

Administration Amendment No. 3

Topic: Codifying the contracting process

Highlighted text **Added and Kept** **Deleted** shows Administration Amendment No. 3 to Bill 31-2021 (see pp. 6-10)

SUMMARY

Amendment No. 3: Codifying the contracting process

The third proposed amendment would codify the City’s existing streamlined practices for the opening and recommending of the lowest responsible bidder to the Council, as well as move the Administration’s review of the Contractor Responsibility Certification form into that process instead of delaying its review until after Council makes the award. This revision is important because all bids, by law, become invalid 60 days after opening and any post-award review could allow an alternate responsible bidder to be lost and require the contract to be readvertised. These precautionary revisions are highlighted in light green and dark green. Light green language would be added to the ordinance, whereas dark green language would be deleted. No contract could be signed until these processes are completed. These revisions would be made to §§124.04, 124.06, and 124.09.

Color Legend: Text **Added and Kept**

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Note: Text from October 14, 2021 Administration memo “Amendment Proposals for RCO Bill”

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BILL NO. 31-2021

ORDINANCE NO. 2021-_____

AN ORDINANCE OF THE CITY OF BETHLEHEM, COUNTIES OF LEHIGH AND NORTHAMPTON, COMMONWEALTH OF PENNSYLVANIA, PROVIDING FOR THE ADOPTION OF CERTAIN PROCEDURES RELATED TO THE SOLICITATION AND AWARD OF PUBLIC CONTRACTS WITHIN THE CITY OF BETHLEHEM; PROVIDING FOR CERTIFICATION REQUIREMENTS FOR PUBLIC CONTRACTORS; PROVIDING FOR CERTIFICATION REQUIREMENTS FOR SUBCONTRACTORS TO PUBLIC CONTRACTS; PROVIDING FOR PUBLIC CONTRACT REVIEW PROCESSES; REPEALING INCONSISTENT ORDINANCES OR PARTS OF ORDINANCES; CONTAINING A SAVINGS CLAUSE AND PROVIDING FOR AN EFFECTIVE DATE; AND ESTABLISHING ARTICLE 124 OF THE CODIFIED ORDINANCES TITLED “RESPONSIBLE CONTRACTING PROCEDURES”

WHEREAS, The City of Bethlehem (the “City”) is duly empowered to enact certain laws needed to protect its proprietary and financial interests relating to major investments made by the City, as well as those relating to the public health, safety, and welfare for the citizens of the City; and

WHEREAS, the City has particular concerns regarding the challenges it faces in planning and executing public works construction projects, especially those relating to its ability to ensure the use of properly qualified contractors and subcontractors and adequate numbers of craft personnel who have industry recognized training in the respective skills and trades needed for future projects; and

WHEREAS, Bethlehem City Council has resolved by resolution No. _____, to address the above-referenced challenges through appropriate procurement and contracting legislation as embodied in this ordinance and wishes to incorporate the terms of this resolution in their entirety as material terms of this ordinance.

THE COUNCIL OF THE CITY OF BETHLEHEM HEREBY ORDAINS AS FOLLOWS:

SECTION 1.

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Article 124 of the Codified Ordinances of the City of Bethlehem, titled “Responsible Contracting Procedures,” is hereby established and shall read as follows:

124.01. Purpose

(a) The City recognizes that there is a need to ensure that all work on public construction and maintenance contracts is performed by responsible, qualified firms that maintain the capacity, expertise, personnel and other qualifications and resources necessary to successfully perform public contracts in a timely, reliable and cost-effective manner.

(b) To effectuate the purpose of selecting responsible contractors for public contracts and to protect the City’s investments in such contracts, prospective contractors and subcontractors should be required to meet pre-established, clearly defined, minimum standards relating to contractor responsibility, including requirements and criteria concerning technical qualifications, competency, experience, adequacy of resources, including equipment, financial and personnel resources, and satisfactory records regarding past project performance, safety, law compliance and business integrity.

(c) Further, due to the critical impact that skilled construction craft labor has on public works projects, and due to the limited availability of skilled construction craft labor and imminent craft labor skill shortages, it is necessary to require contractors and subcontractors to participate in established, formal apprenticeship training programs as a condition of bidding, for the purpose of both promoting successful project delivery and ensuring future workforce development.

