



Thursday, May 25, 2006

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Item # 4B

## Small & Minority Business Resources RECOMMENDATION FOR COUNCIL ACTION

**Subject:** Approve an ordinance adopting a new Chapter 2-9A of the City Code (Minority-Owned and Women-Owned Business Enterprise Construction Services Procurement Program) to establish a procurement program for construction; amending Section 2-1-381 relating to the Minority-Owned and Women-Owned Business Enterprise Procurement Program Advisory Committee; and repealing the current Chapter 2-9 (Minority-Owned and Women-Owned Business Enterprise Procurement Program).

**Fiscal Note:** There is no unanticipated fiscal impact. A fiscal note is not required.

**Additional Backup Material**

(click to open)

No Attachments Available

**For More Information:** Jeffrey Travillion, Sr., Director, 974-7607; Karen Kennard, First Assistant City Attorney, 974-2177

**Prior Council Action:** December 15, 2005 Council approved extension of the ordinance sunset deadline to June 30, 2006

**Boards and Commission Action:** Recommended by the MBE/WBE Citizens Advisory Committee

### Chapter 2-9 A Construction

The City's Minority-Owned and Women-Owned Business Enterprise Procurement Program is scheduled to sunset on June 30, 2006. The current ordinance, Chapter 2-9 of the City Code, covers all city procurements related to construction, professional services, non-professional services, and commodities.

In 2005, the City Council engaged a consultant to conduct an updated study to determine the continued need for the MBE-WBE Program. Based on the evidence from this study, the city's MBE-WBE program is still needed. The evidence from the study indicates that absent this program, minority-owned and women-owned business enterprises would be underutilized on City contracts relative to their availability.

The 2005 study found that the MBE-WBE ordinance is narrowly tailored to address the identified current effects of past discrimination and private sector discrimination in the City's marketplace.

Additionally while reviewing the current ordinance, it was determined that establishing separate programs for each procurement sector would:

- (1) increase the ease and flexibility of administration of each program; and
- (2) help tailor each program more narrowly to the goals each program attempts to achieve

The proposed changes will separate the current ordinance into four (4) separate ordinances

tracking the City's procurement categories. The new ordinances are:

**Chapter 2-9- A Construction**

**Chapter 2-9- B Professional Services**

**Chapter 2-9- C Non-professional Services**

**Chapter 2-9-D Commodities**

**The new Chapter 2-9-A establishes a Minority-Owned and Women-Owned Business Enterprise Program in the City with respect to the procurement of Construction services.**

**Significant ordinance changes are as follows:**

**Section 2-9A-1 Findings are revised to update the history of the ordinance's legal justification by adding findings indicating that the city obtained an updated study to determine whether the MBE/WBE program was still needed, and to determine whether the program could be more narrowly tailored. This new ordinance establishing a MBE/WBE Procurement Program related to Construction is added to provide narrow tailoring of the program to achieve its goals.**

**Section 2-9A-4 Definitions are standardized across all departments, including Public Works, Purchasing, and DSMBR. Definitions are also harmonized with federal regulations.**

**The definition of MINORITY OWNED BUSINESS ENTERPRISE AND WOMEN OWNED BUSINESS ENTERPRISE is amended to require that the business owner be ECONOMICALLY DISADVANTAGED.**

**ECONOMIC DISADVANTAGE is defined to mean a person whose personal net worth is equal to or less than \$900,000 excluding the person's equity in the business enterprise or firm seeking certification and excluding the value of the person's personal residence. The definition also requires that the \$900,000 amount shall be indexed annually for the Austin Metro Area Consumer Price Index as published by the U.S. Department of Labor.**

**The definition of WOMEN OWNED BUSINESS ENTERPRISE is also amended to allow a person to apply for dual certification as both a WBE and a MBE.**

**Section 2-9A-5 Updates the types of race and gender neutral measures that the city will engage in to ensure equal opportunity for all contractors**

**Section 2-9A-6 The Adoption of Rules Section cross references the general City Code provisions that govern how all city departments adopt rules and eliminates duplicative procedures.**

**Section 2-9A-13 The MBE/WBE Advisory Committee are consolidated into the general City Code provisions and conforms this provision to the code provisions that authorize all city Boards and Commissions.**

**Section 2-9A-15 Amends the MBE/WBE Program Eligibility criteria to require that a person's ownership in a Socially and Economically Disadvantage firm must be real, substantial, and continuing. Only a firm that is managed and controlled by a Socially and Economically Disadvantaged person may be certified as a MBE/WBE.**

**Section 2-9A-20 Clarifies that a WBE that is dually certified as a MBE may only be counted once when counting participation goals on a contract.**

**Section 2-9A-26 Establishes a new sunset date for the ordinance of December 31, 2010**



ORDINANCE NO.

1 AN ORDINANCE AMENDING SECTION 2-1-381 OF THE CITY CODE  
2 RELATING TO THE MBE/WBE ADVISORY COMMITTEE; AMENDING THE  
3 CITY CODE TO ADD CHAPTER 2-9A RELATING TO THE MINORITY-  
4 OWNED AND WOMEN-OWNED BUSINESS ENTERPRISE PROCUREMENT  
5 PROGRAM; AND REPEALING CHAPTER 2-9 OF THE CITY CODE  
6 RELATING TO THE MINORITY-OWNED AND WOMEN-OWNED BUSINESS  
7 ENTERPRISE PROCUREMENT PROGRAM.

8  
9 BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

10  
11 PART 1. Section 2-1-381 (*Establishment; Members*) of the City Code is amended to add  
12 Subsection (D) to read:

13 (D) The MBE/WBE Advisory Committee shall:

- 14 (1) review the city manager's report, as described in Sections 2-9A-18  
15 (*Program Review*), 2-9B-18 (*Program Review*), 2-9C-18 (*Program*  
16 *Review*), and 2-9D-18 (*Program Review*); and  
17 (2) recommend changes to the City Code provisions, adopted rules and  
18 regulations, and program operations.

19 PART 2. The City Code is amended to add Chapter 2-9A to read:

20 CHAPTER 2-9A. MINORITY-OWNED AND WOMEN-OWNED BUSINESS  
21 ENTERPRISE PROCUREMENT PROGRAM: CONSTRUCTION.  
22

23 ARTICLE I. GENERAL PROVISIONS.  
24

25 § 2-9A-1 FINDINGS.

26 The city council hereby adopts the following findings:

- 27 (A) The City of Austin regularly enters into contracts for the procurement of  
28 goods and services of many kinds, including for construction. Through its  
29 procurement activities, the City has a substantial impact upon the economy  
30 of the Austin area.  
31 (B) In 1987, the Economic Development Commission of the City was directed  
32 by the city council to review the City's policies and experiences relating to

1 contracting opportunities for minority- and women-owned business  
2 enterprises with the City and to suggest revised policies and procedures, if  
3 determined necessary.

4 (C) The Economic Development Commission, through its Small Business and  
5 Minority Entrepreneurship Committee, held meetings with representatives of  
6 various City departments as well as with interested individuals and  
7 organizations, conducted a public hearing and took statements from  
8 numerous members of the public.

9 (D) The Commission found significant disparities between the number of MBEs  
10 and WBEs and City contracts awarded to, or subcontracted to, MBEs and  
11 WBEs.

12 (E) The city council found that these disparities resulted from discriminatory  
13 practices, thereby impairing the competitive position of MBEs and WBEs  
14 with the City.

15 (F) As a result of the work of the Economic Development Commission in 1987,  
16 the city council passed an affirmative action program to address the City's  
17 role in perpetuating the disparities found in the pattern of contract and  
18 subcontract awards to MBEs and WBEs.

19 (G) In 1989, the U.S. Supreme Court, in the case styled City of Richmond v.  
20 J.A. Croson Co., held that a local government may redress race  
21 discrimination in its contracting activities if it can demonstrate through  
22 relevant evidence a compelling governmental interest sought to be remedied,  
23 and that the remedies adopted are narrowly tailored to promote that interest.

24 (H) In response to Croson, in 1992 the city council engaged a consultant to study  
25 the City's history and contracting practices, the availability of MBEs and  
26 WBEs in the City's marketplace, and any disparities in the City's utilization  
27 of such businesses. The study was completed in September 1993, and  
28 revealed a history in the Austin area of de jure and continuing de facto racial  
29 and gender discrimination in the City's marketplace. Further, disparities  
30 were found between ready, willing and able MBEs and WBEs and the value  
31 of contracts they received from the City.

32 (I) After receipt of the study, the City conducted a series of public hearings at  
33 which additional statistical and other evidence of discriminatory practices  
34 and acts against MBEs and WBEs was presented.

