ORDINANCE NO. 20081211-060

AN ORDINANCE AMENDING CITY CODE CHAPTER 2-9A RELATING TO THE MINORITY-OWNED AND WOMEN-OWNED BUSINESS ENTERPRISE PROCUREMENT PROGRAM.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

PART 1. Section 2-9A-1 of the City Code is amended to add new paragraphs (P), (Q), and (R), and renumber the remaining paragraphs accordingly.

§ 2-9A-1 FINDINGS.

(P) In 2006, the City updated the ordinance to repeal City Code Chapter 2-9 and replace it with four distinct chapters addressing separate aspects of the program: Ordinance 20060608-058 adding Chapter 2-9A. Minority-Owned and Women-Owned Business Enterprise Procurement Program: Construction; Ordinance 20060608-059 adding Chapter 2-9B. Minority-Owned and Women-Owned Business Enterprise Procurement Program: Professional Services; Ordinance 20060608-060 adding Chapter 2-9C. Minority-Owned and Women-Owned Business Enterprise Procurement Program: Nonprofessional Services; and Ordinance 20060608-061 adding Chapter 2-9D. Minority-Owned and Women-Owned Business Enterprise Procurement Program: Commodities.

(Q) As the City updated the ordinance, the City commissioned Colette Holt & Associates in late 2005 and NERA Economic Consulting in late 2006 to conduct an updated availability analysis and other statistical and anecdotal investigations regarding the presence of disparities in the City's marketplace. The results of these efforts are consolidated in the May 2008 report entitled "*Race, Sex, and Business Enterprise: Evidence from the City of Austin*".

(R) Based on the evidence from the 2008 study, the City determined that:

(1) There are identifiable adverse and statistically significant disparities in business formation and business owner earnings for all M/WBE types in the City's marketplace.

(2) There are identifiable adverse and statistically significant disparities in access to capital for all M/WBE types in the City's marketplace.

(3) Despite the City's efforts to create equal opportunities in its marketplace, the evidence continues to indicate that, absent the programs authorized under this ordinance, MBEs and WBEs would be underutilized on City contracts relative to their availability.

(4) Austin's program continues to be narrowly tailored.

PART 2. Section 2-9A-3 of the City Code is amended to read:

§ 2-9A-3 ESTABLISHMENT OF PROGRAM.

Based upon the foregoing findings and pursuant to the foregoing declaration of policy, there hereby is established a Minority-Owned and Women-Owned Business Enterprise Procurement Program for the City with respect to Construction.

The Annual Participation Goals for the Program administered under this Section 2-9A are as follows:

	Construction Participation Goals
African-American Owned Business Enterprises	1.7%
Hispanic-Owned Business Enterprises	9.7%
Asian-American and Native American Owned Business Enterprises	2.3% [~~1.5%~~]
Minority-Owned Business Enterprises	13.7% [~~12.9%~~]
Women-Owned Business Enterprises	13.8% [~~12.6%~~]

PART 3. Section 2-9A-4 of the City Code is amended to read:

§ 2-9A-4 DEFINITIONS.

For the purpose of this chapter the following definitions shall apply. With the exception of specifically defined terms set forth herein, all words shall have their ordinary and usual meanings. In the event of conflict, the specific definition set out herein shall presumptively, but not conclusively prevail over the ordinary and usual meanings.

(1) ADVERSE DECISION. An Adverse Decision includes a notice of violation, denial of certification, decertification, sanction or similar action

taken by SMBR [~~DSMBR~~], a Contract Awarding Authority, or other City official under the Program with respect to a Firm or Business Enterprise.

(2) AFFILIATE. A person or entity is an Affiliate of another person or entity that directly or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person or entity. In determining affiliation, the City shall consider all appropriate factors, including common ownership, common management, and contractual relationships. Affiliates must be considered together in determining whether a firm is a MBE/WBE.

(3) ANNUAL PARTICIPATION GOALS. The targeted levels established by the city council for the annual aggregate participation of MBEs and WBEs in City contracts with respect to Construction procurement, as set forth in Section 2-9A-3 *(Establishment of Program)*, and as may be amended from time to time.

(4) AUSTIN METROPOLITAN STATISTICAL AREA. The specific area defined by the Census Bureau, which is presently limited to Travis, Williamson, Hays, Bastrop and Caldwell Counties.

