

ORDINANCE NO. 2011-01-243

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MIAMI GARDENS, FLORIDA, AMENDING ARTICLE IX OF THE CODE OF ORDINANCES TO ADD DIVISION 6, TO IMPLEMENT A CITY OF MIAMI GARDENS MINORITY BUSINESS ENTERPRISE ORDINANCE; ESTABLISHING A POLICY; PROVIDING FOR CERTIFICATION; PROVIDING FOR OUTREACH; PROVIDING FOR OBJECTIVES AND GOALS; PROVIDING FOR REQUIREMENTS; PROVIDING FOR WAIVERS AND EXCEPTIONS; PROVIDING FOR REPORTING REQUESTS; PROVIDING FOR ADOPTION OF REPRESENTATIONS; REPEALING ALL ORDINANCES IN CONFLICT; PROVIDING A SEVERABILITY CLAUSE; PROVIDING FOR INCLUSION IN CODE; PROVIDING AN EFFECTIVE DATE.

WHEREAS, the City of Miami Gardens would like to encourage the participation of minority-owned businesses in the City of Miami Gardens procurement process, and

WHEREAS, the City has established a local business program which has benefited local businesses within the City, and

WHEREAS, the law does not permit the City to establish a Minority Business Enterprise (MBE) program unless the City undertakes the appropriate studies and has the empirical evidence to support the need for such a program, and

WHEREAS, the law requires the City to determine whether or not qualified MBEs are being disparately impacted in the award of City contracts, prior to establishing a program, and

WHEREAS, Councilman Oliver Gilbert, III is recommending that the City Council approve a program whereby City will begin to collect the relevant data to determine whether in fact MBEs that are eligible and qualified to perform services

on behalf of the City, are being given the opportunity to provide those services,
and

WHEREAS, in the event the data shows that qualified MBEs are being
disparately impacted, the City can take steps to address it, and

WHEREAS, Councilman Gilbert is also recommending that a Diversity in
Contracting Initiative ("DCI") be established in the City commencing with the
adoption of this Ordinance, and

WHEREAS, in accordance with the DCI, all invitations to bid, request for
proposals, request for qualification, or quotes greater than Ten Thousand Dollars
(\$10,000) for any City service will, require the use of a DMI Data Collection Form,
and

WHEREAS, the City Manager will be required to implement a process to
collect, track and report this information to the City Council on a semi-annual
basis, and

WHEREAS, if it is determined that qualified MBEs have been disparately
impacted, the provisions of the Ordinance related to remedying any disparate
impact, will become effective,

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF
THE CITY OF MIAMI GARDENS, FLORIDA, AS FOLLOWS:

Section 1. ADOPTION OF REPRESENTATIONS: The foregoing
Whereas paragraphs are hereby ratified and confirmed as being true, and the same
are hereby made a specific part of this Ordinance.

Section 2. The City Council of the City of Miami Gardens hereby amends Article IX of the Code of Ordinance to add Division 6 as follows:

DIVISION 6. MINORITY BUSINESS ENTERPRISE

Section 2-819. Title.

This Division shall be known and may be cited as the "City of Miami Gardens Minority Business Enterprises (MBE) Ordinance." The program shall be known as the City of Miami Gardens Minority Business Enterprise ("MBE") program.

1. Purpose; declaration of policy.

The MBE program is intended to eliminate any disparate impact to qualified MBEs with respect to eligible contracts. The Local Preference in Bidding program described in Section 2-758 of the Code is race neutral. If there is a strong basis in evidence sufficient to meet the requirements of applicable law, establishing that qualified MBEs have been disparately impacted in contracting and procurement, notwithstanding the Local Preference in Bidding Program, then the city shall implement a narrowly tailored MBE program to address the disparate impact both with respect to the type of contract or procurement in which the disparate impact has been demonstrated, and the race or ethnicity of those subject to the disparate impact.

Upon a showing of such disparate impact, founded upon a strong basis in evidence, the city has a compelling interest in implementing race conscious initiatives to eliminate that specific disparate impact relating to city contracting and procurement.

