

ORDINANCE NO. 2018-

AN ORDINANCE OF THE BOARD OF COUNTY COMMISSIONERS OF BROWARD COUNTY, FLORIDA, PERTAINING TO THE BROWARD COUNTY BUSINESS OPPORTUNITY ACT RELATING TO COUNTY PROCUREMENT AND CONTRACTING OPPORTUNITIES FOR COUNTY BUSINESS ENTERPRISES ("CBEs") AND SMALL BUSINESS ENTERPRISES ("SBEs"); AMENDING SECTIONS 1-81 THROUGH 1-81.8 AND CREATING A NEW SECTION 1-81.9 OF THE BROWARD COUNTY CODE OF ORDINANCES ("CODE"); AMENDING DEFINITIONS; ALLOWING ADDITIONAL TIME FOR BIDDERS TO DEMONSTRATE COMPLIANCE WITH CBE GOALS DURING THE PROCUREMENT PROCESS; CLARIFYING REQUIREMENTS FOR BIDDERS TO ESTABLISH GOOD FAITH EFFORTS TO MEET CBE GOALS; UPDATING CBE AND SBE CERTIFICATION STANDARDS; AMENDING ENFORCEMENT PROVISIONS; AND PROVIDING FOR SEVERABILITY, INCLUSION IN THE CODE, AND AN EFFECTIVE DATE.

(Sponsored by Vice-Mayor Mark D. Bogen and Commissioners Dale V.C. Holness and Barbara Sharief)

WHEREAS, the Broward County Board of County Commissioners has determined that amending Sections 1-81 through 1-81.8 and creating a new Section 1-81.9 of the Broward County Code of Ordinances, pertaining to the Broward County Business Opportunity Act of 2012, is appropriate at this time,

BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF BROWARD COUNTY, FLORIDA:

Section 1. Section 1-81 of the Broward County Code of Ordinances is hereby amended to read as follows:

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1 **Sec. 1-81. Short title.**

2 This section shall be known and may be cited as the "Broward County Business
3 Opportunity Act of 2012" (the "Act").

4 Section 2. Section 1-81.1 of the Broward County Code of Ordinances is hereby
5 amended to read as follows:

6 **Sec. 1-81.1. Objectives and definitions.**

7 (a) *Program objectives.*

8 (1) To ensure that small Broward County-based ~~entities~~ businesses are
9 provided sufficient opportunities to meaningfully participate in the award of
10 County-funded contracts; and

11 (2) To ensure that only the entities that meet the eligibility criteria stated herein
12 are permitted to participate in the programs established by this Act.

13 (b) *Administrative Procedures.* The County Administrator, ~~or his or her~~
14 ~~designee,~~ shall develop administrative procedures to fully implement the provisions of this
15 Act. ~~However, to~~ To the extent that there is any conflict between the provisions of this Act
16 and those procedures, or between the provisions of this Act and any provision of the
17 Broward County Administrative Code, the provisions of this Act shall control.

18 (c) *Program definitions.*

19 (1) *Affiliate* means any corporation, firm, limited liability company, partnership,
20 or other entity that ~~is a parent or subsidiary of, or as determined by the~~
21 ~~Program Director is related to, an entity certified or seeking certification~~
22 ~~under this section~~ directly or indirectly controls, is controlled by, or is under
23 common control with, the entity applying for or certified as a CBE or SBE
24 (as applicable). *Control* means (i) ownership, directly or through one (1) or

1 more affiliates, of fifty percent (50%) or more of the shares of stock entitled
2 to vote for the election of directors, in the case of a corporation, or fifty
3 percent (50%) or more of the equity interests in the case of any other type
4 of legal entity; (ii) status as a general partner in the case of a partnership;
5 (iii) any other arrangement whereby a party controls or has the right to
6 control the Board of Directors or equivalent governing body of the entity; or
7 (iv) in the case of a corporation or a partnership, if the abovementioned
8 applicable level of ownership or control is prohibited in any country where
9 the entity is organized or maintains its headquarters or principal place of
10 business, the maximum ownership or control level for the entity permitted
11 in that country.

12 (2) *Bid* means a response to any County procurement solicitation.

13 (3) *Bidder* means an entity that submits a response to any County procurement
14 solicitation.

15 (4) *Bidder Assurance* means a written pledge, on the Bidder's company
16 letterhead, signed by an authorized representative, in which the Bidder
17 (i) agrees to fully comply with the requirements of the Act; (ii) acknowledges
18 the CBE goal established in the solicitation for the project; and (iii) agrees
19 to engage in Good Faith Efforts, as defined below, to achieve the CBE goal
20 and related requirements as stated in the solicitation documents.

21 (5) *Board* means the Broward County Board of County Commissioners.

22 ~~(4)~~ (6) *Broker* means an individual or entity that ~~seeks to provide goods or services~~
23 ~~to the County that the entity does not provide to other customers in the~~
24 ~~ordinary course of its business~~ acts merely as an intermediary between the

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1 County and prospective suppliers, retailers, or wholesalers of goods,
2 materials, or services. For purposes of the Act, a Broker does not include
3 an individual or entity that owns, operates, or maintains a store, warehouse,
4 or other establishment in which the goods, materials, or services are
5 regularly sold in the ordinary course of business by such individual or entity.

6 ~~Where the procurement at issue primarily involves the purchase of goods,~~
7 ~~an entity that does not, as determined by the Program Director, stock in its~~
8 ~~inventory the general type of goods it seeks to provide to the County is a~~
9 ~~broker. The preceding sentence shall not apply when the cost of an~~
10 ~~individual unit of goods addressed by the procurement exceeds twenty-five~~
11 ~~thousand dollars (\$25,000).~~

12 ~~(5)~~ (7) *Broward County Small Business Development Program or Program* means
13 ~~all requirements of this Act, as well as any administrative policies or~~
14 ~~procedures adopted pursuant to this Act~~ the County's initiatives, through
15 OESBD and its procurement process, to aid and assist the interests of small
16 businesses in Broward County, ensure that small businesses have a fair
17 opportunity to participate in County contracts, preserve free competitive
18 enterprise, and maintain and strengthen the overall economy of Broward
19 County. The Program includes the rules, regulations, and policies
20 delineated in the Act, Chapter 19, Part V of the Broward County
21 Administrative Code, and related administrative procedures.