35 (J) The city council appointed a community-based Disparity Study Ordinance  
36 Committee to review the studies and the law, and to draft programmatic

1 changes to the current ordinance. The committee met over several months  
2 and recommended certain changes to the current ordinance.

3 (K) Based on the evidence provided, the city council determined that:

- 4 (1) Prior to the adoption of the City's 1987 ordinance, there were  
5 disparities between the number of qualified MBEs and WBEs ready,  
6 willing and able to perform services on City contracts and the number  
7 of such businesses actually engaged by the City or the City's prime  
8 contractors.
- 9 (2) Despite the implementation of the 1987 ordinance, disparities in the  
10 utilization of MBEs and WBEs on City contracts continued to exist.
- 11 (3) Although the City has undertaken since 1990 a variety of innovative  
12 race - and gender-neutral technical assistance, insurance and bonding  
13 programs, race- and gender-neutral programs alone have not been  
14 sufficient to remedy the effects of discrimination.
- 15 (4) The evidence continues to demonstrate that MBEs and WBEs have  
16 been underutilized in contracting opportunities on City contracts as a  
17 result of private sector discrimination.
- 18 (5) The existence of an exclusionary network in public contracting and  
19 other systemic barriers has excluded otherwise qualified MBEs and  
20 WBEs from receipt of contracts.
- 21 (6) Although the City has made substantial progress in eliminating  
22 discrimination in its own contracting practices, discrimination exists  
23 in private companies that contract on public projects. As a result of  
24 this discrimination, the City has been in the past a passive participant  
25 in a system of discrimination and, in the absence of programs to  
26 eliminate disparity in utilization, would continue to be a passive  
27 participant in such a system.

28 (L) The City engaged a consultant to conduct an updated study of availability of  
29 minority- and women-owned firms within the Austin area. The 2003 study  
30 indicates that there continue to be minority- and women-owned firms  
31 available to perform the work of City contracts and subcontracts.

32 (M) In 2003, the City examined various availability and disparity studies  
33 conducted for Texas governments. These studies indicate that minority- and  
34 women-owned businesses suffer discrimination in access to opportunities in  
35 the State of Texas.

1 (N) In 2005, the City engaged a consultant to conduct a further updated study to  
2 assess the continued need for this program and whether the program can be  
3 more narrowly tailored to meet such need.

4 (O) Based on the evidence from the 2005 study, the City determined that:

- 5 (1) Despite the City's efforts to create equal opportunities in its  
6 marketplace, the evidence indicates that, absent the programs  
7 authorized under this ordinance, MBEs and WBEs would be  
8 underutilized on City contracts relative to their availability.
- 9 (2) As set forth in the 2005 study, race- and gender-neutral approaches  
10 alone are inadequate to remedy the lingering effects of past  
11 discrimination in the City's marketplace.
- 12 (3) The 2005 study found that the ordinance is narrowly tailored to  
13 address the identified current effects of past discrimination and private  
14 sector discrimination in the City's marketplace. The study also found  
15 that the ordinance reduces the possibility that the City will be a  
16 passive participant in discrimination.
- 17 (4) All of the persons targeted by the ordinance have been affected by  
18 disparities in the City marketplace.
- 19 (5) The ordinance does not unduly burden third parties not eligible for  
20 certification under the program.
- 21 (6) The sunset date contained in the ordinance ensures that the city  
22 council will regularly review the program to verify its necessity and  
23 that it remains tailored to the specific conditions found in the City's  
24 marketplace.

25 (P) Texas law applicable to the City authorizes race- and gender-conscious  
26 contracting goals, and if utilized, requires that goals be based on  
27 constitutional standards related to the City's marketplace.

28 (Q) Under these circumstances and based on the factual predicate which has  
29 been established after careful study and review, the City still has a  
30 compelling governmental interest in remedying the racial and gender  
31 discrimination that exists in the market segments in which the City does  
32 business, and in ensuring that the City is not a participant in such  
33 discrimination, thereby allowing all segments of the Austin community to  
34 share in the economic benefits of the City.

1 (R) The program adopted herein is narrowly tailored to remedy that  
2 discrimination.

3 *Source: 1992 Code Section 5-7-1; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

4 **§ 2-9A-2 POLICY.**

5 It is the policy of the City to provide equal opportunities to all contractors, and to  
6 redress the discrimination found in the City's marketplace and in public contracting  
7 against minority- and women-owned business enterprises. The City seeks to encourage  
8 their full participation in all phases of City procurement activities and to afford them a  
9 full and fair opportunity to compete for all City contracts. The purposes and objectives of  
10 this chapter are as follows:

- 11 (1) To ensure that the City is not a passive participant in a discriminatory  
12 marketplace.
- 13 (2) To ensure that the program is narrowly tailored.
- 14 (3) To provide opportunities for MBEs and WBEs to broaden and enhance their  
15 capacities to do business with the City in the area of construction.
- 16 (4) To provide opportunities for MBEs and WBEs to serve as contractors and  
17 subcontractors for the supply of goods and services to the City in the area of  
18 construction.
- 19 (5) To administer this program in a manner consistent with applicable federal  
20 and state law.

21 *Source: 1992 Code Section 5-7-2; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

22 **§ 2-9A-3 ESTABLISHMENT OF PROGRAM.**

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

26 The Annual Participation Goals for the Program administered under this Section 2-  
27 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	1.5%
Minority-Owned Business Enterprises	12.9%
Women-Owned Business Enterprises	12.6%

Source: 1992 Code Section 5-7-3; Ord. 031204-2; Ord. 031204-25; Ord. 031211-11.

#### § 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 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.

- 1 (4) AUSTIN METROPOLITAN STATISTICAL AREA. The specific area  
2 defined by the Census Bureau, which is presently limited to Travis,  
3 Williamson, Hays, Bastrop and Caldwell Counties.
- 4 (5) BID. A complete, properly signed response to a competitive bidding  
5 Solicitation issued by the City, submitted on the prescribed forms required  
6 by the relevant Contract Awarding Authority, to perform or provide labor,  
7 materials, equipment, supplies or services to or for the City for a stated  
8 price.
- 9 (6) BIDDER. A person, Firm or Business Enterprise that submits a Bid in  
10 response to a Solicitation. A Bidder may be represented by an agent if such  
11 agent provides evidence demonstrating the agent's authority.
- 12 (7) BROKER. A person or entity that fills orders by purchasing or receiving  
13 supplies from a third party supplier rather than out of its own existing  
14 inventory, and provides no Commercially Useful Function other than acting  
15 as a conduit between his or her supplier and his or her customer.
- 16 (8) BUSINESS ENTERPRISE or FIRM. A corporation, partnership, sole  
17 proprietorship, Joint Venture, joint stock company, professional association  
18 or any other legal entity, that is properly licensed and/or otherwise  
19 authorized to do business in the State of Texas.
- 20 (9) CITY and CITY LIMITS. The City of Austin, Texas and its full purpose  
21 annexed boundaries, as established by Chapter 90, page 634, Special Laws  
22 of Texas, 1909, 31st Legislature, as the same may be amended from time to  
23 time and as extended by ordinances of the City of Austin enacted subsequent  
24 thereto.
- 25 (10) CITY MANAGER. The person serving as the chief administrative and  
26 executive officer of the City, as appointed and serving under Art. V, Section  
27 1 of the Austin City Charter (or any successor provision) and includes his or  
28 her designee.
- 29 (11) CITY MARKETPLACE. The geographic and procurement areas in which  
30 the City contracts on an annual basis.
- 31 (12) COMMERCIALLY USEFUL FUNCTION. A Firm is responsible for the  
32 execution of a distinct element of the work of the Contract and carries out its  
33 responsibilities by actually performing, managing, and supervising the work  
34 involved, or fulfilling its responsibilities as Joint Venturer. To determine  
35 whether a Firm is performing a Commercially Useful Function, the City will  
36 evaluate the amount of work subcontracted, normal industry practices and

1 other relevant factors. In determining whether a MBE/WBE Firm is  
2 performing a Commercially Useful Function, the following considerations  
3 shall be counted:

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

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

21 (c) Generally, if a MBE/WBE does not perform or exercise responsibility  
22 for at least 30 percent of the total cost of its Contract with its own  
23 work force, or the MBE/WBE subcontracts a greater portion of the  
24 work of a Contract than would be expected on the basis of normal  
25 industry practice for the type of work involved, it is not performing a  
26 Commercially Useful Function.