(5) BID. A complete, properly signed response to a competitive bidding Solicitation issued by the City, submitted on the prescribed forms required by the relevant Contract Awarding Authority, to perform or provide labor, materials, equipment, supplies or services to or for the City for a stated price.

(6) BIDDER. A person, Firm or Business Enterprise that submits a Bid in response to a Solicitation. A Bidder may be represented by an agent if such agent provides evidence demonstrating the agent's authority.

(7) BROKER. A person or entity that fills orders by purchasing or receiving supplies from a third party supplier rather than out of its own existing inventory, and provides no Commercially Useful Function other than acting as a conduit between his or her supplier and his or her customer.

(8) BUSINESS ENTERPRISE or FIRM. A corporation, partnership, sole proprietorship, Joint Venture, joint stock company, professional association or any other legal entity, that is properly licensed and/or otherwise authorized to do business in the State of Texas.

(9) CITY and CITY LIMITS. The City of Austin, Texas and its full purpose annexed boundaries, as established by Chapter 90, page 634, Special Laws of Texas, 1909, 31st Legislature, as the same may be amended from time to

time and as extended by ordinances of the City of Austin enacted subsequent thereto.

(10) CITY MANAGER. The person serving as the chief administrative and executive officer of the City, as appointed and serving under Art. V, Section 1 of the Austin City Charter (or any successor provision) and includes his or her designee.

(11) CITY MARKETPLACE. The geographic and procurement areas in which the City contracts on an annual basis.

(12) COMMERCIALLY USEFUL FUNCTION. A Firm is responsible for the execution of a distinct element of the work of the Contract and carries out its responsibilities by actually performing, managing, and supervising the work involved, or fulfilling its responsibilities as Joint Venturer. To determine whether a Firm is performing a Commercially Useful Function, the City will evaluate the amount of work subcontracted, normal industry practices and other relevant factors. In determining whether a MBE/WBE Firm is performing a Commercially Useful Function, the following considerations shall be counted:

(a) A MBE/WBE performs a Commercially Useful Function when it is responsible for the work of the Contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a Commercially Useful Function, the MBE/WBE must also be responsible, with respect to materials and supplies used on the Contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. The determination that a MBE/WBE is performing a Commercially Useful Function will be determined by the amount of work subcontracted, normal industry practices, whether the amount the Firm is to be paid under the Contract is commensurate with the work it is actually performing, and other relevant factors.

(b) A MBE/WBE does not perform a Commercially Useful Function if its role is limited to that of an extra participant in a transaction, Contract, or project through which funds are passed in order to obtain the appearance of MBE/WBE participation.

(c) Generally, if a MBE/WBE does not perform or exercise responsibility for at least 30 percent of the total cost of its Contract with its own work force, or the MBE/WBE subcontracts a greater portion of the work of a Contract than would be expected on the basis of normal

industry practice for the type of work involved, it is not performing a Commercially Useful Function.

(13) COMPLIANCE PLAN. The plan submitted with the Bid/Proposal detailing the Bidder/Proposer's achievement of the Goals or Subgoals or its Good Faith Efforts to meet the Goals or Subgoals for all elements of the Solicitation, as defined in Section 2-9A-21 *(Pre-Award Compliance Procedures)*, subject to the rules established by the relevant Contract Awarding Authority. A Compliance Plan must be submitted with a Bid/Proposal for any City project for which Goals or Subgoals have been established.

(14) CONSTRUCTION. The construction, repair, rehabilitation, alteration, conversion or extension of buildings, parks, utilities, streets or other improvements or alterations to real property.

(15) CONSULTANT. A person or Business Enterprise that submits a Proposal to provide professional or nonprofessional services to the City by Contract, and any person who supplies or provides professional or nonprofessional services to the City by Contract.

(16) CONTRACT. Includes the entire and integrated binding legal agreement between the City and a Contractor or Consultant to provide or procure labor, materials, equipment, supplies and services to, for or on behalf of the City. Except as otherwise specifically defined in this section, a Contract does not include:

(a) awards made by the City with federal/state grant or City general fund monies to a non-profit entity where the City offers assistance, guidance, or supervision on a project or program and the recipient of the grant award uses the grant monies to provide services to the community;

(b) sales transactions where the City sells its personal or real property;

(c) a loan transaction where the City is acting as a debtor or a creditor;

(d) lease and franchise agreements;

(e) agreements to use City real property;

(f) gifts of materials, equipment, supplies or services to the City;

(g) interlocal or intergovernmental agreements between or among political subdivisions; or

(h) procurements of commodities or services that are sole source by virtue of intellectual property rights or other exclusive rights and for which there are no other subcontracting opportunities.