22 ~~(6)~~ (8) *Commercially ~~u~~Useful ~~f~~Function* means that a CBE or SBE ~~has~~ performs
23 the following functions as part of its ~~direct contractual~~ responsibility for the
24 ~~execution of a distinct element of the work of a County contract; is required~~

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1 to carry out its contractual responsibilities by actually providing, performing,
2 managing, and supervising the work involved in that contract; and does not
3 act as a broker. under a contract with the Prime Contractor and/or the
4 County, as applicable:

- 5 a. Provides a distinct element of the work under the contract;
- 6 b. Provides management of the work assigned by the Prime Contractor
7 and/or the County, as applicable, and supervision of staff designated
8 to complete the elements of the assigned work;
- 9 c. Performs work under the contract that is consistent with the services
10 and functions it generally provides to other entities in the normal
11 course of its business (e.g., an engineering firm providing
12 engineering design provides a commercially useful function; a CBE
13 or SBE offering consulting services that are vague or not sufficiently
14 detailed which deviate from its normally offered services, would not
15 satisfy this requirement); and
- 16 d. Performs at least fifty percent (50%) of the assigned work with its
17 own employees under its direct management and supervisory
18 control. Conversely stated, the CBE or SBE may not subcontract
19 more than fifty percent (50%) of the work to be performed. Subject
20 to the fifty percent (50%) self-performance requirement, the
21 percentage of self-performed work may vary for certain specialties,
22 including general contractors, based on normal industry practices.
23 However, credit (toward meeting assigned CBE goals) for certified
24 entity participation is only granted for that portion actually performed

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1 by certified CBEs. Note that in projects involving a CBE or SBE
2 reserve, all work associated with the reserve must be performed by
3 CBEs or SBEs, as applicable, in order to be considered responsible
4 under the reserve requirement or the applicable procurement
5 solicitation.

6 ~~(7)~~ (9) *Continuous ~~o~~Operating ~~p~~Presence* means an entity with a current business
7 tax receipt issued by Broward County; that has a physical address ~~number~~
8 ~~and street name~~ located within the geographical limits of Broward County
9 (not a P.O. Box or address provided by a business service center); that has
10 continuously maintained such address for at least one (1) year prior to the
11 time of application for certification; that, if reasonably expected to have
12 equipment in its trade, has located such equipment in its Broward County
13 location; that has been in operation and employs at least one (1) full-time
14 employee or equivalent engaged in its primary specialty at its Broward
15 County location for a period of at least one (1) year; and that, as determined
16 by the Program Director, employs sufficient employees in Broward County,
17 ~~or otherwise demonstrates that it has sufficient staffing,~~ to perform the work
18 required under a contract covered by this ~~section~~ Act. A CBE or SBE may
19 not use a government-owned facility as a business address for purposes of
20 establishing a continuous operating presence unless the CBE or SBE has
21 a lease to occupy such facility.

22 (10) County means Broward County, Florida.

23 ~~(8)~~ (11) *County Business Enterprise ~~or~~ or CBE* means an entity certified as a CBE
24 by the County as provided herein.

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1 (12) Good Faith Efforts means that the Bidder, without an intent to defraud or to
2 seek an unfair advantage, took all necessary steps to secure and maximize
3 CBE participation to meet or exceed the established CBE goal for the
4 project. The determination of Good Faith Efforts shall be made by the
5 Program Director upon evaluation of the Bidder's response to the
6 solicitation.

7 ~~(9)~~ (13) OESBD means the Broward County Office of Economic and Small Business
8 Development.

9 ~~(10)~~ (14) Personal Net Worth means the value of the assets of an individual after
10 total liabilities (not including contingent liabilities) are deducted. For
11 purposes of CBE or SBE certification, an individual's personal net worth
12 shall not include either the individual's ownership interest in any CBE or
13 SBE applying for certification or certified by the County, or the individual's
14 equity in his or her primary place of residence.

15 (15) Prime Contractor means an entity awarded a County contract.

16 ~~(11)~~ (16) Program Director means the Director of OESBD, or his or her designee.

17 ~~(12)~~ ~~Prime Contractor~~ means an entity awarded a County contract.

18 ~~(13)~~ (17) Small Business Enterprise or SBE means an entity certified as an SBE
19 by the County as provided herein.

20 ~~(14)~~ (18) Subcontractor means an entity that enters into a contract with a ~~p~~Prime
21 ~~e~~Contractor to perform work required by a ~~e~~County contract.

1 Section 3. Section 1-81.2 of the Broward County Code of Ordinances is hereby
2 amended to read as follows:

3 **Sec. 1-81.2. Certification standards.**

4 (a) The Program Director shall determine whether an entity is eligible for CBE
5 or SBE certification.

6 (b) *CBE Eligibility Requirements.* ~~In determining whether an entity meets the~~
7 ~~requirements for CBE eligibility, the Program Director shall consider the gross receipts~~
8 ~~and personal net worth of both the applicant for certification and all its affiliates.~~ An entity
9 is eligible for certification as a CBE if it meets the following criteria:

- 10 (1) The entity shall, when combined with any and all ~~a~~Affiliates, ~~have less than~~
11 ~~\$5 million in average annual gross revenue calculated over the previous~~
12 ~~three (3) calendar years. This average annual gross revenue figure shall~~
13 ~~be indexed annually commencing October 1, 2013, using the Council for~~
14 ~~Community and Economic Research's ACCRA Cost of Living Index as~~
15 ~~applied in Broward County~~ have annual average gross receipts no greater
16 than Five Million Dollars (\$5,000,000) calculated over the previous three (3)
17 calendar years, unless that entity is a construction firm or an entity offering
18 to sell commodities to the County; a construction firm (when combined with
19 any and all Affiliates) shall have annual average gross receipts no greater
20 than Nine Million Dollars (\$9,000,000) calculated over the previous three (3)
21 calendar years; to be eligible for certification, an entity offering to sell
22 commodities to the County (when combined with any and all Affiliates) must
23 employ twenty-five (25) or fewer permanent full-time employees but is not
24

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1 subject to any limitation with regard to gross revenue for certification as a
2 commodities firm;