(d) Therefore, the City shall require compliance with the provisions of this ordinance by business entities seeking to provide services to the City as specified herein. The requirements of this ordinance are intended to supplement, not replace, existing contractor qualification and performance standards or criteria currently required by law, public policy or contracting documents. However, in the event that any of the provisions of this ordinance conflict with any law, public policy or contracting documents of the City, this ordinance shall prevail.

124.02. Responsible Contractor Requirements

(a) This ordinance shall apply to public works **projects contracts** undertaken by the City for the construction, demolition, alteration, renovation, modernization, service or maintenance of buildings, structures or facilities valued at **\$100,000 or more. All contractors and subcontractors that perform on such projects, regardless of the value of individual contracts or subcontracts, shall satisfy the requirements of this ordinance in all respects \$250,000 or more and required to be bid under the Third Class City Code. This shall not apply to projects not required to be bid under Third Class City Code, to contracts secured pursuant to joint purchasing agreements, COSTARS and other purchasing protocols authorized by the Commonwealth.**

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(b) All firms engaged in contracts covered by this ordinance shall be qualified, responsible contractors or subcontractors that have sufficient capabilities in all respects to successfully perform contracts on which they are engaged, including the necessary experience, equipment, technical skills and qualifications and organizational, financial and personnel resources. Firms bidding on public contracts shall also be required to have a satisfactory past performance record and a satisfactory record of law compliance, integrity and business ethics.

124.03. Contractor Responsibility Certifications

(a) As a condition of performing work on a public works contract subject to this ordinance, a general contractor, construction manager or other lead or prime contractor seeking award of a contract shall submit a Contractor Responsibility Certification.

(b) The Contractor Responsibility Certification shall be completed on a form provided by the City and shall reference the project for which a bid is being submitted by name and contract or project number.

(c) In the Contractor Responsibility Certification, the construction manager, general contractor or other lead or prime contractor shall confirm the following facts regarding its past performance and work history and its current qualifications and performance capabilities:

(1) The firm and its employees have all valid, effective licenses, registrations or certificates required by federal, state, City, or local law, including, but not limited to, licenses, registrations or certificates required to: (a) do business in the designated locale; and (b) perform the contract work it seeks to perform. These shall include, but not limited to, licenses, registrations or certificates for any type of construction or maintenance trade work or specialty work which the firm proposes to self-perform.

(2) The firm meets the bonding requirements for the contract, as required by applicable law or contract specifications and any insurance requirements, as required by applicable law or contract specifications, including general liability insurance, workers compensation insurance and unemployment insurance.

(3) The firm has not been debarred or suspended by any federal, state or local government agency or authority in the past three (3) years.

(4) The firm has not defaulted on any project in the past three (3) years.

(5) The firm has not had any type of business, contracting or trade license, registration, or other certification revoked or suspended in the past three (3) years.

(6) The firm and its Principals/owners have not been convicted of any crime relating to the contracting business in the past ten (10) years.

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(7) The firm has not within the past three (3) years been found in violation of any law applicable to its contracting business, including, but not limited to, licensing laws, tax laws, prompt payment laws, wage and hour laws, prevailing wage laws, environmental laws or others, where the result of such violation was the payment of a fine, back pay damages or any other type of penalty in the amount of \$5,000 or more.

(8) The firm will pay all craft employees that it employs on the project the current wage rates and fringe benefits as required under applicable federal, state or local wage laws.

(9) All craft labor that will be employed by the firm for the project have completed at least the OSHA 10-hour training course for safety established by the U.S. Department of Labor, Occupational Safety & Health Administration.

(10) The firm will employ craft employees in all classifications and individual trades required to successfully perform the work related to this project.

