any person, other than an employee of the contractor, who agrees or arranges with a contractor to furnish supplies, goods, services or the use of real or personal property, including lease arrangements, which, in whole or in part, are necessary to the performance of one or more federally assisted contracts with the municipality, or who performs, undertakes or assumes any portion of a contractor's obligation under any one or more federally assisted contracts with the municipality.

[X]AA. *Supplier* means, for purposes of these regulations, a regular dealer.

[Y]BB. Woman-owned business enterprise or WBE means a small independent business concern:

1. Which is owned at least 51 percent by one or more women, or, in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more women; and
2. Whose management and daily business operations are controlled by one or more of the women who own it.

Authority--Anchorage Municipal Code 3.40, 7.60.030

7.60.004 Bid forms.

A. All bidders on contracts with the municipality shall complete and file all D/WBE program forms, supplied by the D/WBE officer and included in the specifications for the contract, in the manner and in the timeframes stated in the specifications.

B. If DBE and/or WBE goals are contained in the specifications for a contract, all bidders for that contract shall, prior to the opening of bids, exert good-faith efforts to meet the goals.

C. If, after bid opening, the successful bidder has not met the [PERCENTAGE] goals established for the contract in the manner and timeframes shown in the specifications for the contract, the successful bidder shall demonstrate that he or she has made all of the good-faith efforts to have met the goals as stated in the specifications.

D. If a successful bidder for a contract which contains DBE and/or WBE business participation goals, at any time after award of contract, proposes to remove or make substitutions for DBE and/or WBE subcontractors or joint venture partners under the contract, a written notice of such removal or substitution shall be submitted to the D/WBE officer prior to substitution or removal, with the names, addresses and phone numbers of the subcontractors or joint venture partners to be removed or substituted for and an explanation of the reasons for the removal or substitution. Where such removal or replacement would cause the DBE or WBE percentage, if applicable, to fall below the goal set for the project, the successful bidder shall make good-faith efforts to utilize another DBE or WBE subcontractor as the replacement. These efforts shall be documented and the circumstances fully explained in writing, and approval obtained from the D/WBE officer prior to such replacement. The D/WBE officer shall, within seven days of receipt of such notice, approve said notice of removal and substitution where it is shown

1 that the requested action is for good cause, and not for
2 discriminatory purposes.
3

4 E. The percentage goal requirements of this section may be
5 satisfied by the formation of a joint venture, for purposes of
6 performing under the contract between a non-DBE or non-WBE
7 business and one or more certified DBEs and/or WBEs. Where a
8 joint venture is formed for purposes of performing under a
9 municipal contract in order to meet the DBE and/or WBE goals on
10 the contract, the joint venture must be certified by the D/WBE
11 officer prior to bid opening. The partners in the joint venture
12 must file with the D/WBE officer a (S) Schedule B joint venture
13 certification application obtained from the D/WBE officer along
14 with any other information requested by the D/WBE officer, which
15 is necessary to understand the relationship between the joint
16 venture partners and their various responsibilities and
17 remunerations for review and approval prior to opening of bids.
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20 Authority--Anchorage Municipal Code 3.40, 7.60.030.

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22 7.60.005 Certification.
23

24 A. A business entity, to be certified by the Municipality as
25 a DBE or WBE, must submit to the D/WBE officer sufficient proof
26 to establish that it is a small independent business, at least 51
27 percent of which is owned, for DBE certification, by one or more
28 socially and economically disadvantaged persons, and, for WBE
29 certification, by one or more women; that the disadvantaged or
30 woman owners control the management and operations of the
31 company; and that the company is an independent company. [IN
32 MAKING CERTIFICATION DETERMINATIONS, THE MUNICIPALITY FOLLOWS THE
33 REQUIREMENTS ESTABLISHED AT 49 CFR 23, AS AMENDED IN ITS MOST
34 CURRENT FORM.]
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36 To establish that the applicant company meets these
37 requirements, the disadvantaged or woman owners must show that:
38

- 39 1. The company is a small business;
- 40
41 2. The company is owned at least 51 percent by socially
42 and economically disadvantaged individuals or women and
43 that the ownership is real and substantial and more
44 than pro forma as shown on the ownership documents; the
45 disadvantaged or women owners made (A) real and
46 substantial personal contributions to obtain their
47 ownership interest in the company; the disadvantaged or
48 women owners enjoy the customary incidents of ownership
49 and share in the risks and profits commensurate with
50 their ownership interests. Recognition of a business as
51 a separate entity for tax or corporate purposes is not

necessarily sufficient for recognition as a DBE or WBE;