It is the intent of this Program to complement any federally funded contracts subject to a federally promulgated affirmative action program. In these instances, the City shall administer this Program to complement the federal program.

(17) CONTRACT AWARDING AUTHORITY. The City official or department authorized to enter into contracts on behalf of the City.

(18) CONTRACTOR. Any person or Business Enterprise that submits a Bid or Proposal to provide labor, goods or services to the City by Contract for profit, and any person who supplies or provides labor, goods or services to the City by Contract for profit.

(19) DBE or DISADVANTAGED BUSINESS ENTERPRISE. Defined as provided in 49 Code of Federal Regulation Part 26 or other applicable federal regulations.

[~~(20) DSMBR. The City's Department of Small and Minority Business Resources.~~]

(20) [~~(21)~~] DIRECTOR. The City official who heads the department which manages the Program authorized by this chapter, and the Director's successor, and the successor agency or department.

(21) [~~(22)~~] ECONOMIC DISADVANTAGE. With respect to an individual owner of a Business Enterprise or Firm, Economic Disadvantage means personal net worth equal to or less than $1,300,000 [~~$900,000~~], which figure shall be (a) indexed annually, beginning January 1, 2009 [~~2007~~], for the South Region Consumer Price Index (CPI-U) [~~Austin-Metro Area Consumer Price Index~~], published by the U.S. Department of Labor, Bureau of Labor Standards and (b) exclusive of the individual owner's equity in (i) a Business Enterprise or Firm seeking certification under this Program, and (ii) the personal residence of the individual owner of such Business Enterprise or Firm.

(22) [~~(23)~~] EXPERTISE. Verifiable and demonstrable skills, knowledge or ability to perform in the field of endeavor in which certification is sought by the Business Enterprise as defined by normal industry practices, including licensure where required.

(23) [~~(24)~~] FRONT. A business which purports to be a MBE/WBE but that is actually owned, controlled or managed in a manner that is inconsistent with the requirements for certification set forth in this chapter.

(24) [~~(25)~~] GOALS. The goals or Subgoals established for a particular Solicitation or Contract, as set forth in Section 2-9A-3 *(Establishment of Program)* and calculated as authorized in Section 2-9A-19 *(Establishment of MBE/WBE Participation Levels for Individual Contracts in Construction).*

(25) [~~(26)~~] GOOD FAITH EFFORTS. The actions undertaken by a Bidder, Contractor, or Proposer to achieve a MBE/WBE Goal with respect to a Contract. Minimum standards are as set forth in Section 2-9A-21 *(Pre-Award Compliance Procedures).*

(26) [~~(27)~~] JOINT VENTURE. An association of two or more persons, or any combination of types of Business Enterprises and persons numbering two or more, proposing to perform a single Contract, in which each Joint Venture partner contributes property, capital, efforts, and skill and/or knowledge, and in which the MBE/WBE is responsible for a distinct, clearly-defined portion of the work of the Contract and whose share in the capital contribution, control, management, risks and profits of the Joint Venture is equal to its ownership interest. A Joint Venture seeking certification pursuant to the Program must have an agreement in writing specifying the terms and conditions of the relationships between the partners and their relationship, risks, and responsibilities under the Contract.

(27) LEASE. A long-term agreement, contract, or instrument conveying property to another at the will of either lessor or lessee for compensation, not on an ad hoc or contract-by-contract basis.

(28) LIKE-KIND. For purposes of substitutions of previously designated MBEs and/or WBEs, a MBE for a MBE, if MBE and WBE Goals are used in a Solicitation; a member of a racial or ethnic group for a member of the same racial or ethnic group, if racial or ethnic Subgoals are used in the Solicitation; or a WBE for a WBE.

(29) MBE/WBE AND SMALL BUSINESS ADVISORY COMMITTEE. The Minority-owned and Women-owned Business Enterprise and Small Business Enterprise Procurement Program Advisory Committee [~~committee~~] appointed by the city council to serve those functions described in Section 2-9A-13 *(MBE/WBE and Small Business Advisory Committee).* It is composed as set forth in Chapter 2-1 *(City Boards)* [~~Section 2-1-163 (Minority-Owned And Women-Owned Business Enterprise And Small Business Enterprise Procurement Program Advisory Committee)~~] of the Code.