(11) ~~<reserved.> The firm participates in a Class A Apprenticeship Program for the past three (3) years, at a minimum, for each separate trade or classification in which it employs craft employees and shall continue to participate in such program or programs for the duration of the project. This apprenticeship requirement helps ensure that workers employed on the project are participants in or graduates of bona fide apprenticeship training programs in each trade or craft in which their services are utilized, as evidenced by the fact that the program is registered with federal or state government and has been in continuous existence for no fewer than five (5) years prior to the project relating to the certification. For purposes of this section, a Class A Apprenticeship Program is an apprenticeship program that is currently registered with and approved by the U.S. Department of Labor or a state apprenticeship agency and has graduated apprentices to journey person status for at least three (3) of the past five (5) years. This may be an apprenticeship program that is subject to the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. ("ERISA"), or a non-ERISA program. To demonstrate compliance with this section, the firm shall provide, with this certification, a list of all trades or classifications of craft employees it will employ on the project and documentation verifying it participates in a Class A Apprenticeship Program.~~

(12) The firm has all other technical qualifications and resources, including equipment, personnel and financial resources, to perform the referenced contract, or will obtain same through the use of qualified, responsible subcontractors.

(13) The firm will maintain all qualifications, resources and capabilities referenced in this certification throughout the duration of the project.

(14) The firm shall notify the City within seven (7) days of any material changes to all matters attested to in this certification.

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(15) The firm understands that the Contractor Responsibility Certification required by this section shall be executed by a person who has sufficient knowledge to address all matters in the certification and shall include an attestation stating, under the penalty of perjury, and/or Unsworn Falsification to Authorities, that the information submitted is true, complete and accurate.

(d) Execution of the Contractor Responsibility Certification required by this ordinance shall not establish a presumption of contractor responsibility and the City may require any additional information it deems necessary to evaluate a firm's status as a responsible contractor, including technical qualifications, financial capacity or other resources and performance capabilities. The City may require that such information be included in a separate Statement of Qualifications and Experience or as an attachment to the Contractor Responsibility Certification.

(e) The submitting firm shall stipulate in the Contractor Responsibility Certification that, if it receives a Notice of Award **Intent to Award Contract**, it will provide a Subcontractor List and required subcontractor information as specified in Section 124.05 of this ordinance.

(f) If the submitting firm has ever operated under another name, or is controlled by another company or business entity, or in the past five (5) years controlled or was controlled by another company or business entity, whether as a parent company, subsidiary or in any other business relation, it shall attach a separate statement to its Contractor Responsibility Certification that explains in detail the nature of any such relationship. Additional information may be required from such an entity if the relationship in question could potentially impact contract performance.

(g) If a firm fails to provide a Contractor Responsibility Certification required by this section, it shall be disqualified from bidding. No action of any nature shall lie against the City because of its refusal to accept a bid for failing to provide information required by this section.

124.03A Bid Preference for Apprenticeship Programs

(a) On contracts valued over \$250,000 for which the City secures competitive bids pursuant to City and State law, the Purchasing Bureau shall award a bid preference as set forth in subsection 124.03(c) to any firm that submits with its bid, a Contractor Responsibility Certification, and participates in an apprenticeship program registered with the Commonwealth of Pennsylvania for each separate trade or classification in which it employs craft employees and shall continue to participate in such program or programs for the duration of the project. This apprenticeship requirement helps ensure that workers employed on the project are participants in or graduates of bona fide apprenticeship training programs in each trade or craft in which their services are utilized.

(b) In determining the lowest responsible bidder on any such contract, the City shall subtract the amount set forth in subsection 124.03(c) from the bid amount of any bidder who shall have submitted a Contractor Responsibility Certification and participate in an apprenticeship program in the manner specified in Article 124.03(a) for purposes of

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comparing such bid against other bidders. The contract amount awarded, however, shall be the amount of the price offered, exclusive of the preference.

(c) The amount of the bid preference shall be two percent (2%).

(d) The City may determine not to award a bid preference if the City certifies that such a preference would result in the loss of federal, state or similar funds or grants.

124.04. Notice of Award ~~Notice of Intent to Award Contract~~

(a) After it has received bids for a public works construction project, the City Administration shall evaluate all bids for compliance with this Article 124, Article 121.05, the Third Class City Code, the requirements of the contract documents, and all applicable other laws, ordinances, rules, and regulations, as well as engage in additional inquiries to verify that the prospective awardee and its subcontractors have the technical qualifications and performance capabilities necessary to successfully perform the contract and that the firms have a sufficient record of law compliance and business integrity to justify the award of a public contract to the lowest responsible bidder. In conducting such inquiries, the City may seek relevant information from the firm, its prior clients or customers, its subcontractors or any other relevant source.

