



Councilman Wayne New
Denver District 10

Best Practices

**Supporting and Enhancing the Growth and
Development of MBE / WBE / SBE in City
Construction Contracts**



Minority, Women, and Small Business Enterprise Construction Contracting Ordinance (Rev. 2014)

- Addresses years of past discrimination against minority and small businesses in the construction industry.
- Provides assistance for the growth and development of small, minority, and women businesses (SBE / MBE / WBE).
- Promotes participation by SBE / MBE / WBE firms in City contracts for construction, design, and construction services.
- Establishes SBE / MBE / WBE certification process to determine participation eligibility.
- Sets specific project achievement goals as % of contract total \$.
- Establishes Division of Small Business Opportunity (DSBO) to develop, manage, and enforce programs for enhancing SBE / MBE / WBE utilization in City construction contracts.



Why Was SBE / MBE / WBE Program Reviewed?

- Over a year ago, a representative of minority subcontractors asked for assistance with specific payment problems.
- Subcontractors described payment issues related to:
 - ✓ Not being paid promptly for completed, approved work and retainage.
 - ✓ Combining change orders on completed, approved work and then only paying a % of the total approved cost of all change orders.
 - ✓ Not being allowed to perform work or be compensated for costly sole preparation of proposal work used in a successful contract award.
 - ✓ Lack of support, assistance, and training by DSBO.
- Subcontractors were and still are afraid to complain publicly or use the Rev. 2014 Ordinance mediation process due to fear they will be excluded from future construction contracts.



How the Program and Issues Were Reviewed

- Improvement efforts focused on Rev. 2014 Ordinance and SBE / MBE / WBE support and assistance.
- Discussions were held with: Mayor Hancock, OED, DSBO, Subcontractors, General Contractors, Construction Industry Associations, Construction Payment, CH2M Hill, Construction Project Management, City Attorneys, and Related Agencies & City Departments.
- Improvement information was distributed to Council colleagues and review participants.
- A team of CW Ortega, CM Kashmann, Ann Bennett, and CM New was formed to review the work and interview subcontractors.
- Subcontractor interviews were also conducted by Mayor Hancock and OED to verify payment issues.



National Ethical Standards

- National and local examples of unfair, unethical behavior that conflict with current Ordinance
- Industry codes of ethics were reviewed.
 - ✓ American Institute of Constructors (AIC) Standards of Professional Conduct
 - ✓ Model Code of Ethics for a Construction Subcontractor (ASA)
- Code of ethics emphasizes key ethical standards of conduct.
 - ✓ Practices that create unfair advantage.
 - ✓ Actions that injure professional reputation of others.
 - ✓ Abuse of one's position to gain material advantage.
 - ✓ Promotion of self interest that does not uphold the standards of the construction industry.



Ordinance Recommendations

1. Billing and Payment Tracking Process
2. Early Completed Work Retainage Payment
3. Linkage of Letters of Intent and Construction Utilization
4. Retaliation
5. Evaluation of the Division of Small Business Opportunity (DSBO)



Billing and Payment Tracking Process

Problem

- Data is not transparent or available on all billing and payment information for completed SBE / MBE / WBE work.

Recommendation for Improvement

- A payment tracking process will collect all required billing and payment data by SBE / MBE / WBE to be evaluated by DSBO.
Note: RTD uses a tracking form to eliminate these payment problems.
- DSBO presently collects most required information on each SBE / MBE / WBE subcontractor.
- Contractor will not be required to submit tracking process data.
- Tracking process is totally separate from contract billing process.



Billing and Payment Tracking Process Information

- Prime contractor information (name, address, contact person, and telephone)
- MBE / WBE subcontractor information (name, address, contact person, telephone, email address, and certification number)
- Contract information (reporting month, reference #, name, and date executed)
- Subcontract information (services, task order number, or work order number)
- Original subcontract amount
- Change order amount and approval date
- Current subcontract amount
- Payment received in current month
- Total payments received
- Percent of work completed
- Billing request rejection date and reason for rejection
- Past due invoices (invoice date, refer #, # of days past due, and amt outstanding)
- Comments



Tracking / Communication and Billing

30 Day Cycle

Communication Process

DSBO
(B2G Software)



Subcontractor Compliance Data

Billing Process

Contractor / Prime Subcontractor
(Textura Software)



Subcontractor Billing Request



Billing and Payment Tracking Process

Recommendations for Improvement

- DSBO will monitor payment accuracy and payment performance of SBE / MBE / WBE subcontractors using the tracking process and prepare reports on performance to be submitted to City Council.

Rev. 2014 Ordinance Reference – Pages 7-8, Sec. 28-34, DSBO Program Administration (a)

(2) “Providing information and assistance to SBEs, MBEs, WBEs, and other business enterprises relating to City contracting practices and procedures, and bid specifications, requirements and prerequisites.”

(6) “Working with user departments to monitor contracts to ensure prompt payments to SBEs, MBEs and WBEs, and compliance with applicable goals and commitments.”