2. Applicability.

The requirement for the provision of reports to city council, pursuant to Sections 14 and 15 respectively shall apply immediately upon this Division becoming effective. However, the balance of the MBE Program shall only be operative if it is shown that qualified MBEs are being disparately impacted in city contracting and procurement and is shown to exist pursuant to a substantial basis in evidence. In such event, implementation of the MBE program shall be narrowly tailored to the specific area of

contracting or procurement and the race and ethnicity of those subject to the disparate impact.

The determination that disparate impact in city procurement or contracting exists shall be made by the city council based on the data gathered and analyzed by the city manager and any necessary outside consultant(s). Any finding of disparate impact must have a basis in evidence and meet all the other requirements of applicable law as necessary to implement narrowly tailored race based remedies. It also must specifically identify the type of contract or procurement subject to the disparate impact and the nature of the impact in terms of the race or ethnicity of those subject to such disparate impact.

Upon such findings, the balance of the MBE program shall become effective, including the MBE participation goals, which shall become applicable as provided in this Ordinance for those identified areas of procurement and contracting shown to evidence such disparate impact in favor of those specifically shown to have been impacted.

The recommendation of the narrowly tailored remedies for the specific disparate impact found shall be made by the city manager to the city council within forty-five (45) days of the semi-annual report wherein the disparate impact was identified. That recommendation shall specify the area of contracting and procurement found to have a basis in evidence of disparate impact as well as the group or groups who are subjected to such disparate impact. The city council shall hold a public hearing or hearings, within thirty (30) days of the city manager's recommendation, as shall be necessary for it to confirm the basis in evidence of such findings and to insure that the remedies recommended are sufficiently narrowly tailored. Thereafter, the city manager shall implement the program within sixty (60) days of city council's confirmation of the evidence and approval of the goals.

3. Certification.

(a) Any Black, Hispanic, Asian or Native American business enterprise, operating as such on a continuous basis for at least one (1) year, prior to attempting Miami Gardens certification, that has been certified as a MBE by any qualified government entity in Miami Dade County, Broward County, Palm Beach County, or the State of Florida wishing to qualify to participate in projects as a MBE under this Ordinance, will be deemed certified upon submittal of proof of prior certification.

4. Outreach.

Upon an appropriate finding of disparate impact on the basis of race or ethnicity for identified areas of contracting and procurement, the following outreach efforts shall be conducted in favor of the groups disparately impacted in order to achieve the purposes and policies of this Ordinance with respect to the specific area and type of procurement subject to the disparate impact:

(a) *Eligible contracts for construction or construction related projects.* For all eligible contracts for construction or construction related projects that have been found to evidence disparate impact as provided herein, the user or soliciting department will send electronic notification in accordance with approved methods to all city certified MBEs who are members of the group subject to such disparate impact and that perform the type of work to be contracted in sufficient time to allow said MBEs to participate effectively. The notice shall solicit said MBEs interest in working on the project and shall advise such MBEs:

1. Of the specific work the city intends to contract;
2. That their interest in the project is being solicited; and
3. How to obtain request for proposals or invitations to bid or information or specifications on the proposed contract.

(b) *Eligible contracts for goods and non-professional services.* For all eligible contracts pertaining to the procurement of goods and non-professional services that have been found to evidence a disparate impact as provided herein, the procurement manager, or the soliciting department, will notify the city manager and notify all city certified MBEs who are members of the group subject to such disparate impact and are available to provide all such goods or services. The notification shall advise such MBEs:

1. Of the specific work the city intends to contract;
2. That their interest in the project is being solicited; and
3. How to obtain request for proposals or invitations to bid or information or specifications on the proposed contract.

(c) *Eligible contracts for professional services.* For eligible contracts for the procurement of professional services where MBEs have been disparately impacted as provided herein, the soliciting department will make good faith efforts to promptly identify and notify all city certified MBEs who are members of the group who have been disparately impacted and are available to provide all such goods or services. The notification shall advise MBEs:

1. Of the specific work the city intends to contract;
2. That their interest in the project is being solicited; and
3. How to obtain request for proposals or invitations to bid or information or specifications on the proposed contract.