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

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

- 1 (15) **CONSULTANT.** A person or Business Enterprise that submits a Proposal  
2 to provide professional or nonprofessional services to the City by Contract,  
3 and any person who supplies or provides professional or nonprofessional  
4 services to the City by Contract.
- 5 (16) **CONTRACT.** Includes the entire and integrated binding legal agreement  
6 between the City and a Contractor or Consultant to provide or procure labor,  
7 materials, equipment, supplies and services to, for or on behalf of the City.  
8 Except as otherwise specifically defined in this section, a Contract does not  
9 include:
- 10 (a) awards made by the City with federal/state grant or City general fund  
11 monies to a non-profit entity where the City offers assistance,  
12 guidance, or supervision on a project or program and the recipient of  
13 the grant award uses the grant monies to provide services to the  
14 community;
  - 15 (b) sales transactions where the City sells its personal or real property;
  - 16 (c) a loan transaction where the City is acting as a debtor or a creditor;
  - 17 (d) lease and franchise agreements;
  - 18 (e) agreements to use City real property;
  - 19 (f) gifts of materials, equipment, supplies or services to the City;
  - 20 (g) interlocal or intergovernmental agreements between or among  
21 political subdivisions; or
  - 22 (h) procurements of commodities or services that are sole source by virtue  
23 of intellectual property rights or other exclusive rights and for which  
24 there are no other subcontracting opportunities.

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

- 28 (17) **CONTRACT AWARDING AUTHORITY.** The City official or department  
29 authorized to enter into contracts on behalf of the City.
- 30 (18) **CONTRACTOR.** Any person or Business Enterprise that submits a Bid or  
31 Proposal to provide labor, goods or services to the City by Contract for  
32 profit, and any person who supplies or provides labor, goods or services to  
33 the City by Contract for profit.

- 1 (19) DBE or DISADVANTAGED BUSINESS ENTERPRISE. Defined as  
2 provided in 49 Code of Federal Regulation Part 26 or other applicable  
3 federal regulations.
- 4 (20) DSMBR. The City's Department of Small and Minority Business  
5 Resources.
- 6 (21) DIRECTOR. The City official who heads the department which manages  
7 the Program authorized by this chapter, and the Director's successor, and the  
8 successor agency or department.
- 9 (22) ECONOMIC DISADVANTAGE. With respect to an individual owner of a  
10 Business Enterprise or Firm, Economic Disadvantage means personal net  
11 worth equal to or less than \$900,000, which figure shall be (a) indexed  
12 annually, beginning January 1, 2007, for the Austin Metro Area Consumer  
13 Price Index, published by the U.S. Department of Labor, Bureau of Labor  
14 Standards and (b) exclusive of the individual owner's equity in (i) a  
15 Business Enterprise or Firm seeking certification under this Program, and  
16 (ii) the personal residence of the individual owner of such Business  
17 Enterprise or Firm.
- 18 (23) EXPERTISE. Verifiable and demonstrable skills, knowledge or ability to  
19 perform in the field or endeavor in which certification is sought by the  
20 Business Enterprise as defined by normal industry practices, including  
21 licensure where required.
- 22 (24) FRONT. A business which purports to be a MBE/WBE but that is actually  
23 owned, controlled or managed in a manner that is inconsistent with the  
24 requirements for certification set forth in this chapter.
- 25 (25) GOALS. The goals or Subgoals established for a particular Solicitation or  
26 Contract, as set forth in Section 2-9A-3 (*Establishment of Program*) and  
27 calculated as authorized in Section 2-9A-19 (*Establishment of MBE/WBE*  
28 *Participation Levels for Individual Contracts in Construction*).
- 29 (26) GOOD FAITH EFFORTS. The actions undertaken by a Bidder or Proposer  
30 to achieve a MBE/WBE Goal with respect to a Contract. Minimum  
31 standards are as set forth in Section 2-9A-21 (*Pre-Award Compliance*  
32 *Procedures*).
- 33 (27) JOINT VENTURE. An association of two or more persons, or any  
34 combination of types of Business Enterprises and persons numbering two or  
35 more, proposing to perform a single Contract, in which each Joint Venture  
36 partner contributes property, capital, efforts, and skill and/or knowledge, and

1 in which the MBE/WBE is responsible for a distinct, clearly-defined portion  
2 of the work of the Contract and whose share in the capital contribution,  
3 control, management, risks and profits of the Joint Venture is equal to its  
4 ownership interest. A Joint Venture seeking certification pursuant to the  
5 Program must have an agreement in writing specifying the terms and  
6 conditions of the relationships between the partners and their relationship,  
7 risks, and responsibilities under the Contract.

- 8 (28) **LIKE-KIND.** For purposes of substitutions of previously designated MBEs  
9 and/or WBEs, a MBE for a MBE, if MBE and WBE Goals are used in a  
10 Solicitation; a member of a racial or ethnic group for a member of the same  
11 racial or ethnic group, if racial or ethnic Subgoals are used in the  
12 Solicitation; or a WBE for a WBE.
- 13 (29) **MBE/WBE ADVISORY COMMITTEE.** The committee appointed by the  
14 city council to serve those functions described in Section 2-9A-13  
15 (*MBE/WBE Advisory Committee*). It is composed as set forth in Section 2-1-  
16 381 (*Establishment; Meeting*) of the Code.
- 17 (30) **MANUFACTURER.** A Firm that operates or maintains a factory or  
18 establishment that produces, on the premises, the materials, supplies,  
19 articles, or equipment required under the Contract and of the general  
20 character described by the specifications.
- 21 (31) **MINORITY-OWNED BUSINESS ENTERPRISE or MBE.** A business  
22 including, without being limited to, a sole proprietorship, partnership,  
23 corporation, Joint Venture, limited liability company, or any other business  
24 or professional entity:
- 25 (a) which is at least 51 percent owned by one or more Minority Persons,  
26 or in the case of a publicly owned business, at least 51 percent of all  
27 classes of the stock of which is owned by one or more Minority  
28 Persons;
- 29 (b) whose management, policies, major decisions and daily business  
30 operations are independently controlled by one or more such Minority  
31 Persons;
- 32 (c) which performs a Commercially Useful Function;
- 33 (d) the size of which does not exceed the size limits established by rule;
- 34 (e) doing business in the City's Marketplace for at least three months  
35 prior to the date of application for certification;

1 (f) which is certified by the City; and

2 (g) which is Economically Disadvantaged.

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

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

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

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

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

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

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

24 (33) **OWNED, MANAGED AND INDEPENDENTLY CONTROLLED.** A  
25 Business Enterprise or Firm is Owned, Managed and Independently  
26 Controlled if one or more Minority Persons or Women who own the  
27 requisite interest in or assets of a business applying for certification possess  
28 the customary incidents of such ownership, including an equivalent interest  
29 in profit and loss, and have contributed an equivalent percentage of capital  
30 or equipment and Expertise to the business. Ownership shall be measured as  
31 though not subject to the community property interest of a spouse, if both  
32 spouses certify in writing that the nonparticipating spouse relinquishes  
33 control over his or her community property interest in the subject business  
34 (but by doing so is not required to transfer ownership interest or to  
35 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) **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

1 qualities. Social Disadvantage must stem from circumstances beyond the  
2 individual's control.

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

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

12 (42) SUBCONTRACTOR. Any person or Business Enterprise providing goods,  
13 labor or services to a Contractor if such goods, labor or services are procured  
14 or used in fulfillment of the Contractor's obligations arising from a Contract  
15 with the City. Subcontractor includes every level of subcontracting required  
16 to fulfill a Contract with the City.

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

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

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

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

33 (a) which is at least 51 percent owned by one or more Women; or, in the  
34 case of a publicly owned business, at least 51 percent of all classes of  
35 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 rule;
- (e) doing business in the 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.

*Source: 1992 Code Section 5-7-4; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

#### **§ 2-9A-5 RACE AND GENDER NEUTRAL MEASURES TO ENSURE EQUAL OPPORTUNITY FOR ALL CONTRACTORS.**

The City shall develop and use measures to facilitate the participation of all Business Enterprises in City contracting activities with respect to Construction. These measures shall include, but are not limited to:

- (1) arranging Solicitation times for the presentations of Bids, quantities, specifications, and delivery schedules so as to facilitate the participation of interested Contractors and Subcontractors;
- (2) segmenting contracts so as to facilitate the participation of Business Enterprises;
- (3) providing assistance to Business Enterprises in overcoming barriers such as difficulty in obtaining bonding and financing;
- (4) providing timely information programs on contracting procedures, Bid preparation, and specific contracting opportunities;
- (5) holding pre-Bid conferences, where appropriate, to explain the projects and to encourage other Contractors to use all available Business Enterprises as Subcontractors;

- 1 (6) adopting prompt payment procedures, including requiring by Contract that  
2 prime Contractors pay Subcontractors (and Consultants pay Subconsultants,  
3 as the case may be) within 10 calendar days of receipt of payment from the  
4 City and, where appropriate, issuing joint checks to Contractors and  
5 Subcontractors (or, as the case may be, to Consultants and Subconsultants);
- 6 (7) expediting payments and advancing payments to cover start-up and  
7 mobilization costs, where appropriate;
- 8 (8) collecting information from all prime Contractors (or Consultants) on City  
9 Contracts detailing the bids received from all Subcontractors (or  
10 Subconsultants) for City Contracts and the expenditures to Subcontractors  
11 (or Subconsultants) utilized by prime Contractors (or Consultants) on City  
12 Contracts;
- 13 (9) implementing a continuous process for information flow between  
14 Contractors, DSMBR, the Purchasing Office, and relevant City departments;
- 15 (10) reviewing bonding and insurance requirements to eliminate unnecessary  
16 barriers to contracting with the City; and
- 17 (11) referring complaints of discrimination to the appropriate state or federal  
18 agency for investigation and resolution, or taking other action as appropriate.

