

ORDINANCE NO. 96-54 AC CMS

AN ORDINANCE AMENDING ORDINANCE NO. 85-65 AC CMS,
AS AMENDED, WHICH ESTABLISHED A MINORITY BUSINESS ENTERPRISE
PROGRAM FOR THE CITY OF OBERLIN, OHIO

BE IT ORDAINED by the Council of the City of Oberlin, County of Lorain, State of Ohio, a majority of all members elected thereto concurring:

SECTION 1. That ordinance No. 85-65, as amended, which established a Minority Business Enterprise Program for the City of Oberlin, Ohio, is hereby amended to read as set forth in Exhibit A attached hereto and incorporated herein by reference.

SECTION 2. It is hereby found and determined that all formal actions of this Council concerning or relating to the adoption of this ordinance were adopted in an open meeting of this Council, and that all deliberations of this Council and of any of its committees that resulted in such formal action, were in meetings open to the public in compliance with all legal requirements, including Section 121.22 of the Ohio Revised Code.

SECTION 3. That this ordinance shall take effect at the earliest date allowed by law.

PASSED: 1st Reading - June 3, 1996
2nd Reading - June 17, 1996
3rd Reading - July 1, 1996

ATTEST:


CLERK OF COUNCIL


CHAIRMAN OF COUNCIL

POSTED: July 2, 1996

EFFECTIVE DATE: August 1, 1996

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EXHIBIT A

SECTION I. INTRODUCTION

The purpose of this Minority Business Enterprise (MBE) Program is to aggressively seek participation of minority business enterprises in the City's procurement activities. It must be emphasized that nothing in this Minority Business Enterprise Program will be used to discriminate against any company or companies. However, the City of Oberlin accepts the premise that special efforts must be made to include minority business enterprises in the nation's economic system, and, further, the City is committed to ensuring minority firms of an equitable opportunity by undertaking every reasonable effort to attain the goals set forth in this Minority Business Enterprise Program.

SECTION II. DEFINITIONS

The term "minority business enterprise" means a small business concern, as defined pursuant to Section 3 of the Small Business Act and implementing regulations, which is owned and controlled by one or more minorities. For the purpose of this definition:

1. "Minority" means persons who are citizens or lawful permanent residents of the United States who are:
 - a. "Black Americans", which includes persons having origins in any of the Black racial groups of Africa;
 - b. "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;
 - c. "Native Americans", which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;
 - d. "Asian-Pacific Americans", which includes persons whose origins are from Japan, China, Taiwan, Korea, Viet-Nam, Laos, Cambodia, the Phillipines, Samoa, Guam, the U.S. Trust Territories of the Pacific, and the Northern Marianas;
 - e. "Asian-Indian Americans", which includes persons whose origins are from India, Pakistan, and Bangladesh;
2. "Owned and controlled" means that at least fifty-one percent (51%) of the

business, including corporate stock if a corporation, is owned by persons who belong to one or more of the groups set forth in 1. above and that such owners have control over the management and day-to-day operations of the business and an interest in the capital, assets, and profits and losses of the business proportionate to their percentage of ownership. In order to qualify as a minority business enterprise, a business shall have been owned and controlled by such persons at least one year prior to being awarded a contract pursuant to this section.

3. "Compliance" means the condition existing when a contractor has met and implemented the requirements of this Program.
4. "Contractor" means any person, partnership, corporation, association, or joint venture which has been awarded a public contract and includes every subcontractor on such a contract.
5. "Subcontractor" means any person, partnership, corporation, association, or joint venture which supplies any of the work, labor, services, supplies, equipment, materials, or any combination of the foregoing under a contract with the contractor on a public contract.
6. "Public contract" means any contract awarded by the City whereby the City is committed to expend or does expend its funds in return for work, labor, services, supplies, equipment, materials, or any combination of the foregoing, or any lease, lease by way of concession, concession agreement permit or permit agreement whereby the City leases, grants, or demises property of the City or otherwise grants a right or privilege to occupy or use property of the City.
7. "Joint venture" means an association of two or more businesses to carry out a single business enterprise for profit for which purpose they combine their property, capital, efforts, skills and knowledge.
8. "Noncompliance" means the condition existing when a contractor has failed to meet and implement the requirements of this Program.
9. "Recipient" means any entity, public or private, to whom financial assistance is extended, directly or indirectly.
10. "Bidder" means any person, partnership, corporation, association or joint venture seeking to be awarded a public contract.
11. "Certified MBE" means any MBE having been approved by the City of Oberlin as being an MBE qualified to participate in the MBE Program.

12. "Goals" means a numerically expressed objective which contractors are required to make good faith efforts to achieve and which the City must make a good faith effort to achieve through its procurement practices.

SECTION III. POLICY STATEMENT

It is the policy of the City of Oberlin to support the fullest possible participation by firms owned and controlled by minority persons in the performance of contracts and subcontracts and procurements financed in whole or in part with funds under the control of the City of Oberlin.

In the furtherance of this Policy, the City of Oberlin shall take such action to ensure that minority business enterprises shall have the maximum opportunity to participate in contracts and subcontracts and procurements let by the City of Oberlin.

The Contract Compliance Officer is responsible for the day-to-day administration of the City's MBE Program. Other management personnel, especially those responsible for procurement and contracting, **SHALL** give their full cooperation to the Contract Compliance Officer in the implementation of this Policy.

The Minority Business Enterprise Program which has been developed pursuant to this Policy outlines the specific actions which are and will be taken by the City of Oberlin to insure that bona fide minority business enterprises have maximum opportunity to participate in business opportunities resulting from the City's activities. Affirmative action shall be consistent with sound procurement principles and applicable law, and, in line with such principles and law, it is the policy of the City of Oberlin to utilize minority business enterprises in all areas, and they are encouraged to participate in all procurements.

Chairman, City Council

SECTION IV. RESPONSIBILITIES

A. City Manager

The City Manager has the overall responsibility for the administration of this Minority Business Enterprise Program.