(d) The City Manager shall ensure that all vendors who have been previously qualified to perform work on behalf of the City, who meet the requirements as an MBE, are notified whenever an eligible contract for construction, goods or professional services is available.

(e) The city manager shall provide semi-annual reports to the city council with respect to the outreach efforts described above and the annual goals, project goals and bid preference contracts.

5. Objectives and goals.

(a) *Objective.* The objective of this Ordinance is to eliminate disparate impact in order to ensure equal business opportunity and retain diverse workforce opportunities in city contracting and procurement. Upon an appropriate finding of disparate impact against specified groups for identified areas of contracting and procurement as provided for herein, the city manager shall make recommendations to city council to approve annual goals for the utilization of such specified groups in order to eliminate such disparate impact. Goals shall be set for the specific areas and type of procurement subject to disparate impact. Such goals will determine the baseline for assessing the success of the programs used to eliminate such disparate impact. The primary method or measurement to assess the success of these efforts will be the Diversity in Contracting Initiative ("DCI").

(b) *Annual MBE goals for city contracting and procurement.* Annual goals shall be set in each area or type of procurement where MBEs have been disparately impacted for appropriate utilization rates of the certified MBE providers who were disparately impacted for the various categories of the city contracting and procurement. Such annual goals are estimates only and shall be based upon the findings contained within the annual program performance reports. The project goals are the standards by which compliance will be measured. The city manager shall identify the availability of certified MBE contractors and subcontractors and suppliers ("available MBEs") with respect to city procurement of construction, construction-related services, goods, non-professional services and/or professional services shown to have been disparate impacted and project goals shall be based on the availability of certified MBEs ("available MBEs") to perform the anticipated scopes of the contract that can be subcontracted. The city manager shall advise all bidders and responders of such information in a readily accessible form.

6. Setting project goals.

(a) *Project goals.* Upon the finding of disparate impact based on race or ethnicity with respect to city contracting or procurement and the adoption of annual goals, specific goals shall be set on a project-by-project basis in an effort to eliminate such disparate impact. Goals shall be set for eligible contracts in each area of contracting or type of procurement found to have been subject to disparate impact. The goals may be set for each race, or ethnic group disparately impacted on the basis of their availability.

(b) *Goal setting committees.* The goal setting committee shall be comprised of the city manager, procurement manager or user department, outside consultant, if any, and the city attorney or their designees ("goal setting committee").

(c) *Construction project goals.* The respective goal setting committee shall determine appropriate rates of anticipated MBE participation based on the proportionate availability of the group disparately impacted for each type of bid construction project found to have been subject to disparate impact.

(d) *Construction-related projects.* To the extent permitted by law, the respective goal setting committee shall determine appropriate rates of MBE participation based on the proportionate availability of the group disparately impacted for each type of

construction-related area found to have been subject to disparate impact.

(e) *Goods.* The goal setting committee shall determine appropriate rates of MBE participation based on the proportionate availability of the group that has been disparately impacted against for the procurement of goods

(f) *Non-professional services projects.* The respective goal setting committee shall determine appropriate rates of MBE participation for each type of non-professional services project where MBEs have been disparately impacted.

(g) *Professional services projects.* To the extent allowed by applicable law, the respective goal setting committee shall establish appropriate rates of MBE participation based upon the proportionate availability of the group disparately impacted for the type of professional service projects found to have been disparately impacted.

Section 7. Bid preference for eligible contracts.

(a) Each type of eligible contracts for construction, construction-related services, goods, and professional and non-professional services found to have been disparately impacted may grant bid preferences of five (5) percent or twenty thousand dollars (\$20,000.00), whichever is less, on construction projects to MBEs who were the subject of such disparate impact. Once all bids are received pursuant to this subsection, the bids of each such certified MBE will be reduced by a dollar amount of five (5) percent or twenty thousand dollars (\$20,000.00), whichever is less, for the purposes of establishing the apparent low bidder. Then, the low responsible, responsive bidder will be awarded the contract at the bid amount submitted; or

(b) Each type of eligible contract for construction-related professional services or professional services may include a rating preference, on professional services projects to be put out for a request for proposal or request for quotes of an estimated amount of one hundred thousand dollars (\$100,000.00) or more, to MBEs or firms utilizing MBEs, which were disparately impacted. Said rating preference will be one (1) to five (5) additional/bonus points, based on the level of MBE participation in the bid and how such level meets the MBE program goals, on a ninety-five (95) point scale used when evaluating and rating bids for professional services.