3 (2) No person with a legal or beneficial ownership interest, direct or indirect, in
4 the entity or any ~~a~~Affiliate of the entity shall have a ~~p~~Personal ~~n~~Net ~~w~~Worth
5 exceeding ~~seven hundred and fifty thousand dollars (\$750,000)~~ One Million
6 Three Hundred Twenty Thousand Dollars (\$1,320,000); and

7 (3) The entity shall have a ~~e~~Continuous ~~o~~Operating ~~p~~Presence in Broward
8 County and may only operate in areas zoned to permit its operations. The
9 entity must allow OESBD to conduct site visits of its primary place of
10 business and any other place of operation by the entity at any time during
11 normal operating hours. The entity's obligation to allow site visits shall
12 continue throughout its certification as a CBE, and its failure to allow such
13 site visitation may constitute grounds for decertification; and

14 (4) The entity must not be a joint venture, as joint ventures are not eligible for
15 certification. However, an entity otherwise eligible for certification is not
16 disqualified from certification by its participation in a joint venture.

17 (c) *SBE Eligibility Requirements.* ~~In determining whether an entity meets the~~
18 ~~requirements for SBE eligibility, the Program Director shall consider the gross receipts~~
19 ~~and personal net worth of both the applicant and all affiliates.~~ An entity is eligible for
20 certification as an SBE if it meets the following criteria:

21 (1) The entity shall employ ~~twenty-five (25)~~ fifteen (15) or fewer permanent full-
22 time employees. In addition, eligibility is subject to the following gross
23 revenue limitations: Professional consultants, when combined with any and
24 all ~~a~~Affiliates, shall have less than ~~f~~Five ~~h~~Hundred ~~t~~Thousand ~~d~~Dollars

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1 (\$500,000) in average annual gross revenue calculated over the previous
2 three (3) calendar years. ~~Firms in contractual services shall, when~~
3 ~~combined with any and all affiliates, have less than one million dollars~~
4 ~~(\$1,000,000) in average annual gross revenue calculated over the previous~~
5 ~~three (3) calendar years. Firms in Entities providing construction services~~
6 shall, when combined with any and all ~~a~~Affiliates, have less than ~~€~~Three
7 ~~m~~Million ~~d~~Dollars (\$3,000,000) in average annual gross revenue calculated
8 over the previous three (3) calendar years. Entities providing services other
9 than professional consulting or construction shall, when combined with any
10 and all Affiliates, have less than One Million Dollars (\$1,000,000) in average
11 annual gross revenue calculated over the previous three (3) calendar years.
12 ~~Firms~~ Entities offering to sell commodities to the County shall be subject to
13 the employee limitation ~~stated above in this paragraph~~ but are not subject
14 to any gross revenue limitation with regard to a certification as a
15 commodities firm;

- 16 (2) No person with a legal or beneficial ownership interest, direct or indirect,
17 ~~with in~~ in the entity or any ~~a~~Affiliate of the entity shall have a personal net worth
18 ~~exceeding seven hundred and fifty thousand dollars (\$750,000)~~ One Million
19 Three Hundred Twenty Thousand Dollars (\$1,320,000); and
- 20 (3) The entity shall have a ~~e~~Continuous ~~e~~Operating ~~p~~Presence in Broward
21 County and may only operate in areas zoned to permit its operations. The
22 entity must allow OESBD to conduct site visits of its primary place of
23 business and any other place of operation by the entity at any time during
24 normal operating hours. The entity's obligation to allow site visits shall

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1 continue throughout its certification as an SBE, and its failure to allow such
2 site visitation may constitute grounds for decertification; and

3 (4) The entity must not be a joint venture, as joint ventures are not eligible for
4 certification. However, an entity otherwise eligible for certification is not
5 disqualified from certification by its participation in a joint venture.

6 (d) *Required disclosure and notification.* During the application process, an
7 applicant must disclose all of its Affiliates and other entities that employ or share
8 principals, management, or key personnel with the applicant entity. Once the applicant
9 entity has become certified as a CBE or SBE, that entity must notify OESBD within thirty
10 (30) calendar days after any changes in the ownership, affiliation, management, or key
11 personnel. Failure to provide timely notice of any such changes shall constitute grounds
12 for decertification.

13 ~~(d)~~ (e) *Discriminatory actions forbidden.* No person or entity shall be denied CBE
14 or SBE certification on the basis of race, color, sex, religion, national origin, disability,
15 age, marital status, political affiliation, sexual orientation, pregnancy, or gender identity
16 and ~~or~~ expression.

17 ~~(e)~~ (f) *Application for Certification.*

18 (1) An entity seeking certification as a CBE or SBE shall submit an application
19 demonstrating that the entity meets the eligibility requirements of
20 paragraphs (b) or (c) above, as applicable. In addition, the entity must
21 identify ~~which~~ the general type(s) of goods or services it provides or sells in
22 the ordinary course of its business to customers other than the County. An
23 entity will only be certified to provide goods or services to the County that
24

1 the entity also provides to other customers in the ordinary course of its
2 business. Brokers are not eligible for certification.

3 (2) Applications for certification must be submitted ~~in a~~ on the form ~~and manner~~
4 ~~determined by the Program Director~~ provided by OESBD. Applications
5 must be completed in their entirety, and entities applying for OESBD
6 certification must supply all of the information requested therein, agree to
7 supply any additional information requested by OESBD, and agree to be
8 bound by the provisions and regulations of the Program governing the
9 certification and decertification process, as applicable.

10 (3) The burden of establishing certification eligibility is on the entity seeking
11 certification as a CBE or SBE. All required documentation must be provided
12 before a certification decision will be rendered by OESBD.

13 (4) Entities seeking certification as a CBE or SBE must maintain compliance
14 with the certification standards under the Program throughout the duration
15 of certification with the County. Failure to do so shall constitute grounds for
16 decertification.

17 (g) Certification Complaints. Any person or entity may file a written complaint
18 alleging that a CBE or SBE is ineligible for certification. The complaint shall be a public
19 record in accordance with Chapter 119, Florida Statutes, and must contain at least the
20 name and address of the complainant. OESBD shall investigate complaints that are
21 supported by specific assertions of ineligibility and actual documentation. OESBD shall
22 not be required to investigate anonymous complaints or complaints that merely assert
23 general allegations of a CBE's or SBE's ineligibility for certification.