B. Contract Compliance Officer (CCO)

The Code Administrator of the City of Oberlin shall function as the Contract Compliance Officer, and report directly to the City Manager. The CCO will maintain a directory of MBE's identified for participation in the program. The directory shall be consulted before making any bid recommendation or award.

The CCO shall periodically review, evaluate and, if necessary, recommend revisions to the City's contract and procurement procedure, and shall report to City Council after the first six months and thereafter once each year at the Council meeting immediately following the anniversary date of the passage of Ordinance No. 85-65 AC CMS on the degree to which the City has met the minority business enterprise goals herein described.

It is the responsibility of the CCO to carry out the day-to-day administration of this Minority Business Enterprise Program reporting directly to the City Manager.

Among the specific duties of the Contract Compliance Officer are:

1. To include but not limited to develop, monitor the implementation of, and provide continuing evaluation of this program. The CCO will work closely with those persons responsible for making management decisions regarding procurement and contracting for the City.
2. To circulate the MBE Policy Statement to personnel throughout the City and to minority and non-minority community and business organizations.
3. To maintain and constantly update a Directory of bona fide minority businesses with specific information on expertise, work performance, and other data.
4. To assist in securing management and technical assistance for the expansion and overall development of MBE's.
5. To publicize business opportunities at the City with the objective of reaching MBE's to assist such businesses as they compete for contracts and subcontracts.
6. To attend pre-bid and pre-construction meetings to explain MBE requirements.
7. To monitor contractors' and subcontractors' compliance with MBE commitments throughout the life of contracts.
8. To plan and participate in training sessions for the purpose of informing potential bidders about this MBE Program and about business opportunities with the City.
9. To serve as liaison with agencies supporting economic development in the minority community.

10. To maintain accurate and up-to-date records demonstrating MBE efforts and progress under this Program.
11. To advise contractors of the steps necessary to bring them into compliance with the City's requirements regarding MBE utilization and to conduct compliance reviews, as needed, to ensure effective program implementation.
12. To report quarterly to the City Manager on progress being made in the implementation of this Program and to recommend program modifications. The CCO will also be responsible for the timely submission of reports on this Program that are required by the City Council.

C. Other Personnel

Other administrative personnel share the responsibility for ensuring the effective implementation of this Program. They shall give their full cooperation and active support of this Program to the City Manager and the Contract Compliance Officer. Administrative personnel are evaluated on their performance in this area.

SECTION V. ENSURING EQUITABLE OPPORTUNITIES FOR MINORITY BUSINESS ENTERPRISES

The City recognizes that the establishment of goals for MBE participation must be coupled with specific techniques which will enhance the likelihood of goal attainment.

All bid specifications shall include an explanation of requirements concerning MBE participation. Further information, including lists of possible MBE subcontractors compiled from the MBE directory shall be available upon request and shall be provided by the CCO at pre-bid conferences.

The following techniques shall be used to provide assistance directly to MBE's:

1. Appropriate MBE's, selected from the MBE directory by the City Manager and CCO, will receive early notice of at least ten (10) working days of contracting opportunities. Bid notices will automatically be provided to the CCO and will be published in media which reach minority entrepreneurs. Members of the MBE Advisory Committee shall receive copies of invitations, to bid, MBE directory, and list of prospective MBE participants for each bid so that they may distribute them to other MBE's. The purpose of such distribution of information is to increase the awareness among MBE's of opportunities with the City.
2. The practice of the City is to allow a reasonable amount of time for completion

of bids or proposals for all prospective contractors, including MBE's. The minimum time allowed for completion of bids is thirty (30) days from the date of publication of the invitation to bid. Whenever feasible, adjustments are made in deadlines in order to minimize bidding constraints.

3. The City shall use the least complicated standard bid forms appropriate to each procurement solicitation.
4. The City shall consider breaking contracts into smaller parts, where economically feasible, prorating payment and delivery schedules, and using staged bonding where not inconsistent with the law.
5. Materials necessary for the completion of a contract may be purchased directly by the City and furnished to the MBE contractor for installation, subject to appropriate contract amendments to be agreed upon prior to such purchases.

In addition to the methods previously mentioned of providing information on business opportunities for MBE's with the City, such as use of the MBE Advisory Committee, use of minority-oriented newspapers and other media, and training session on bidding procedures, the City will also periodically inform MBE organizations of business opportunities with it, as well as future trends in development and the procurement implications of these trends.

As a further means of increasing awareness, the City shall develop an informational pamphlet for distribution to minority businesses and organizations assisting MBE's. Material in the pamphlet shall include:

1. Items and services purchased or contracted for by the City on a regular basis;
2. Prerequisites for contracting with the City;
3. Location of information regarding proposed procurements;
4. Certification requirements for minority business enterprises;
5. Name, office and hours of the City's CCO;
6. Directions for obtaining plans and specifications; and
7. Explanation of payment and delivery schedules.

The City recognizes that the normal procurement process may present problems to business enterprises that are unfamiliar with bidding procedures, lacking in strong management methods, or simply inexperienced. The City shall offer whatever aid may be reasonable and necessary to individuals and/or groups of MBE's in overcoming such barriers so as to advance

the intent and goals of this Program. Among the techniques which shall be used to assist MBE's are:

1. City staff provides counseling on the completion of bids so that the necessary requirements are met. Staff also conducts training sessions for groups of MBE's by category of construction, supply and service. These sessions include instruction on every phase of the bidding process. Individual MBE's who have questions or need assistance are referred by the CCO to the appropriate official for guidance. The CCO pursues all requests for assistance to ensure that all necessary information was provided and, if necessary, issues the appropriate bidding documents. To ensure that all potential MBE bidders are aware of the availability of this assistance, all solicitations for bids and requests for proposals include the name, address and phone number of the CCO with a statement that any MBE wishing information on the City's bidding process should contact the CCO.
2. The City will provide coordination with and referral to existing programs of the U.S. Department of Commerce, the Small Business Administration, U.S. Department of Transportation appropriate state agencies and other organizations designed to provide management and technical assistance to MBE's.
3. MBE's are, upon request, counseled regarding the specific reasons their bid was unsuccessful. Requests for debriefing sessions are to be made through the CCO who will arrange for appropriate staff to be present.
4. Where a proposed procurement of goods and/or services includes requirements for bid and/or performance bonds, insurance or technical assistance, the City will advise MBE's as needed of procedures to be followed to obtain necessary bonds, insurance and/or technical assistance, including referral to (see #2 above). Where the MBE bidder has exhausted its opportunities to obtain the necessary bonds, insurance and/or technical assistance and is otherwise qualified, the City Manager may recommend to the City Council that the City waive the necessary bonding. The City Manager may also recommend to the City Council that the City help secure insurance and/or technical assistance for the MBE. The waiver of bonding and/or help in securing insurance and/or technical assistance by the City shall be conducted in accordance with sound procurement principles and shall be consistent with applicable law and shall, if the City deems necessary, include the right on behalf of the City to reasonably participate in certain of the MBE business functions including management assistance and payroll control.
5. Upon recommendation of the City Manager, and with the approval of the City Solicitor, the City may waive bid bond requirements for qualified MBE's for contracts less than \$50,000, as long as the risk to the City as a result of

granting a waiver has been avoided or minimized by the use of bid bond alternatives such as, but not limited to, irrevocable Letters of Credit, personal guarantees, or the pledge of real and/or personal property.

Implementation of all of the foregoing programs must be and is consistent with appropriate statutes and regulations.

Additional activities which improve the opportunities for minority business enterprises will be implemented as the need arises. Innovative approaches to fulfilling the City's minority business enterprise commitment will be recommended by the CCO or the MBE Advisory Committee at any time for the consideration of the City Council.

SECTION VI. THE MEANS BY WHICH THE CITY OF OBERLIN ENSURES THAT BIDDERS MAKE GOOD FAITH EFFORTS TO MEET MBE CONTRACT GOALS

Invitations To Bid (ITB) and Requests For Proposals (RFP) for all procurements for which MBE goals have been established shall contain the notice to prospective Bidders/Proposers which includes an assurance that they used good faith effort to achieve the level of MBE participation sought by the City in the procurement and a statement of the level of participation attained by such efforts. (The Notice to Prospective Bidders/Proposers and amendments to the form of bid are provided in Attachment A.) These submittal will be considered elements of the bid (proposal) responsiveness. If the bidder states that it failed to attain the goal, it must also submit with its bid a statement detailing its efforts to obtain capable certified MBE participation. Said statement, together with any supporting documentation will be used by the CCO to assess the good faith of said bidder. Each bidder will also be required to submit with its bid (proposal) a complete MBE participation plan setting forth the extent of MBE involvement in the procurement. The failure to submit said plan with the bid (proposal) or the submission of an incomplete plan shall be considered an assessment of said bidder's responsiveness. In order to afford MBE subcontractors time to assemble an accurate price quote, the prospective bidder shall inform MBE subcontractors of possible subcontracting opportunities at least five (5) business days prior to the bid opening. If said information is not given, there will be no finding of good faith effort to meet MBE contract goals and the bid will be deemed nonresponsive.

The Invitation To Bid and Request For Proposals shall further advise each bidder that the successful bidder's MBE participation shall, in the event a contract is awarded, become a part of the procurement contract, binding said successful bidder to full and faithful performance in accordance with said plan. The Invitation To Bid and Request For Proposals shall further advise bidders that only certified MBE firms are eligible for participation in a plan. Every effort will be made by the City to certify MBE firms prior to bid submission. Certification will not be made after the bids or proposals are opened. Substitutions of certified MBE's appearing in a plan will be permitted only where the CCO determines that such substitution

will not result in an abuse of this program. Said determination shall be reduced to written form and shall include the reasons therefor.

The CCO shall promptly review the MBE participation plans and statements of efforts, and shall assess the responsiveness of each bidder with regard to MBE participation. In making the assessment, the CCO shall consider whether the submissions demonstrate good faith efforts on the part of the bidder to obtain capable certified MBE participation.

The standard by which the CCO shall determine whether the efforts made by a bidder were good faith efforts is whether such efforts could reasonably be expected to produce sufficient MBE participation to meet the goals set for the procurement. In reaching a decision, the CCO shall consider all efforts advanced by the bidder as well as the criteria set forth in Attachment D, Standards for Determining Good Faith Efforts.

The CCO shall apply the following standards in making an assessment of the bidder's responsiveness regarding its MBE participation:

1. Whether the participation plan contains capable, certified MBE firms.
2. Whether the firms listed are performing a commercially useful function.
3. Whether the firms listed are sharing monetary benefit in proportion to their share of the work on the project.
4. Whether the plan exhibits a likelihood of goal attainment.
5. Whether the prime/sub relationships are firm, i.e., whether conditional subcontracts have been entered.

The CCO shall diligently and regularly review the successful bidder's performance under its resulting contract with the City with a view to ensuring full and faithful performance of the MBE participation plan submitted by said bidder. Staff within the City shall actively assist the CCO in this effort. Contract administration shall include review and monitoring of MBE contract requirements. Contract administrators shall notify the CCO when failure or laxity is suggested by the manner of the contractor's performance. The review by the CCO shall include, but not be limited to, a comparison of the payments made by the City to the successful bidder and the payments received by MBE subcontractors with the certifications by said subcontractors that said work was performed and payments therefor received. The CCO may, from time to time, at any time during the performance of the contract and up to three (3) years following completion of the contract, perform compliance reviews. Said reviews shall be performed expeditiously. Immediately following the conclusion of each performance and/or compliance review, the CCO shall reduce the findings and conclusions to written form, serve a copy on the contractor, and file the same in the contract file.