(b) For each public works construction contract being awarded in an amount in excess of \$50,000 which is required to be advertised for bids under the Third Class City Code, the City Administration shall prepare a memorandum directed to City Council recommending the lowest responsible bidder to whom the contract should be awarded and the following information:

- (1) the contract price;
- (2) whether the contract appropriation is included in the current year's budget;
- (3) all funding sources for the work to be performed;
- (4) the term of the contract;
- (5) a description of the scope of work to be performed; and
- (6) the completed Contractor Responsibility Certification, if required by Article 124.02.

(c) Upon receipt of the memorandum, City Council shall consider the recommendation of the Administration and take such action thereon at it deems appropriate in a manner allowed by law.

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~~(a) After it has received bids for a project, the City shall issue a Notice of Intent to Award Contract to the firm offering the lowest responsible bid.~~

~~(b) Such Notice shall be issued immediately or as soon as practicable after bids are opened and Notice of Intent to Award Contract is issued. The Notice shall stipulate that the contract award is conditioned on the issuance of a written Contractor Responsibility Determination, as required by Section 124.05 and any other conditions deemed appropriate by the City.~~

124.05. Subcontractor Lists

~~(a)~~ A prospective awardee shall submit to the City a Subcontractor List containing the names of any subcontractors that will be used for the referenced project, their addresses, and a description of the work each listed subcontractor will perform on the project.

~~(b) At the time a prospective awardee submits the Subcontractor List, it shall also submit Subcontractor Responsibility Certifications for all listed subcontractors to the City. Subcontractor Responsibility Certifications shall be executed by the respective subcontractors on forms prepared by the City and shall contain the same information and representations required in Contractor Responsibility Certifications, including verification of apprenticeship qualifications as required by Section 124.03(c)(11), for each trade or classification of craft workers it will employ on the project.~~

~~(c) Subcontractor Responsibility Certifications shall be executed by a person having sufficient knowledge to address all matters in the certification and shall include an attestation stating, under the penalty of perjury and/or Unsworn Falsification to Authorities, that all information submitted is true, complete and accurate.~~

124.06. <Reserved; simplified and prior content merged into 124.04>

~~124.06. Contractor Responsibility Review and Determination~~

~~(a) After a Notice of Intent to Award Contract has been issued, the City shall undertake a review process to determine whether the prospective awardee is a qualified, responsible contractor in accordance with the requirements of this ordinance and other applicable laws and regulations and has the resources and capabilities to successfully perform the contract. The time of the review process shall be as determined necessary by the City.~~

~~(b) As part of this review process, the City shall ensure that the Contractor Responsibility Certification, the Subcontractor List and the Subcontractor Responsibility Certifications, as required by this ordinance, have been submitted and properly executed.~~

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~~(e) The City may conduct any additional inquiries to verify that the prospective awardee and its subcontractors have the technical qualifications and performance capabilities necessary to successfully perform the contract and that the firms have a sufficient record of law compliance and business integrity to justify the award of a public contract. In conducting such inquiries, the City may seek relevant information from the firm, its prior clients or customers, its subcontractors or any other relevant source.~~

~~(d) If at the conclusion of the review process the City determines that all responsibility certifications have been properly completed and executed, and if it concludes that the qualifications, background and responsibility of the prospective awardee and the firms on its Subcontractor List are satisfactory, it may issue a formal written Contractor Responsibility Determination verifying that the prospective awardee is a qualified, responsible contractor. In the event a firm is determined to be non-responsible, the City shall proceed to conduct a responsibility review of the next lowest, responsive bidder or, if necessary, rebid the project.~~

~~(e) A Contractor Responsibility Determination may be issued after the conclusion of the review process under Section 124.06. A Responsibility Determination may be revoked or revised in any manner at any time if the City obtains relevant information warranting any such revocation or revisions.~~