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1 (h) Continuing Certification. In order to maintain its certification, a certified CBE
2 or SBE shall submit an OESBD form affidavit of continuing eligibility, on an annual basis,
3 on or before the anniversary date on which the entity was first certified as a CBE or SBE,
4 and shall participate in periodic OESBD certification eligibility reviews. Failure to fully
5 complete the OESBD form affidavit on or before the anniversary date of the entity's CBE
6 or SBE certification may result in suspension of certification or decertification, as
7 applicable.

8 Section 4. Section 1-81.3 of the Broward County Code of Ordinances is hereby
9 amended to read as follows:

10 **Sec. 1-81.3. CBE goals and reserves.**

11 (a) Establishment of Cumulative Annual CBE Goal. A ~~cumulative annual~~ CBE
12 goal of at least twenty-five percent (25%) participation by CBEs is hereby established for
13 the total dollar value of all ~~each~~ County contracts, except those contracts that are subject
14 to other participation goals other than CBE reserves (e.g., federal DBE program, ~~or~~ SBE
15 reserves), those contracts that are exempt from the County's Procurement Code, those
16 contracts that are otherwise ineligible by state or federal law, and those contracts to which
17 goals are not assigned (e.g., ~~sole-source~~ sole source, sole brand, and emergency
18 contracts). However, a CBE goal of at least twenty-five percent (25%) shall not be
19 required if, at any time, the Board approves a different goal or approves that no CBE goal
20 shall be set, based upon a written OESBD determination provided to the Board that
21 establishes one (1) of the following:

22 (1) With regard to no CBE goal being set:

23 a. There is no available CBE that is qualified to participate in a specific
24 project; or

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1 ~~(3) A CBE goal shall not be set when the Purchasing Director determines,~~
2 ~~pursuant to the County's Procurement Code, that a County solicitation will~~
3 ~~be for a sole source purchase.~~

4 ~~(4) A CBE goal shall not be set on those contracts that are subject to other~~
5 ~~participation goals (e.g., federal DBE program, SBE reserves).~~

6 ~~(5) CBE goals shall be set as a percentage of the total value of the contract,~~
7 ~~excluding the amount that the County reimburses to a Prime Contractor~~
8 ~~pursuant to the contract.~~

9 ~~(6) The criteria used and calculations performed to establish each contract~~
10 ~~goal, or the rationale for deciding not to establish a goal for a particular~~
11 ~~contract, shall be maintained in writing by the Program Director.~~

12 ~~(7) The Program Director may waive the application of any previously-~~
13 ~~established CBE contract goal, or may modify any CBE contract goal, after~~
14 ~~issuance of a solicitation but before the time of bid submissions, whenever~~
15 ~~the Program Director determines that such waiver or modification would be~~
16 ~~in the best interest of the County.~~

17 ~~(8) (c)~~ Board waiver of CBE goal. The Board of County Commissioners may waive
18 the application of, or may modify, any CBE goal at any time.

19 ~~(d)~~ A Bidder may satisfy the requirements of the Act by meeting the established
20 CBE goal through bona fide, commercially useful participation of CBEs or by showing that
21 the Bidder made Good Faith Efforts to achieve the established CBE goal for the project.

22 ~~(d) (e)~~ Establishing CBE Reserves. A contract may be reserved for CBEs when
23 the Program Director, after consultation with the Purchasing Director, determines that
24 establishing such reserves is appropriate ~~to meet the cumulative annual CBE goal, or to~~

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1 create opportunities for CBEs to gain experience as ~~p~~Prime ~~e~~Contractors. However, no
2 contract shall be reserved for CBEs when the Program Director determines that no CBE
3 or only one (1) CBE is available to perform the work required under the contract.

4 ~~(e)~~ (f) *Solicitations Involving Reserves.* When a CBE reserve is established in
5 connection with a County solicitation, CBEs and ~~non-CBEs~~ nonCBEs may respond to the
6 solicitation. If a CBE is ~~available~~ with capacity to perform the reserved work submits a
7 responsive and responsible Bid or the highest-ranked responsive and responsible
8 proposal, the reserved work will be awarded to a the CBE that submits the lowest
9 responsive and responsible Bid or the highest-ranked responsive and responsible
10 proposal (consistent with all applicable terms and conditions of the County's Procurement
11 Code and subject to entering into an agreement acceptable to the County). If no CBE
12 firm is ~~available~~ with capacity to perform the reserved work submits a responsive and
13 responsive Bid, a non-CBE firm nonCBE with the lowest responsive and responsible Bid
14 or the highest-ranked responsive and responsible proposal, as applicable, may be
15 awarded the contract with at least a twenty-five percent (25%) CBE goal (unless the CBE
16 goal is waived or otherwise modified by Board action), or the County may reject all bids
17 and responses submitted.

18 ~~(f)~~ *GDBE Goals in Executory Contracts.* ~~All Community Disadvantaged~~
19 ~~Business Enterprise (CDBE) goals in effect upon the enactment of this Act shall remain~~
20 ~~in full force and effect.~~

1 Section 5. Section 1-81.4 of the Broward County Code of Ordinances is hereby
2 amended to read as follows:

3 **Sec. 1-81.4. SBE reserves.**

4 (a) When the County issues a solicitation that is anticipated to result in a
5 contract with a value of less than ~~two hundred and fifty thousand~~ dollars
6 (\$250,000), the contract shall be reserved for SBEs, except those contracts that are
7 otherwise ineligible pursuant to state or federal law. However, no contract shall be
8 reserved for SBEs when the Program Director determines that no SBE ~~or only one~~ (1)
9 ~~SBE is certified~~ available to perform the work required under the contract.

10 (b) If an SBE reserve is established, only SBEs will be eligible to bid on the
11 solicitation. ~~Only an SBE shall be awarded a contract with an SBE reserve, except when~~
12 ~~(1) no SBE responds to the solicitation; or (2) no SBE is responsive to the terms of the~~
13 ~~solicitation.~~ In the event that no SBE responds or no SBE is responsive, the Purchasing
14 Director shall cancel the solicitation, and the using agency shall submit it to OESBD to
15 determine whether a CBE reserve should be established for any new solicitation.