If the CCO finds that the successful bidder has failed to fully and faithfully perform its obligations under its MBE Plan, the CCO shall promptly notify the City Manager who shall immediately seek corrective action from the successful bidder. If the bidder fails or refuses to promptly take corrective action, the City Manager shall then notify City Council. Refusal by the contractor or subcontractor to comply with any portion of this program as herein stated and described will subject the offending party to any or all of the following penalties:

1. Withholding of all future payments under the involved public contract to the contractor in violation until it is determined that the contractor or subcontractor is in compliance with the provisions of the contract;
2. Refusal of all future bids for any public contract with the City or any of its departments or divisions until such time as the contractor or subcontractor demonstrates that they have established and shall carry out the policies of the program as herein outlined;
3. Cancellation of the public contract and declaration of forfeiture of the performance bond;
4. In cases in which there is substantial or material violation or the threat of substantial or material violation of the compliance procedure or as may be provided for by contract, appropriate proceedings may be brought to enforce those provisions, including the enjoining, within applicable law, of contractor, subcontractors or other organizations, individuals or groups who prevent directly, indirectly, or seek to prevent directly or indirectly, compliance with the policy, as herein outlined; and
5. Order the contractor to stop work.

The action taken by the City Manager shall remain in force until vacated by Council action or until the cause for action has abated. Past performance of the contractor shall be considered by the CCO in the assessment of the contractor's responsibility in any future bid competition in which said contractor participates.

Administration of this MBE Program in procurements will be achieved by the City Manager. Before a purchase order is issued, the City shall affirmatively seek certified MBE's capable of supplying the goods or services to be procured and shall solicit their quotations. As a minimum, the City shall consult the MBE Directory prior to the solicitation of any quotations. The City will record their efforts in this regard on a standard form and shall place the completed form in the procurement file, prior to the auditor issuing a purchase order. Copies of said records shall be filed with the CCO on a weekly basis.

SECTION VII. CERTIFICATION OF MBE'S AND JOINT VENTURES

Pursuant to the United States Supreme Court decision *J.A. Croson v. City of Richmond*, Virginia, the City of Oberlin performed a disparity study to determine, inter alia, the geographical borders for an MBE program. Minority businesses located within the State of Ohio will be certified as MBE's for purposes of this program. All provisions set forth hereinafter concerning MBE certification shall be read as including this restriction.

In order to ensure that this Program benefits only firms owned and controlled in both form and substance by one or more minority individuals, the City of Oberlin determines the eligibility for certification of every MBE seeking business opportunities with the City.

Any business, including the MBE partner in a joint venture, wishing to participate as an MBE in contracts and subcontracts let by the City must complete and submit a Schedule A - Information for Determining Minority Business Enterprise Eligibility. In addition, a joint venture MBE must also complete and submit Schedule B - Information for Determining Joint Venture Eligibility. The schedule(s) must be signed by the authorized representative of the business entity and notarized. A business wishing to be certified as an MBE or joint venture by the City must have been in business one (1) year prior to applying for certification as a minority business enterprise. Since only certified MBE's and joint ventures may be considered in evaluating an MBE participation plan, certification must be achieved five (5) business days prior to the relevant bid date. This requirement must be communicated to uncertified MBE's early on in the proceedings.

An MBE which has been certified by another agency may request in writing that the City accept evidence of that certification in lieu of Schedule(s) A and/or B. The City retains the right to deny such request and require the submission of Schedule(s) A and/or B.

An MBE which has been determined by the Small Business Administration to be owned and controlled by minority individuals under Section 8(a) of the Small Business Act, as amended, need only submit evidence of that determination.

The CCO shall promptly review said schedules and advise the applicant of its status as certified or not certified. If the applicant is not certified as an MBE, the reasons therefor shall be clearly stated in writing and submitted to the applicant.

The denial of certification by the City shall be final for the pending contract and all other contracts pending at the time of the denial. Persons who have been denied certification may correct the deficiencies which caused the denial and apply for certification for future contracts or may seek reconsideration at any time prior to award of a pending contract. The CCO may reconsider the denial of certification prior to the award of any pending contract.

Any firm which believes that it has been wrongly denied certification as an MBE or joint venture may file a written, signed and dated appeal with the City Manager.

Once certified, an MBE must update its submission annually by submitting a new Schedule A

or certifying that the Schedule A on file is still accurate. Any time there is a change in ownership or control of the firm, the MBE must submit a new Schedule A.

In determining the eligibility of a firm for certification as an MBE, the City will use the following standards:

1. The firm must be an independent business, and the ownership and control by minority individuals must be real, substantial, and continuing and must go beyond the pro forma ownership reflected in the firm's ownership documents. Said owners must enjoy the customary incidents of ownership and must share in the risks and profits commensurate with their ownership interests. Recognition of the business as a separate entity for tax or corporate purposes will not necessarily be sufficient for certification as an MBE. In determining whether a firm is an independent business, the City will consider all relevant factors, including the date the business was established, the adequacy of its resources for work as a contractor or subcontractor for the City, and the degree to which financial, equipment leasing, and other relationships with non-MBE firms vary from industry practice.
2. The minority owners must also possess the power to direct or cause the direction of the management and policies of the firm and to make the day-to-day, as well as major decisions on matters of management, policy, and operations. The firm must not be subject to any formal or informal restrictions which limit the customary discretion of the minority owners.
3. If the owners of the firm who are not minorities are disproportionately responsible for the operation of the firm, then the firm is not controlled by minority individuals and will not be certified as an MBE for purposes of this MBE Program. Where the actual management of the firm is contracted out to individuals other than the owner, those persons who have the ultimate power to hire and fire the managers will be considered as controlling the business.
4. All securities which constitute ownership and/or control of a corporation for purposes of establishing it as an MBE must be held in trust, or by a guardian for a minor, and will be considered as held by minority individuals in determining the ownership or control of a corporation.
5. The contribution of capital or expertise by the minority owners to acquire their interests in the firm must be real and substantial.

Special attention shall be paid to the following circumstances:

1. Newly formed firms and firms whose ownership and/or control has changed since the date of the advertisement of the contract will be closely scrutinized to

determine the reasons for the timing of the formation of or change in the firm.

2. A previous and/or continuing employer-employee relationship between or among present owners will be carefully reviewed to ensure that the employee-owner has the requisite management responsibilities and capabilities.
3. Any relationship between an MBE and a business that is not an MBE but which has an interest in the MBE, conflicts with the ownership and control requirements outlined herein.

