

## **Don't Miss Out On The City of Chicago's Construction Procurement and Contracting Initiatives**

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In recent years, the City of Chicago has implemented new rules and created numerous programs to increase the pool of bidders on City contracts, incentivize the use of small minority and women-owned businesses, build capacity of local businesses, and encourage the employment of local residents.

This article highlights some of the City's initiatives and provides tips to make sure that your company is not only taking advantage of available incentives, but also complying with applicable rules.

### *Retainage Revisions*

On May 24, 2017, Mayor Emanuel and Alderman Carrie Austin introduced Ordinance 2017-3858 to the City Council. Ordinance 2017-3858 proposed an amendment to Chapter 2-92-250 of the Chicago Municipal Code related to retainage requirements for City construction projects.

Retainage is a portion of the agreed-upon contract price that is deliberately withheld until the work is substantially complete (or sometimes later) to assure that a contractor or subcontractor satisfies its obligations and completes a construction project. Before the proposed amendment, Chapter 2-92-250 of the Chicago Municipal Code *required* the City to withhold a certain amount of retainage for construction contracts between the City and prime contractors and, in turn, permitted prime contractors to withhold retainage from their respective subcontractors.

Retainage opponents claimed that the City's practice of requiring retainage often resulted in heavy burdens being placed on subcontractors – the entities least equipped to deal with such burdens. Opponents maintained that by requiring retainage, the City and prime contractors were essentially forcing subcontractors to finance projects until retainage was released – often well after project completion. Mayor Emanuel, a retainage opponent himself, introduced Ordinance 2017-3858 as an effort to alleviate the financial burden that the practice of withholding of retainage can have on subcontractors.

Ordinance 2017-3858, amending Chapter 2-92-250 of the Municipal Code, passed the City Council on June 28, 2017 and was published at the Chicago City Council meeting on July 26, 2017. The new retainage amendments became effective on August 25, 2017.

Ordinance 2017-3858 eliminates the City's mandatory withholding of retainage from prime contractors on most City projects and, based on the ordinance, most prime contracts are required to include a provision prohibiting prime contractors from withholding retainage from their subcontractors.

If you are a prime contractor seeking to do business with the City, check your agreement. Through the course of the project, make sure that retainage is not being improperly withheld from you and

that the City is complying with its own rules. Prime contractors should also take the time to review their subcontract forms. It is important to make sure that you have removed any boilerplate retainage language, that you have a plan in place to discontinue your standard retainage practices, and that you are fully compliant with the new rules. If you are a subcontractor, make sure that you closely review your City project contracts. Make sure that you do not sign a contract that includes retention withholdings that violate the Municipal Code. Throughout the course of the project, make sure your payments are being properly processed and that retention is not being withheld. Whatever your role may be on the next City project, make sure that you take the time to review the newly amended Chapter 2-92-250 of the Municipal Code.

### *The Small Business Initiative*

If you are a small construction business in the City of Chicago, one of the local programs that you should be taking advantage of is the Department of Procurement Services' (DPS) Small Business Initiative (SBI).

The goal of SBI is to expand opportunities for small local businesses by providing a level playing field for them to compete in the construction realm – an area in which larger companies are often at an advantage. DPS, through the SBI program, aims to increase the opportunities that small businesses have to do business with the City of Chicago.

SBI is a construction program wherein small local businesses are the exclusive bidders on certain construction projects. The program is quite simple – DPS identifies certain construction projects in the City's Buying Plan and those projects are then offered exclusively to small local business enterprises.

The program is divided into two tiers based on business and project size, SBI I and SBI II. SBI I projects are typically limited to estimated project construction costs of \$3,000,000 or less and SBI II projects are typically limited to estimated project construction costs of \$2,000,000 or less.

In order for your business to participate in the SBI program, you must be qualified as a "small local business enterprise" – as defined by the applicable rules. The key assessment factors that determine eligibility are whether: (1) your company has been in business for one year or more; (2) your entity will self-perform the majority of the work on the project and/or utilize subcontractors who are also considered small local business enterprises; (3) your entity has its principal place of business and the majority of its full-time work force located in the six-county region of Chicago (Cook, DuPage, Kane, Lake, McHenry, and Will); and (4) your entity meets certain gross receipt and size parameters. In order to be qualified for the program, you must also be prepared to establish your ability to perform satisfactorily in your purported area(s) of specialty without substantial reliance upon the finances, resources, bonding, expertise, staff, facilities, or equipment of another business.

In order to take advantage of these exclusive bidding opportunities, make sure to bookmark and regularly check the City's Buying Plan. The City's Buying Plan can be found on the DPS website at: <https://www.cityofchicago.org/content/dam/city/depts/>. The Buying Plan is updated on a quarterly basis and it clearly identifies each of the SBI I and SBI II jobs that are available to bid.

If you are a potential bidder that has not already been qualified as a small local business enterprise, the bid package for each SBI construction program procurement will contain the affidavits required for qualification. If you have already been qualified, you will be required to submit annual affidavits confirming your continued compliance with the eligibility requirements of SBI. You will also be subject to an on-going responsibility to inform DPS of any changes.

### Diversity Credit Program

If you are a private sector firm that is also looking to bid on public work, the Diversity Credit Program provides some worthwhile incentives.

The Diversity Credit Program is a program designed to increase the use of minority and women-owned businesses on contracts issued in the private sector by making such participation eligible for credit toward MBE/WBE goals on City contracts.

Credits will be awarded for utilization of MBEs and WBEs on private sector contracts which do not have affirmative action goals mandated by law or contract. In order to be eligible for such credit, the contractor must be able to demonstrate that the MBEs and WBEs performed a direct, commercially useful function on the private sector contract, working within the area of specialty of the MBE or WBE as certified by the City. Indirect participation, or participation by the MBE or WBE as a second-tier or lower tier subcontractor, is not eligible for credit. One dollar of credit will be issued for every three dollars earned by the MBEs and WBEs on the private sector contract. In order to qualify for the credit, the MBEs or WBEs for which the credit is being sought must be certified as such by the City at the time they are utilized on the private sector contract. Credits will expire one year after award.

When a contractor wishes to apply its credits, it will do so at the time it bids on the City contract. The MBEs or WBEs on which the credit is based must still be certified as such by the City at the time of the bid opening for the City contract. The maximum amount of credit available on any given City contract is five percent (5%) of the dollar value of that City contract. Credits may only be used once.

If you are a contractor that routinely utilizes MBEs or WBEs on private sector projects, make sure that you keep track of this information so that you may take advantage of the available credits for future projects with the City. If you are an MBE or a WBE looking to increase your private sector opportunities, consider including the Diversity Credit Program as part of your marketing efforts.

### Educate Yourself

The above is only a sample of the bid incentives, credits, initiatives and rules that the City of Chicago has implemented to increase the pool of bidders on City contracts, incentivize the use of small minority and women-owned businesses, and level the playing field for local businesses. Give your company every opportunity to succeed by educating yourself on what the City has to offer – a great starting point is the City of Chicago's recently issued *Guide to Bid Incentives and Programs*, available at <https://www.cityofchicago.org/city/en/depts/dps/provdrs/comp.html>.