16 (c) Notwithstanding anything to the contrary in paragraphs (a) and (b) above,
17 in the event that none of the responses to an SBE reserve solicitation would result in a
18 contract with a value of less than ~~two hundred and fifty thousand~~ dollars
19 (\$250,000), the Purchasing Director may elect to either accept the response(s) and
20 proceed to the award stage, or reject the response(s) and request that OESBD determine
21 whether a CBE reserve should be established for any new solicitation.

1 Section 6. Section 1-81.5 of the Broward County Code of Ordinances is hereby
2 amended to read as follows:

3 **Sec. 1-81.5. Satisfaction of CBE goals; gGood ~~f~~Faith ~~e~~Efforts.**

4 (a) A ~~b~~Bidder shall be considered ~~non-responsible unless a bidder meets either~~
5 ~~the CBE goal established for the contract~~ responsible as to the CBE requirement if the
6 Bidder's response to the solicitation either satisfies the established CBE goal or
7 demonstrates the Bidder's gGood ~~f~~Faith ~~e~~Efforts to meet satisfy the established CBE
8 goal, as defined in paragraph (d) below. Failure of a Bidder to make any representations
9 regarding its commitment to attain the CBE goal prior to award of the contract shall be
10 cause for the Program Director to recommend that the Bidder's response to the
11 solicitation be deemed nonresponsible.

12 (b) ~~In order to meet the CBE goal of a solicitation, a bidder entity must submit~~
13 ~~the following information~~ Letters of Intent. A Bidder's response to the solicitation satisfies
14 the responsibility criteria for the established CBE goal if the Bidder submits completed
15 Letter(s) of Intent, stating all of the following information:

- 16 (1) The names and addresses of each CBE that ~~will~~ would participate in the
17 contract if awarded to the Bidder;
- 18 (2) A description of the work that each CBE ~~will~~ would perform and the North
19 American Industry Classification System (NAICS) code assigned to each
20 CBE;
- 21 (3) The percentage of the total contract value that ~~each CBE will receive the~~
22 Bidder intends to subcontract to each CBE ("CBE Work Percentages"), and
23 whether those percentages cumulatively meet or exceed the established
24 CBE goal;

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1 (4) ~~Written documentation, in a form acceptable to OESBD, of the Bidder's~~
2 ~~commitment to use each CBE whose participation the bidder submits to~~
3 ~~meet the contract goal~~ subcontract the CBE Work Percentages to the
4 identified CBEs, as affirmed in writing by authorized representatives of the
5 Bidder and each CBE; and

6 (5) ~~Written confirmation, in a form acceptable to OESBD, from each CBE that~~
7 ~~it will participate in the contract as indicated by the bidder. A written~~
8 certification from the Bidder that the scope of work proposed to be
9 performed by each CBE is within the field of each CBE's current
10 certification, and that each CBE has stated that it is ready, willing, and able
11 to perform at least the percentage of work allocated to it as listed on the
12 schedule.

13 (c) ~~The bidder should submit the above information as follows:~~

14 (1) ~~Under sealed bid procedures, the information should be provided with the~~
15 ~~sealed bid response; or~~

16 (2) ~~Under requests for letters of interest or requests for proposals, the~~
17 ~~information should be provided with the initial letter of interest or proposal.~~

18 (d) ~~If the information required by section (b) above is not provided in~~
19 ~~accordance with section (c) above, the information must be provided to the County within~~
20 ~~three (3) business days after OESBD notifies the bidder that it has not provided all the~~
21 ~~required information with its response. Failure to provide the County with this information~~
22 ~~within such three (3) business days may be cause for the response to the solicitation to~~
23 ~~be deemed non-responsible.~~

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1 (c) Bidder Assurances. Notwithstanding the requirement of a Bidder to provide
2 completed Letter(s) of Intent as required in paragraph (b) above, a solicitation may allow
3 a Bidder to submit completed Bidder Assurances with its response to the solicitation and
4 thereafter submit completed Letter(s) of Intent no later than the timeframe required in the
5 applicable solicitation documents. However, in order for the Program Director to
6 recommend that the Bidder is responsible regarding the established CBE goal of the
7 solicitation, the Bidder must submit completed Letter(s) of Intent that satisfy the
8 established CBE goal no later than the timeframe required in the applicable solicitation
9 documents.

10 ~~(e)~~ (d) Determination of Good Faith Efforts.

11 (1) A ~~b~~Bidder whose response to a solicitation fails to satisfy the requirements
12 of paragraphs (b) and (c) above, as applicable, shall not be denied award
13 of a contract due to failure to meet the assigned contract goal if the bBidder
14 otherwise timely (within the applicable timeframes provided in paragraphs
15 (e) and (d) above, as applicable the solicitation) provides documentation
16 demonstrating, as determined by the Program Director, the bBidder's
17 gGood fFaith eEfforts to meet the goal satisfy the requirements. In making
18 such determination, the Program Director shall consider the quality,
19 quantity, and extent of the various efforts that the bidder has made to meet
20 the goal.

21 (2) In determining whether a Bidder has demonstrated Good Faith Efforts under
22 this Act, the Program Director shall consider the quality, quantity, and extent
23 of the various efforts that the Bidder has made to satisfy the established
24

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1 CBE goal. These efforts that may be ~~considered by the Program Director~~
2 include, but are not limited to:

3 a. Soliciting through activities such as attendance at ~~pre-bid~~ prebid
4 meetings, advertising, or written notices, the interest of certified
5 CBEs (~~or CBEs eligible for certification~~) that have the ability and
6 capacity to perform the contract work. The ~~b~~Bidder must solicit this
7 interest in a timely manner to allow the CBEs to respond to the
8 solicitation. The ~~b~~Bidder must take appropriate steps to follow up
9 initial solicitations of CBEs.

10 b. Identifying the portions of the contract that could reasonably be
11 performed by a CBE in order to increase the likelihood that the CBE
12 goals will be achieved. This may include, where appropriate and
13 commercially practicable, separating contract work items into
14 segments more appropriate for participation by CBEs.

15 c. Providing each interested CBE with adequate information about the
16 plans, specifications, and requirements of the contract in a timely
17 manner.