(c) In the event that a certified MBE also qualifies for the City of Miami Gardens local vendor preference the vendor must indicate which preference will be applied to the bid. MBEs will not be allowed to apply for both preferences.

Section 8. General information requirements.

Upon the appropriate finding of disparate impact on the basis of race or ethnicity with respect to specific contract or procurement activities of the city, the following information must be provided with respect to each such contract or procurement activity for each racial or ethnic group subject to such disparate impact:

(a) At the time of bid submittal, all bidders on such an eligible contract shall submit, as part of their bid documents, information and documentation adequate to evidence their efforts, at that point in time to obtain participation of the racial or ethnic group disparately impacted, to meet the project goal. Such documentation shall include, but need not limited to, the following:

1. Schedule of all such MBE subcontractors solicited;
2. Schedule of all such MBE subcontractors, suppliers or joint venturers anticipated to participate therein, including the dollar amounts and scopes of work of such participation;
3. Any letters of intent in existence as of submittal from all such participating MBE subcontractors; and
4. An affidavit declaring the bidder's intention to fully comply with the provisions of this Ordinance and all city procedures established pursuant hereto.

(b) Prior to award of the bid, any changes to the participation of such a MBE in a bidder's bid, must be provided in writing to the user department and the city manager and approved in writing by the procurement manager and the city manager.

(c) After bid award, the winning bidder shall provide a complete summary of all deviations in actual use of subcontractors and suppliers including actual payments, on or before thirty (30) days after completion of the contract or procurement.

(d) A bidder's failure to submit any information required by this Ordinance or by the city's MBE program procedures may render the bid non-responsive.

Section 9. Prohibition on brokering services.

It is prohibited hereunder to use a MBE provider, contractor or subcontractor as a broker of services, rather than an actual provider thereof. Accordingly, to qualify as a MBE award the following shall apply:

(a) MBEs are required to perform a commercially useful function on contracts let or made pursuant to this Ordinance.

(b) Only expenditures to or contracts with MBEs that perform a commercially useful function in the work of a contract may be counted towards the MBE utilization. A MBE is considered to perform a commercially useful function when it is responsible for execution of a distinct element of the work of a contract and carrying out its responsibilities by actually performing, managing and/or supervising the work involved. To determine whether a MBE is performing a commercially useful function, the city will evaluate all relevant factors such as, for example, the amount of work subcontracted and industry practices.

(c) Consistent with normal industry practice, a MBE may enter into subcontracts. If a MBE subcontracts fifty (50) percent or more of the work of a contract, the MBE shall be presumed not to be performing a commercially useful function. The MBE may present evidence to rebut this presumption to the city, with any decision in that regard being based upon normal industry standards.

Section 10. Goal achievement.

(a) All contractors, subcontractors and suppliers are subject to the reporting requirements applicable to eligible contracts as set forth herein. All MBE participation goals are intended as an indication of contract and procurement awards reflective of reasonable utilization of competent, available MBE certified providers. In the event a disparate impact is specifically identified and established in a manner required by applicable law, the participation goals are mandatory and must be met, unless there is a showing that the goals could not be met notwithstanding good faith effort to do so. The city manager shall hear, review and evaluate the evidence and argument that good faith effort has been

made pursuant to the requirements contained herein. Any appeal of the city manager's finding shall be to the city council. The city council's decision shall be final.

(b) All parties seeking city contracts or procurement are responsible for achieving established participation goals in order to remedy disparate impact to MBEs, in a manner required by applicable law. It shall also be the responsibility of such parties to maintain said goals for the duration of any project.

(c) If the prime contractor or bidder on a construction project is subject to MBE participation goals, it may count its own participation towards the goal, provided it is a certified MBE. However, such contractor or bidder shall not be exempt from good faith efforts and the requirement to meet the participation goals for all other applicable MBE classifications.