(30) MANUFACTURER. A Firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the Contract and of the general character described by the specifications.

(31) MINORITY-OWNED BUSINESS ENTERPRISE or MBE. A business including, without being limited to, a sole proprietorship, partnership, corporation, Joint Venture, limited liability company, or any other business or professional entity:

(a) which is at least 51 percent owned by one or more Minority Persons, or in the case of a publicly owned business, at least 51 percent of all classes of the stock of which is owned by one or more Minority Persons;

(b) whose management, policies, major decisions and daily business operations are independently controlled by one or more such Minority Persons;

(c) which performs a Commercially Useful Function;

(d) the size of which does not exceed the size limits established by the United States Small Business Administration [~~rule~~];

(e) doing business in the State of Texas [~~City's Marketplace~~] for at least three months prior to the date of application for certification;

(f) which is certified by the City; and

(g) which is Economically Disadvantaged.

(32) MINORITY PERSON. A person is a Minority Person, and is rebuttably presumed to be Socially Disadvantaged, if he or she is a citizen of the United States or a lawfully admitted resident alien and a member of one of the following groups:

(a) Blacks or African-Americans (persons whose origins are in one of the Black racial groups of Africa);

(b) Hispanics (persons whose origins are in Mexico, Central or South America, Spain or any of the Spanish-speaking islands of the Caribbean, regardless of race);

(c) Native Americans (persons whose origins are in any of the original peoples of North America);

(d) Asian-Americans (persons whose origins are in any of the original peoples of the Far East, Southeast Asia, the islands of the Pacific or the Northern Marianas, or the Indian Subcontinent);

(e) other groups, or other individuals, found by the Director pursuant to rule, to be Socially and Economically Disadvantaged, and to have suffered actual social and economic discrimination and decreased opportunities to compete in the City's Marketplace or to do business with the City; and

(f) for purposes of contracts funded by other sources, groups found to be eligible for the designation of DBE by such governmental sources.

(33) OWNED, MANAGED AND INDEPENDENTLY CONTROLLED. A Business Enterprise or Firm is Owned, Managed and Independently Controlled if one or more Minority Persons or Women who own the requisite interest in or assets of a business applying for certification possess the customary incidents of such ownership, including an equivalent interest in profit and loss, and have contributed an equivalent percentage of capital or equipment and Expertise to the business. Ownership shall be measured as though not subject to the community property interest of a spouse, if both spouses certify in writing that the nonparticipating spouse relinquishes control over his or her community property interest in the subject business (but by doing so is not required to transfer ownership interest or to characterize the property as the separate property of the spouse). The ownership and control of the Firm shall be real, substantial, and continuing and shall go beyond the pro forma ownership of the Firm as reflected in its ownership documents.

(34) PROGRAM. The Minority-Owned and Women-Owned Business Enterprise Procurement Program as authorized by this chapter.

(35) PROPOSAL. A complete, properly signed response to a Solicitation that, if accepted, would bind the Proposer to perform the resultant Contract.

(36) PROPOSER. A person, Business Enterprise or Firm that submits a Proposal in response to a Solicitation. A Proposer may be represented by an agent if such agent provides evidence demonstrating the agent's authority.

(37) REGULAR DEALER. A Firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the Contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business. To be a Regular Dealer,

the Firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question. A person may be a Regular Dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business if the person both owns and operates distribution equipment for the products. Any supplementing of Regular Dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or Contract-by-Contract basis. Packagers, Brokers, manufacture representatives, or other persons who arrange or expedite transactions are not Regular Dealers.

(38) SIGNIFICANT LOCAL BUSINESS PRESENCE. A Firm has a Significant Local Business Presence if it has an established place of business in the Austin Metropolitan Statistical Area, at which one or more of its employees is regularly based. Such place of business must have a substantial role in the MBE's/WBE's performance of a Commercially Useful Function. A location utilized solely as a post office box, mail drop or telephone message center or any combination thereof, with no other substantial work function, shall not be construed to constitute a Significant Local Business Presence.

(39) SMBR. The City's Small and Minority Business Resources Department.

(40) [~~(39)~~] SOCIALLY DISADVANTAGED. A Minority Person or Woman is Socially Disadvantaged if he or she has been subjected to racial, ethnic or gender prejudice or cultural bias within American society because of his or her identity as a member of a group and without regard to individual qualities. Social Disadvantage must stem from circumstances beyond the individual's control.

