

**PALM BEACH COUNTY
BOARD OF COUNTY COMMISSIONERS
AGENDA ITEM SUMMARY**

5A-2

Meeting Date: July 21, 2009 ☐ Consent ☒ Regular
 ☐ Workshop ☐ Public Hearing

Department:

Submitted By: The County Attorney's Office
 Submitted For: Office of Small/Minority/Women Business Assistance

I. EXECUTIVE BRIEF

Motion and Title: Staff recommends motion to approve on preliminary reading and advertise for public hearing on August 18, at 9:30 am: an Ordinance of the Board of County Commissioners of Palm Beach County, Florida, amending Sections 2-80.21 through 2-80.34 of the Palm Beach County Code, which codified Ordinance No. 2002-064, as amended by Ordinance No. 04-071, Ordinance No. 05-048, and Ordinance No. 2008-014, and established the Small Business Enterprise Program; providing for definitions; providing for eligibility standards; providing for commercially useful business function; providing for application procedures; providing for application review procedures; providing for repeal of laws in conflict; providing for severability; providing for inclusion in the code of laws and ordinances; and providing for an effective date.

Summary: The Office of Small Business Assistance (OSBA) conducted a study of comparable regional programs and reviewed gross receipts of county SBEs. Based on the research, the OSBA determined in order to reduce confusion, the county should utilize gross receipts when determining the size of the SBE for certification. Other changes to the SBE Ordinance are recommended to create a thorough process for reviewing applications for certification and provide further clarity in the ordinance. Countywide (TKF)

Background and Policy Issues: The Board of County Commissioners implemented a Small Business Enterprise Program (SBE) on October 1, 2002. During the nearly seven years of implementation of the program, it has become apparent that certain changes are needed to provide clarity. The proposed ordinance amendment was reviewed with the Small Business Advisory Committee on May 13, 2009 and they unanimously approved the changes. The ordinance draft was sent to the Economic Council of Palm Beach County, the Business Development Board of Palm Beach County, and the League of Cities.

The proposed changes are highlighted below:

- The definition for adjusted gross margin is deleted (Section I).
- The definition for affiliation is added (Section I).
- The definition of business category is added (Section I).
- The definition of days is amended to reflect business days (Section I).
- The definition of domicile is amended to include a requirement that employees are working from a Palm Beach County office and that the location is zoned appropriately (Section I).
- The definition of gross receipts is added (Section I).
- The definition of home business is added (Section I)
- The definition for small business is amended to reflect gross receipts rather than adjusted gross margin. (Section I).
- The definition of subsidiary is added (Section I).
- The application procedures are amended to require businesses to submit information regarding their affiliation to avoid large businesses creating small corporations for the purpose of qualifying for SBE certification (Section II, IV and VIII).
- References to North American Industrial Classification System (NAICS) codes are deleted (Section V).
- The time period for reviewing application is extended to 90 days (Section V).

Attachments:

1. Proposed Ordinance Amendment

Recommended by: Hazel L.K. Oxendine
 Hazel L.K. Oxendine, Director OSBA

7/6/09
 Date

Approved by: Verdenia C. Baker
 Verdenia C. Baker, Deputy County Administrator

7/13/09
 Date

II. FISCAL IMPACT ANALYSIS

A. Five Year Summary of Fiscal Impact:

Fiscal Years	2008	2009	2010	2011	2012
Capital Expenditures	-0-	-0-	-0-	-0-	-0-
Operating Costs	-0-	-0-	-0-	-0-	-0-
External Revenues	-0-	-0-	-0-	-0-	-0-
Program Income (County)	-0-	-0-	-0-	-0-	-0-
In-Kind Match (County)	-0-	-0-	-0-	-0-	-0-

NET FISCAL IMPACT

ADDITIONAL FTE
POSITIONS (Cumulative) _____

Is Item Included In Current Budget? Yes _____ No

Budget Account No.: Fund __ Agency __ Org. __ Object __ Reporting Category

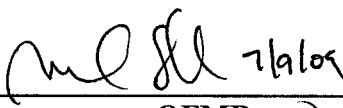

B. Recommended Sources of Funds/Summary of Fiscal Impact:

☒ Approval of this item will not have fiscal impact at this time. The fiscal impact will be determined on a project by project basis.

C. Departmental Fiscal Review:

III. REVIEW COMMENTS

A. OFMB Fiscal and/or Contract Dev. and Control Comments:


na 2-20-09 OFMB  7/1/09


Contract Dev. and Control 7/1/09

B. Legal Sufficiency:


Assistant County Attorney 7/10/09

C. Department Review:


Department Director

This summary is not to be used as a basis for payment.

