



Metropolitan Nashville and Davidson County, TN

Legislation Text

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An ordinance amending Title 4 of the Metropolitan Code pertaining to the membership of the Procurement Standards Board and certain contract requirements.

WHEREAS, recent examples of informal subcontracting practices in the private sector demonstrate that the Metropolitan Government, when contracting for certain work in the public sector, may incur substantial risk of liability if awardees similarly fail to follow transparent subcontracting standards; and

WHEREAS, the death of 16-year old Gustavo Ramirez demonstrates that certain practices in the construction industry place the workers in Nashville and Davidson County at risk for serious injury and death; and

WHEREAS, Nashville and Davidson County are now experiencing a shortage of adequately trained, skilled craft laborers, diminishing the Metropolitan Government's ability to maintain public infrastructure and carry out public works in a safe, efficient and workmanlike manner; and

WHEREAS, it is in the best interest of the Metropolitan Government to ensure quality work performed pursuant to publicly procured contracts in order to minimize liability due to employment and safety violations of contracting parties.

NOW, THEREFORE, BE IT ENACTED BY THE COUNCIL OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY:

Section 1. Section 4.08.010 of the Metropolitan Code is hereby amended by deleting subsection B. in its entirety and substituting with the following new subsection B.:

B. Membership of the standards board. The standards board shall be composed of seven members as follows:

1. The director of finance of metropolitan government, who shall serve as chairperson of the board, and who may be represented by a designee;
2. The director of law of metropolitan government, who may be represented by a designee;
3. The head of another department of the metropolitan government, to be appointed to the board by the mayor;
4. One (1) outside member, not an employee or elected official of the metropolitan government, appointed by the metropolitan county council, who shall be selected by that body by a majority vote of its membership, to serve a term of three (3) years, or until a successor has been duly appointed and qualified;
5. Three other outside members, not employees or elected officials of metropolitan government, two of whom shall be appointed by the mayor and one of whom shall be appointed by the Director of the Metro Human Relations Commission, as provided herein, and all shall be confirmed by a majority vote of the whole membership of the council. These members shall serve a term of three years, respectively, or until a successor has been duly appointed and qualified; except, of the members first appointed, one shall serve for a term of two years and one shall serve for a term of three years. Of these two outside members appointed by the mayor, at least one shall be a representative of labor.
6. Provided, however, of the seven members, at least one shall be a female and at least one shall be an African American, provided however, that an African-American female shall not satisfy the requirement of one female and one African American, and shall meet the requirement of only one such position.

Section 2. Chapter 4.08 of the Metropolitan Code is hereby amended by adding the following new subsection

C of Section 4.08.020:

C. The Standards Board shall provide the public an established process for comment relative to the promulgation of regulations.

Section 3. Section 4.04.080 of the Metropolitan Code is hereby amended by adding the following paragraph:

The Purchasing Division shall also maintain a list of all persons or entities with which Metro Government (inclusive of all departments, agencies, and other public entities) contracts. The list shall note which of those persons or entities employ or utilize temporary laborers as defined in Section 4.20.130. The Purchasing Division shall create this list by no later than November 1, 2021 and, at least once a year every year thereafter, it shall update and present the list to the Standards Board and the Metro Council.

Section 4. Section 4.12.010 of the Metropolitan Code is hereby amended by deleting the definition of "Responsible bidder or offeror" in its entirety and substituting it with the following new definition:

"Responsible bidder or offeror" means a person who has the capability in all respects to perform fully the contract requirements and the integrity and reliability which will assure good faith performance. A ruling by a court or a finding of a governmental agency of competent jurisdiction of such person's violation of any federal or state law or regulation regarding employment practices or a finding by a governmental agency of competent jurisdiction of such person's serious violation of any federal or state safety standards shall disqualify that person from meeting the definition of "responsible bidder or offeror" for three (3) years after the ruling or finding. Further, a person's failure to comply with Section 4.20.055 on any prior award shall disqualify that person from meeting the definition of "responsible bidder or offeror" for a period of seven (7) years after the violation.

As used in this Section, "employment practices" shall refer to matters regulated under The Fair Labor Standards Act of 1938, 29 U.S.C. § 201-219; The Family Medical Leave Act, 29 U.S.C. §2601, et seq.; Title VII of the Civil Rights Act of 1964 and 42 U.S.C. 1981 (Section 1981); The Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq.; The Americans with Disabilities Act of 1990, 42 U.S.C. § 12101; The Rehabilitation Act of 1973, 29 U.S.C. § 701, et seq.; the Education Amendments Act of 1972, 20 U.S.C. § 1681, et seq.; the National Labor Relations Act of 1935, 29 U.S.C. § 151, et seq.; or the Tennessee Wage Regulation Act, Tenn. Code. Ann. § 50-2-101, et seq. As used in this section, "serious" shall have the same meaning as the term is used in the Tennessee Occupational Safety and Health Act of 1972, Tenn. Code. Ann. § 50-3-101, et seq., and applicable federal law.

