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Title: Amending various sections of Chapter 3, "Contracts and Leases," for the purposes of updating goal setting for individual contracts and the authority of the fairness in construction board, and regulating prevailing wage and wage theft.

Sponsors: Kevin O'Neill, Quinton Lucas, Andrea Bough, Ryana Parks-Shaw

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Date	Ver.	Action By	Action	Result
11/10/2021	2	Council		
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11/9/2021	1	Transportation, Infrastructure and Operations Committee	Adv and Do Pass as Cmte Sub, Debate	Pass
11/3/2021	1	Transportation, Infrastructure and Operations Committee	Hold on Agenda	
10/28/2021	1	Council		

COMMITTEE SUBSTITUTE FOR ORDINANCE NO. 210991, AS AMENDED

Amending various sections of Chapter 3, "Contracts and Leases," for the purposes of updating goal setting for individual contracts and the authority of the fairness in construction board, and regulating prevailing wage and wage theft.

BE IT ORDAINED BY THE COUNCIL OF KANSAS CITY:

Section 1. That Chapter 3 of the Code of Ordinances entitled "Contracts and Leases" is hereby amended by repealing Sections 3-425, 3-431, 3-451, 3-453, 3-463, and 3-622 and enacting in lieu thereof new sections of like number and subject matter to read as follows:

Sec. 3-425. Application to leases, tax increment financing and tax abatement entities.

(a) *Lease of city property for development.* The provisions of this division shall apply to all projects on property leased by the city to any person for development of the property by that person or any other authorized person.

(b) *Projects under tax increment financing.* The tax increment financing commission shall adopt the city's affirmative action program and the city's minority and women's business enterprise program which shall

apply to all projects financed in whole or in part by tax increment financing as that term is used in RSMo § 99.800 et seq. All redevelopment agreements between the tax increment financing commission and a developer must contain MBE/WBE goals and workforce utilization goals which are approved by the board, as applicable, and which are applicable to 100 percent of all redevelopment project costs, identified within a tax increment financing plan approved by the city council. For purposes of this subsection, the "city's affirmative action program" and "minority and women's business enterprise program" shall have the same meaning as used in this division.

(c) *Projects under tax abatement entities.* All corporations organized under RSMo § 353.010 et seq. for the purpose of redevelopment within the city limits, land clearance for redevelopment authority with an area of operation within the city, enhanced enterprise zone boards with an area of operation within the city and planned industrial expansion authority for the city shall adopt the city's affirmative action program and the city's minority and women's business enterprise program which shall apply to all projects receiving city tax abatement in whole or in part.

Sec. 3-431. Setting goals for individual contracts.

(a) Except for goals to be established by the applicable board as provided in sections 3-450, goals shall be established for individual contracts by the director, as determined pursuant to this section. Goals shall be applied to the total dollar value of the contract, unless otherwise authorized by the director.

(b) Individual contract goals shall be flexible and are to be determined on a contract-by-contract basis. In determining whether goals should be established for an individual contract or in setting the specific goal for an individual contract, the following shall be considered:

- (1) The scope of work; and
 - (2) The number and types of qualified MBEs and WBEs available to perform such work, or portions of it; and
 - (3) Whether the contract can be structured to create potential opportunities for qualified MBEs and WBEs to participate as subcontractors, service providers and/or suppliers; and
 - (4) The level of participation of certified MBEs and WBEs in similar contracts awarded by other city departments and incentive agencies, and on local projects awarded by the state and federal governments in the previous and current fiscal years; and
 - (5) The city department's or incentive agency's progress toward meeting its annual MBE/WBE goals and its expectations as to how future contracts will be used toward meeting such goals; and
 - (6) The potential dollar amount of the contract.
- (c) When goals for individual contracts are set, they shall be set as follows:
- (1) For all city and incentive agency professional service and goods and services contracts with an estimated cost of more than \$160,000, by the fairness in professional services and goods board, upon the recommendation of the director, as provided in section 3-450.