19 *Source: 1992 Code Section 5-7-15; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

20 **§ 2-9A-6 ADOPTION OF RULES.**

- 21 (A) Purpose and scope. The Director is delegated the authority under Section 2-  
22 9A-10 (*Duties of Department of Small and Minority Business Resources*) of  
23 this chapter to administer this chapter, including the authority to formulate  
24 and adopt such rules and regulations as may be reasonable, necessary and  
25 required to assist in the implementation, administration or enforcement of  
26 this chapter. Such adoption of rules and regulations shall be conducted  
27 according to the standards of uniform practice and procedures set forth in  
28 Chapter 1-2 of the Code.

29 *Source: 1992 Code Section 5-7-5; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

1 **ARTICLE 2. PROGRAM MANAGEMENT.**

2  
3 **§ 2-9A-10 DUTIES OF DEPARTMENT OF SMALL AND MINORITY**  
4 **BUSINESS RESOURCES.**

5 The Minority-Owned and Women-Owned Business Enterprise Procurement  
6 Program with respect to Construction shall be administered and executed by a  
7 Department of Small and Minority Business Resources, whose Director shall report to the  
8 City Manager. The Director has final administrative authority over the operations of the  
9 Program. The duties and function of the Department of Small and Minority Business  
10 Resources shall include the following:

- 11 (1) Formulating, proposing and adopting rules and regulations for the further  
12 development, implementation and monitoring of the Program, in accordance  
13 with the process established in Section 2-9A-6 (*Adoption of Rules*).
- 14 (2) Assuring that MBEs and WBEs are informed of City contracting  
15 opportunities.
- 16 (3) Providing information and assistance to MBEs, WBEs, and DBEs relating to  
17 City procurement practices and procedures and Bid specifications,  
18 requirements and prerequisites.
- 19 (4) Certifying businesses as MBEs, WBEs, and DBEs, maintaining certification  
20 records, and ensuring that all City departments have an up-to-date  
21 certification register.
- 22 (5) Reviewing Contractors' achievement of the Goals or documentation of Good  
23 Faith Efforts made to comply with the participation Goals for Contracts, and  
24 rendering decisions on whether Good Faith Efforts have been sufficient.
- 25 (6) Working with User Departments to monitor Contracts to ensure prompt  
26 payments to MBEs, WBEs, and DBEs and compliance with participation  
27 Goals and commitments.
- 28 (7) Establishing project participation Goals and/or Subgoals in accordance with  
29 Section 2-9A-19 (*Establishment of MBE/WBE Participation Levels for*  
30 *Individual Contracts in Construction*).
- 31 (8) Receiving, reviewing, and acting upon complaints and suggestions  
32 concerning the Program, and reporting violations of this chapter when such  
33 violations occur as provided in Section 2-9A-25 (*Sanctions*).

1 (9) Providing staff support and reports to the MBE/WBE Advisory Committee  
2 and forwarding its recommendations to the City Manager, city council and  
3 City departments to further the policies and objectives of the Program.

4 (10) Reporting the availability of MBEs, WBEs, and DBEs certified by the City  
5 to perform Contracts for the City.

6 *Source: 1992 Code Section 5-7-10; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

7 **§ 2-9A-11 DUTIES OF FINANCE AND ADMINISTRATIVE SERVICES**  
8 **DEPARTMENT.**

9 The Purchasing Office of the Finance and Administrative Services Department  
10 shall have the following duties and responsibilities with regard to the Program:

11 (1) Maintaining records of:

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

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

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

20 (d) monthly reports for all procurements valued in excess of \$5,000,  
21 which shall include, at a minimum:

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

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

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

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

31 (v) upon request, the number and identities of MBEs, WBEs, and  
32 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 DSMBR with implementation, administration and enforcement of this chapter.

*Source: 1992 Code Section 5-7-11; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

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

The Public Works Department and any other departments or offices of the City which receive appropriate delegation for project management, Contract management,

1 and/or Construction and/or design Contract responsibility shall have the following duties  
2 and responsibilities with regard to the Program:

- 3 (1) assisting the Director with setting project participation Goals and/or  
4 Subgoals for Contracts as authorized by Section 2-9A-19 (*Establishment of*  
5 *MBE/WBE Participation Levels for Individual Contracts in Construction*)  
6 hereof;
- 7 (2) assuring integration of all vendor lists with the vendor list maintained by the  
8 Finance and Administrative Services Department;
- 9 (3) assisting in the identification of available MBE, WBE, and DBE  
10 Subcontractors, and providing other assistance in meeting the Goals;
- 11 (4) performing other activities to support DSMBK, as set forth in the rules;
- 12 (5) gathering and maintaining subcontracting data for those Contracts which  
13 they manage;
- 14 (6) submitting subcontracting data to the Finance and Administrative Services,  
15 Public Works, and/or such other City departments as may be required by the  
16 relevant Contract Awarding Authority, within 15 calendar days of month's  
17 end;
- 18 (7) managing Construction Contracts in a consistent manner to assure Contract  
19 compliance in utilization of MBE, WBE, and DBE Subcontractors; and
- 20 (8) notwithstanding the provisions of this section, no project management  
21 department shall have the authority to conduct any activities without express  
22 ordinance or rule delegation to such department.

23 *Source: 1992 Code Section 5-7-12; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

#### 24 **§ 2-9A-13 MBE/WBE ADVISORY COMMITTEE.**

25 The MBE/WBE Advisory Committee shall perform those functions as set forth in  
26 Section 2-1, Article 38 of the Code.

27 *Source: 1992 Code Section 5-7-13; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

### 28 **ARTICLE 3. PROGRAM ELEMENTS.**

#### 29 **§ 2-9A-15 PROGRAM ELIGIBILITY.**

- 30 (A) Only Business Enterprises that meet the criteria of Minority-Owned  
31 Business Enterprises, as defined in Section 2-9A-4 (*Definitions*) or Women-  
32

1 Owned Business Enterprises, as defined in Section 2-9A-4 (*Definitions*) may  
2 be certified for participation. The applicant has the burden of production  
3 and persuasion by a preponderance of the evidence.

4 (B) All MBEs and WBEs must be certified prior to participating in the Program.

5 (C) Certifications shall be conducted and records kept by DSMBR or its  
6 designee, as approved by the city council.

7 (D) Only a Firm owned by a Socially and Economically Disadvantaged  
8 person(s) may be certified as a MBE/WBE.

9 (1) The Firm's ownership by a Socially and Economically Disadvantaged  
10 person must be real, substantial, and continuing, going beyond *pro*  
11 *forma* ownership of the Firm as reflected in ownership documents.  
12 The owner(s) must enjoy the customary incidents of ownership and  
13 share in the risks and profits commensurate with that ownership  
14 interest.

15 (2) The contributions of capital or expertise by the Socially and  
16 Economically Disadvantaged owner(s) to acquire the ownership  
17 interest must be real and substantial. If Expertise is relied upon as  
18 part of a Socially and Economically Disadvantaged owner's  
19 contribution to acquire ownership, the Expertise must be of the  
20 requisite quality generally recognized in a specialized field, in areas  
21 critical to the Firm's operations, indispensable to the Firm's potential  
22 success, specific to the type of work the Firm performs and  
23 documented in the Firm's records. The individual whose expertise is  
24 relied upon must have a commensurate financial investment in the  
25 Firm.

26 (E) Only a Firm that is managed and controlled by a Socially and Economically  
27 Disadvantaged person(s) may be certified as a MBE/WBE.

28 (1) A Firm must not be subject to any formal or informal restrictions that  
29 limit the customary discretion of the Socially and Economically  
30 Disadvantaged owner(s). There can be no restrictions through  
31 corporate charter provisions, by-law provisions, contracts or any other  
32 formal or informal devices that prevent the Socially and Economically  
33 Disadvantaged owner(s), without the cooperation or vote of any non-  
34 Socially and Economically Disadvantaged person, from making any  
35 business decision of the Firm, including the making of obligations or  
36 the dispersing of funds.