ORDINANCE NO. 2009 - _____

AN ORDINANCE OF THE BOARD OF COUNTY COMMISSIONERS OF PALM BEACH COUNTY, FLORIDA, AMENDING SECTIONS 2-80.21 THROUGH 2-80.34 OF THE PALM BEACH COUNTY CODE, WHICH CODIFIED ORDINANCE NO. 2002-064, AS AMENDED BY ORDINANCE NO. 04-071, ORDINANCE NO. 05-048, AND ORDINANCE NO. 2008-014, AND ESTABLISHED THE SMALL BUSINESS ENTERPRISE PROGRAM; PROVIDING FOR DEFINITIONS; PROVIDING FOR ELIGIBILITY STANDARDS; PROVIDING FOR COMMERCIALLY USEFUL BUSINESS FUNCTION; PROVIDING FOR APPLICATION PROCEDURES; PROVIDING FOR APPLICATION REVIEW PROCEDURES; PROVIDING FOR RECERTIFICATION; PROVIDING FOR DECERTIFICATION; PROVIDING FOR M/WBE ELIGIBILITY; PROVIDING FOR REPEAL OF LAWS IN CONFLICT; PROVIDING FOR SEVERABILITY; PROVIDING FOR INCLUSION IN THE CODE OF LAWS AND ORDINANCES; AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, it is the policy of Palm Beach County that all businesses be afforded an opportunity for full participation in our free enterprise system; and

WHEREAS, in order to implement this policy, Palm Beach County is committed to ensuring full and equitable participation by small business enterprises in the provision of goods and services to Palm Beach County; and

WHEREAS, on October 1, 2002, Palm Beach County implemented a Small Business Enterprise Program; and

WHEREAS, modifications to the Program are appropriate.

NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF PALM BEACH COUNTY, FLORIDA, that Sections 2-80.21 through 2-80.34 of the Palm Beach County Code are hereby amended as follows:

SECTION I. DEFINITIONS:

Section 2-80.21 of the Palm Beach County Code is amended to read as follows:

Acting as a conduit means, in part, not acting as a regular dealer by making sales of material, goods or supplies from items bought, kept in stock and regularly sold to the public, as opposed to only government agencies, in the usual course of business. Brokers, manufacturer's representatives, sales representatives and non-stocking

distributors are considered as conduits that do not perform a commercially useful business function.

Affiliation means that the entity applying for SBE Certification controls, has the power to control, or is controlled by another entity or entities, or an identity of interest exists between the entity applying for SBE Certification and another entity or entities. In determining whether an affiliation exists, it is necessary to consider factors including, but not limited to, common ownership, common management, common use of facilities, equipment, and employees, contractual obligations and family interest in the business. Affiliated entities must be considered together in terms of gross receipts in determining whether a business entity meets SBE eligibility criteria.

~~Adjusted gross margin means total revenue less cost of materials, product and subcontractors, excluding cost of any leased employees.~~

Board means the board of county commissioners of Palm Beach County, Florida.

Business Category means construction; professional services procured pursuant to the Competitive Consultant Negotiations Act (CCNA); other professional services, and commodities. For purposes of SBE eligibility criteria, a business entity shall be considered for eligibility in the business category in which it performs the largest portion of its work.

Certification means the process by which the office of small business assistance determines a business meets the criteria for a small, minority or woman business enterprise.

Certified small business enterprise (SBE) means a business which has been certified by the office of small business assistance (SBA).

Code means the Palm Beach County Code.

Commercially useful business function means adding value to the goods and services supplied under a contract.

Committee means the small business advisory committee.

County means Palm Beach County.

Days means business calendar days, unless specified otherwise.

Domiciled in the county means the business holds a valid Palm Beach County

1 business tax receipt and has a permanent place of business in Palm Beach County. In
2 order to establish a permanent place of business in Palm Beach County, the business
3 must:

4 (1) Demonstrate business activity during the preceding twelve (12) months at
5 the Palm Beach County location, and sufficient full-time employees in Palm Beach
6 County to perform the contracted work;

7 (2) The Palm Beach County business tax receipt bears the Palm Beach
8 County address, and the Palm Beach County location is in an area zoned for the
9 conduct of such business;

10 (3) The Palm Beach County location must be verifiable through documentation
11 such as lease agreement, utility bills, client invoices, payroll records or other appropriate
12 documentation; and

13 (4) The Palm Beach County location must be identifiable through signage,
14 telephone book listing, or other appropriate means. On-site visits may be conducted
15 prior to and during the certification term to determine continued adherence to the
16 domicile requirements and other requirements of the code. Additional backup
17 documentation may be requested on a case-by-case basis. A Palm Beach County
18 telephone number or post office box in Palm Beach County shall not be sufficient to
19 establish domicile in Palm Beach County.