(d) When goals are established for a contract, such goals shall be stated in any invitation for bid or request for proposals. No invitation for bid or request for proposals shall be released until goals have been requested and set in accordance with subsection (b) of this section, or until the city department or incentive agency soliciting the contract has been notified by the director that goals will not be established. If the goals are to be set by a board and such board shall have failed to meet for any reason within thirty calendar days from the date upon which such board shall have last convened, then the invitation for bid or request for proposals may be released with the goals as recommended by the director and an addendum thereto shall be issued setting forth the goals once established by the board.

(e) For contracts other than construction contracts, the director is authorized to require a bidder or proposer to make good faith efforts to achieve MBE/WBE participation without setting a numerical MBE/WBE goal on the solicitation as long as the director could have set an MBE/WBE goal based on the factors in section 3-431(b).

Sec. 3-451. Fairness in construction board.

(a) Establishment and authority. There is hereby established the fairness in construction board. The board's authority is limited to city construction bids, proposals and contracts, and those incentive projects, in which the estimated cost thereof is more than \$300,000.00. The board's authority is limited to making determinations as to whether good faith have been made and the assessment and amount of liquidated damages on incentive agency projects when the applicable agency and the director fail to mutually agree, and hearing and investigating appeals set forth in section 3-453 hereof arising from city bids, proposals and contracts under its jurisdiction. The board is also authorized, pursuant to Sections 3-453 and 3-622, to hear appeals regarding penalties imposed by the director for failure to pay prevailing wage or otherwise engaging in wage theft.

(b) Board composition. The board shall be composed of eleven members and ten alternates appointed by the mayor as follows:

- (1) One member and one alternate recommended by the Builders' Association; and
- (2) One member and one alternate recommended by the Heavy Constructors' Association; and
- (3) One member and one alternate recommended by the Minority Contractors' Association of Kansas City; and
- (4) One member and one alternate recommended by the Kansas City Hispanic Association Contractors Enterprise, Inc.; and
- (5) One member and one alternate recommended jointly by the Women Construction Owners and Executives and National Association of Women in Construction; and
- (6) One member and one alternate jointly recommended by the specialty contractors associations; and
- (7) One member and one alternate recommended by the Associated Builders and Contractors; and

- (8) One member and one alternate recommended by local labor organizations and unions; and
- (9) Two members and two alternates from the community at large; and
- 10) Chairperson appointed by the mayor and submitted to the entities named in section 3-451(b) (1)-(9) for approval. Any one of the named entities can veto the mayor's submission and require another submission.

(c) Term. The terms of all board members shall be for a period of four years, however, all members shall continue in office as such until the respective successors shall have been appointed. Board members serving as of the effective date of this division shall retain their seats for the remainder of their unexpired terms.

(d) Alternates. In the event a board member is unable to attend a meeting of the board or has a conflict of interest with regard to a particular contract or issue, the alternate shall temporarily serve in such member's stead. The term of an alternate shall expire at the expiration of the term of the board member.

(e) Ineligibility. The following persons are ineligible to serve on the board:

- (1) Members of the city council; and
- (2) Employees of the city; and
- (3) Nonresidents of the city, unless the nonresident works in the city metropolitan area or is appointed to represent the interests of an organization that maintains an office in the city metropolitan area.

(f) Conflict of interest. In the event a board member has a conflict of interest in a contract or issue that comes before the board, the member shall be temporarily replaced by the alternate. In the event an alternate has a conflict of interest in a bid, contract or issue that comes before the board, the alternate shall recuse himself.

(g) Absence of chairperson. In the event the chairperson is not in attendance at any board meeting, a majority of board members shall select a member to act as chairman for that meeting.

(h) Quorum. Six members of the board shall constitute a minimum quorum unless otherwise increased by board rules.

Sec. 3-453. Responsibilities of the fairness in construction board.

(a) Any bidder or proposer on a city construction project having a construction contract for which the estimated cost thereof is more than \$300,000.00 may, prior to award of the construction contract (except in the case of a substitution, in which case shall necessarily occur after the award of a contract), appeal to the board any determination by the director concerning the following issues:

- (1) Waiver of the individual contract goals pursuant to section 3-437(a); or
- (2) Substitution of an MBE/WBE listed on a contractor utilization plan pursuant to section 3-441; or
- (3) Substitution of an MBE/WBE listed on a contractor utilization plan pursuant to section 3-443;
or

- (4) Modification of the percentage of the participation on a contractor utilization plan pursuant to section 3-443.