(41) [~~(40)~~] SOLICITATION. A Solicitation means, as the case may be, an invitation for Bids, a request for Proposals, a request for qualifications, a request for quotations, or such other request as defined by the City.

(42) [~~(41)~~] SUBCONSULTANT. A person, Firm or Business Enterprise providing professional or nonprofessional services to a prime Consultant if such professional or nonprofessional services are procured or used in fulfillment of the prime Consultant's obligations arising from a Contract with the City, and including every level of subconsulting required to fulfill a Contract with the City.

(43) [~~(42)~~] SUBCONTRACTOR. Any person or Business Enterprise providing goods, labor or services to a Contractor if such goods, labor or services are procured or used in fulfillment of the Contractor's obligations arising from a

Contract with the City. Subcontractor includes every level of subcontracting required to fulfill a Contract with the City.

(44) [~~(43)~~] SUBGOALS. The targeted levels established by the city council for the annual aggregate participation of each group of Minority Persons and Women with respect to Construction procurement, or the targeted levels for the participation of each group of Minority Persons and Women as project participation Goals established pursuant to Section 2-9A-19 *(Establishment of MBE/WBE Participation Levels for Individual Contracts in Construction).*

(45) [~~(44)~~] USER DEPARTMENT. The department or office of the City that is funding the Contract for the goods or services procured by a Contract and is the consumer of the goods and/or services under Contract on behalf of the City.

(46) [~~(45)~~] WOMAN. A person, whether a citizen of the United States or a lawfully admitted resident alien, who is of the female gender.

(47) [~~(46)~~] WOMEN-OWNED BUSINESS ENTERPRISE or WBE. A business including, without being limited to, a sole proprietorship, corporation, partnership, Joint Venture, limited liability company, or any other business or professional entity:

(a) which is at least 51 percent owned by one or more Women; or, in the case of a publicly owned business, at least 51 percent of all classes of the stock of which is owned by one or more such Women;

(b) whose management, policies, major decisions and daily business operations are independently controlled by one or more such Women;

(c) which performs a Commercially Useful Function;

(d) the size of which does not exceed size limits established by the United States Small Business Administration [~~rule~~];

(e) doing business in the State of Texas [~~City's Marketplace~~] for at least three months prior to the date of application for certification;

(f) which is certified by the City; and

(g) which is Economically Disadvantaged.

(h) Women who are Minority Persons may choose for the purposes of certification and recertification to be certified as WBEs, MBEs, or

both, but cannot be double counted on a Contract to meet a participation Goal.

PART 4. Section 2-9A-6 of the City Code is amended to read:

§ 2-9A-6 ADOPTION OF RULES.

[~~(A) Purpose and scope.~~]The Director is delegated the authority under Section 2-9A-10 *(Duties of* [~~*Department of*~~] *Small and Minority Business Resources* Department*)* of this chapter to administer this chapter, including the authority to formulate and adopt such rules and regulations as may be reasonable, necessary and required to assist in the implementation, administration or enforcement of this chapter. Such adoption of rules and regulations shall be conducted according to the standards of uniform practice and procedures set forth in Chapter 1-2 (*Adoption of Rules*) of the Code.

PART 5. Section 2-9A-11 of the City Code is amended to read:

§ 2-9A-11 DUTIES OF THE FINANCIAL [~~FINANCE~~] AND ADMINISTRATIVE SERVICES DEPARTMENT.

The Purchasing Office of the Financial [~~Finance~~] and Administrative Services Department shall have the following duties and responsibilities with regard to the Program:

(1) Maintaining records of:

(a) the dollar amounts of awards of prime Contracts to MBEs, WBEs, and DBEs;

(b) the actual dollar amounts paid under subcontracts awarded to MBEs, WBEs, and DBEs compared to total dollars paid on Contracts. These payments shall be measured against projected payments or Goals;

(c) the total annual expenditures to MBEs, WBEs, and DBEs as a percentage of the total expenditures on all Contracts awarded by the City;

(d) quarterly [~~monthly~~] reports for all procurements valued in excess of $5,000, which shall include, at a minimum:

(i) the number of Contracts and subcontracts awarded to MBEs, WBEs, and DBEs;

(ii) the total dollar value of Contracts and subcontracts;

(iii) the percentage of the dollar value of all Contracts and subcontracts awarded during this period that were awarded to MBEs, WBEs, and DBEs;

(iv) an indication of whether, and the extent to which, the percentage of Contracts and subcontracts awarded met the Annual Participation Goals, if any have been established;

(v) upon request, the number and identities of MBEs, WBEs, and DBEs awarded Contracts or subcontracts; and

(vi) department-by-department awards to MBEs, WBEs, and DBEs and expenditures, in comparison to total procurements of each department and the total for the City.