20 *Front* shall mean a business which purports to be a small business but which is
21 actually owned and/or controlled in a manner which does not comply with the county's
22 requirements of certification.

23 *Goals* mean annual small business goals expressed as percentages of total
24 dollar volume for participation of small businesses in the county's procurement of goods,
25 services and construction.

26 Gross Receipts means the total annual sales for the applicant as stated on its
27 federal income tax return, or for a new business that has not yet filed a federal income
28 tax return, on its audited financial statements before deductions for returned items,
29 allowances and discounts.

30 Home business means a small business that operates from the business owner's

1 home. Home businesses usually have a very small number of employees that are often
2 members of the business owner's family. A home business is not affiliated with, nor a
3 subsidiary of another company located outside of the home. Home businesses meeting
4 this definition are eligible for certification as a small business, provided they meet all
5 other certification criteria. Home offices of an employee working for a company located
6 in another county do not establish domicile in Palm Beach County.

7 *Joint venture* means an association of two (2) or more persons or businesses
8 registered with the State of Florida to carry out a single business enterprise for profit for
9 which purpose they combine their property, capital, efforts, skills and knowledge.

10 *Minority person* means an individual who is a citizen or lawful permanent resident
11 of the United States who is:

12 (1) A "black American," a person having origins in any of the black racial groups
13 of Africa.

14 (2) A "Hispanic American," a person of Spanish or Portuguese culture with
15 origins in Mexico, Central or South America, or the Caribbean, regardless of race.

16 (3) An "Asian American," a person having origins in any of the original peoples
17 of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands.

18 (4) A "Native American," a person who is a member of, or is eligible to be a
19 member of, a federally recognized Indian tribe. A "federally recognized Indian tribe"
20 means an Indian tribe, band, nation, rancheria, pueblo, colony or other organized group
21 or community, including any Alaska native village, which was recognized by the
22 secretary of the interior on October 1, 1985, as having special rights and is recognized
23 as eligible for the services provided by the United States to Indians because of their
24 status as Indians, and any tribe that has a pending application for federal recognition on
25 October 1, 1985, as having special rights and is recognized as eligible for the services
26 provided by the United States to Indians because of their status as Indians, and any
27 tribe that has a pending application for federal recognition on October 1, 1985.

28 *M/WBE* means a minority-owned business enterprise or a women-owned
29 business enterprise or a combination minority and women-owned business enterprise.
30 A M/WBE is any small business concern which is organized to engage in commercial

1 transactions, which is domiciled in Palm Beach County, and which is at least fifty-one
2 (51) percent owned by minority persons and/or women who are members of an insular
3 group that is of a particular racial, ethnic or national origin makeup or gender, which has
4 been subjected historically to disparate treatment due to identification in and with that
5 group resulting in an under-representation of commercial enterprises under the group's
6 control, and whose management and daily operations are controlled by such persons.

7 *Manufacturer* means a firm or business entity that produces an item from raw
8 materials or who substantially alters the form of a product in order to make it suitable for
9 a particular use.

10 *Owned*, for the purpose of determining whether a business is a minority or
11 women business enterprise, shall mean that the minorities or women, as the context
12 requires, shall possess an ownership interest of at least fifty-one (51) percent.

13 *Prime contractor* means any person who has a contract with the county to
14 provide specific construction services, sales, supplies, materials, professional services,
15 labor and/or equipment.

16 *Professional services* means any narrow discipline wherein a known practitioner
17 has through education and experience developed expert advisory and programming
18 skills as a vocation; any service performed primarily by vocational personnel which
19 requires the analysis or certification of a professional before the services are acceptable
20 to the user of the service; or any other advisory study, or programming activity where
21 the director of purchasing determines that the level of skills and/or creativity of the
22 potential or known practitioner(s) warrants a competitive proposal or submittal process.

23 *Project goal* means SBE goals expressed as percentages of total dollar volume
24 for participation of small businesses, on individual county contracts.

25 *SBE* means small business enterprise certified by Palm Beach County.

26 *Sheltered Market Program* means a program under which certain contracting
27 opportunities are made available only to certified SBEs.

