

ORDINANCE \_\_\_\_\_

AMENDING THE STATE COLLEGE BOROUGH CODE

TO ADD SPECIFIC RESPONSIBLE CONTRACTOR REQUIREMENTS

**AN ORDINANCE OF THE BOROUGH OF STATE COLLEGE, COMMONWEALTH OF PENNSYLVANIA, PROVIDING FOR THE ADOPTION OF CERTAIN PROCEDURES RELATED TO THE SOLICITATION AND AWARD OF CERTAIN PUBLIC CONSTRUCTION CONTRACTS; PROVIDING FOR CERTIFICATION REQUIREMENTS FOR PUBLIC CONTRACTORS AND SUBCONTRACTORS TO PUBLIC CONTRACTS; PROVIDING FOR PUBLIC CONTRACT REVIEW PROCEDURES; PROVIDING FOR ASSURANCE ON THE USE OF PROPERLY TRAINED CONSTRUCTION PERSONNEL; CONTAINING A SAVINGS CLAUSE AND PROVIDING FOR AN EFFECTIVE DATE.**

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**WHEREAS**, pursuant to State College Purchasing Code, Chapter 1, Part N, most public works contracts must be competitively bid and contracts awards shall normally be made to the lowest responsible bidder, provided that Council, upon recommendation of the Purchasing Authority, shall have the right to take into consideration such other factors as delivery date, quality of service, length of warranty, etc.; and

**WHEREAS**, notwithstanding the importance of the responsible bidder requirement, there is very limited guidance for defining the term responsible in relevant statutes, regulations or case law, and, therefore, prudent procurement and contracting policy dictates that this term should be more specifically defined; and in doing so, available guidance regarding the general meaning of the “responsible” contractor term should be followed, which typically relates to the technical qualifications and other capabilities relating to a contractor’s ability to successful delivery public works projects; and

**WHEREAS**, in undertaking its infrastructure and other public works projects, the Borough of State College seeks to utilize reliable and efficient procurement procedures that will help ensure that its projects are delivered with reasonable certainty, in a safe, timely manner, and in accordance with contract specifications and applicable industry codes at the lowest overall cost and best value; and

**WHEREAS**, to protect its financial and proprietary interests in these projects, and to offset performance risks inherent to public works contracting, the Borough of State College desires to use efficient procurement procedures that adequately protect and promote these interests, including clearly defined, pre-established evaluation criteria to address the unique challenges of capital construction and to result in the selection of qualified, reputable contractors and subcontractors that are committed to the Borough’s goals of safe, timely, cost-effective project delivery; and

**WHEREAS**, to establish efficient procurement procedures, the Borough of State College seeks to require that its public works contracts are to be performed by qualified responsible contractors

and subcontractors that meet essential performance criteria, including: (a) satisfactory records of past performance, including compliance with applicable laws and industry regulations; and (b) adequate present performance capabilities, including contractor and subcontractor competency and availability of skilled craft personnel; and

**WHEREAS**, in seeking to ensure the adequate development of trained, skilled personnel for the construction industry, as well as other industries, the United State Congress passed the Fitzgerald Act, Pub. L. No. 75-308, 50 Stat. 664, which created a system in which workers could be properly trained in construction skills and safety procedures through organized, formally registered apprenticeship training programs that meet established quality, safety and performance standards, and such programs are approved and monitored by the U.S. Department of Labor and state labor agencies, including the Pennsylvania State Apprenticeship Council; and

**WHEREAS**, the Borough of State College wishes to establish procurement standards for public works construction to address these findings and considerations, limit project delivery risks and protect its financial and proprietary interests, and better ensure efficient procurement and successful delivery of these projects.

**NOW THEREFORE, IT IS HEREBY ORDAINED BY THE STATE COLLEGE BOROUGH COUNCIL THAT:**

### **Section 1. Purpose**

The Borough of State College (hereinafter “Borough”) recognizes that there is a need to ensure that all construction work on public buildings is performed by responsible, qualified firms that maintain the capacity, expertise, personnel and other qualifications and resources necessary to successfully perform the contracts in a timely, reliable, and cost-effective manner.