Billing and Payment Tracking Process

Rev. 2014 Ordinance Reference – Pages 7-8, Sec. 28-34, DSBO Program Administration (a)

(7) “Receiving, reviewing, and acting upon complaints and suggestions concerning the various programs established through Chapter 28 or by federal law.”

(8) “Collecting data to evaluate the programs and other City contracting initiatives.”

(9) “Monitoring the various programs and the City’s progress towards the established annual MBE / WBE goal.”



Early Completed Work Retainage Payments

Problem

- A SBE / MBE / WBE may complete work early in the project (1 to 2 months) but must wait to the end of the project (18 to 24 months) to be paid retainage.

Recommendations for Improvement

- Upon the written request of the contractor, the release of subcontractor retainage for approved and completed total work prior to the entire completion of the construction project may be authorized by the City.

Rev. 2014 Ordinance Reference, Page 51, Section 28-74, Payments,...

- “All contractors and consultants shall promptly render payment to all subcontractors, subconsultants, joint venturers, manufacturers, manufacturer’s representatives and brokers on a contract.”

State Law: “Colorado does not require a partial release of or reduction in retainage for construction projects with public entities. However, on written request by the contractor, if the public entity finds that satisfactory progress is being made in any phase of the contract, it may authorize final payment from the withheld percentage to the contractor or subcontractors who have completed their work in a manner acceptable to the public entity.”



Letters of Intent and Construction Utilization

Problem

- There may be confusion on subcontractor the linkage between subcontractor letters of intent and the actual utilization of subcontractors in the initial schedule of construction.

Recommendations for Improvement (Sec. 28-71 Schedule of Work to be Performed by MBEs and WBEs Additional Language)

- “The anticipated utilization of all MBEs and WBEs shall conform to the individual letters of intent submitted for each MBE / WBE at the time of the final project-specific proposal to and authorized by the City or private owner.
- If the MBE or WBE listed on the letter of intent is not the MBE or WBE listed on the MBE / WBE utilization project schedule, then an explanation on this change is to be forwarded to the Director by the contractor for review and approval.”



Letters of Intent and Construction Utilization

Rev. 2014 Ordinance References

- **Sec. 28-68. Identification of Participating MBEs and WBEs**

Page 48: “(b) Proposers must submit such an executive letter of intent for each MBE or WBE listed by the Proposer ...”

- **Sec. 28-71 Schedule of Work to be Performed by MBEs and WBEs.**

Page 50: “Within five (5) business days following commencement of work on a contract, the contractor or consultant shall submit to the Director a duplicate of the project schedule, which sets forth in detail the anticipated utilization of all MBEs and WBEs on the contract.”



Retaliation

Problem

- There are instances when a SBE / MBE / WBE may be intimidated, threatened with retaliation, and influenced to make decisions that are not in their best interest for both current and future construction projects.

Recommendation for Improvement

- Revised 2014 Ordinance: Section 28-75(a)(4) – (4) Terminate ...to substitute another MBE or WBE; or **retaliate against any MBE or WBE who reports issues to DSBO**; or

AIC Standards of Professional Conduct

- A Constructor shall not engage in any deceptive practice, or in any practice which creates an unfair advantage for the Constructor or another.



Division of Small Business Opportunity (DSBO)

Problem

- There have been many complaints by SBE / MBE / WBE subcontractors that DSBO is not providing the same support, assistance, and training that had been provided in the past by DSBO.

Recommendations for Improvement

- A formal outside evaluation of DSBO should be conducted to improve the following:
 - ✓ Support and assistance to SBE / MBE / WBE firms.
 - ✓ Monitoring payment process performance to ensure accurate and complete payments to SBE / MBE / WBE and project achievement goals.
 - ✓ Provide enhanced educational, training, and mentoring services.
 - ✓ Collect participation and process data to ensure Ordinance compliance.
 - ✓ The use of disparity study data in project goal development.



Division of Small Business Opportunity (DSBO)

Rev. 2014 Ordinance Reference

On pages 6 – 9 the functions, powers and duties, review proceedings, program administration, measures to promote equal opportunities, and collection of fees are fully described.

This information clearly identifies responsibilities that are not being performed and support an outside evaluation for operational improvement.

Special emphasis is placed on the following:

- Goal Achievement and Accurate Payment Reporting (Sec. 28-34)
- Required Quarterly Performance Reporting to City Council Members (Sec. 28-79)



Important Areas of Emphasis

“Whereas” Emphasis on Existing Policy and Practice
that will be Tracked and Monitored

1. Payment for Approved Completed Work
2. Timing of Payment for Completed Work
3. End of Project Retainage Payment



Payment for Approved Completed Work

Problem

- There are instances when the scope of project work, quality and work specifications has not changed and has not affected approved work, change order or directive costs, and the SBE / MBE / WBE has not been paid fully for all quality, completed and approved work.