28 *Small business* means a business domiciled in Palm Beach County and certified
29 by Palm Beach County which is an independently owned and operated for profit
30 business concern organized to engage in commercial transactions and whose adjusted

gross margin does not exceed the following:

(1) For a provider of construction the annual ~~adjusted gross margin receipts~~ may not exceed ~~three—nine~~ million ~~two—hundred—thousand—dollars~~ (\$~~9,000,000.00~~~~3,200,000.00~~) (averaged over the previous three (3) years, or if in business, less than three (3) years, averaged during duration of business).

(2) For a supplier of commodities the annual ~~adjusted gross receipts margin~~ may not exceed ~~one—five~~ million ~~six—hundred—thousand—dollars~~ (\$~~5,000,000.00~~~~1,600,000.00~~) (averaged over the previous three (3) years, or if in business, less than three (3) years, averaged during duration of business).

(3) For a supplier of professional services procured pursuant to the CCNA statute the annual ~~adjusted gross receipts margin~~ may not exceed ~~two—five~~ million ~~seven—hundred—thousand—dollars~~ (\$~~5,000,000.00~~~~2,700,000.00~~) (averaged over the previous three (3) years or if in business, less than three (3) years, averaged during duration of business).

(4) For a supplier of other professional services, the annual gross receipts may not exceed four million dollars (\$4,000,000.00) (averaged over the previous three (3) years, or if in business, less than three (3) years, averaged during the duration of the business.) ~~On October 1 of each year, starting October 1, 2005, the maximum adjusted gross margin utilized to determine eligibility as a small business will be adjusted by multiplying the current adjusted gross margin by the annual consumer price index and adding that amount to the adjusted gross margin maximum. The office of small business assistance will publish the revised adjusted gross margin maximum annually on their web page.~~

A small business must be owned and controlled by an individual who is a citizen or a lawful permanent resident of the United States.

Small and minority/women business directory means a compilation of certified small businesses and M/WBEs which is maintained electronically by the office of small business assistance and made available to contractor(s) or vendor(s) for use in identifying subcontractors, material suppliers, etc.

Subsidiary means a company whose controlling interest is owned by another

1 company. A subsidiary cannot be considered an independent business.

2 All terms not specifically defined herein, but defined in the county's purchasing
3 ordinance Chapter 2, Article III, Division 2, Part A of the County Code, as may be
4 amended, shall carry the definition therein described.

5 **SECTION II. SMALL BUSINESS ELIGIBILITY STANDARDS:**

6 Section 2-80.30(a) of the Palm Beach County Code is amended to read as follows:

7 An eligible small business is a for-profit business concern ~~which~~whose gross
8 receipts ~~adjusted margin is~~ are within the standards as defined in section 2-
9 80.21 above and who has been in business for at least one (1) year or whose
10 owner has a certificate of small business competency issued by the Small
11 Business Development Center, Palm Beach Resource Center, Palm Beach
12 Community College or other office of Small Business Assistance approved
13 course. An eligible small business for this program shall be an independent
14 business. Recognition of the business as a separate legal entity for tax or
15 corporate purposes is not necessarily sufficient for recognition as a small
16 business. In determining whether a potential small business is an independent
17 business, the county shall consider all relevant factors, including but not limited
18 to, the date the business was established, the adequacy of its resources for the
19 type of work specified, relationships with affiliates and subsidiaries, and the
20 degree to which financial, equipment leasing and other relationships with other
21 businesses vary from established industry practices. An eligible small business
22 for this program must perform a commercially useful business function. If there
23 has been a recent change in ownership of the business, a review of whether the
24 acquisition of the business was done pursuant to an arm's length transaction will
25 also be considered in determining independence of the business.

26 **SECTION III. COMMERCIALLY USEFUL BUSINESS FUNCTION:**

27 Section 2-80.30(b) of the Palm Beach County Code is amended to read as follows:

28 A small business is considered to perform a commercially useful business
29 function when it is responsible for execution of a distinct element of work of a
30 contract and carrying out its responsibilities by actually performing, managing and

1 supervising the work performed. Businesses who merely act as a conduit do not
2 perform a commercially useful business function and will not be eligible for
3 certification as a SBE. In determining whether a business performs a
4 commercially useful business function, consideration will include, but not be
5 limited to whether the business adds a value to the product or service provided;
6 whether the business has a distributorship agreement ~~arrangement~~ with the
7 manufacturer of goods supplied; whether the business takes possession of the
8 product or service provided; whether the business warrants the product or
9 service provided; whether the business maintains sufficient storage space to
10 keep the product in inventory; whether the business maintains sufficient
11 inventory to meet the requirements of its contracts; whether the business
12 provides the product or service to the public or other business other than a
13 governmental agency.