Section 11. Good faith efforts.

Any bidder, submitting a bid on eligible contracts, which does not meet any mandatory participation project goals established by this Division to remedy specifically identified disparate impact established in a manner required by applicable law, must provide in its bid, documentation of its good faith efforts to achieve said goals. The ability or desire of a bidder or contractor to perform the work of a contract with its own organization does not remove the requirement to make good faith efforts to meet the goals. Evidence of good faith efforts will include, but not be limited to, the following:

(a) Attendance at pre-bid conference, if held;

(b) Soliciting through reasonable and available means the interest of MBEs that have the capability to perform the work of the contract. The bidder or contractor must solicit this interest within sufficient time to allow the MBEs to respond. The bidder or contractor must take appropriate steps to follow up initial solicitations with interested MBEs.

(c) Providing interested MBEs with adequate information about the plans, specifications, and requirements of the contract, including addenda, in a timely manner to assist them in responding to the solicitation.

(d) Negotiating in good faith with interested MBEs that have submitted bids. Documentation of negotiation must include the names, addresses, and telephone numbers of MBEs that were

solicited; the date of each such solicitation; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why agreements could not be reached with MBEs to perform the work. That there may be some additional costs involved in soliciting and using MBEs is not a sufficient reason for a contractor's failure to meet the goals, as long as such costs are reasonable.

(e) Not rejecting MBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The MBEs standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations are not legitimate causes for rejecting or not soliciting bids to meet the goals.

(f) Making a portion of the work available to MBE subcontractors and suppliers and to select those portions of the work or material consistent with the available MBE subcontractors and suppliers, to facilitate meeting the goals.

(g) Making good faith efforts, despite the ability or desire of a bidder or contractor to perform the work of a contract with its own organization. A bidder or contractor who desires to self-perform the work of a contract must demonstrate good faith efforts unless the goal has been met.

(h) Selecting portions of the work to be performed by MBEs in order to increase the likelihood that the goals will be met. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate MBE participation, even when the bidder or contractor might otherwise prefer to perform these work items with its own forces.

(i) Making efforts to assist interested MBEs in obtaining bonding, lines of credit, or insurance as required by the city or contractor, where applicable.

(j) So long as the bidder provides the potential MBEs with sufficient advance notice of its deadline for accepting bids, the refusal to use a MBE contractor or provider who does not meet such deadline shall not be a basis for refusing to find a good faith effort has been made.

Bidders or contractors are not required to accept higher quotes in order to meet the goal. In determining whether a bidder or contractor has made good faith efforts, the performance of other

bidders or contractors in meeting the contract project goal may be considered.

The determination of whether a bidder has made good faith effort will be made by the city manager prior to the award of the project in compliance with the terms hereof. Any appeal of the manager's finding shall be to the city council. The City Council's decision shall be final.

Section 12. Post-award contract compliance.

With respect to all participation goals set to eliminate disparate impact to MBEs, established in a manner required by applicable law, all awardees shall provide the city manager a written report and verification of the utilization and solicitation of all subcontractors sufficient for the city manager to ascertain and confirm the amount of utilization of such MBEs subject to the disparate impact, both in awards and dollar value actually paid. All contractors shall provide the city manager a written report and verification of all dollars paid to all subcontractors, including the following:

(a) The contractor shall submit monthly reports in such form, manner and time as required by the city manager summarizing the ongoing participation of all subcontractors in the project.

(b) A payment schedule in the form of a signed statement must be submitted by the contractor or awardee with the monthly pay request denoting the amount paid to all subcontractors as providers.

(c) The contractor shall bring to the attention of the user department and the procurement division any situations in which regularly scheduled payments are not made to any subcontractors.

(d) At the completion of performance on the construction project, the contractor shall submit a final schedule by affidavit of all participating subcontractors to the user department and the procurement department. This document will be an affidavit denoting final contract amount and payments made to all subcontractors.

Section 13. Exceptions and waivers.