1 (2) The Socially and Economically Disadvantaged owner(s) must possess  
2 the power to direct or cause the direction of the management and  
3 policies of the Firm and to make day-to-day as well as long-term  
4 decisions on management, policy, operations and work.

5 (3) The Socially and Economically Disadvantaged owner(s) may delegate  
6 various areas of the management or daily operations of the Firm to  
7 persons who are not Socially and Economically Disadvantaged. Such  
8 delegations of authority must be revocable, and the Socially and  
9 Economically Disadvantaged owner(s) must retain the power to hire  
10 and fire any such person. The Socially and Economically  
11 Disadvantaged owner(s) must actually exercise control over the  
12 Firm's operations, work, management and policy.

13 (4) The Socially and Economically Disadvantaged owner(s) must have an  
14 overall understanding of, and managerial and technical competence,  
15 experience and expertise, directly related to the Firm's operations and  
16 work. The Socially and Economically Disadvantaged owner(s) must  
17 have the ability to intelligently and critically evaluate information  
18 presented by other participants in the Firm's activities and to make  
19 independent decisions concerning the Firm's daily operations, work,  
20 management, and policymaking.

21 (5) If state law or City ordinance requires the owner(s) to have a  
22 particular license or other credential to own and/or control a certain  
23 type of Firm, then the Socially and Economically Disadvantaged  
24 owner(s) must possess the required license or credential. If state law  
25 or City ordinance does not require that the owner possess the license or  
26 credential, the fact that the owner(s) lacks such license or credential is  
27 a factor in determining whether the Socially and Economically  
28 Disadvantaged owner(s) actually controls the Firm.

29 (6) A Socially and Economically Disadvantaged owner cannot engage in  
30 outside employment or other business interests that conflict with the  
31 management of the Firm or prevent the owner from devoting  
32 sufficient time and attention to the affairs of the Firm to manage and  
33 control its day-to-day activities.

34 (F) Only an independent Firm may be certified as a MBE/WBE. An  
35 independent Firm is one whose viability does not depend on its relationship  
36 with another Firm. Recognition of an applicant as a separate entity for tax or  
37 corporate purposes is not necessarily sufficient to demonstrate that a Firm is

independent and non-Affiliated. In determining whether an applicant is an independent business, the Director will:

- (1) Scrutinize relationships with non-Certified Firms in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.
  - (2) Consider whether present or recent employer/employee relationships between the Socially and Economically Disadvantaged owner(s) of the applicant and non-Certified Firms or persons associated with non-Certified Firms compromise the applicant's independence.
  - (3) Examine the applicant's relationships with non-Certified Firms to determine whether a pattern of exclusive or primary dealings with non-Certified Firm compromises the applicant's independence.
  - (4) Consider the consistency of relationships between the applicant and non-Certified Firms with normal industry practice.
- (G) An applicant shall be certified only for specific types of work in which the Socially and Economically Disadvantaged owner(s) has the ability and Expertise to manage and control the firm's operations and work.
- (H) Applications for certification shall be on standard forms prepared by DSMBR and adopted by rule, and shall be designed to ensure that the criteria for participation in the Program are satisfied.
- (I) To ensure that the Program only benefits eligible Business Enterprises, the City shall also certify the eligibility of Joint Ventures involving MBEs and WBEs and non-MBE and WBE Contractors.
- (J) In lieu of conducting its own certifications, DSMBR by rule may accept formal certifications of WBEs and MBEs by other entities as meeting the requirements of this chapter, provided that DSMBR determines that the certification standards of such entities are comparable to those of the City. DSMBR should strive to coordinate certification activities with other agencies to implement a universal certification process.
- (K) The certification status of all MBEs and WBEs shall be reviewed on an annual basis by 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 DSMBR within 60 calendar days from the date of receipt of written notification from DSMBR shall result in decertification of the Firm.

(L) The Director may move to decertify a Business Enterprise that does not continuously meet the criteria set forth in this section.

(M) The Director may move to decertify a certified MBE/WBE that repeatedly fails to respond to requests for quotations from Bidders/Proposers who timely solicit participation on a Contract, that repeatedly fails to attend relevant pre-Bid conferences, or that repeatedly fails to honor quotations in bad faith.

(N) Decertification by another agency shall create a prima facie case for decertification by the City. The challenged entity shall then have the burden of proving that the City certification should be maintained.

*Source: 1992 Code Section 5-7-16; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

#### **§ 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) 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,

and is not an adversarial proceeding. 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 within four calendar days of receipt of the final Adverse Decision, in accordance with the procedures established by the Purchasing Office.

(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, 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.

Source: 1992 Code Section 5-7-17; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.

#### **§ 2-9A-17 PROCEDURE FOR CHALLENGING CERTIFICATION AS A MBE/WBE.**

(A) To challenge the eligibility of a Firm that has been certified as a MBE/WBE, a third party may present information under oath that the Firm does not meet the criteria contained in Section 2-9A-15 (*Program Eligibility*). The presumption that the challenged party is eligible shall remain in effect until the Director makes the final determination.

(B) The challenge shall be made in writing to the Director and shall include all information relied upon by the challenging party.

(C) The Director shall notify the challenged party in writing that the eligibility of his or her Firm has been challenged. This notice shall identify the challenging party and summarize the grounds for the challenge. The notice may also require the challenged party to provide the Director, within a reasonable time, any information requested to permit the Director to evaluate the eligibility of the Firm.

- 1 (D) The provisions of Section 2-9A-16 (*Procedure for Appealing and Protesting*  
2 *Adverse Decision*) shall apply to challenges to certification.

3 *Source: 1992 Code Section 5-7-18; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

4 **§ 2-9A-18 PROGRAM REVIEW.**

- 5 (A) The Annual Participation Goals shall be expressed as a cumulative Goal for  
6 all groups of Minority Persons composed of annual Subgoals for each group  
7 of Minority Persons, and a separate Goal for Women, and such participation  
8 Goals shall be set forth in Section 2-9A-3 (*Establishment of Program*). The  
9 Annual Participation Goals shall be based on the availability of MBEs and  
10 WBEs in the City's Marketplace as required by federal and state laws, and  
11 shall be expressed as percentages for each group of Minority Persons and  
12 Women under each type of Contract. Project participation Goals and  
13 Subgoals may be established based on the availability of certified Firms to  
14 perform the work of the Contract. Participation Goals shall be reviewed by  
15 DSMBR on at least a biennial basis for continued relevance, narrow  
16 tailoring, and applicability.

- 17 (B) The city council shall receive an annual report from the City Manager  
18 detailing the City's performance under this chapter, department by  
19 department, for the preceding fiscal year. The report shall contain the  
20 utilization of MBEs and WBEs based on the audited financial records for the  
21 preceding fiscal year, and provide the percentages of MBEs and WBEs on  
22 the City's list of certified vendors.

- 23 (C) The city council will review this report and the City's progress towards  
24 eliminating discrimination in its contracting activities and Marketplace and  
25 revise the Program as necessary to meet legal and Program requirements.  
26 As new evidence becomes available to the City, the city council may revise  
27 this chapter if necessary. Annual Participation Goals and Subgoals may be  
28 revised for the balance of the term of the Program if the city council finds  
29 that:

- 30 (1) the Program has yet to redress the effects of discrimination in the  
31 City's Marketplace against MBEs and WBEs and that in the absence  
32 of race- and gender-conscious remedial measures the City would  
33 necessarily be a passive participant in a discriminatory marketplace;  
34 (2) the Goals and Subgoals are narrowly tailored to redress that  
35 discrimination; and

(3) the Goals and Subgoals are in compliance with applicable federal and state laws.

(D) For ease of Program administration, Solicitations may contain Goals and Subgoals, if applicable, expressed as round numbers, using mathematical rounding principles.

(E) Based on the size of the Contract, the type of work of the Contract, and the availability of each group of MBEs to perform elements of the work of the Contract, the City may utilize either the cumulative MBE Goal or the Subgoals for each group of Minority Persons in a Contract Solicitation, or set project MBE/WBE participation Goals as provided in Section 2-9A-19 (*Establishment of MBE/WBE Participation Levels for Individual Contracts in Construction*).

(F) These Goals and Subgoals shall be in effect from the effective date of this chapter to the effective date of the chapter containing revised Annual Participation Goals established by city council in accordance with Section 2-9A-18(C) (*Program Review*).