14 **SECTION IV. APPLICATION PROCEDURES:**

15 Section 2-80.30(c) of the Palm Beach County Code is amended to read as follows:

16 All applicants wishing to be considered as certified businesses for the benefits of
17 this program must apply for small business certification by completing the application
18 and affidavit which can be obtained through the office of small business assistance and
19 pay the applicable fee for certification, modification of certification or recertification.
20 Applicants must submit the documentation listed below as appropriate to their business
21 and all of its affiliates. The office of small business assistance may request any other
22 documentation necessary to determine eligibility. Documents not in English must be
23 accompanied by a certified translation. In instances where the applicant business has
24 not been in existence three (3) years, it shall provide the documentation for the years
25 the business has been in existence.

26 (1) Corporations:

- 27 a. List of the corporation's current full-time and part-time employees by
28 length of service;
29 b. Proof of business location and operation in Palm Beach County;
30 c. Articles of incorporation, including date approved by the state, and any

- subsequent amendments;
- d. By-laws;
- e. Prior three (3) years' financial statement prepared by an independent CPA or accountant;
- f. Prior three (3) years' federal corporate tax returns, including all schedules, as signed and filed;
- g. Copies of last three (3) months' corporate payroll;
- h. Any necessary licenses to perform the work for which certification is sought;
- i. Palm Beach County business tax receipt;
- j. A list of all affiliates.

(2) Partnerships:

- a. List of the partnership's current full-time and part-time employees by length of service;
- b. Proof of business location and operation in Palm Beach County;
- c. Partnership agreement;
- d. Prior three (3) years' financial statements prepared by an independent CPA or accountant;
- e. Prior three (3) years' federal tax returns, including all schedules, as signed and filed;
- f. Any other necessary license to perform the work for which certification is sought;
- g. Copies of last three (3) months' partnership payroll.
- h. Palm Beach County business tax receipt;
- i. A list of all affiliates.

(3) Sole proprietors:

- a. Any other necessary license to perform the work for which certification is sought;
- b. Verification of fictitious name registration;
- c. Prior three (3) years' federal tax returns, including all schedules, as

1 signed and filed;

2 d. List of current full-time and part-time employees by length of service;

3 e. Proof of business location and operation in Palm Beach County.

4 f. Palm Beach County business tax receipt;

5 g. A list of all affiliates.

6 **SECTION V. APPLICATION REVIEW PROCEDURES:**

7 Section 2-80.30(d) of the Palm Beach County Code is amended to read as follows:

8 Once an applicant has submitted the application and all supporting documentation,
9 certification review will be completed within ninety (90) ~~sixty (60)~~ days and the following
10 procedures will apply:

11 (1) The small business certification application and all supporting documents will
12 be logged in as appropriate. The application will be reviewed for completeness and
13 accuracy. The office of small business assistance will inform the applicant of any
14 missing documentation. Any applicant failing to submit the requested documentation
15 within thirty (30) days of the notice shall be deemed to have abandoned its application.

16 (2) References will be called and information verified by third parties, when
17 appropriate. The office of small business assistance will review the goods or services
18 provided by the applicant to determine the appropriate ~~North American Industrial~~
19 ~~Classification System (NAICS) and/or~~ National Institute of Government Procurement
20 (NIGP) classification codes. Businesses will only be certified in the areas where they
21 provide a commercially useful business function. In those instances when the ~~NAICS~~
22 ~~and/or~~ NIGP codes are broader than the goods or services provided by the applicant,
23 the office of small business assistance will appropriately limit the certification to those
24 goods or services for which the application performs a commercially useful business
25 function.

26 (3) When deemed appropriate by the office of small business assistance, a
27 personal interview or site visit will be scheduled with the principal(s) to discuss the
28 documentation submitted and determine if the applicant meets the established criteria.