(b) Any contractor having a contract for which the estimated cost thereof is more than \$300,000.00 may prior to the award of a construction contract (except in the case of a substitution, in which case shall necessarily occur after the award of a contract) appeal to the board any determination by the director concerning the following issues:

- (1) MBE/WBE contract credit towards meeting the percentage of MBE/WBE participation identified in the contractor utilization plan; or
- (2) Substitution of an MBE/WBE listed on a contractor utilization plan pursuant to section 3-443; or
- (3) Modification of the percentage of the participation on a contractor utilization plan pursuant to section 3-443; or
- (4) The assessment or amount of liquidated damages.

(c) Any entity subject to a penalty for failure to pay prevailing wage or otherwise engaging in wage theft pursuant to Section 3-622 may appeal to the board any such determination by the director.

(d) Appeals shall be made to the board by filing with the director within fifteen (15) calendar days after notice of the director's determination through a written request for review by the board, stating the grounds of such appeal with specificity. The director shall promptly forward a copy of any appeal to the chairperson and members of the board.

(e) To the extent a bidder, proposer, or contractor is notified that any determination made by the director is final and appealable to the board, and such bidder, proposer, or contractor fails to file an appeal of such final determination within fifteen (15) calendar days of such final determination, such failure to file a timely appeal shall constitute a waiver of the right of a bidder, proposer, or contractor to appeal the director's determination and such person shall be estopped to deny the validity of any determination which could have been timely appealed.

- (f) Authority of board.

- (1) The board shall have authority to decide appeals, and may reverse, affirm or modify determinations of the director pursuant to subsections (a) (b), and (c) hereof. The board shall have the power to inquire into all the facts and circumstances of appeals within its jurisdiction and may hold hearings for such purpose. The board shall not hold hearings to inquire into those matters which the board, upon recommendation by the city attorney or her designee, deems to be frivolous and without merit and whose determination shall be final.
- (2) Except for those appeals which are found to be frivolous in accordance with section 3-353(f)(1), the board shall hold a hearing within thirty (30) calendar days of the date of filing of a timely appeal. The failure to hold a hearing or determine an appeal frivolous within the prescribed time shall result in the director's determination being overturned without further action, unless the

delay was requested or caused by the party filing the appeal.

- (3) The board shall issue a written report of its decision within the later of thirty (30) calendar days of the filing of a timely appeal or fourteen (14) calendar days from the conclusion of the hearing and its decision shall be final for all purposes. Notwithstanding the foregoing, the city council shall retain the right to waive any provision of this article in accordance with section 3-437(b).

(g) In the event an appeal is pending before the board and the project is presented to the city council for consideration prior to the board's issuance of its decision, the city council shall be notified by including in the fact sheet notification that there is an appeal pending before the board. The city council may elect to delay award of the project until after the board issues its decision.

(h) For incentive agency projects, when the applicable incentive agency and the director are unable to reach a mutual determination within thirty (30) days, the board shall have the authority to make determinations as to whether good faith efforts have been made and on the assessments and amount of liquidated damages, pursuant to sections 3-437, 3-441, 3-443, and 3-447. The board shall have the power to inquire into all the facts and circumstances and hold hearings for such purpose. When agreement cannot be reached after the requisite thirty (30) days, the director or applicable agency shall notify the board of such disagreement within five (5) days. Upon notification by the director or applicable agency, the board shall hold a hearing within thirty (30) calendar days. The board shall issue its determination as to whether good faith efforts have been made within fifteen (15) calendar days from the conclusion of the hearing and its decision shall be final for all purposes. Notwithstanding the foregoing, the city council shall retain the right to waive any provision of this section.

Sec. 3-463. Duties and authority of director.

(a) The director is hereby authorized to establish rules and regulations to implement this division which rules and regulations shall be submitted to the city council for its approval and shall be in writing and published.