- 3 The disadvantaged or woman owners have the power to control the management and policies of the company and that they exercise that power; and there are no restrictions that prevent the disadvantaged or woman owners, without the cooperation or vote of other individuals who are not disadvantaged or women, from making a business decision for the company;
4. The disadvantaged or woman owners have the power, including the technical expertise and experience, to manage the overall as well as the day-to-day operations of the company and that they exercise that power; and
5. The company is independent. In determining whether a potential DBE or WBE is an independent business, the D/WBE officer shall consider all relevant factors, including the date the business was established, the adequacy of its resources to provide the services it offers, and the degree to which financial, equipment leasing, and other relationships with firms which are not DBEs or WBEs vary from industry practice.

B. The proof required by subsection A of this section may include any or all of the following, but is not limited to:

1. The Schedule A certification application, obtained from the D/WBE officer, and completed by the disadvantaged or woman owners of the applicant company;
2. The support documents called for on the Schedule A certification application;
3. Evidence of certifications from other agencies, including current participation in the U.S. Small Business Administration's 8(a) program, if applicable.

C. An applicant for certification as a DBE or WBE company shall cooperate with the D/WBE officer in providing additional information requested in order to make a determination regarding certification.

D. Any business certified as a DBE or WBE must report, to the D/WBE office, in writing within 30 days, any changes in ownership of the stock or assets of the business, changes in the officers, directors or management of the business, or any other significant changes within the business which may affect the ownership, control or management of the business, or the way in which profits or losses are divided or of any changes in physical location, mailing address, and telephone number.

E. A business certified as a DBE or WBE shall file annual applications for recertification, provided by the D/WBE office, along with the support documents called for on the application, prior to the expiration of its current certification.

F. The D/WBE officer shall designate places within the Municipality of Anchorage where lists of [CERTIFIED] DBE and WBE businesses certified by the Municipality shall be kept for inspection by bidders and contractors. Such lists shall be updated by the D/WBE officer from time to time as new DBEs and WBEs exist and are certified and as DBEs and WBEs which no longer qualify for certification are removed.

Authority--Anchorage Municipal Code 3.40 7.60.030; AR No 95-63, § 3, 3-28-95.

7.60.006 Goals.

A. To the extent required by an agency or instrumentality of the United States, t [T]he D/WBE officer shall [RECOMMEND TO THE MAYOR ANNUAL GOALS FOR PARTICIPATION BY DBE AND WBE BUSINESSES IN MUNICIPAL CONTRACTS.] establish DBE and/or WBE goals for federally assisted contracts. These goals may vary from [TIME] contract to [TIME] contract and may be expressed in terms of a percentage of the total dollar [EXPENDITURE THROUGH MUNICIPAL CONTRACTING DURING THE YEAR.] amount awarded for the contract or as a requirement to take certain good faith efforts as specified by the federal funding agency or instrumentality and included in the specifications for the contract.

B. Goals shall bear a direct relationship to the numbers of certified DBE and WBE businesses in each subcontracting area and to the total dollar expenditure in those subcontracting areas. The goals established will be such to assure inasmuch as possible that the overall goal for the Municipality of Anchorage established by the specific federal funding agency or instrumentality is met.

[B. THE D/WBE OFFICER, WITH THE CONCURRENCE OF THE MAYOR, MAY INCLUDE GOALS FOR DBE AND/OR WBE BUSINESS PARTICIPATION, EXPRESSED IN TERMS OF A PERCENTAGE OF THE TOTAL DOLLAR AMOUNT OF THE CONTRACT, IN THE SPECIFICATIONS FOR CONTRACTS WHICH INVOLVE WORK IN SUBCONTRACTING AREAS IN WHICH CERTIFIED DBES AND WBES EXIST.]

Authority--Anchorage Municipal Code 3.40, 7.60.030

7.60.007 Affirmative action plan

As part of the D/WBE office's affirmative action plan, and the plans, procedures and techniques for aiding and assisting disadvantaged and woman-owned businesses, the D/WBE officer shall perform the following functions:

- A. Make information available to qualified DBEs and WBEs concerning securing management and technical assistance for the establishment, expansion and overall development of DBEs and WBEs, and obtaining necessary financial support and service bonding.
- B. Inform DBEs and WBEs of the disadvantaged and woman-owned business enterprise program and of bidding, contract and performance opportunities and requirements.
- C. Make information available concerning the arrangement of joint ventures between DBEs and/or WBEs and non-DBE and non-WBE businesses, or between two or more DBEs and WBEs.
- D. Assist in reviewing bids or proposals when appropriate
- E. Disseminate information concerning DBEs and WBEs and their utilization to municipal departments.
- F. Maintain a directory of certified DBEs and WBEs and records of DBE and WBE participation in federally assisted [MUNICIPAL] contracts.
- G. Actively solicit bids from DBEs and WBEs, publicize opportunities in minority publications and identify subcontracting areas for DBE and WBE participation.