(e) For all procurements valued at less than $5,000, a monthly report which shall include:

(i) the number of Contracts awarded to MBEs, WBEs and DBEs;

(ii) the dollar value of Contracts so awarded;

(iii) the percentage of the dollar value of all Contracts awarded during this period which were awarded to MBEs, WBEs, and DBEs;

(iv) an indication of whether, and the extent to which, the percentage of Contracts awarded met the Annual Participation Goals; and

(v) upon request, the number and identities of MBEs, WBEs, and DBEs awarded Contracts.

(2) Assisting in the record-keeping functions by obtaining monthly reports from the Public Works Department [~~, Transportation, Planning, and Sustainability Department,~~] and other Construction project management departments on the status of Construction Contract MBE, WBE, and DBE obligations.

(3) Compiling an annual report of the last fiscal year's MBE, WBE, and DBE participation in contracting activity by department and for the City as a whole.

(4) Compiling and reporting to city council after the end of each fiscal year, the utilization of MBEs and WBEs for that year based on awards of Contracts.

(5) Operating, maintaining and enhancing the information systems necessary to assist SMBR [~~DSMBR~~] with implementation, administration and enforcement of this chapter.

PART 6. Section 2-9A-12 of the City Code is amended to read:

§ 2-9A-12 DUTIES OF PROJECT MANAGEMENT DEPARTMENTS.

(A) Except as provided in Subsection B, t[~~T~~]he Public Works Department and any other departments or offices of the City which receive appropriate delegation for project management, Contract management, and/or Construction and/or design Contract responsibility shall have the following duties and responsibilities with regard to the Program:

(1) assisting the Director with setting project participation Goals and/or Subgoals for Contracts as authorized by Section 2-9A-19 *(Establishment of MBE/WBE Participation Levels for Individual Contracts in Construction)* hereof;

(2) assuring integration of all vendor lists with the vendor list maintained by the Finance and Administrative Services Department;

(3) assisting in the identification of available MBE, WBE, and DBE Contractors and Subcontractors, and providing other assistance in meeting the Goals;

(4) performing other activities to support SMBR [~~DSMBR~~], as set forth in the rules;

(5) gathering and maintaining subcontracting data for those Contracts which they manage;

(6) submitting subcontracting data to the Finance and Administrative Services, Public Works, and/or such other City departments as may be required by the relevant Contract Awarding Authority, within 15 calendar days of month's end;

(7) managing Construction Contracts in a consistent manner to assure Contract compliance in utilization of MBE, WBE, and DBE Subcontractors, [~~; and~~]

(B) [~~(8)~~] Nothwithstanding [~~notwithstanding~~] the provisions of this section, no project management department shall have the authority to conduct any activities without express ordinance or rule delegation to such department.

PART 7. Section 2-9A-13 of the City Code is amended to read:

§ 2-9A-13 MBE/WBE ADVISORY COMMITTEE.

The MBE/WBE and Small Business Advisory Committee shall perform those functions as set forth in Chapter 2-1 [~~Section 2-1-163 (*Minority-Owned And Women-Owned Business Enterprise And Small Business Enterprise Procurement Program Advisory Committee*)~~] of the Code.

PART 8. Subsection (K) of Section 2-9A-15 of the City Code is amended to read:

§ 2-9A-15 PROGRAM ELIGIBILITY.

(K) The certification status of all MBEs and WBEs shall be reviewed on an annual basis by SMBR [~~DSMBR~~] or its designee, as approved by city council. The annual review may be conducted through examination of a sworn affidavit of continuing eligibility (including all such attachments as may be required by rule) submitted by the Business Enterprise or Firm seeking certification. MBEs and WBEs are required to seek recertification upon the third anniversary of their initial certification and upon the third anniversary of all subsequent certifications. Failure of the Firm to seek recertification by filing the necessary documentation with SMBR [~~DSMBR~~] within 60 calendar days from the date of receipt of written notification from SMBR may [~~DSMBR shall~~] result in decertification of the Firm.