To effectuate the purpose of selecting responsible contractors for contracts for construction work on public buildings and to protect the Borough’s investments in such contracts, prospective contractors and sub-contractors should be required to meet pre-established, clearly defined, minimum standards relating to contractor responsibility, including requirements and criteria concerning technical qualifications, competency, expertise, adequacy of resources, including equipment, financial and personnel, and satisfactory records regarding past project performance, safety, law compliance and business integrity.

It is important that skilled workers performing construction projects for the Borough have proper safety training.

Therefore, the Borough shall require compliance with the provisions of this Ordinance by contractors seeking to enter contracts for construction work on public buildings as specified herein. The requirements of this Ordinance are intended to supplement, not replace, existing contractor qualifications and performance standards or criteria currently required by law, public policy or contracting documents.

### **Section 2. Responsible Contractor Requirements**

(a) All contractors and subcontractors of any tier that perform work valued at or over

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\$250,000 on any public facility or public works project, including construction, demolition, alteration, renovation, repair and service or maintenance work, shall meet the requirements of this ordinance.

- (b) All firms engaged in contracts covered by this ordinance shall be qualified, responsible contractors or subcontractors that have sufficient capabilities in all respects to successfully perform contracts on which they are engaged, including the necessary experience, equipment, technical skills and qualifications and organizational, financial and personnel resources. Firms bidding on public contracts shall also be required to have a satisfactory past performance record and a satisfactory record of law compliance, integrity and business ethics.
- (c) The firm will pay all craft employees on this project, at a minimum, the applicable wage and fringe benefit rates, as established for the classification in which the worker is employed, in accordance with the Davis-Bacon Act or the Pennsylvania Prevailing Wage Act, 43 P.S. Section 165-1 *et. seq.*, whichever is applicable.

### **Section 3. Contractor Responsibility Certifications**

- (a) As a condition of performing work on a public works contract subject to this Ordinance, a general contractor, construction manager or other lead or prime contractor seeking award of a contract shall submit a Contractor Responsibility Certification as specified herein.
- (b) The Contractor Responsibility Certification shall be completed on a form provided by the Municipality and shall reference the project for which a bid is being submitted by name and contract or project number.
- (c) In the Contractor Responsibility Certification, the construction manager, general contractor or other lead or prime contractor shall confirm and certify the following facts regarding its past performance and work history and its current qualifications and performance capabilities:
  - (1) The firm and its employees have all valid, effective licenses, registrations or certificates required by federal and state law and the laws of the Borough with respect to the contract work it seeks to self-perform.
  - (2) The firm meets the bonding requirements for the contract, as required by applicable law or contract specifications and any insurance requirements, as required by applicable law or contract specifications, including general liability insurance, workers compensation insurance and unemployment insurance.
  - (3) The firm has not been debarred or suspended by any federal, state, or local government agency or authority in the past three years.
  - (4) The firm has not defaulted on any project in the past three years.
  - (5) The firm has not had any type of business, contracting or trade license, registration, or other certification revoked or suspended in the past three years.
  - (6) The firm and its principals/owners have not been convicted of any crime relating to the contracting business in the past ten years.

- (7) Within the past three years, the firm has not been found in violation of any law applicable to its contracting business, including, but not limited to, licenses laws, tax laws, wage and hour laws, prevailing wage laws, environmental laws or others, where the result of such violation was the payment of a fine, back pay damages or any other type of penalty in the amount of \$5,000 or more.
  - (8) The firm will employ a sufficient number of craft labor personnel required to successfully perform any project work it self-performs or shall use qualified subcontractors to meet this requirement.
  - (9) The firm shall ensure that all craft labor it employs on the project will have completed, prior to working on the project the OSHA 10-hour training course for safety established by the U.S. Department of Labor and at least one person with OSHA 30 training.
  - (10) The firm shall assign workers to perform only work in their respective craft or trade for which they have sufficient skills and training or shall use qualified subcontractors to meet this requirement.
  - (11) The firm shall comply with the wage requirements set forth in section 2(c) of this Ordinance. The minimum wage for custom fabrication work shall be the same as the wage paid for project work in accordance with each applicable trade or classification.
  - (12) The firm has all other technical qualifications and resources, including equipment, personnel and financial resources, to successfully perform the referenced contract and shall maintain such capabilities throughout the duration of the project, or will obtain same through the use of qualified, responsible subcontractors or vendors.
  - (13) The firm will maintain all qualifications, resources and capabilities referenced in this certification throughout the duration of the project.
  - (14) The firm shall notify the Borough within seven days of any material changes in its operation that relate to any matter attested to in this codification.
  - (15) The firm understands that the Contractor Responsibility Certification required by this section shall be executed by a person who has sufficient knowledge to address all matters in the certification and shall include an attestation stating, under the penalty of perjury, that the information submitted is true, complete and accurate.
- (d) Execution of the Contractor Responsibility Certification required by this ordinance shall not establish a presumption of contractor responsibility and the Municipality may require any additional information it deems necessary to evaluate a firm's status as a responsible contractor, including technical qualifications, financial capacity or other resources and performance capabilities. The Municipality may require that such information be included in a separate Statement of Qualifications and Experience or as an attachment to the Contractor Responsibility Certification.
- (e) The submitting firm shall stipulate in the Contractor Responsibility Certification that, if it receives a Notice of Intent to Award Contract, it will provide a Subcontractor List and required subcontractor information as specified in Section h of this Ordinance.
- (f) If the submitting firm has ever operated under another name or is controlled by