18 d. Negotiating in good faith with each interested CBE. Evidence of such
19 negotiation includes the names, addresses, and telephone numbers
20 of CBEs that were considered; a description of the information
21 provided regarding the plans and specifications for the work selected
22 for subcontracting; and explaining why an agreement could not be
23 reached with any of the interested CBEs ~~to perform the work~~. The
24 fact that there may be some additional costs involved in

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1 subcontracting with CBEs is not in itself sufficient reason for a
2 ~~b~~Bidder's failure to meet the contract CBE goal, as long as such
3 additional costs are reasonable, as determined by the Program
4 Director in his or her sole discretion.

5 e. Rejecting an interested CBE as being unqualified for participation
6 only after diligently investigating the CBE's capabilities and
7 documenting the sound reasons justifying such rejection (with such
8 documentation to be provided to the Program Director).

9 (3) In determining whether a ~~b~~Bidder has made a ~~g~~Good ~~f~~Faith ~~e~~Efforts, the
10 Program Director may also consider the level of CBE participation proposed
11 by the bidder and the level of participation proposed by other ~~b~~Bidders as
12 well as any representations made by the Bidder during the bid, proposal, or
13 selection phases of the procurement regarding the Bidder's commitment to
14 attain the CBE goal. ~~The closer the bidder's proposed participation is to the~~
15 ~~goal or to the proposed participation by other bidders, the greater the~~
16 ~~indication of good faith by the bidder.~~

17 Section 7. Section 1-81.6 of the Broward County Code of Ordinances is hereby
18 amended to read as follows:

19 **Sec. 1-81.6. Participation requirements and enforcement.**

20 (a) Participation Requirements. ~~CBEs and SBEs~~ Entities may not participate
21 in a County contract as CBEs or SBEs unless they are certified, ~~at the time of bid~~
22 ~~submission/opening,~~ as CBEs or SBEs, as applicable, prior to Bid submittal to perform
23 the type of work required by the contract. However, if it becomes necessary to substitute
24 a CBE or SBE in order to meet the contract's participation requirements, a CBE or SBE

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1 may be substituted, upon the approval of the Program Director, provided that such CBE
2 or SBE is certified at the time of the substitution.

3 ~~(b)~~ (1) Only the work actually performed by a CBE or SBE (whether as a ~~p~~Prime
4 ~~e~~Contractor or ~~s~~Subcontractor) shall be counted toward satisfaction of the
5 applicable goal.

6 ~~(e)~~ (2) Contractors that use CBEs or SBEs as ~~s~~Subcontractors on a County
7 contract must pay those ~~s~~Subcontractors directly for all goods or services
8 provided by the ~~s~~Subcontractors within fifteen (15) days ~~of~~ after receipt of
9 payment from the County, ~~unless a shorter payment period is established~~
10 ~~under Florida law or in the applicable contract.~~

11 (b) Fair Dealing. It is the County's policy that all business activities related to
12 this Act shall be conducted in a fair and reasonable manner, free of fraud, coercion,
13 collusion, intimidation, or bad faith. Violation of this policy by any Prime Contractor,
14 Subcontractor, Bidder, or other individual or entity that seeks to engage in business with
15 the County may result in a written determination by the Director of Purchasing, after
16 consulting with the Program Director and the Office of the County Attorney, that the
17 County should consider termination of any or all business relationships between the
18 violating individual(s) or entity(ies) and the County, including cancellation of solicitations,
19 cessation of negotiations, revocation of CBE or SBE certification, and suspension or
20 debarment for cause from consideration for award of future contracts. Such written
21 determination shall state the reasons for the action taken and inform the individual(s) and
22 entity(ies) involved of their right to administrative review in accordance with
23 Section 21.119 of the Procurement Code. Any determination made by the Director of
24

1 Purchasing pursuant to this paragraph may be appealed in accordance with
2 Section 21.120 of the Procurement Code.

3 ~~(d)~~ (c) CBEs and SBEs may participate in a County contract only if they are
4 performing a ~~commercially useful~~ Commercially Useful ~~f~~Function in the contract and are
5 not acting as a ~~b~~Brokers.

6 (d) Enforcement. The provisions of this Act, unless noted otherwise, are
7 primarily enforced through the issuance of Notices to Cure and Notices of Violation by
8 OESBD. OESBD may issue such notices for any infraction of the CBE or SBE programs.
9 Failure to respond timely and completely to such notices will place the alleged violator in
10 a state of noncompliance.

11 (1) Notice to Cure. A Notice to Cure is formal notification to a CBE or SBE of
12 an alleged violation of the Act. A Notice to Cure may be issued if the entity
13 fails to timely provide requested information or documentation, or if the
14 entity:

- 15 a. Engages in a practice that contravenes the CBE or SBE programs;
- 16 b. Fails to meet certified Subcontractor participation;
- 17 c. Fails to meet prompt payment requirements;
- 18 d. Fails to supply required utilization reports;
- 19 e. Fails to utilize certified Subcontractors as agreed or, without approval
20 from the Program Director, substitutes, deletes, or otherwise adjusts
21 the certified subcontracting team; or
- 22 f. Fails to comply with any other Program requirement, as determined
23 by the Program Director.

24
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1 (2) Notice of Violation. A Notice of Violation results from a substantiated
2 violation of the Act. OESBD may issue a Notice of Violation if a CBE or
3 SBE fails to comply with a Notice to Cure after being given opportunity to
4 do so through the Notice to Cure process. However, for willful or egregious
5 violations of the Act, as determined by OESBD, a Notice of Violation may
6 issue without the prior issuance of a Notice to Cure.

7 (e) Penalties for Violations of the Act. The Program Director may determine,
8 upon reasonable notice to the person or entity involved and reasonable opportunity for
9 that person or entity to be heard, that a person or entity has violated the Act. Upon such
10 a determination, the Program Director may recommend, pursuant to Section 21.119 of
11 the Procurement Code, that the Purchasing Director suspend or debar such entity for
12 cause from consideration for award of future contracts for a period of up to three (3) years.

13 (1) The County will maintain a public list of entities suspended or debarred from
14 contracting with the County. The list will detail actions taken in response to
15 the Program Director's recommendations. Entities that have their
16 certification revoked through enforcement action of OESBD will be listed on
17 the OESBD website.