A joint venture is eligible for certification if the MBE partner of the joint venture meets the standards set forth herein and the MBE partner is responsible for a clearly defined portion of the work to be performed and shares in the ownership, control, management responsibilities, risks, and profits of the joint venture.

Responsibility for determining whether a firm, in fact, is certified as an MBE will be the contractor's. Should it be found that a firm was used as an MBE but not qualified as such, the City reserves the right to impose sanctions against the contractor and the MBE which may include termination of the contract and the rejection of future bids.

Should certification or recertification be denied, the reason(s) for the denial shall be stated in writing. Applicants must be notified that there is an appeal process.

The City shall safeguard from disclosure to unauthorized persons information that reasonably may be regarded as confidential business information, consistent with federal, state and local law.

SECTION VIII. APPEALS OF DENIALS OF CERTIFICATION AS AN MBE

A. Filing:

Any individual or firm which believes that it has been wrongly denied certification as an MBE or joint venture may file an appeal in writing, signed and dated, with the City. The appeal shall be filed in the Office of the City manager no later than thirty (30) days after the date of denial of certification. The City Manager may extend the time for filings or waive the time limit in the interest of justice, specifying in writing the reasons for so doing. Third parties who have reason to believe that another firm has been wrongly denied or granted certification as an MBE or joint venture may advise the City Manager.

The City Manager may hold hearings on the matter where all parties may be present and may submit evidence pertaining to the appeal. The City Manager shall issue a written decision on the matter within ten (10) working days from the date of the filing of the appeal.

The MBE Advisory Committee shall have the following duties and responsibilities:

- a.) Shall assist the City in the identification of MBE's which can provide needed goods and services to the City.
- b.) Shall be trained by City staff on all bid procedures relating to securing contracts and subcontracts with the City. The organizations represented by the various members of the MBE Advisory Committee will be requested to hold training sessions for MBE's with which they work to enable the City to have the widest possible range of knowledgeable MBE bidders. The CCO will attend such sessions.
- c.) Shall meet with the CCO to review problems MBE's have in competing for contracts and subcontracts so that further procedures can be developed to legally remove impediments.
- d.) Shall receive notice of all invitations to bid, contract specifications, and other procurement related information at the earliest possible time.
- e.) Shall receive specific information bid analysis including the recommendations from the department head for contract award for the purpose of determining compliance with this ordinance.
- f.) Shall review reports of the CCO and may make additional suggestions for program modification to the City Manager and City Council.
- g.) Shall arrange for the recording and maintaining of all proceedings of the MBE Advisory Committee.

SECTION IX. GOALS

The provisions of this Minority Business Enterprise Program will be applied to all contracts in excess of \$10,000.

The City Manager, with the assistance of staff, shall annually review and recommend to City Council goals for the use of MBE's. Said goals, together with a description of the methodology used to establish them, shall be submitted to the City Council for approval.

The City Manager or his designee shall meet with staff members on a regular basis commencing no later than the first day of September of each calendar year to review the prior performance of this program and to establish the MBE goals for the coming year. The following minimum criteria shall be utilized in the determination of the goals: (1) the goals shall be based on the expected number and types of contracts to be awarded and the number

and types of MBE's likely to be available to compete for contracts to be awarded during the goal period, and (2) the goal shall be based on past results of the City's efforts to contract with MBE's and the reasons for these results.

Following the submission of said goals to City Council and their approval, the City Manager shall publish in general circulation and minority focus media and trade publications a notice announcing the goals and the fact that the goals and a description of the methodology used to establish them are available for inspection during regular business hours at the principal office of the City for thirty (30) days following said publication, the fact that the public may submit comments on said goals to the City within forty-five (45) days of the date of publication, and the fact that said publication, and the fact that said comments are for informational purposes only. The City Manager shall include in said notice the addresses to which comments may be sent.

A. Dollar awards in excess of \$10,000

The City of Oberlin hereby establishes the following goals for participation by MBE's in contracts, subcontracts, and/or joint ventures awarded by the City:

1. 20% of construction/repair contract dollar amounts
2. 10% of supplies, services contract dollar amounts
3. 20% of professional services contract dollar amounts

A good faith effort must be made to obtain all goals.

B. Purchases under \$10,000

The city of oberlin hereby established the following goal for purchases which are under \$10,000:

1. 10% for material, equipment, services and supplies

A good faith effort must be made to obtain all goals.

SECTION XI. COMPLAINTS

Any person who believes himself or herself, another person, or any specific class of individuals to be subjected to a violation of these policies may file a complaint in writing, signed and dated, with the City Manager. The complaint shall be filed no later than thirty (30) days after the date of an alleged violation or the date on which a continuing course of

conduct in violation of this part was disclosed. The City Manager may extend the time for filing or waive the time limit in the interest of justice, specifying in writing the reason for so doing.

Any party desiring to file an appeal of the decision of the City Manager may do so by filing a notice of appeal with the Clerk of Council within ten (10) working days of the decision issued by the City Manager.

The City Council shall hear and decide the appeal within thirty (30) days from the filing of the appeal with the Clerk of Council.

Any involved party will cooperate fully with the investigation. Failure or refusal by such party to furnish requested information within ten (10) working days or other failure to cooperate is a violation of these policies.

Upon completion of the investigation, the City Council will inform the all parties involved of the results of the investigation in writing. If the investigation indicates a failure to comply with the MBE requirements, the remedies stated in these policies are followed.

Neither the City of Oberlin nor any contractor nor any other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by these policies, or because he or she made a complaint, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under these policies. The identity of complainants shall be kept confidential at their election during the conduct of any investigation, proceeding or hearing under these policies. But when such confidentiality is likely to hinder the investigation, the complainant shall be advised for the purpose of waiving this privilege.

SECTION XII. MBE DIRECTORY

A directory of bona fide (certified) minority business enterprises will be maintained and frequently updated. The directory will at a minimum include the following information on each MBE listed: name, address, and telephone number; (character of the enterprise; date business established; legal structure of business bonding capacity; type of work/service provided; and names of contact persons.