29 (4) Applicants approved for certification will be notified immediately by mail.
30

1 **SECTION VI. RECERTIFICATION:**

2 Section 2-80.30 (h) of the Palm Beach County Code is amended to read as follows:

3 Certified SBEs are required to submit an affidavit of their continued eligibility as a
4 SBE every three (3) years along with an application for recertification. The office of
5 small business assistance may conduct site visits or review documents to ensure
6 continued compliance as a small business. If there has been a change in operation,
7 ownership, control, activities, domicile or ~~adjusted-gross~~ receipts, ~~margin~~ the SBE must
8 notify the office of small business assistance within thirty (30) days of the change.
9 Supporting documentation may be required for continued certification. A company that
10 fails to submit its application for recertification and affidavit of continued eligibility or fails
11 to submit documentation requested by the office of small business assistance or allow a
12 site visit, will no longer be deemed certified for purposes of participation in the small
13 business program.

14 The criteria for recertification shall be the same as for certification. An applicant may
15 request an appeal of denial of recertification within fifteen (15) days of receipt of notice
16 of denial. The hearing shall be conducted in the manner describe in section 2-80.30(g).
17 An applicant denied recertification may not reapply for certification for one (1) year from
18 the denial of recertification.

19 **SECTION VII. DECERTIFICATION:**

20 Section 2-80.30(i) of the Palm Beach County Code is hereby amended to read as
21 follows:

22 If during the period of certification, the county has reason to believe that the SBE
23 received certification improperly, or that there has been a substantial change in
24 circumstances in the operation, ownership, control, activities, domicile, or ~~adjusted~~
25 gross ~~margin~~-receipts that continued certification would be contrary to the county's small
26 business policy, then the Office of Small Business Assistance may conduct an
27 investigation of the allegations.

28 The Office of Small Business Assistance may decertify the SBE if the
29 investigation indicates that:

30 1. The small business cannot be contacted at the last known address in

1 Palm Beach County;

2 2. The small business is no longer in business;

3 3. The small business is no longer licensed to do the type of business for which
4 it was certified;

5 4. The small business obtained its original certification and/or recertification
6 through false representation or deceit;

7 5. The small business has been disbarred or suspended as a vendor by the
8 county purchasing department. At the expiration of any suspension, the firm may
9 reapply for certification;

10 6. Site visits have revealed no business being conducted at the county location;
11 or

12 7. The small business does not meet the current eligibility standards for
13 certification as a small business. Certification under a previous ordinance does not
14 guarantee that the small business continues to be eligible for their entire certification
15 period.

16 8. The small business does not perform a commercially useful business function.

17 9. The small business refuses to allow an on-site inspection.

18 10. The small business has failed to notify the Office of Small Business of any
19 change in the ownership, location, structure or any other aspect of the small business
20 which would affect its small business certification.

21 The Office of Small Business Assistance shall notify the small business by
22 certified mail that it has been decertified. The small business may request an appeal
23 hearing of the decertification within fifteen (15) days of receipt of the notice. The
24 resolution of the appeal shall be conducted in the manner described in Subsection 2-
25 80.30(g). Nothing in this section shall prevent the Office of Small Business Assistance
26 from commencing an investigation regarding the legitimacy of a small business
27 certification. A business decertified pursuant to this section may not re-apply for
28 certification for one (1) year from the date of decertification.

29

30

1 **SECTION VIII. M/WBE ELIGIBILITY:**

2 Section 2-80.31 of the Palm Beach County Code is amended as follows:

3 (a) Eligibility standards: Although preferences to certified M/WBEs will not be
4 extended under this part, unless otherwise provided by law, businesses eligible for
5 certification as a M/WBE are encouraged to maintain their certification in order to assist
6 in the tracking of M/WBE availability and awards of contracts to M/WBEs. This
7 information is vital to determining whether race and gender neutral programs assist
8 M/WBE firms or whether race and gender preferences are necessary, in order to
9 address any continued discrimination in the market.

10 An eligible MBE or WBE is a small for profit business concern domiciled in the county
11 which is both owned and controlled by minorities or by women and whose gross
12 receipts are within the standards as defined in Section 2-80.21 above. Further, the
13 business must meet all other criteria of a small business as provided above. This means
14 that minorities and/or women must own at least fifty-one (51) percent of the business
15 and that the management and daily business operations are controlled by the minorities
16 and/or women who own it. An eligible M/WBE for this program shall be an independent
17 business. The ownership and control by minorities and/or women shall be real,
18 substantial and continuing, and shall continue beyond the pro forma ownership of the
19 firm as reflected in its ownership documents. The minority and/or women owners shall
20 enjoy the customary incident of ownership and shall share in the risks and profits
21 commensurate with their ownership interest, as demonstrated by an examination of the
22 substance rather than form or arrangements. Recognition of the business as a separate
23 legal entity for tax or corporate purposes is not necessarily sufficient for recognition as
24 an M/WBE. In determining whether a potential M/WBE is an independent business, the
25 county shall consider all relevant factors, including but not limited to the date the
26 business was established, the adequacy of its resources for the type of work specified,
27 relationships with affiliates and subsidiaries, and the degree to which financial,
28 equipment leasing and other relationships with nonminority firms vary from established
29 industry practices. If there has been a recent change in ownership of the business, a
30 review of whether the acquisition of the business was done pursuant to an arm's length

1 transaction will also be considered in determining independence of the business.