*Source: 1992 Code Section 5-7-19; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

#### **§ 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.

(B) For ease of Program administration, Solicitations may contain Goals and/or Subgoals, if applicable, expressed as round numbers, using mathematical rounding principles.

- 1 (C) The Director shall rely on the information systems operated and maintained  
2 by the Finance and Administrative Services Department for the availability  
3 percentages used to establish project participation Goals or Subgoals.
- 4 (D) The Director shall establish by rule a process for Contract awarding  
5 authorities to apply for project participation Goals or Subgoals in a timely  
6 manner.

7 *Source: 1992 Code Section 5-7-20; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

8 **§ 2-9A-20 COUNTING PARTICIPATION OF MBES AND WBES.**

- 9 (A) When a MBE/WBE participates in a Contract, only the value of the work  
10 actually performed by the MBE/WBE toward MBE/WBE Goals shall be  
11 counted towards the overall Goal.
- 12 (1) The entire amount of that portion of a Contract that is performed by  
13 the MBE's/WBE's own forces shall be counted, including the cost of  
14 supplies and materials obtained by the MBE/WBE for the work of the  
15 Contract, and supplies purchased or equipment leased by the  
16 MBE/WBE (except supplies and equipment the MBE/WBE  
17 Subcontractor purchases or leases from the prime Contractor or its  
18 Affiliate).
- 19 (2) Notwithstanding clause (1) above, on a single Contract, a MBE that is  
20 also a WBE may only be counted once (i.e., toward the MBE Goal or  
21 toward the WBE Goal, but not both).
- 22 (3) The entire amount of fees or commissions charged by a MBE/WBE  
23 Firm for providing a *bona fide* service, such as professional, technical,  
24 Consultant, or managerial services, or for providing bonds or  
25 insurance specifically required for the performance of a Contract,  
26 toward MBE/WBE Goals, provided the fee is reasonable and not  
27 excessive as compared with fees customarily allowed for similar  
28 services shall be counted.
- 29 (4) When a MBE/WBE subcontracts part of the work of its Contract to  
30 another Firm, the value of the subcontracted work may be counted  
31 toward Goals only if the MBE/WBE Subcontractor is itself a  
32 MBE/WBE. Work that a MBE/WBE subcontracts to a non-  
33 MBE/non-WBE Firm does not count toward MBE/WBE Goals.
- 34 (5) If a Subcontractor contracts part of its work to a MBE/WBE Firm, the  
35 value of that work may be counted toward MBE/WBE Goals. Work

1 that a MBE/WBE Subcontractor contracts to another MBE/WBE Firm  
2 shall not be counted twice towards the Goal.

- 3 (B) When a MBE/WBE performs as a participant in a Joint Venture, only the  
4 portion of the total dollar value of the Contract equal to the distinct, clearly  
5 defined portion of the work of the Contract that the MBE/WBE performs  
6 with its own forces and for which it is at risk shall be counted towards  
7 MBE/WBE Goals.
- 8 (C) Only expenditures to a MBE/WBE Contractor that is performing a  
9 Commercially Useful Function shall be counted.
- 10 (D) When a MBE/WBE is presumed not to be performing a Commercially  
11 Useful Function as provided in this section, the MBE/WBE may present  
12 evidence to rebut this presumption. DSMBR may determine that the Firm is  
13 performing a Commercially Useful Function given the type of work  
14 involved and normal industry practices.
- 15 (E) Expenditures with MBEs/WBEs for materials or supplies shall be counted  
16 toward MBE/WBE Goals as follows:
- 17 (1) If the materials or supplies are obtained from a MBE/WBE  
18 Manufacturer or Regular Dealer, 100 percent of the cost of the  
19 materials or supplies toward MBE/WBE Goals shall be counted.
- 20 (2) With respect to materials or supplies purchased from a MBE/WBE  
21 that is neither a Manufacturer nor a Regular Dealer, count the entire  
22 amount of fees or commissions charged for assistance in the  
23 procurement of the materials and supplies, or fees or transportation  
24 charges for the delivery of materials or supplies required on a job site,  
25 toward MBE/WBE Goals only if the payment of such fees are a  
26 customary industry practice and such fees are reasonable and not  
27 excessive as compared with fees customarily allowed for similar  
28 services. Do not count any portion of the cost of the materials and  
29 supplies themselves toward MBE/WBE Goals, however.
- 30 (F) If a Firm ceases to be a certified MBE/WBE during a Contract, the dollar  
31 value of work performed under a Contract with that Firm after it has ceased  
32 to be certified shall not be counted.
- 33 (G) In determining achievement of MBE/WBE Goals, the participation of a  
34 MBE/WBE Subcontractor shall not be counted until the amount being  
35 counted toward the Goal has been paid to the MBE/WBE.

Source: 1992 Code Section 5-7-21; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.

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

- (A) In all Solicitations for which a Goal has been established for Contracts, the City shall indicate its Goals and/or Subgoals for the use of MBEs/WBEs. All Solicitation and Contract documents for which a Goal or Subgoals have been established shall contain: 1) a description of this chapter and Program; 2) the requirements related to achieving the Goals or Subgoals; 3) if Goals or Subgoals are not achieved, the requirement of documentation of the Bidder's/Proposer's Good Faith Efforts, including the Good Faith Efforts of Minority Persons and Women Bidders/Proposers, to achieve the Goals or Subgoals. When the City has established Subgoals, Bidders/Proposers who do not achieve each of the Subgoals must document Good Faith Efforts to achieve the Subgoals that were not met.
- (B) Achievement of Goals or Subgoals or documentation of Good Faith Efforts applies to every Contract for which Goals or Subgoals are established. The rules shall prescribe an accelerated and simplified procedure for Contracts solicited and awarded on an emergency basis. The Bidder/Proposer shall submit a compliance plan detailing its achievement of the Goals or Subgoals or its Good Faith Efforts to meet the Goals or Subgoals. The MBE/WBE lists provided by the City to a Bidder/Proposer shall establish the minimum universe from which a Bidder/Proposer may solicit Subcontractors to meet the Goals or Subgoals. The compliance plan shall be due at the time set out in the Solicitation documents, which time shall not be less than four hours after the deadline for submission of Bids.
- (C) Any agreement between a Bidder/Proposer and a MBE/WBE in which the Bidder/Proposer requires that the MBE/WBE not provide subcontracting quotations to other Bidders/Proposers is prohibited.
- (D) MBE and WBE Subcontractors must be competitive with non-MBE/non-WBE Subcontractors on price, quality, and delivery. MBEs and WBEs shall respond to relevant requests for quotations.
- (E) Where the Bidder/Proposer cannot achieve the Goals or Subgoals, its compliance plan shall document its Good Faith Efforts to achieve the Goals or Subgoals. DSMBR will determine whether the Bidder/Proposer has made such Good Faith Efforts. In making this determination, DSMBR will consider, at a minimum, the Bidder/Proposer's efforts to do the following:
- (1) Soliciting through reasonable and available means the interest of MBEs/WBEs with a Significant Local Business Presence who have

1 the capability to perform the work of the Contract. The Bidder must  
2 solicit this interest within sufficient time to allow the MBEs/WBEs to  
3 respond to the Solicitation. The Bidder/Proposer must take  
4 appropriate steps to follow up initial Solicitations with interested  
5 MBEs/WBEs. The Bidder/Proposer must state a specific and  
6 verifiable reason for not contacting each certified Firm with a  
7 Significant Local Business Presence. For some Contracts, based on  
8 criteria to be determined by DSMBR in consultation with the User  
9 Department and set forth by rule pursuant to Section 2-9A-6  
10 (*Adoption of Rules*), DSMBR shall make the initial contact with  
11 MBEs, WBEs and DBEs, as the case may be, in which case a  
12 Bidder/Proposer's efforts under this Subsection (E)(1) shall not be  
13 considered.

14 (2) Providing interested MBEs/WBEs with adequate information about  
15 the plans, specifications, and requirements of the Contract, including  
16 addenda, in a timely manner to assist them in responding to a  
17 Solicitation.

18 (3) (a) Negotiating in good faith with interested MBEs/WBEs that  
19 have submitted Bids to the Bidder/Proposer. A MBE/WBE that  
20 has submitted a Bid to a Bidder/Proposer but has not been  
21 contacted within five business days of submission of the Bid  
22 may contact DSMBR to request a meeting with the  
23 Bidder/Proposer. DSMBR will schedule a meeting between the  
24 MBE/WBE and the Bidder/Proposer to facilitate negotiation. If  
25 such a meeting does not occur and the MBE/WBE submitting  
26 the Bid to the Bidder/Proposer is not selected, the  
27 Bidder/Proposer must explain the reason for not selecting the  
28 MBE/WBE and provide written documentation supporting the  
29 stated reason. Written documentation of negotiation may  
30 include the names, addresses, and telephone numbers of  
31 MBEs/WBEs that were considered; a description of the  
32 information provided regarding the plans and specifications for  
33 the work selected for subcontracting; and evidence as to why  
34 additional agreements could not be reached for MBEs/WBEs to  
35 perform the work.