The directory will be made available to bidders and proposers who need this information in their efforts to meet the MBE requirements of the City. Specifically, lists of possible MBE subcontractors will be distributed at pre-bid conferences, and other information will be made available upon receipt of requests from bidders.

The directory will also be made available to procurement personnel and to the MBE Advisory Committee, and to any other referrals deemed appropriate, i.e., libraries.

The directory does not contain any information that reasonably may be regarded as confidential business information, consistent with federal, state and local law.

SECTION XIII. INTERNAL AUDIT AND REPORTING

The Contract Compliance Officer will maintain record-keeping systems which document all activities undertaken to further the policies and achieve the goals of this Program. These records will include:

1. Awards to MBE's, including names of contractors and subcontractors, nature of the work, total value of the contract or subcontract, and the amount of the MBE awards as a percentage of the dollar value of the funds expended in all contracts and subcontracts awarded;
2. Specific efforts to identify and award contracts and subcontracts to minority owned and controlled firms;
3. Copies of advertised invitations to bid;
4. Copies of direct mailings to minority businesses;
5. Pre-bid conference information;
6. Requests for assistance from MBE's interested in bidding on contracts let by the City;
7. Group meetings and training sessions for MBE's; and
8. Efforts to assist MBE's in acquiring bonding and insurance.

The CCO reports quarterly to the City Manager regarding the progress of this program. The entire program will be reviewed in detail annually, measuring accomplishments against goals, with necessary revisions recommended at that time.

The CCO is responsible for compiling the necessary data and submitting these reports on a timely basis.

SECTION XIV. SLIDING SCALE FOR MBE COMPARISON

The following table shall be used by the City Manager and Contract Compliance Officer to determine whether a bid is responsive and eligible to be considered for a contract award. If the bid of a Minority Business Enterprise exceeds that of a majority bidder by more than the amount and percentage set forth in said attachment, it shall not be considered responsive and, unless a waiver by City Council is granted, shall not be considered for a contract award.

<u>Amount of Bid</u>	<u>Percentage Amount Above Low Dollar Bid Minority Bidders are Allowed to Exceed Majority Bidders</u>
\$ 5,000 - \$ 9,999	5.6%
\$ 10,000 - \$ 14,999	5.4%
\$ 15,000 - \$ 19,999	5.2%
\$ 20,000 - \$ 24,999	5.0%
\$ 25,000 - \$ 29,999	4.8%
\$ 30,000 - \$ 34,999	4.6%
\$ 35,000 - \$ 39,999	4.4%
\$ 40,000 - \$ 44,999	4.2%
\$ 45,000 - \$ 49,999	4.0%
\$ 50,000 - \$ 54,999	3.8%
\$ 55,000 - \$ 59,999	3.6%
\$ 60,000 - \$ 64,999	3.4%
\$ 65,000 - \$ 69,999	3.2%
\$ 70,000 - \$ 74,999	3.0%
\$ 75,000 - \$ 79,999	2.8%
\$ 80,000 - \$ 84,999	2.6%
\$ 85,000 - \$ 89,999	2.4%
\$ 90,000 - \$ 94,999	2.2%
\$ 95,000 - \$ 99,999	2.0%
\$100,000 - \$149,999	1.8%
\$150,000 - \$199,999	1.6%
\$200,000 - \$249,999	1.5%
\$250,000 - \$299,999	1.4%
\$300,000 - \$349,999	1.3%
\$350,000 - \$399,999	1.2%
\$400,000 - \$449,999	1.1%
\$450,000 - \$499,999	1.05%
\$500,000 & Above	1.0%

SECTION XV. FLUCTUATING GOALS

Prior to the issuance of a request for proposal or a request for bids, the City staff responsible for the issuance of the request, with the cooperation of the Contract Compliance Officer shall set the MBE participation goal for that specific purchase. Individual fluctuating goals ranging from 0% to 100% may be set based primarily upon the subcontracting opportunities available in a given procurement, and the availability and capability of MBE firms listed on the City's

directory of certified MBE's.

SECTION XVI. WAIVER

City Council may grant a waiver of the requirements set forth in this Minority Business Enterprise Program upon recommendation of the City Manager, upon a showing of impossibility of compliance, unusual hardship to the City, emergency, or other circumstances peculiar to the specific bid.

SECTION XVII. PENALTY

In addition to all other penalties or remedies available to the City as set forth hereinbefore, the responsible officers of any purported MBE and/or the responsible officers of any non-MBE which is acting in concert with said purported MBE, who knowingly and willingly attempt to circumvent the MBE eligibility standards as set forth in Section VII of the MBE Program Ordinance, or who fraudulently induce the City of Oberlin to certify an MBE which, in fact, does not comply with those standards, are guilty of a misdemeanor or the first degree and, upon conviction, shall be subject to a fine of not more than \$1,000 and imprisonment of not longer than six (6) months.

SECTION XVIII. GRADUATION

In order to ensure that the MBE program meets its objective of helping small minority businesses become self-sufficient and able to compete in the market with non-minority firms, that MBE firms should "graduate" from the program once their average annual receipts reached \$14 million.

In implementing this provision a firm is not "graduated" from the program, and hence no longer an eligible MBE, until its average annual gross receipts over the previous three year period exceed \$14 million. The fact that a firm exceeds \$14 million in gross receipts in a single year does not necessarily result in graduation.

It should also be pointed out that the \$14 million ceiling, like small business size limits under Section 3 of the Small Business Act, includes revenues of "affiliates" of the firm as well as the firm itself.

In addition, firms still are subject to applicable lower limits on business size standards established by the Small Business Administration in 13 CFR 121. For example, if Small Business Act regulations say that \$7.5 million average gross annual revenue is the size limit for a certain type of business, that size limit rather than the overall \$14 million ceiling determines whether the firm qualifies in terms of its size to be an MBE.

051596

ERIC R. SEVERS

LAW OFFICES OF

Eric R. Severs Co., L.P.A.