Section 5. Chapter 4.20 of the Metropolitan Code is hereby amended by adding the following new Section 4.20.055:

4.20.055 Subcontractor contracts required.

A. A person awarded a contract pursuant to this Chapter shall require and obtain written contracts for all work performed within the scope of the award, regardless of the awardee's privity with the person performing the work. Such contracts shall include a description of the work to be performed, the timeframe for completing such work, and the compensation (or method for calculating the compensation) to be paid for the work performed. Every person awarded a contract pursuant to this Chapter is responsible for ensuring that any and all subcontractors, lower tier subcontractors, independent contractors, and any other person performing work within the scope of the award are paid in accordance with the terms of their written contracts.

B. A person awarded a contract pursuant to this Chapter shall furnish to the Procurement Department all such written contracts within 30 days of execution of the contract. Such contracts shall constitute public records subject to public inspection and shall be made readily accessible to the public via posting, whether on a publicly available internet site or by physical posting at the site of the contract work.

C. Failure to comply with either A or B of this Section shall be sufficient evidence of lack of integrity and reliability to disqualify the person from meeting the definition of "responsible bidder or offeror" as defined in this Chapter.

D. Every contract issued pursuant to this Chapter shall contain the following clause (where the "Contractor" shall mean the person awarded a contract with the metropolitan government):

Contractor understands and agrees that it alone is responsible to Metro for all of the work under this Contract. Contractor is responsible for all aspects of the Contract, including those performed by a subcontractor. Contractor is responsible for monitoring any subcontractor or other parties performing work under the Contract and is responsible for ensuring that all responsibilities under the Contract are fulfilled. Contractor will be held responsible in the event of non-compliance by any subcontractor.

Section 6. Chapter 4.20 of the Metropolitan Code is hereby amended by deleting subsections A and B of Section 4.20.100 in their entirety and substituting with the following:

A. Any person who may enter into any contractual agreement with the metropolitan government or any agency thereof for any public works or improvements shall maintain for inspection by the purchasing agent certified copies of monthly payroll records, including employees' names, hours worked, and rates paid, but excluding addresses and social security numbers which shall be deleted or redacted, and shall maintain and preserve such payroll records for the previous three hundred sixty-five days on an ongoing basis. The purchasing agent or his designee may periodically examine the records required to be kept under this section.

B. The purchasing agent is authorized to enter into a contract or contracts with qualified, independent firms to perform the necessary review and investigation to determine compliance with the provisions of this chapter; Except that, for every procurement exceeding the sum of one million dollars, the purchasing agent shall enter into a contract or contracts with qualified, independent firms to perform the necessary review and investigation to determine compliance with the provisions of this title. This subsection is in no way intended to subject the metropolitan government to any provision of the federal Davis-Bacon Act.

Section 7. Chapter 4.20 of the Metropolitan Code is hereby amended by deleting Section 4.20.105 in its entirety and substituting with the following:

4.20.105 - Utilization of apprentice, training, and certification programs-Employer information.

A. Any person submitting a bid or proposal for any construction or public works infrastructure project shall furnish the purchasing agent with the following information:

1. The extent of the employer's utilization of federally registered apprenticeship programs;
2. The extent of the employer's utilization of MC3 and MCCR training curriculum;
3. Number of OSHA 10-certified and OSHA 30-certified individuals on project;
4. Number of OSHA 100-certified individuals on project;
5. Percentage of employees on project covered by health benefits offered by the employer; and
6. Percentage of employees on project covered by workers' compensation by employer.

B. The procurement standards board shall establish criteria for weighing the factors set forth in subsection A of this section when evaluating a bid or proposal for any construction or public works infrastructure projects.

Section 8. Chapter 4.20 of the Metropolitan Code is hereby amended by adding the following new Section 4.20.130:

4.20.130 - Sanitation Measures.

Every person awarded a contract for construction or public works infrastructure projects shall ensure that all

individuals performing work on the project have, at a minimum, completed OSHA 10 training prior to commencing work.

Every person awarded a contract for construction projects shall ensure there is at least one handwashing station on every floor of the facility being constructed. Further, every person awarded a contract for construction projects shall ensure that toilets are provided consistent with OSHA Standard No. 1926.51, as amended; except that in no event shall there be fewer than two (2) toilets on the site of the contract work. During the pendency of an emergency order from the State or County Health Department, persons awarded a contract for construction shall provide any personal protective equipment recommended by the Department at no cost to individuals working within the scope of the award.