18 (2) For all recommendations from the Program Director for suspension or
19 debarment due to violations of the Act, the Purchasing Director will review
20 the allegations and determine what action(s), if any, shall be taken against
21 the alleged violator.

22 (3) Any person or entity having a substantial interest in the alleged violation of
23 the Act who is dissatisfied or aggrieved with the Purchasing Director's
24 determination regarding such violation may appeal said determination in

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1 accordance with the procedures contained in Section 21.120 of the
2 Procurement Code.

3 ~~(e)~~ (f) The administrative procedures adopted pursuant to this Act shall include
4 procedures by which OESBD will monitor CBE and SBE participation on County contracts
5 for which CBE and SBE goals or reserves are set.

6 ~~(f)~~ (g) Each contract setting a CBE goal shall provide that, prior to a Prime
7 Contractor terminating its contract with a CBE Subcontractor for any reason, including for
8 cause, the Prime Contractor shall provide the Program Director with written notice of the
9 proposed termination. Thereafter, when a CBE sSubcontractor is terminated by a pPrime
10 eContractor for any reason, including for cause, the pPrime eContractor shall, with notice
11 to and the concurrence of the Program Director, substitute another CBE in order to meet
12 the level of CBE participation provided in the pPrime eContractor's contract with the
13 County. The contract shall also provide that such substitution shall not be required in the
14 event the termination results from the County changing the scope of work under the
15 contract and there is no available CBE to perform the new scope of work.

16 ~~(g)~~ (h) All entities that bid on or participate in County contracts subject to this Act
17 are responsible for meeting the requirements of this Act and the requirements of any
18 administrative procedures adopted pursuant to this Act. If an entity fails to comply with
19 these requirements, the County may exercise any administrative remedies it has under
20 the County's Procurement Code, administrative procedures adopted pursuant to this Act,
21 or any other right or remedy provided in the contract or under applicable law, with all of
22 such rights and remedies being cumulative.

1 Section 8. Section 1-81.7 of the Broward County Code of Ordinances is hereby
2 amended to read as follows:

3 **Sec. 1-81.7. Administrative requirements and other remedies.**

4 (a) *Required ~~CBE~~ Contract Language.* ~~Each~~ The County shall require that
5 each solicitation and contract that contains CBE or SBE requirements, and each
6 subcontract a ~~p~~Prime eContractor executes with a CBE or SBE in connection with that
7 County contract, shall include the following ~~assurance~~ requirements:

8 (1) ~~"No party to this contract may discriminate on the basis of race, color, sex,~~
9 ~~religion, national origin, disability, age, marital status, political affiliation,~~
10 ~~sexual orientation, pregnancy, or gender identity and expression in the~~
11 ~~performance of this contract. The County's contractor (Prime, CBE, or SBE,~~
12 ~~as applicable) shall comply with all applicable requirements of the Broward~~
13 ~~County Small Business Development Program in the award and~~
14 ~~administration of this contract. Failure by the County's Prime eContractor~~
15 ~~to carry out any of these requirements shall constitute a material breach of~~
16 ~~contract, which shall permit the County to terminate its contract with the~~
17 ~~County's Prime eContractor or to exercise any other remedy provided under~~
18 ~~the contract, under the Broward County Code of Ordinances or~~
19 ~~Administrative Code, or under applicable law, with all of such remedies~~
20 ~~being cumulative."~~

21 (2) For solicitations and contracts where the Prime Contractor is required to
22 satisfy a CBE goal or a CBE or SBE reserve, as applicable, substantially
23 the following language shall be included in the contract: "The parties
24 stipulate that if the Prime Contractor fails to meet the CBE or SBE

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1 commitment, as applicable (the "Commitment"), the damages to the County
2 arising from such failure are not readily ascertainable at the time of
3 contracting. Therefore, if the Prime Contractor fails to meet the
4 Commitment and the County determines, in the sole discretion of the
5 Program Director, that the Prime Contractor failed to make Good Faith
6 Efforts to meet the Commitment, the Prime Contractor shall pay the County
7 liquidated damages in an amount equal to fifty percent (50%) of the actual
8 dollar amount by which the Prime Contractor failed to achieve the
9 Commitment, up to a maximum amount of ten percent (10%) of the total
10 contract amount (excluding costs and reimburseables). For example, if the
11 contract amount (excluding costs and reimburseables) is One Million
12 Dollars (\$1,000,000), there is a twenty-five percent (25%) CBE goal, and
13 CBEs receive only twenty percent (20%) of the amounts paid by the County
14 (excluding costs and reimbursables), then the Prime Contractor would have
15 fallen short of the Commitment by Fifty Thousand Dollars (\$50,000), and
16 the liquidated damages due the County would equal Twenty-Five Thousand
17 Dollars (\$25,000). Such liquidated damages amount shall be either credited
18 against any amounts due from the County or paid to the County within thirty
19 (30) days after written demand, as elected by the County. These liquidated
20 damages shall be the County's sole contractual remedy for the Prime
21 Contractor's breach of the Commitment, but shall not affect the availability
22 of administrative remedies under this Act. Any failure to meet the
23 Commitment attributable solely due to force majeure, changes to the scope
24 of work by the County, or inability to substitute a Subcontractor under the

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1 Act where the Program Director has determined that such inability is due to
2 no fault of the Prime Contractor, shall not be deemed a failure by the Prime
3 Contractor to meet the Commitment."

4 (b) *Establishment of CBE/SBE Directory.* The Program Director shall maintain
5 a directory listing all ~~certified~~ CBEs and SBEs. The listing shall include each entity's
6 address, phone number, and the type(s) of work the entity has been certified to perform
7 as a CBE or SBE on a County contract. The directory shall be revised monthly, and shall
8 be made available to contractors and the public ~~upon request~~ through the County website.
9 The Program Director shall manage directory listings for the U.S. Department of
10 Transportation certification programs in accordance with the requirements of those
11 programs and the State of Florida Unified Certification Program.

12 (c) Whenever adjustments to criteria for CBE eligibility ~~and adjustments to the~~
13 ~~cumulative annual CBE goal~~ are proposed, they shall be promptly published by the
14 Program Director on the website of OESBD.