FIRST FLOOR

BANK ONE BUILDING

5 SOUTH MAIN STREET

OBERLIN, OHIO 44074

May 22, 1996

TELEPHONES

OBERLIN (216) 774-1278

ELYRIA (216) 322-7624

Ms. Fran Baumann
Chair, Oberlin City Council
64 East Lorain Street
Oberlin, Ohio 44074

Re: Proposed Minority Business Enterprise Program Ordinance Amendments

Dear Chair Baumann:

I have had the opportunity to review the draft of the proposed modifications to Ordinance No. 85-65 AC CMS, as amended, the Oberlin Minority Business Enterprise Program. Other than some minor typographical and punctuation changes, the modifications, as proposed, are fine.

I mention one concern regarding the program. Since the J.A. Croson Co. case (Richmond v. J.A. Croson Co. 488 US 469 [1989]), any such race-based programs at the state or local level are subject to strict scrutiny. Further, that case, and those decided after it in the federal court system, indicates that such programs must be narrowly tailored and last no longer than the discriminatory effects they are designed to eliminate.

In order to comply with the requirements set forth in the Croson case, the City of Oberlin did perform a disparity study. As a result of that disparity study, certain minor modifications were made to our MBE program. However, there was a dearth of historical information available to the team of students that completed the disparity study. Accordingly, there may be some weakness in our disparity study itself.

Moreover, the federal courts, and more specifically the U.S. Supreme Court, appear to be turning more conservative. That is, the burden of proof (and corresponding historic data and studies) in order to satisfy the strict scrutiny test seems to be ever increasing. I am not altogether convinced that our current MBE ordinance and the disparity study upon which it is based could survive this recently heightened scrutiny.

Yours truly,



Eric R. Severs

Oberlin City Solicitor

ERS:smw

cc: Robert DiSpirito, City Manager
George Abram, Chairperson, MBE Advisory Committee
Marshall Whitehead, Contract Compliance Officer

85 S. Main Street, Oberlin, Ohio 44074

DATE: March 28, 1996

TO: To Whom It May Concern

FROM: George Abram, MBE Advisory Committee Chairperson

RE: DRAFT OF MBE ORDINANCE

To help you to review the draft of the Minority Business Enterprise (MBE) Ordinance, you will note that there are some words that are in **bold** and some that have a ~~strikeout line~~ through them.

The wording in **bold** is the language that the MBE Advisory Committee recommends. The wording that has a ~~strikeout line~~ is recommended for deletion.

If you have any questions, please contact Sharon Pearson for assistance.

/skp

B:\MBEORDMD.MEM

City of
Oberlin
85 South Main Street, Oberlin Ohio 44074

March 28, 1996

The Honorable Frances Baumann and
Members of Oberlin City Council
85 South Main Street
Oberlin, Ohio 44074

Dear Frances Baumann:

The Minority Business Enterprise (MBE) Advisory Committee has completed the review of the MBE Ordinance 85-65 and amendments. The results of our review are presented to you in this packet.

One of our more important recommendations has to do with the eight (8) county limit. We recommend that the eight (8) county limit for MBE certification be expanded to the entire State of Ohio for these reasons:

- ☐ The City receives bids from all around the State (and beyond). Therefore the City should likewise recognize, certify and utilize MBE's from the same area; where the City seeks majority firms the City should seek minority firms.
- ☐ The City participates in the State Cooperative Purchasing Program. One reason the City participates in the State Cooperative Purchasing Program is to drive down costs by forcing competition. Therefore, it behooves us to amend our ordinance accordingly.
- ☐ The 1993 Disparity Study states (page 131), "The City may add or subtract counties to this list as a result of the periodic review process."

Please note the attached graphs. The information for these graphs is from January 1993 through June 1995. You will notice that nearly 1/4 of all bids are from outside the eight (8) county MBE certification area. The MBE Advisory Committee believes that if the certification area expands, the City will be better able to reach it's MBE goal.

Minority Business Enterprise Committee
Page 2

The Committee requests your favorable consideration of these recommendations. Your earliest reply is requested.