Authority--Anchorage Municipal Code 3.40, 7.60.030.

7.60.008 Investigation

A. Upon receipt of an allegation that a violation of Anchorage Municipal Code 7.60 or these regulations has occurred, or upon his or her own initiative, the D/WBE officer may conduct an impartial investigation of the administration of a federally assisted municipal contract involving DBEs or WBEs, municipal contractors or certified DBEs or WBEs and develop and preserve a complete record of such investigation. The purpose of such an investigation is to verify whether or not a violation exists. In aid of its investigation, the disadvantaged and woman-owned business enterprise program office may issue subpoenas to compel the attendance of witnesses and the production of books and records.

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2 B. If an investigation establishes probable cause to believe
3 that a violation of Anchorage Municipal Code 7.60 or these
4 regulations has occurred, the D/WBE officer shall attempt to
5 resolve the matter by available informal means. Such informal
6 means may include a conference at which the person or
7 representative of the business charged with a violation may
8 present such testimony, statements, documents or other evidence
9 in his, her, or its behalf as he or she may wish. If no probable
10 cause to support an alleged violation is found to exist, the
11 complaint shall be dismissed.
12

13 C. If an investigation cannot be resolved by informal means,
14 the D/WBE officer shall proceed in accordance with section
15 7.60.009 below.
16

17 D. For reasonable cause shown, the D/WBE officer may
18 reconsider or cause to be reconsidered any matter.
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20

21 Authority--Anchorage Municipal Code 3.40, 7.60.030
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23 7.60.009 Violations and sanctions
24

25 A. Any of the following constitutes a violation for which
26 sanctions may be imposed under these regulations:
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- 28 1. Any act in violation of or contrary to the requirements
29 of Anchorage Municipal Code 7.60 or these regulations;
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- 31 2. Falsifying a sworn statement or any other statements or
32 information contained in either the bid forms or
33 certification information or any reports required under
34 Anchorage Municipal Code 7.60 or these regulations;
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- 36 3. Failure to file any form or information required by
37 these regulations or Anchorage Municipal Code 7.60;
38
- 39 4. Refusal to allow or cooperate in an investigation
40 conducted under section 7.60.008 of these regulations.
41

42 B. If the D/WBE officer finds that a violation exists, and
43 that violation is not resolved through informal means, the D/WBE
44 officer may take any of the following actions:
45

- 46 1 If the violator is a municipal contractor, the D/WBE
47 officer may recommend to the mayor that the purchasing
48 officer be directed to suspend, limit or terminate the
49 contract or that the contractor be directed to provide
50 such assurances of future compliance as the D/WBE
51 officer deems appropriate. In addition, the D/WBE

officer may recommend that the violator be disqualified from bidding on municipal contracts for one year. .

- 2 If the violator is a DBE or WBE, certified under section 7.60.005 of these regulations, in addition to the sanctions listed in subsection B.1 above, the D/WBE officer may recommend to the mayor that the certification be taken away from the business.
3. If the violator is a municipal officer or employee, the D/WBE officer may recommend that the mayor initiate appropriate disciplinary action against such officer or employee.
4. If a bid or proposal has been evaluated in violation of Anchorage Municipal Code 7.60 or these regulations, the D/WBE officer may recommend to the mayor that the bid or proposal be disregarded in awarding the contract.

C. The mayor shall accept, reject or modify the action recommended by the D/WBE officer in writing within 15 days of receipt of such recommendation. Upon receipt of the mayor's decision accepting in whole or in part the recommendations of the D/WBE officer, a notice of violation describing the sanctions to be imposed and informing the violator of the procedures for appeal shall be served by mail or in person on the violator.

D. A violation of Anchorage Municipal Code 7.60 or these regulations can be cured if the violator proves to the satisfaction of the D/WBE officer that the violator has taken steps and completed actions necessary to remedy the violation and to assure that similar violations do not occur in the future.

Authority--Anchorage Municipal Code 3.40, 7.60.030

PASSED AND APPROVED by the Anchorage Assembly this 9th day of February, 1999

Ray Von Lemminger
Chair of the Assembly

ATTEST

Lynne J. Ferguson
Municipal Clerk