2 An eligible M/WBE must perform a commercially useful business function, ~~as opposed~~
3 ~~to only acting as a conduit.~~

4 (1) Ownership: In determining ownership of the business, the contribution of
5 capital or expertise by the minority and/or women owners to acquire their interest in the
6 firm shall be real and substantial. Examples of insufficient contributions include, but are
7 not limited to, a promise to contribute capital, a note payable to the firm or its owners
8 who are not minorities or women, or the mere participation as an employee, rather than
9 as a manager/owner.

10 (2) Control: The minority and/or woman owner(s) must have operational and
11 managerial control of the business.

12 a. The primary consideration determining operational control and the
13 extent to which the minority person and/or woman actually operates the business
14 will rest upon the peculiarities of the industry of which the business is a part.
15 Accordingly, in order to clarify the level of operational involvement of the minority
16 person or woman in the business to be deemed as an M/WBE, the following
17 examples are put forth and are not to be all-inclusive.

18 1. The minority person and/or woman should have some
19 experience in the industry for which certification is sought.

20 2. The minority person and/or woman should be able to
21 demonstrate that basic decisions pertaining to the daily operation of the
22 business are independently made.

23 3. The minority person and/or woman should have some technical
24 competence in the industry for which certification is sought. The minority
25 person and/or woman should have a working knowledge of the technical
26 requirements of the business needed to operate in the industry.

27 b. Managerial control means that the minority and/or woman has the
28 demonstrable ability to make independent and unilateral business decisions
29 needed to guide the future and destiny of the business. For a minority and/or
30 woman to demonstrate the extent of his/her control, the following examples are

1 put forth and are not intended to be all-inclusive:

2 1. Corporate bylaws or partnership agreements or other
3 agreements should be free of restrictive language which dilutes the
4 minority's or women's control, thus preventing him/her from making those
5 decisions which affect the destiny of the business.

6 2. The minority person and/or woman should be able to clearly
7 show, through production of documents, the areas of control such as, but
8 not limited to:

9 i. Authority and responsibility to sign payroll checks and
10 letters of credit.

11 ii. Authority for negotiations and signature responsibility
12 for insurance and/or bonds.

13 iii. Authority for negotiations and/or signature services.

14 If the owners of the firm who are not minorities or women are disproportionately
15 responsible for the operation of the firm, then the firm is not to be considered an M/WBE
16 within the meaning of this program. Where the actual management of the firm is
17 contracted out to individuals other than the owner, those persons will be considered as
18 controlling the business.

19 (3) *Commercially useful business function.* A M/WBE is considered to perform
20 a commercially useful business function when it is responsible for execution of a distinct
21 element of work of a contract and carrying out its responsibilities by actually performing,
22 managing and supervising the work performed. Businesses who merely act as a conduit
23 do not perform a commercially useful business function and will not be eligible for
24 certification as a M/WBE. In determining whether a business performs a commercially
25 useful business function, consideration will include, but not be limited to, whether the
26 business adds a value to the product or service provided; whether the business takes
27 possession of the product or service provided; whether the business has a
28 distributorship agreement ~~arrangement~~ with the manufacturer of goods supplied;
29 whether the business warrants the product or service provided; whether the business
30 maintains sufficient storage space to keep the product in inventory; whether the

1 business maintains sufficient inventory to meet the requirements of its contracts;
2 whether the business provides the product or service to the public or other business
3 other than a governmental agency.

4 (b) Application procedures: All applicants wishing to be considered as certified
5 businesses must apply for M/WBE certification by completing an M/WBE disclosure
6 affidavit which can be obtained through the office of small business assistance.

7 Applicants must submit the documentation listed below, as appropriate to their business
8 and all of its affiliates. The office of small business assistance may request any other
9 documentation necessary to determine eligibility. Documents not in English must be
10 accompanied by a certified translation. In instances where the applicant business has
11 not been in existence three (3) years, it shall provide the documentation for the years
12 the business has been in existence.

13 (1) Corporations.