(b) Notwithstanding any other section to the contrary, the director is hereby authorized to establish rules and regulations to implement the city's MBE/WBE program requirements into contracts that utilize alternative construction delivery methods pursuant to chapter 3, Code of Ordinances, or other alternative procurement or contracting methods if the contract would be subject to MBE/WBE goals under this division.

(c) The director shall, in addition to any other duties specified herein:

- (1) Administer and enforce this article to ensure that MBE/WBEs have equal opportunity to participate in city contracts and subcontracts and work with all city department directors and agency heads to implement the city's MBE/WBE program; and
- (2) Coordinate the establishment of MBE/WBE methodologies with all city departments and incentive agencies including establishment of goals, except goals to be established by the applicable Board, as may be appropriate to remedy underutilization of MBE/WBEs; and
- (3) Update the M/W/DBE Kansas City Mo. Online Directory available to all bidders, proposers, the general public, city departments and incentive agencies no less frequently than every three (3) months; and

(4) Assist city departments incentive agencies, bidders, proposers, contractors and developers in

- finding qualified MBEs and WBEs to participate in contracts; and
- (5) Identify appropriate participation opportunities for qualified MBEs and WBEs in contracts; and
 - (6) Publish an annual report for the city's fiscal year which states for each city department and agency:
 - a. The number of contracts awarded and the total contract dollars awarded pursuant to such contracts; and
 - b. The number of prime contracts awarded to WBEs and MBEs as identified by race and/or ethnicity and the total dollars awarded and paid pursuant to such contracts; and
 - c. The number of subcontracts awarded to WBEs and MBEs as identified by race and/or ethnicity and the total contract dollars awarded and paid pursuant to such contracts; and
 - d. A summary of total waiver requests submitted that are granted or denied and the reasons for the grant or denial; and
 - e. The number of MBE/WBE firms certified by race and/or ethnicity; and
 - (7) Provide a compliance report to the city manager within 30 days after the end of each quarter which shall include:
 - a. The total number of contracts awarded and the total contract dollar amount awarded pursuant to such contracts; and
 - b. The number of contracts awarded to qualified MBEs as identified by race and/or ethnicity and WBEs and the total contract dollar amount awarded and paid pursuant to such contracts; and
 - c. The director of civil rights and equal opportunity evaluation of the city's progress toward meeting MBE/WBE utilization plans and any actions he or she intends to take to address any shortfall in meeting the goals established in such plans; and
 - d. Any other information as may be required by the city manager; and
 - (8) Provide monthly compliance reports to the applicable incentive agency for contracts entered into in connection with sections 3-425(b) and 3-425(c) updating the incentive agency as to the project developer's compliance with the M/WBE goals and work with the applicable incentive agency to assist developers who are not compliant. Failure of the director to furnish these reports does not absolve incentive agency or developer from complying with the processes outlined by agreement with the incentive agency; and
 - (9) Provide the city council a report outlining the effects of any revisions to this division within 18 months of their effective date. The purpose of this report is to ensure that such revisions promote increased opportunities for minority or women business enterprise participation on contracts.
 - (10) Develop and maintain relationships with organizations representing contractors, including

minorities and women organizations, and solicit their support for the city's program; and

(10) Furnish staff assistance to the boards established in this division. This shall include but not be limited to providing to the boards within thirty days following the end of each quarter interim reports containing the information described in subsection (6) and such other reports and information as the board, from time to time, may request; and

(11) Implement any federal or state minority business enterprise program required by law or federal or state contract; and

(12) Appoint a designated neutral hearing examiner for certification revocation hearings.

Sec. 3-622. Prevailing wage and wage theft prevention.

(a) The following definitions shall apply to this section:

(1) *Board* shall mean the Fairness in Construction Board

(2) *City* means the City of Kansas City, Missouri

(3) *Director* means the director of the civil rights and equal opportunity department or such director's delegate.

(4) *Prevailing Wage Rate* shall mean the prevailing hourly rate of wages as set forth in RSMo Sections 290.210 to 290.340 and the Annual Wage Order which is paid to a workman engaged in work of a similar character within the locality.

(5) *Wage theft* shall mean the withholding or denial of wages or employee benefits rightfully owed to a workman or employee.