124.07. Subcontractor ~~Responsibility Review~~ Requirements

(a) A construction manager, general contractor or other lead or prime contractor shall not be permitted to use a subcontractor on any work performed for the City unless it has identified the subcontractor on its Subcontractor List, ~~and provided a Subcontractor Responsibility Certification in accordance with the requirements of Section 124.05.~~

(b) A subcontractor listed on a firm's Subcontractor List shall not be substituted unless written authorization is obtained from City, ~~and a Subcontractor Responsibility Certification is provided for the substitute subcontractor.~~

(c) In the event that the City determines that a prospective subcontractor listed by the apparent low bidder does not meet the responsibility standards of this ordinance, it may, after informing the prospective awardee, exercise one of the following options:

(1) permit the awardee to substitute a qualified, responsible, subcontractor in accordance with the requirements of this section;

(2) require the awardee to self-perform the work in question if the firm has the required experience, licenses and other qualifications to perform the work in question; or

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(3) disqualify the prospective awardee.

(d) In the event that a subcontractor is disqualified ~~under this ordinance~~, the general contractor, construction manager or other lead or prime contractor shall not be permitted to make any type of contractual claim against the City on the basis of a subcontractor disqualification.

124.08. False or Misleading Responsibility Certifications

~~(a)~~ If the City determines that a Contractor ~~or Subcontractor~~ Responsibility Certification contains false or misleading material information that was provided knowingly or with reckless disregard for the truth, or omits material information knowingly or with reckless disregard of the truth, the firm for which the certification was submitted shall be prohibited from performing work for the City for a period of three (3) years, and shall be subject to any other penalties and sanctions, including contract termination, available to the City under law. A contract terminated under these circumstances shall further entitle the City to withhold payment of any monies due to the firm as damages.

124.09. Execution of Final Contract **[stricken language merged into 124.04]**

(a) A contract subject to this ordinance shall not be executed until all conditions of the Notice of Award have been fulfilled.

(b) All bid submissions and awarded contracts shall be available for public inspection and copying in the manner allowed by the Pennsylvania Right-to-Know Law.

~~(a) A contract subject to this ordinance shall not be executed until all requirements of this ordinance have been fulfilled and until Contractor and Subcontractor Responsibility Certifications have been issued by the City under Section 124.06(d). Upon completion of all requirements under this ordinance, the City may execute a final contract based upon the Notice of Intent.~~

~~(b) Prior to the execution of a final contract under this Section, the City shall publicly post the Notice of Intent to Award, Contractor and Subcontractor Responsibility Certifications, Subcontractor Lists and Contractor Responsibility Determination on the City website for public inspection for a period of five (5) calendar days after the issuance of the Contractor Responsibility Determination.~~

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124.10 Waiver of RCO Requirements

~~The requirements listed in Section 124.03(e)(11) and Section 124.07(e) may only be waived by resolution of the City Council under the following conditions:~~

- ~~(1) After three (3) attempts, no bids that meet the requirements of this ordinance have been received for the project by the close of the bidding periods;~~
- ~~(1) Bid materials and waiver resolution are provided to the City Council Clerk no later than 12:00 PM on the Thursday before the next scheduled City Council meeting;~~
- ~~(2) The waiver may only apply for the specific project;~~

~~The resolution shall identify the basis for the waiver, which provisions of sections 124.03 and 124.07 are to be waived, and whether the project shall be re-bid.~~

SECTION 2.

The terms, conditions and provisions of this ordinance are hereby declared to be severable, and, should any portion, part or provision of this ordinance be found by a court of competent jurisdiction to be invalid, unenforceable or unconstitutional, City Council hereby declares its intent that the ordinance shall have been enacted without regard to the invalid, unenforceable or unconstitutional portion, part or provision of this ordinance.

SECTION 3.

This ordinance shall become effective twenty (20) days after enactment.

SECTION 4.

Any and all other ordinances or parts of ordinances in violation or in conflict with the terms, conditions and provisions of this ordinance are hereby repealed to the extent of such irreconcilable conflict.

Sponsored by: _____

PASSED finally in Council on this _____ day of _____, 2021.

President of Council

ATTEST:

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City Clerk

This Ordinance approved this this _____ day of _____, 2021.

Mayor

AMENDMENT SPONSORS

Sponsored by: _____