14 a. List of the corporation's current full-time and part-time employees
15 by length of service;

16 b. Articles of incorporation, including date approved by the state, and
17 any subsequent amendments;

18 c. By-laws;

19 d. Prior three (3) years' financial statement prepared by an
20 independent CPA or accountant;

21 e. Prior three (3) years' federal corporate tax returns, including all
22 schedules, as signed and filed;

23 f. Resumes of principals and management personnel of business
24 showing education, training and employment with dates;

25 g. Stock transfer agreement(s);

26 h. Any necessary licenses to perform the work for which certification is
27 sought;

28 i. Copies of last three (3) months' corporate payroll;

29 j. Stock ledger;

30 k. Copies of the corporation's distribution of profits for the previous

1 year;

2 l. Copies of third party agreements such as rental and lease
3 agreements, management agreements, or purchase agreements;

4 m. Copies of stock certificates issued;

5 n. Proof of stock purchase;

6 o. Palm Beach County business tax receipt.

7 p. List of all affiliates.

8 (2) Partnerships.

9 a. List of the partnership's current full-time and part-time employees
10 by length of service;

11 b. Partnership agreements;

12 c. Prior three (3) years' financial statements prepared by an
13 independent CPA or accountant;

14 d. Prior three (3) years' federal tax returns, including all schedules, as
15 signed and filed;

16 e. Resumes of all partners and management personnel showing
17 education, training and employment with dates;

18 f. Any necessary licenses to perform the work for which certification is
19 sought;

20 g. Buy-out rights agreement;

21 h. Profit-sharing agreement;

22 i. Copies of last three (3) months' partnership payroll;

23 j. Proof of capital invested;

24 k. Copies of the partnership's distribution of profits for the previous
25 year;

26 l. Copies of third party agreements such as rental and lease
27 agreements, management agreements or purchase agreements;

28 m. Palm Beach County business tax receipt.

29 n. List of all affiliates.

30 (3) Sole proprietors:

- 1 a. Any necessary licenses to perform the work for which certification
- 2 is sought;
- 3 b. Verification to do business under an assumed name;
- 4 c. Owner and management personnel resumes;
- 5 d. Prior two (2) years' federal tax returns, including all schedules, as
- 6 signed and filed;
- 7 e. List of current full-time and part-time employees by length of
- 8 service;
- 9 f. Palm Beach County business tax receipt.
- 10 g. List of all affiliates.

11 (c) Application review and appeal procedures: The procedures for application
12 review, recertification, decertification and appeals provided in section 2-80.30(d)--(j)
13 shall apply equally for M/WBE certification.

14 **SECTION IX. REPEAL OF LAWS IN CONFLICT:**

15 All local laws and ordinances in conflict with any provisions of this Ordinance are
16 hereby repealed to the extent of such conflict.

17 **SECTION X. SEVERABILITY:**

18 If any section, paragraph, sentence, clause, phrase, or word of this Ordinance is
19 for any reason held by the Court to be unconstitutional, inoperative, or void, such
20 holding shall not affect the remainder of this Ordinance.

21 **SECTION XI. INCLUSION IN THE CODE OF LAWS AND ORDINANCES:**

22 The provisions of this Ordinance shall become and be made a part of the Code
23 of Laws and Ordinances of Palm Beach County, Florida. The sections of this Ordinance
24 may be renumbered or relettered to accomplish such, and the word "ordinance" may be
25 changed to "section", "article", or other appropriate word.

26 **SECTION XII. EFFECTIVE DATE:**

27 The provisions of this Ordinance shall become effective upon filing with the
28 Department of State.

29

30

1 APPROVED and ADOPTED by the Board of County Commissioners of Palm Beach
2 County, Florida, on this the _____ day of _____, 2009.

3
4 SHARON R. BOCK,
5 CLERK & COMPTROLLER
6 PALM BEACH COUNTY
7

PALM BEACH COUNTY, FLORIDA, BY ITS
BOARD OF COUNTY COMMISSIONERS

8
9
10 By: _____
11 Deputy Clerk
12

By: _____
John F. Koons, Chairman

13
14
15 APPROVED AS TO FORM AND
16 LEGAL SUFFICIENCY
17

18
19
20 By: 
21 County Attorney
22

23 EFFECTIVE DATE: Filed with the Department of State on the ____ day of _____,
24 2009.

25 G:\WPDATA\ENG\TKF\SMALL BUSINESS OFFICE\Small-Business-Ord-Amendment 2009 - 07-06-09.rtf