Section 9. Chapter 4.20 of the Metropolitan Code is hereby amended by adding the following new Section 4.20.140:

4.20.140 - Temporary Labor.

A person awarded a contract or any subcontractor in privity with that person must offer, in writing, direct employment to any temporary laborer that performs 30 days of work within the scope of the award. As used in this Section, "temporary laborer" shall mean a natural person who contracts for employment with any person or entity engaged in the business, for profit, of employing such laborers to perform work or provide services to or for any entity performing work within the scope of an award.

Section 10. This Ordinance shall take effect from and after its enactment, the welfare of the Metropolitan Government of Nashville and Davidson County requiring it.

Analysis

This ordinance amends the Metro Procurement Code to increase the size of the Procurement Standards Board, as well as to impose additional requirements on Metro contractors and bidders for Metro contracts. The Procurement Standards Board is current comprised of five members: the Metro Finance Director (or designee), the Metro Director of Law (or designee), another department head selected by the Mayor, and two outside members appointed by the Mayor and confirmed by the Council. This ordinance would increase the size of the board to seven members. The two additional members would include a person appointed by the director of the Human Relations Commission and one person elected by the Council. In addition, at least one of the members appointed by the Mayor would be required to be a "representative of labor."

This ordinance would also make the following changes to the Procurement Code:

- The ordinance would require the Purchasing Agent to identify which contractors on the list of Metro contractors use temporary labor.
- The ordinance would rewrite the definition of "responsible bidder or offeror." This definition was amended by Ordinance No. BL2019-1731 in August 2019 to provide that a bidder could be deemed disqualified if a court or regulatory agency makes a final determination that the bidder committed a willful violation of employment laws or safety standards within the past five years. This ordinance expands that further to make contractors ineligible to receive a Metro contract for three years if they violate employment laws or for serious safety violations, and makes them ineligible for seven years if

they don't have a written contract for all subcontractor work. The subcontractor contracts must include a description of the work, the timeframe for completion, and the compensation. Prime contractors would be responsible for ensuring all subcontractors are paid in accordance with the terms of their written contract. A copy of each written contract would be required to be provided to the "Procurement Department" within 30 days of execution, which would be open for public inspection. The Council Office would note that there is no Procurement Department in Metro. The Division of Purchases is a division of the Metro Finance Department pursuant to Section 4.08.030 of the Metro Code.

- All Metro contracts would include language stating that the contractor is responsible for ensuring that all contract requirements are satisfied, and will be responsible for noncompliance of a subcontractor.
- The ordinance would require the Purchasing Agent to enter into a contract with an independent firm to ensure compliance "with the provisions of this title," which would be for any provision in the Procurement Code (M.C.L. Title 4), for all contracts exceeding \$1 million. According to the Purchasing Division, this would impact approximately 30 contracts. It is unclear what the cost would be to retain such a consultant. The Purchasing Division's closest approximation would be the cost of construction project managers, who provide a similar service. The cost of construction project managers ranges from 3% to 15% of the total contract amount.
- The bill would modify the Procurement Code provision regarding the utilization of apprenticeship programs and employee health insurance. Ordinance BL2019-1731 amended the Procurement Code to require construction contractors to provide information regarding the utilization of federally-registered apprenticeship programs, whether a certain training curriculum is used, the number of OSHA certified individuals on a project, and the percentage of employees covered by health benefits and workers compensation offered by the employer. This ordinance would add a requirement that such factors be included as part of the bid evaluation process for construction contracts. This means that points would be allocated for these factors when making an award. It is unclear whether this requirement is consistent with T.C.A. § 7-51-1802(c), which prohibits local governments from requiring that contractors provide health benefits.
- The ordinance would require every worker to complete a minimum of 10 hours of OSHA training, ensure at least one handwashing station and at least two toilets are provided at jobsites, and require employers to provide the necessary personal protective equipment while an emergency health order is in effect. Requiring specific levels of training may not be consistent with T.C.A. § 62-6-111(i)(2)(c), which prohibits local governments from imposing additional requirements upon state licensed contractors beyond what the state requires.
- The ordinance would require prime and subcontractors to offer direct employment to any temporary laborer that performs 30 days of work as part of the contract award.

The Tennessee General Assembly has now enacted SB1150/HB1112, which raises preemption issues regarding portions of this ordinance. A substitute ordinance is being drafted in an effort to address the preemption issues.