(a) Participation goals shall not apply to:

- 1) Projects that are not subject to a bid process, in accordance with the City's Purchasing Ordinance;
- 2) In instances where federal and or state law mandate that it cannot apply; or
- 3) To state or federal contracts where such goals are not permitted.

(b) The city manager may waive compliance with mandatory goals when the bidder demonstrates he/she has made reasonable good faith efforts to meet such goals. In order to waive such compliance, the city manager shall make a finding that the bidder has satisfied its obligation to make good faith efforts at meeting mandatory goals under the following circumstances:

1. Whenever the bidder has obtained the list of available MBE's from the city manager and provides proof of his/her efforts to contact such available MBE's; or

2. An insufficient number of available MBEs submitted a proposal or bid to participate in the project that was either responsive to the request or reasonable in terms of comparable dollar amounts for such work or goods in the Miami Gardens area, and those that did were selected for participation.

Section 14. Diversity in Contracting Initiative

The City Manager shall initiate a city wide process to collect data relevant to determining whether MBEs are being disparately impacted in the award of city procurement contracts. All invitations to bid, requests for proposes, requests for qualifications, and all quotes greater than Ten Thousand Dollars (\$10,000) for any city service shall require the use of a Diversity in Contracting Initiative form for the purpose of collecting and tracking data so that this information can be reported to the city council.

Section 15. Reports to council.

The city manager shall prepare semi-annual reports to city council delineating the utilization rates of MBEs compared to availability on the basis of procurements and total dollars awarded. When applicable, the reports shall measure goal achievement, compliance, good faith efforts, and exceptions and waivers. The

goals contained within the reports shall also be submitted to city council.

Section 3. CONFLICT: All ordinances or Code provisions in conflict herewith are hereby repealed.

Section 4. SEVERABILITY: If any section, subsection, sentence, clause, phrase or portion of this Ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portions of this Ordinance.

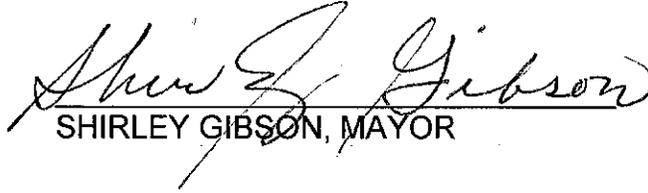
Section 5. INCLUSION IN CODE: It is the intention of the City Council of the City of Miami Gardens that the provisions of this Ordinance shall become and be made a part of the Code of Ordinances of the City of Miami Gardens and that the section of this Ordinance may be renumbered or relettered and the word "Ordinance" may be changed to "Chapter," "Section," "Article" or such other appropriate word or phrase, the use of which shall accomplish the intentions herein expressed.

Section 6. EFFECTIVE DATE: This Ordinance shall become effective immediately upon its final passage.

PASSED ON FIRST READING ON THE 12th DAY OF JANUARY, 2011.

PASSED ON SECOND READING ON THE 26th DAY OF JANUARY, 2011.

ADOPTED AND PASSED BY THE CITY COUNCIL OF THE CITY OF
MIAMI GARDENS AT ITS REGULAR MEETING HELD ON THE 26TH DAY OF
JANUARY, 2010.


SHIRLEY GIBSON, MAYOR

ATTEST:


RONETTA TAYLOR, MMC, CITY CLERK

Prepared by SONJA KNIGHTON DICKENS, ESQ.
City Attorney

SPONSORED BY: COUNCILMAN OLIVER GILBERT, III

Moved by: Councilman Gilbert
Second by: Vice Mayor Campbell

VOTE: 7-0

Mayor Shirley Gibson	<u> X </u> (Yes)	____ (No)
Vice Mayor Aaron Campbell, Jr.	<u> X </u> (Yes)	____ (No)
Councilwoman Lisa Davis	<u> X </u> (Yes)	____ (No)
Councilman Oliver Gilbert, III	<u> X </u> (Yes)	____ (No)
Councilwoman Sharon Pritchett	<u> X </u> (Yes)	____ (No)
Councilwoman Felicia Robinson	<u> X </u> (Yes)	____ (No)
Councilman Andre' Williams	<u> X </u> (Yes)	____ (No)