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another company or business entity or in the past five years controlled or was controlled by another company or business entity, whether as a parent company, subsidiary or in any other business relation, it shall attach a separate statement to its Contractor Responsibility Certification that explains in detail the nature of any such relationship. Additional information may be required from such an entity if the relationship in question could potentially impact contract performance.

- (g) If a firm fails to provide a Contractor Responsibility Certification required by this section, it shall be disqualified from bidding. No action of any nature shall lie against the Borough because of its refusal to accept a bid for this reason.

#### **Section 4. Notice of Intent to Award Contract**

- (a) After it has received bids for a project, the Municipality shall issue a Notice of Intent to Award Contract to the firm offering the lowest responsible bid.
- (b) Such Notice shall be issued immediately or as soon as practicable after bids are opened and Notice of Intent to Award Contract. The Notice shall stipulate that the contract award is conditioned on the issuance of a written Contractor Responsibility Determination for the firm as required by Section 6 of this Ordinance, compliance with Subcontractor Certifications required by Section 5 of this Ordinance, and any other qualification standards required by the Borough.

#### **Section 5. Subcontractor Responsibility Requirements**

- (a) Within thirty (30) days of receiving a Notice of Intent to Award Contract, the prospective awardee shall submit a Subcontractor List, which provides the name and address of the subcontractors it will use on the project, the scope of work assigned to each subcontractor, and Subcontractor Responsibility Certifications as required by this Section.
- (b) The prospective awardee shall not be permitted to use a subcontractor on any work performed for the Borough unless it has identified the subcontractor on its Subcontractor List and provided a Subcontractor Responsibility Certification in accordance with the requirements of Section 4.
- (c) At the time a prospective awardee submits the Subcontractor List it shall also submit Subcontractor Responsibility Certifications and applicable supporting information for all listed subcontractors to the Borough.
- (d) A prospective awardee shall determine whether any firm on its Subcontractor List is organized as a sole proprietorship owned and operated by a single person. This shall apply to subcontractors at any tier. For any such entity, the prospective awardee shall ensure that the sole proprietorship subcontractor is a legitimate business entity and not a misclassified employee by requiring the subcontractor to supplement its Subcontractor Certification with its Employer Identification Number and copies of any license, certificate or registration it is required to maintain in to do business in the state in which it is located.

- (e) Subcontractor Responsibility Certifications shall be executed by the respective subcontractors on forms prepared by the Borough and contain the same information, representations and supporting information required in Contractor Responsibility Certifications required by Section 3(c)(10) for each trade or classification of craft workers it will employ on the project.
- (f) Subcontractor Responsibility Certifications shall be executed by a person having sufficient knowledge to address all matters in the certification and shall include an attestation stating, under the penalty of perjury, that all information submitted is true, complete and accurate.
- (g) A subcontractor listed on a firm's Subcontractor List shall not be substituted unless written authorization is obtained from the Borough and a Subcontractor Responsibility Certification is provided for the substitute subcontractor.
- (h) In the event that the Borough determines that a subcontractor fails to meet the requirements of this Ordinance or is otherwise determined to be non-responsible, it may, after informing the prospective awardee, exercise one of the following options:
  - (1) Permit the awardee to substitute a qualified, responsible subcontractor in accordance with the requirements of this section, upon submission of a completed Subcontractor Certification for the substitute and approval of the substitute by the Borough.
  - (2) Require the awardee to self-perform the work in question if the firm has the required experience, licenses and other qualifications to perform the work in question; or
  - (3) Disqualify the prospective awardee.