PART 9. Section 2-9A-16 of the City Code is amended to read:

§ 2-9A-16 PROCEDURE FOR APPEALING AND PROTESTING ADVERSE DECISION.

(A) A Firm that is subject to an Adverse Decision, or has received written notice from the Director or other City official of intent to impose an Adverse Decision, is entitled to appeal such Adverse Decision as set forth herein.

(1) Within seven calendar days of the date the Firm receives notice of intent to impose an Adverse Decision, the Firm must file written notice of intent to appeal. Failure to file a written notice of intent within this time waives all rights to appeal or protest the Adverse Decision.

(2) SMBR [~~DSMBR~~] shall set forth by rule the procedures a Firm must follow to file a written appeal, which appeal must be filed within 21 calendar days of the date the Firm receives notice of intent to impose an Adverse Decision.

(3) The Director will determine whether the grounds for an appeal are sufficient, and, if the Director so determines, shall set a date for an appeal hearing, usually within five calendar days. The appeals hearing is an informal meeting, not subject to the Open Meetings Act (Texas Government Code Chapter 551), and is not an adversarial proceeding. SMBR [~~DSMBR~~] shall set forth by rule the persons who may attend an appeal hearing.

(4) The Director shall determine on the basis of the information provided at the appeal hearing whether to maintain or deny the Adverse Decision. Such decision by the Director shall be a final decision, subject to protest, and shall be communicated to the Firm in writing within 10 calendar days of the hearing.

(B) A Firm that is subject to an Adverse Decision after appeal may protest the Adverse Decision to an independent hearing examiner appointed by the City. The Firm must submit a notice of intent to protest to the Purchasing Office or relevant Contract Awarding Authority within four calendar days of receipt of the final Adverse Decision, in accordance with the procedures established by the Purchasing Office or relevant Contract Awarding Authority.

(C) If the Adverse Decision is a notice of noncompliance, no appeal is required. The Firm may immediately protest a notice of noncompliance to the Purchasing Office or the relevant Contract Awarding Authority, following the procedures set forth in the applicable Solicitation.

(D) A Firm that does not timely appeal and protest an Adverse Decision to decertify the Firm, or whose appeal and protest are unsuccessful, may not reapply for certification until 180 calendar days after the Adverse Decision.

PART 10. Subsection (A) of Section 2-9A-19 of the City Code is amended to read:

§ 2-9A-19 ESTABLISHMENT OF MBE/WBE PARTICIPATION LEVELS FOR INDIVIDUAL CONTRACTS IN CONSTRUCTION.

(A) The city council recognizes that the availability of MBEs and WBEs is not uniformly present across all areas of Contracting. Therefore, the Director, where appropriate, and pursuant to criteria established by rule, may establish project participation Goals and/or Subgoals for individual Contracts, based on:

(1) normal industry practice with respect to Construction, as determined in consultation with the User Department;

(2) the availability of at least three certified MBEs or WBEs to perform the functions of those individual Contracts; [~~and~~]

(3) the City's utilization of MBEs and WBEs to date, so as to achieve the Annual Participation Goals and Subgoals, if any; and

(4) any additional relevant factors.

PART 11. Subsection (G) of Section 2-9A-21 of the City Code is amended to read:

§ 2-9A-21 PRE-AWARD COMPLIANCE PROCEDURES.

(G) The Director shall review the compliance plan prior to award, including the scope of work, [~~and the letters of intent from any MBE/WBE Subcontractors~~] within a reasonable time so as not to unduly delay award of the Contract.

(1) If the Director determines that the compliance plan demonstrates that the Goals or Subgoals have been achieved, then the Contract Awarding Authority, with the concurrence of the Director, after the Contract Awarding Authority and Director review the letters of intent, shall recommend award to the city council. For all competitively Bid projects, signed letter(s) of intent between the certified low Bidder and the MBE and/or WBE Subcontractor(s) must be received by the Contract Awarding Authority within three business days of notification of the status as certified low Bidder. For procurements conducted through the request for Proposal or request for qualifications process, no later than after final execution of a professional or nonprofessional services agreement but before the issuance of a notice to proceed, the successful Proposer must deliver signed subcontracts between itself and the MBE and/or WBE Subcontractor(s) and/or Subconsultant(s) for the scope of work reflected in the Proposal as awarded.