Sincerely,

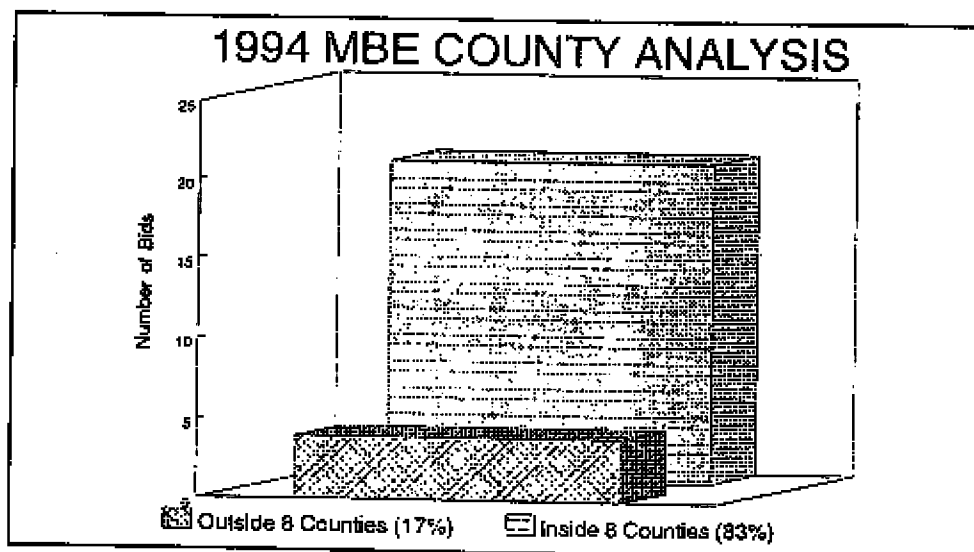
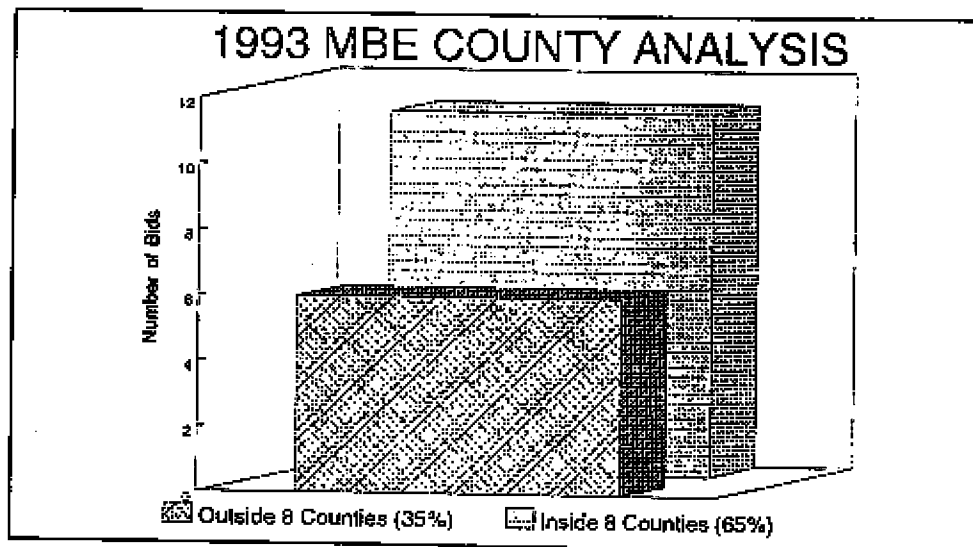
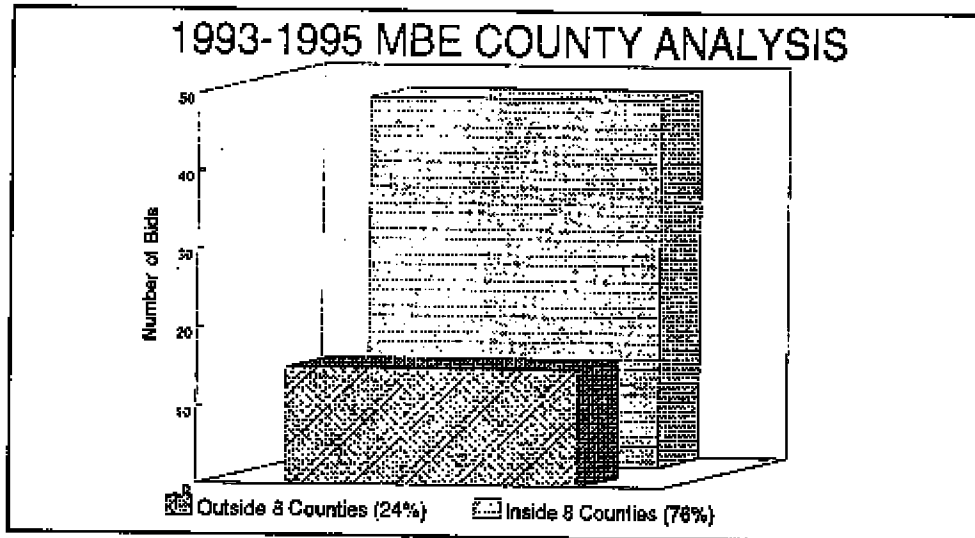
A handwritten signature in cursive script, appearing to read "George Abram", written in dark ink.

George Abram, Chairperson
MBE Advisory Committee

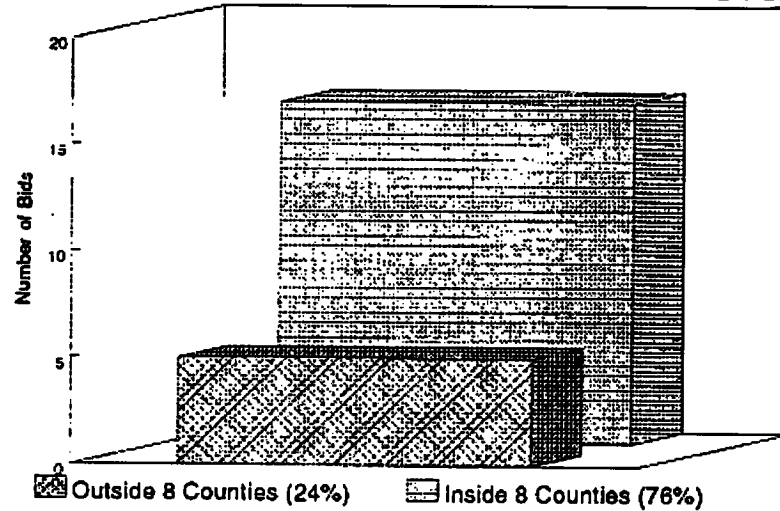
cc: File
MBE Advisory Committee
Marshall Whitehead, Contract Compliance Officer
Sharon Pearson, Assistant to Administration

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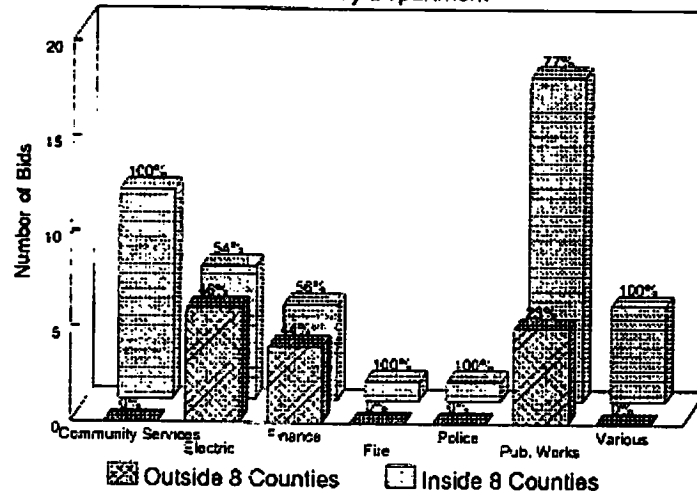
1993 - 1995 ACCEPTED BIDS ANALYSIS



1995 MBE COUNTY ANALYSIS



1993-1995 MBE COUNTY ANALYSIS By Department



1993-1995 MBE COUNTY ANALYSIS By Bid Type