#### **Section 6. Contractor Responsibility Review and Determination**

- (a) After a Notice of Intent to Award Contract has been issued, the Borough shall undertake a review process to determine whether the prospective awardee is a qualified, responsible contractor in accordance with the requirements of this ordinance and other applicable laws and regulations and has the resources and capabilities to successfully perform the contract. The time of the review process shall be as determined necessary by the Borough.
- (b) As part of this review process, the Borough shall ensure that the Contractor Responsibility Certification and Subcontractor Responsibility Certifications and applicable supporting information comply with the requirements of this Ordinance.
- (c) The Borough may conduct any additional inquiries to verify that the prospective awardee and its subcontractors have the technical qualifications and performance capabilities necessary to successfully perform the contract and that the firms have

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a sufficient record of law compliance and business integrity to justify the award of a public contract. In conducting such inquiries, the Municipality may seek relevant information from the firm, its prior clients, or customers, its subcontractors, or any other relevant source.

- (d) After the Borough determines that all responsibility certifications have been properly executed and has verified that all other relevant information requested for reviews indicates that the prospective awardee and its subcontractors are qualified, responsible firms, it shall issue a written Contractor Responsibility Determination for the prospective awardee.
- (e) In the event a firm is determined to be non-responsible, the Borough shall notify the firm and proceed to conduct a responsibility review of the next lowest, responsive bidder or, if necessary, rebid the project. A Responsibility Determination may be revoked at any time if the Borough obtains relevant information warranting any such revocations.

**Section 7. Execution of Final Contract** A contract subject to this Ordinance shall not be executed until all requirements of this Ordinance have been fulfilled and until a Contractor Responsibility Determination has been issued by the Borough pursuant to Section 6.

#### **Section 8. False or Misleading Responsibility Certifications**

If the Borough determines that a Contractor Certification, Subcontractor List or Subcontractor Responsibility Certification contains false or misleading information that was provided knowingly or with reckless disregard for the truth, the firm for which the certification was submitted shall be disqualified from the project and shall be prohibited from performing work for the Borough for a period of three (3) years. The Borough may withhold payment of any monies due to the firm as damages and impose other applicable penalties and sanctions, including contract termination, as permitted by law or contract.

#### **Section 9. Emergencies**

Should the Borough determine that emergency circumstances exist which render the requirement and procedures set forth in this Ordinance unduly burdensome, then in that event, and only in that event, the Borough may award a contract for a Borough project without application of the terms of this Ordinance. Any such determination shall be made by the vote of the Borough Council in a publicly advertised meeting.

#### **Section 10. Repealer.**

Any and all other ordinances or parts of ordinances in violation or in conflict with the terms, conditions and provisions of this ordinance are hereby repealed to the extent of such irreconcilable conflict.

**§11. Waiver of Requirements.** The requirements listed herein may only be waived after approval by the Borough Council under the following conditions:

- 1) No bids have been received for the project by the close of the bidding period; or,
- 2) The Borough receives a single bid for a project which exceeds the

budget for the project. In either event, the waiver may only apply for a specific project.

**Section 12. Severability.**

The terms, conditions and provisions of this Ordinance are hereby declared to be severable, and should any portion, part or provision of this ordinance be found by a court of competent jurisdiction to be invalid, unenforceable, or unconstitutional, the Borough hereby declares its intent that the Ordinance shall have been enacted with without regard to the invalid, unenforceable or unconstitutional portion, part or provision of this ordinance.

**Section 13. Effective Date.**

This ordinance shall become effective thirty (30) days after enactment, and approval by the Mayor.

**ENACTED AND ORDAINED**, by the Borough of State College, State College Pennsylvania, on the \_\_\_\_ day of \_\_\_\_\_, 2023.

**ATTEST:**

**BOROUGH COUNCIL PRESIDENT**

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