15 Section 9. Section 1-81.8 of the Broward County Code of Ordinances is hereby
16 amended to read as follows:

17 **Sec. 1-81.8. Decertification and appeals.**

18 (a) *Certification Review.* OESBD may, at its sole discretion, conduct a
19 certification review of any ~~certified~~ CBE or SBE. Upon request from OESBD, a ~~certified~~
20 ~~entity~~ CBE or SBE shall promptly provide OESBD with any documents or information
21 related to the entity's eligibility certification, and shall, upon request from OESBD,
22 promptly provide OESBD access to its premises. Failure to promptly provide documents,
23 information, or access may result in the decertification of the entity as provided below.

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1 **(b) Decertification.** OESBD may, at any time after it has certified an entity as a
2 CBE or SBE, decertify that entity if the entity no longer meets the eligibility criteria
3 enumerated in Section 1-81.2 of this Act. In addition, OESBD may decertify entities for
4 the following reasons:

5 **(1)** The persons or entities that applied for the CBE or SBE certification of the
6 entity no longer own or control the certified entity, and OESBD was not
7 notified of such change in ownership or control in accordance with this Act;

8 or

9 **(2)** An OESBD investigation, initiated by OESBD or a Certification Complaint,
10 as defined in Section 1-81.2(g), above, reveals evidence of the entity's
11 failure to satisfy the requirements of this Act or Chapter 19, Part V of the
12 Broward County Administrative Code, as applicable; or

13 **(3)** OESBD determines at any time that the entity had misrepresented itself
14 during the application, continuing certification process, or while certified as
15 a CBE or SBE, in connection with meeting the requirements for CBE or SBE
16 certification; or

17 **(4)** The entity has been suspended or debarred by Broward County. In such
18 an instance, the entity shall be decertified and such decertification will be in
19 effect for the period of suspension or debarment.

20 **(b) (c) Notice of Decertification.** If OESBD determines that a ~~certified entity~~ CBE
21 or SBE no longer meets the ~~CBE or SBE~~ respective eligibility requirements of this Act, or
22 has otherwise violated the provisions of this Act, OESBD may revoke the entity's
23 certification as a CBE or SBE for a period of up to one (1) year. Within ten (10) calendar
24

1 days after such revocation, OESBD shall send the entity a notice of decertification and
2 transmit a copy to the Director of Purchasing.

3 (d) *Administrative Review.*

4 (1) OESBD shall issue a written determination to not certify or to decertify an
5 entity as a CBE or SBE (collectively, "Certification Determination"). Any
6 entity that believes it has been wrongly denied certification as a CBE or
7 SBE, or that has been decertified as a CBE or SBE, may administratively
8 appeal a Certification Determination by filing a petition for administrative
9 review within ten (10) calendar days after the date of such Certification
10 Determination. The petition for administrative review shall be sent to the
11 Program Director at the address identified in the Certification Determination.

12 (2) The petition for administrative review must clearly articulate the reason(s)
13 why the petitioner contends the Certification Determination was erroneous
14 and provide any and all documentation that the petitioner believes
15 demonstrates that the entity meets all the requirements for certification or
16 continuing certification as a CBE or SBE, as applicable.

17 (3) The Program Director will review the petition for administrative review to
18 determine whether the petition pleads sufficient grounds to reverse the
19 Certification Determination. Thereafter, the Program Director shall grant or
20 deny the petition, as applicable, in writing ("Decision"). The Decision shall
21 be final and shall be mailed to the affected entity within ten (10) calendar
22 days after the date the Program Director issues the Decision.

23 ~~(e)~~ (e) *Reapplication.* An entity that does not timely appeal a Certification
24 Determination, or is decertified pursuant to ~~this section~~ the Act, may not reapply for

1 certification until one (1) year after ~~its decertification~~ the date of the Certification
2 Determination or the Decision, whichever is later.

3 ~~(d) Appeals. An entity that wishes to appeal a decertification may do so in~~
4 ~~accordance with the administrative policies and procedures adopted pursuant to this Act.~~

5 Section 10. Section 1-81.9 of the Broward County Code of Ordinances is hereby
6 created to read as follows:

7 **Sec. 1-81.9. Small Business Development.**

8 (a) Program Graduation. A CBE or SBE that exceeds the CBE or SBE gross
9 revenue or personal net worth eligibility requirements of this Act, as applicable, will be
10 designated by the Program Director as a graduate of the Program. Program graduates
11 may complete their work under all current County projects under their previous CBE or
12 SBE status provided that the Bid submission date of those projects occurred prior to the
13 CBE's or SBE's date of Program graduation. CBEs or SBEs decertified for cause shall
14 not be considered Program graduates under this Act.

15 (b) Incentive Programs. The Program Director shall have the authority to
16 create incentives to encourage the development of local small businesses and to foster
17 relationships between the County, small businesses, and the regional business
18 community, including mentor-protégé programs and economic development initiatives.

19 Section 11. **SEVERABILITY.**

20 If any portion of this Ordinance is determined by any Court to be invalid, the invalid
21 portion shall be stricken, and such striking shall not affect the validity of the remainder of
22 this Ordinance. If any Court determines that this Ordinance, or any portion hereof, cannot
23 be legally applied to any individual(s), group(s), entity(ies), property(ies), or
24

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1 circumstance(s), such determination shall not affect the applicability hereof to any other
2 individual, group, entity, property, or circumstance.

3 Section 12. INCLUSION IN CODE.

4 It is the intention of the Board of County Commissioners that the provisions of this
5 Ordinance shall become and be made a part of the Broward County Code; and that the
6 sections of this Ordinance may be renumbered or relettered and the word "ordinance"
7 may be changed to "section," "article," or such other appropriate word or phrase in order
8 to accomplish such intentions.

9 Section 13. EFFECTIVE DATE.

10 This Ordinance shall become effective as provided by law.

11
12 ENACTED

13 FILED WITH THE DEPARTMENT OF STATE

14 EFFECTIVE

15
16 Approved as to form and legal sufficiency:
17 Andrew J. Meyers, County Attorney

18 By /s/ Tricia D. Brissett 03/21/18
19 Tricia D. Brissett (date)
20 Assistant County Attorney

21 By /s/ René D. Harrod 03/21/18
22 René D. Harrod (date)
23 Deputy County Attorney

24 TDB/mm
03/21/18
CBE Bidder Compliance Ordinance
#280297

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