(2) In the event the applicable Goal(s) or Subgoals have not been achieved, then the Director shall evaluate the Bidder's/Proposer's Good Faith Efforts to achieve those Goals or Subgoals as documented in the compliance plan. The Director shall evaluate the compliance plan based on the criteria established in Subsection (E) of this section. The Director may request clarification in writing of items listed in the compliance plan, provided such clarification is minor and shall not include the opportunity to augment listed MBE/WBE participation or Good Faith Efforts.

(3) If the Director finds that a Bidder/Proposer did not make sufficient Good Faith Efforts, the Director shall communicate his finding to the Contract Awarding Authority or other appropriate City official. The Director shall recommend to the Contract Awarding Authority that the Bid/Proposal be rejected based on failure to comply with this chapter. The Contract Awarding Authority may reject the Bid/Proposal as not in compliance with this chapter, or may advise the City Manager of additional considerations which may form the basis for accepting the Bid/Proposal as being in the best overall interest of the Program and the City.

(4) If the Contract Awarding Authority finds that the Bid/Proposal does not comply with this chapter, a Bidder/Proposer may request a protest hearing. The City Manager has the authority to make the final decision, subject to council action, if required. In determining whether compliance with this section has been met, the City Manager may determine that the effort of the Bidder/Proposer substantially complies with the purpose of this chapter and such determination is in the best interest of the Program and the City.

PART 12. Subsection (I) of Section 2-9A-21 of the City Code is amended to read:

§ 2-9A-21 PRE-AWARD COMPLIANCE PROCEDURES.

(I) The City purchasing officer or relevant Contract Awarding Authority may waive minor informalities in the compliance plan. A minor informality is one that does not affect the competitiveness of the Bid/Proposal.

PART 13. Subsection (F) of Section 2-9A-22 of the City Code is amended to read:

§ 2-9A-22 POST-AWARD COMPLIANCE PROCEDURES.

(F) Notice of appeal from an Adverse Decision under Subsection (E) must be filed with the Purchasing Office or relevant Contract Awarding Authority within 14 calendar days from the date of receipt of the finding [~~with the Purchasing Office~~], including any written documentation to demonstrate how the Contractor or Consultant, as the case may be, has complied with the contracted Goals or Subgoals. The Purchasing Office or relevant Contract Awarding Authority shall hold a hearing within 15 calendar days of receipt of notice of appeal on whether the Contractor or Consultant has complied with the contracted Goals or Subgoals. The Contract Awarding Authority, the project or Contract manager, the Director, and the Contractor or Consultant shall participate. The Purchasing Office or relevant Contract Awarding Authority shall make a finding in writing within 15 calendar days after the close of the

hearing date, along with a recommendation for resolution of the Adverse Decision, if appropriate.

PART 14. Subsection (A) of Section 2-9A-23 of the City Code is amended to read:

§ 2-9A-23 POST-SUBMISSION CHANGES TO THE COMPLIANCE PLAN.

(A) The Contractor cannot make changes to the compliance plan or substitute [~~MBE/WBE~~] Subcontractors listed in the compliance plan without the prior written approval of the Director. Unauthorized changes or substitutions shall be a violation of this chapter, and may constitute grounds for rejection of the Bid or Proposal or cause termination of the executed Contract for breach, and/or subject the Bidder/Proposer to Contract penalties or other sanctions.

PART 15. Section 2-9A-26 of the City Code is amended to read:

§ 2-9A-26 SUNSET PROVISION.

This chapter of the Code expires at the close of business December 31, 2013 [~~2010~~], unless prior to that date the city council votes to reauthorize the Program.

PART 16. Chapter 2-9A is amended to replace the phrase "DSMBR" with "SMBR" each place it occurs, including Sections 2-9A-4, 2-9A-5, 2-9A-11, 2-9A-12, 2-9A-15, 2-9A-16, 2-9A-18, 2-9A-20, and 2-9A-21.

PART 17. Chapter 2-9A is amended to replace the phrase "Department of Small and Minority Business Resources" with "Small and Minority Business Resources Department" each place it occurs, including Sections 2-9A-6 and 2-9A-10.

PART 18. This ordinance takes effect on January 1, 2009.

PASSED AND APPROVED

December 11, 2008

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§
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Will Wynn
Mayor

APPROVED:

David Allan Smith
City Attorney

ATTEST:

Shirley A. Gentry
City Clerk