36 (b) That there may be some additional costs involved in soliciting  
37 and using MBEs and WBEs is not a sufficient reason for a  
38 Bidder/Proposer's failure to meet the Goals and Subgoals, as  
39 long as such costs are reasonable.

- 1 (4) Not rejecting MBEs/WBEs as being unqualified without sound  
2 reasons based on a thorough investigation of their capabilities. The  
3 MBE's/WBE's standing within its industry, membership in specific  
4 groups, organizations, or associations and political or social  
5 affiliations (for example union vs. non-union employee status) are not  
6 legitimate causes for rejecting or not soliciting Bids to meet the Goals  
7 and Subgoals.
- 8 (5) It is the Bidder/Proposer's responsibility to make a portion of the  
9 work available to MBE/WBE Subcontractors and suppliers and to  
10 select those portions of the work or material needs consistent with the  
11 available MBE/WBE Subcontractors and suppliers, so as to facilitate  
12 meeting the Goals or Subgoals.
- 13 (6) The ability or desire of a Bidder/Proposer to perform the work of a  
14 Contract with its own organization does not relieve the  
15 Bidder/Proposer of the responsibility to make Good Faith Efforts. A  
16 Bidder/Proposer who desires to self perform the work of a Contract  
17 must demonstrate Good Faith Efforts unless the Goals or Subgoals  
18 have been met.
- 19 (7) Bidders/Proposers are not required to accept higher quotes in order to  
20 meet the Goals or Subgoals.
- 21 (F) The following factors may also be considered by DSMBR in determining  
22 that a Bidder/Proposer has made Good Faith Efforts. These factors are not  
23 intended to be a mandatory checklist, nor are they intended to be exclusive  
24 or exhaustive. Other factors or types of efforts may be relevant in  
25 appropriate cases.
- 26 (1) Selecting portions of the work to be performed by MBEs/WBEs in  
27 order to increase the likelihood that the Goals or Subgoals will be met.  
28 This includes, where appropriate, breaking out Contract work items  
29 into economically feasible units to facilitate MBE/WBE participation,  
30 even when the Bidder/Proposer might otherwise prefer to perform  
31 these work items with its own forces.
- 32 (2) Making efforts to assist interested MBEs/WBEs in obtaining bonding,  
33 lines of credit, or insurance as required by the City or Contractor.
- 34 (3) Making efforts to assist interested MBEs/WBEs in obtaining  
35 necessary equipment, supplies, materials, or related assistance or  
36 services.

- 1 (4) Effectively using the services of Minority Person/Women community  
2 organizations; Minority Person/Women Contractors groups; local,  
3 state, and federal Minority Person/Women business assistance offices;  
4 and other organizations to provide assistance in the recruitment and  
5 placement of MBEs, WBEs and/or DBEs. It is the Bidder/Proposer's  
6 responsibility to seek guidance from DSMBR on any questions  
7 regarding compliance with this section.
- 8 (5) In determining whether a Bidder/Proposer has made Good Faith  
9 Efforts, the performance of other Bidders/Proposers in meeting the  
10 Contract may be considered. For example, when other  
11 Bidders/Proposers meet the Goals or Subgoals, it may be reasonably  
12 questioned whether, with additional reasonable efforts, the apparent  
13 successful Bidder/Proposer could have met the Goals or Subgoals.  
14 Similarly, if the apparent successful Bidder/Proposer fails to meet the  
15 Goals, but meets or exceeds the average MBE/WBE participation  
16 obtained by other Bidders/Proposers, this may be evidence that the  
17 apparent successful Bidder/Proposer made Good Faith Efforts.
- 18 (G) The Director shall review the compliance plan prior to award, including the  
19 scope of work and the letters of intent from any MBE/WBE Subcontractors  
20 within a reasonable time so as not to unduly delay award of the Contract.
- 21 (1) If the Director determines that the compliance plan demonstrates that  
22 the Goals or Subgoals have been achieved, then the Contract  
23 Awarding Authority, with the concurrence of the Director, shall  
24 recommend award to the city council. For all competitively Bid  
25 projects, signed letter(s) of intent between the certified low Bidder  
26 and the MBE and/or WBE Subcontractor(s) must be received by the  
27 Contract Awarding Authority within three business days of  
28 notification of the status as certified low Bidder. For procurements  
29 conducted through the request for Proposal or request for  
30 qualifications process, no later than after final execution of a  
31 professional or nonprofessional services agreement but before the  
32 issuance of a notice to proceed, the successful Proposer must deliver  
33 signed subcontracts between itself and the MBE and/or WBE  
34 Subcontractor(s) and/or Subconsultant(s) for the scope of work  
35 reflected in the Proposal as awarded.
- 36 (2) In the event the applicable Goal(s) or Subgoals have not been  
37 achieved, then the Director shall evaluate the Bidder's/Proposer's  
38 Good Faith Efforts to achieve those Goals or Subgoals as documented  
39 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 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.

(H) The rejection of Bids/Proposals in conformance with this section does not affect the ability of the Contract Awarding Authority to continue to evaluate and consider the remaining Bids/Proposals that achieve the Goals or Subgoals or demonstrate Good Faith Efforts and to develop a recommendation to city council for award of the Contract.

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

*Source: 1992 Code Section 5-7-22; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

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

(A) Upon award of a Contract by the city council that includes Goals or Subgoals that are met, the Goals or Subgoals become covenants of performance by the Contractor in favor of the City.

1 (B) The following schedules shall apply:

- 2 (1) For Construction Contracts, the Contractor must present a work  
3 schedule that includes when the MBE/WBE Subcontractors shall be  
4 utilized at the job site. This schedule is due on or before the  
5 preconstruction meeting with the project manager.
- 6 (2) For professional and nonprofessional services Contracts, the  
7 Contractors or Consultants, as the case may be, must present a written  
8 schedule of when the MBE/WBE Subcontractors shall be utilized on  
9 the project. This written schedule is due on or before execution of the  
10 Contract for services, when the final scope of work is determined.

11 (C) All Contractors shall provide Subcontractor payment information to the  
12 Contract Awarding Authority with each request for payment submitted to  
13 the City. The Director shall monitor Subcontractor participation during the  
14 course of the Contract and shall have reasonable access to all Contract-  
15 related documentation held by the Contractor, as established by rule.

16 (D) All Consultants shall provide Subconsultant payment information to the  
17 Contract Awarding Authority with each request for payment submitted to  
18 the City. The Director shall monitor Subconsultant participation during the  
19 course of the Contract and shall have reasonable access to all Contract-  
20 related documentation held by the prime Consultant, as established by rule.

21 (E) Prior to Contract Closeout by the Contract Awarding Authority, project  
22 manager, or Contract manager, the Director shall evaluate the Contractor's  
23 fulfillment of the contracted Goals or Subgoals, taking into account all  
24 approved substitutions, terminations and changes to the Contract's scope of  
25 work. Should the Director find the Contractor to have fulfilled the  
26 contracted Goals, the Director shall so state in writing to the Contractor, the  
27 Contract Awarding Authority, and the project or Contract manager. Should  
28 the Director find the Contractor has not fulfilled the contracted Goals or  
29 Subgoals, the Director shall provide the reasons for such conclusion and  
30 recommend an appropriate Adverse Decision in writing to the Purchasing  
31 Office with copies to the Contractor, the Contract Awarding Authority, the  
32 project manager, and/or the Contract manager.

33 (F) Notice of appeal from an Adverse Decision under Subsection (E) must be  
34 filed within 14 calendar days from the date of receipt of the finding with the  
35 Purchasing Office, including any written documentation to demonstrate how  
36 the Contractor or Consultant, as the case may be, has complied with the  
37 contracted Goals or Subgoals. The Purchasing Office shall hold a hearing  
38 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 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.