(6) *Workman* means a person employed to perform labor for which a prevailing wage rate is applicable.

(b) Unless superseded by federal or state law, no less than the prevailing wage rate shall be paid to a workman performing work as part of the construction, reconstruction, improvement, enlargement, alteration, painting and decorating, or major repair on any of the following:

(1) All construction contracts entered into by the city for which the total project cost exceeds \$75,000.00.

(2) Any new development plan, or substantial modification to an existing plan, that is approved by the city council or any economic development agency created by the city and that seeks ad valorem real and/or personal property tax abatement, exemption or redirection for which the total project cost exceeds \$75,000.00 conducted as part of the plan.

(3) Any projects on property leased by the city for which the total project cost exceeds \$75,000.00.

(c) The director shall promulgate rules and regulation as are necessary to carry out the provisions of this section. All such rules and regulations shall be provided to the economic development agencies created by

the city and authorized to approve tax abatement, exemption or redirection within ten days of their promulgation.

(d) Notwithstanding the foregoing provisions of this section, the city council and any economic development agency created by the city shall retain the discretion to authorize the abatement, redirection or exemption, in whole or in part, of ad valorem real property taxes to the full extent authorized by any provision of law. The city council and any economic development agency created by the city shall give particular consideration to the following exceptions ("extraordinary qualifications") in determining whether to authorize any abatement or exemption structure, or approve any development plan providing for incentives to be conveyed on a project-specific basis that is not in compliance with this section:

- (1) Located in a severely distressed census tract that has continuously maintained such status for not less than ten years immediately prior to the effective date of the request.
- (2) Projects that support affordable housing and extremely affordable housing by meeting the requirements of Committee Substitute for Ordinance No. 201038, as Amended, for such housing.
- (3) Projects that connect residents living in continuously distressed census tracts to new employment opportunities by:
 - a. Providing at least 100 new entry-level jobs to Kansas City with an annual salary of at least \$32,000.00, or \$42,000.00 inclusive of wages and benefits; and
 - b. Incorporating options for mass public transportation or locating in an established high-frequency transit corridor.
- (4) Projects that involve the renovation or rehabilitation of a building has been designated by a government entity as a local or national historic landmark or contribute to a historic district, or projects that have filed an application with the National Park Service to be placed on the National Register of Historic Places, in which case the exclusion would be subject to such designation being approved.

Determination of eligibility for extraordinary qualifications shall be made upon receipt by the city or any economic development agency created by the city of an application or request for ad valorem real and/or personal property tax abatement, exemption or redirection.

(e) Any contractor, subcontractor, developer or any other entity who performs work on a city contract, or receives tax incentive, abatement, or redirection from an economic development agency created by the city, or contracts for the construction of a project or development on land owned by the city shall be subject to the following penalties if determined by the director to have not paid prevailing wage or otherwise engaged in wage theft:

- (1) termination of contract; and
- (2) loss of tax incentive, abatement, or redirection; and
- (3) debarment from future work pursuant to Section 3-321

(f) Upon a finding of non-compliance with this section, the director has the discretion to impose any of the above penalties. Any entity subject to penalty may appeal the determination of the director to the board in conformance with the appeal process outlined in Section 3-453.

(g) In addition to penalties imposed pursuant to RSMo. Section 290.340, any person who is found to have violated this section shall be guilty of an ordinance violation, punishable by a fine of not more than \$500.00, by imprisonment of not more than 180 days, or by such fine and imprisonment.

(h) This section shall apply only to projects that have not yet submitted an application for the abatement, redirection or exemption of taxes to the city or any economic development agency created by the city and shall not be construed in a manner as to apply to any tax abatement or transaction authorized by the city, any economic development agency created by the city, or any other public entity prior to May 14, 2021. Notwithstanding the foregoing, the requirements of this ordinance shall be imposed on any project that has submitted to the city or any economic development agency created by the city an application for the abatement, redirection or exemption of taxes prior to its effective date but has not received final approval from the relevant authorizing body within three years of May 14, 2021.

Approved as to form and legality:

Eluard Alegre
Assistant City Attorney