Recommendations for Improvement

- SBE / MBE / WBE are to be paid for all approved completed work related to defined work, change orders and change directives.
- Multiple SBE / MBE / WBE billing requests for approved work will not be held and / or accumulated for payment reduction purposes.



Payment for Approved Completed Work

Rev. 2014 Ordinance Reference, Page 4, (a) History of Discrimination

History - (4) “Such discrimination in contracting opportunities violates the city’s constitutional duty to prohibit, prevent, and eliminate race- and gender-based discrimination and its effects in the conduct of its business.”

(5) “Such discrimination continues to require action to prevent discrimination and to remedy its effects.”

Rev. 2014 Ordinance Reference, Page 51, Section 28-74, Payments,...

- “All contractors and consultants shall promptly render payment to all subcontractors, subconsultants, joint venturers, manufacturers, manufacturer’s representatives and brokers on a contract.”



Final Project Retainage Payments

Problems:

- 5% or sometimes greater of each billing request is withheld or retained from payment to assure required work will be satisfactorily completed.
- At the end of the project SBE / MBE / WBE have had to wait up to or greater than two years to receive their retainage payment.

Recommendations for Improvement

- Retention should be paid no later 35 days after the total completion of approved defined SBE / MBE / WBE work for the entire construction project. After 95% of contracted work has been satisfactorily completed and approved, retainage may be decreased to twice that value of estimated remaining work, and the retainage in excess of this value will be released to the contractor for payment to appropriate SBE / MBE / WBE subcontractors.



Timing of Completed Work Billing Request and Payment Processing

Problem

- Since SBE / MBE / WBE must pay their workers weekly and suppliers monthly, the lack of prompt payment is detrimental for the financial viability, growth and development of all SBE / MBE / WBE subcontractors.

Recommendations for Improvement

- Clearly defined and stated billing request documentation requirements must be communicated and explained to all SBE / MBE / WBEs.
- SBE / MBE / WBE properly documented billing requests for approved work are submitted to prime contractors and should be promptly submitted for payment in every 30 day billing cycle.
- Billing requests submitted for payment should be approved and entered into Textura System by the Prime Contractor to meet the 30 day billing cycle or returned due to insufficient documentation.



Timing Completed Work Billing Request and Payment Processing

Recommendations for Improvement (Continued)

- Complete billing request and payment dates and any variance information and comments will be recorded on the billing and payment tracking form.
- The City's 35-day payment processing policy and procedures will be followed with specific processing timing managed, and, following the State's 7 day payment requirement, upon receiving billing payment from the City the contractor will pay the subcontractors .

Rev. 2014 Ordinance Reference, Page 51, Section 28-74, Payments,...

- "All contractors and consultants shall promptly render payment to all subcontractors, subconsultants, joint venturers, manufacturers, manufacturer's representatives and brokers on a contract."

State Law: "A prime contractor must pay its subcontractors within seven calendar days after receiving payments from the public entity that were included in the contractor's request for payment, if the subcontractor is performing satisfactorily in the contract."



High Level Payment Flow and Timing

City	Start	What If
↓		
Prime Contractor	35 Days	45 - 60 Days
↓		
Tier 1 Subcontractor	7 Days	30 - 60 Days
↓		
Tier 2 Subcontractor	7 Days	7 - 10 Days
Payment Timing Goal	49 Days	82 - 130 Days

Cash Flow and Prompt Payment - Critical for MBE / WBE / SBE.



City Prompt Payment Process

- Contractor billing requests follow a normal 30 day monthly cycle.
- Prompt Pay Policy requires billing requests to be paid in 35 days.
- Interest is paid for a request paid outside of 35 days and paid on the 88 requests shown below.
- 35 day cycle begins with the receipt of documented / verified billing request by the specific agency (Public Works, DEN, Parks & Rec).

City Prompt Pay Results

8/1/16 - 7/31/17

Construction Payments

# of Total Payments	# Within 35 Days	% Within 35 Days	# Outside 35 Days	% Outside 35 Days
2,828	2,740	96.9%	88	3.1%



Focus on Most Critical Issues

Rev. 2014 Ordinance Reference – This important ordinance was created to eliminate discrimination and support the development and growth of our minority, women, and small businesses in the construction industry. The ordinance focus is on SBE / MBE / WBE.

Data – Without transparent and complete information on billing and payment process information for SBE, MBE, and WBE subcontractors, it will be impossible to evaluate performance fully and reduce opportunities for any discriminatory behavior.

DSBO – Without a fully functioning DSBO, the support and assistance; the education and training; and the monitoring of payment performance and goal achievement for SBE, MBE, and WBE subcontractors cannot be performed.



Proposed Approval and Implementation Time Table

- **November 29** – City Council Committee Business, Arts, Workforce & Aeronautical Services (BIZ) – Public Hearing
- **December 5** – Mayor / Council Meeting
- **December 11** – City Council – 1st Reading
- **December 18** – City Council – 2nd / Final Reading
- **January – February, 2018** – Education and Training
- **March 1, 2018** – Implementation for All New and Existing Contracts



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Discussion and Questions