*Source: 1992 Code Section 5-7-23; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

**§ 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.
- (B) All requests for changes or substitutions of the Subcontractors listed in the compliance plan shall be made to the Director in writing, and shall clearly and fully set forth the basis for the request. A Contractor shall not substitute a Subcontractor or perform the work designated for a Subcontractor in the compliance plan with its own forces unless and until the Director approves such substitution in writing. A Contractor shall not allow a substituted Subcontractor to begin work until both the Director and the City's project manager overseeing the completion of the Contract have approved the substitution.
- (C) The facts supporting the request must not have been known nor reasonably should have been known by the parties prior to the submission of the compliance plan. Bid shopping is prohibited. The Contractor must meet with the Subcontractor and negotiate with the Subcontractor to resolve the problem. If requested by either party, the City shall facilitate such a meeting. Where there has been a mistake or disagreement about the scope of work, the MBE/WBE can be substituted only where an agreement cannot be reached for a reasonable price for the correct scope of work.
- (D) Substitutions of the Subcontractor shall be permitted only on the following bases:
- (1) unavailability after receipt of reasonable notice to proceed;
  - (2) failure of performance;

- 1 (3) financial incapacity;
- 2 (4) refusal by the Subcontractor to honor the Bid or Proposal price;
- 3 (5) mistake of fact or law about the elements of the scope of work of a
- 4 Solicitation where a reasonable price cannot be agreed;
- 5 (6) failure of the Subcontractor to meet insurance, licensing or bonding
- 6 requirements; or
- 7 (7) the Subcontractor's withdrawal of its Bid or Proposal.
- 8 (E) The Director's decision whether to permit or deny the proposed substitution,
- 9 and the basis therefore, will be communicated to the parties in writing by the
- 10 Director within seven business days.
- 11 (F) Where the Contractor has established the basis for the substitution to the
- 12 satisfaction of the Director, he shall make Good Faith Efforts to fulfill the
- 13 compliance plan. The Contractor may seek the assistance of DSMBR in
- 14 obtaining a new MBE/WBE Subcontractor. To fulfill the compliance plan,
- 15 the Contractor shall first make Good Faith Efforts to substitute with a Like-
- 16 Kind MBE/WBE Subcontractor. If a competitive agreement considering
- 17 price, quality and delivery cannot be reached with such Subcontractor, the
- 18 Contractor shall make Good Faith Efforts to obtain other MBE/WBE
- 19 substitutes so as to meet the Goals or Subgoals, in conformance with Section
- 20 2-9A-21 (*Pre-Award Compliance Procedures*). If the Goals or Subgoals
- 21 cannot be reached and Good Faith Efforts have been made to meet the
- 22 Goals, the Contractor may substitute with a non-MBE/non-WBE.
- 23 (G) When a MBE/WBE is included in a Bidder's compliance plan and is
- 24 decertified or becomes ineligible to participate on contracts after issuance of
- 25 a Solicitation but prior to award, or subsequent to award of a Contract, the
- 26 participation of such a Business Enterprise may be counted as provided in
- 27 the rules.
- 28 (H) If the City, as owner under the Contract, requires the substitution of a
- 29 Subcontractor listed in the compliance plan, the Contractor shall undertake
- 30 Good Faith Efforts to substitute with a Like-Kind MBE/WBE Subcontractor.
- 31 If a competitive agreement considering price, quality and delivery cannot be
- 32 reached with such Subcontractor, the Contractor shall make Good Faith
- 33 Efforts to obtain other MBE/WBE substitutes so as to meet the Goals or
- 34 Subgoals, in conformance with Section 2-9A-21 (*Pre-Award Compliance*
- 35 *Procedures*). If the Goals or Subgoals cannot be reached and Good Faith

Efforts have been made to meet the Goals, the Contractor may substitute with a non-MBE/non-WBE.

- (I) If a Contractor plans to hire a Subcontractor on any scope of work that was not previously disclosed in the compliance plan, the Contractor shall obtain the approval of the Director to modify the compliance plan and must make Good Faith Efforts to ensure that MBEs/WBEs have a fair opportunity to Bid on the new scope of work.

*Source: 1992 Code Section 5-7-24; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

#### **§ 2-9A-24 POST-AWARD CHANGES TO THE SCOPE OF WORK.**

- (A) Changes to the scopes of work shall be documented by the Contract Awarding Authority at the time they arise, to establish the reasons for the change and to document resulting changes in the applicable Goals for the Contract.
- (B) For Construction Contracts, where there is a change order that requires work beyond the scope of trades originally required to accomplish the project, then it is the duty of the Contractor to fulfill the Goals or to make Good Faith Efforts to fulfill the Goals for that change order. Change orders that do not alter the type of trades originally required to accomplish the project may be undertaken using the Subcontractors and suppliers already under Contract to the Contractor.
- (C) For professional and nonprofessional services Contracts, when there is a change to the scope of work which requires new, additional services beyond the services originally required to accomplish the project, then it is the duty of the Proposer to fulfill the applicable contracted Goals or Subgoals or to make Good Faith Efforts to fulfill the applicable contracted Goals or Subgoals for that change. Changes to the scope of work which do not alter the type of services as originally required to accomplish the project may be undertaken using the Subconsultants, Subcontractors and suppliers already under Contract to the Proposer.

*Source: 1992 Code Section 5-7-25; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

#### **§ 2-9A-25 SANCTIONS.**

- (A) The following violations of this chapter are unlawful and may result in sanctions:

- (1) providing false or misleading information to the City in connection with an application for or challenge to certification, recertification or decertification as a MBE/WBE;
  - (2) providing false or misleading information to the City in connection with submission of a Bid, responses to requests for qualifications or Proposals, Good Faith Efforts documentation, post-award compliance, or other Program operations;
  - (3) substituting MBE/WBE Subcontractors without first receiving approval for such substitutions; or
  - (4) committing any other violations of the provisions of this chapter.
- (B) A Bidder, Proposer, Contractor, Subcontractor or applicant for certification is subject to being barred, suspended, or deemed non-responsible in future City Solicitations and contracts for a period up to five years, if it is found to have:
- (1) provided false or misleading information in connection with an application for certification or recertification;
  - (2) provided false or misleading information in connection with the submission of a Bid or Proposal or documentation of Good Faith Efforts, post-award compliance, or other Program operations;
  - (3) failed to fulfill contractual Goals or Subgoals and thereby materially breached the Contract; or
  - (4) repeatedly failed to comply in good faith with substantive provisions of this chapter.
- (C) When the Director, the Contract Awarding Authority, or any other City official identifies a violation of this chapter, such violation must be referred to the Purchasing Office for evaluation of proper sanctions. Such evaluation shall include consultation with the Law Department prior to any recommendation for sanctions.
- (D) Department procedures shall be promulgated and conducted by the Purchasing Office of the Finance and Administrative Services Department.
- (E) A MBE/WBE that repeatedly and knowingly refuses to honor Bid or Proposal prices is subject to being decertified by the Director, after notice and hearing.

- 1 (F) Nothing in this chapter shall be deemed to prevent the city attorney from  
2 seeking criminal sanctions at municipal court or referring the matter to other  
3 appropriate law enforcement authorities, as authorized by this section.
- 4 (G) Where appropriate and lawful, the City may by Contract impose a fixed sum  
5 as a penalty to be paid by the Bidder/Proposer for an unexcused failure to  
6 meet the Goals or Subgoals or to otherwise comply with the Program. In  
7 addition, the City may deduct from retainage any difference in subcontract  
8 prices from substitutions not approved by the City.
- 9 (H) In addition to other sanctions available to the City, the violation of any  
10 provision of this chapter may be included as an incident of breach in each  
11 Contract.
- 12 (I) For federally funded contracts administered pursuant to federal regulations,  
13 sanctions may be imposed as provided therein.

14 *Source: 1992 Code Section 5-7-26; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

15 **§ 2-9A-26 SUNSET PROVISION.**

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

18 *Source: 1992 Code Section 5-7-27; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

19 **§ 2-9A-27 INTERPRETATION**

20 Nothing in this chapter is intended, nor should it be construed, in the interpretation  
21 of this chapter or its application, as authorizing violations of the competitive Bidding  
22 statutes and professional services solicitation statutes promulgated by the Texas  
23 legislature or federal constitutional standards as enunciated by the U.S. Supreme Court.

24 *Source: 1992 Code Section 5-7-28; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

25 **§ 2-9A-28 SEVERABILITY.**

26 If any section, subsection, clause, or provision of this chapter is held to be invalid  
27 by a court of competent jurisdiction, the remainder of this chapter shall not be affected by  
28 such invalidity.

29 *Source: 1992 Code Section 5-7-29; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

30 **PART 3. Chapter 2-9 (Minority-Owned And Women-Owned Business Enterprise**  
31 **Procurement Program) of the City Code is repealed.**

1 **PART 4.** This ordinance takes effect on \_\_\_\_\_, 2006.

2 **PASSED AND APPROVED**

3  
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5  
6 \_\_\_\_\_, 2006

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Will Wynn  
Mayor

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11 **APPROVED:** \_\_\_\_\_  
12 David Allan Smith  
13 City Attorney

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15 **ATTEST:** \_\_\_\_\_  
16 Shirley A. Gentry  
City Clerk

**Draft**