AUSTIN CITY COUNCIL

AGENDA



Thursday, June 8, 2006

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Small & Minority Business Resources
RECOMMENDATION FOR COUNCIL ACTION

ITEM 61

Subject: Approve an ordinance adopting a new Chapter 2-9D of the City Code (Minority-Owned and Women-Owned Business Enterprise Commodities Procurement Program) to establish a procurement program for commodities.

Amount and Source of Funding:

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

Additional Backup Material
(click to open)
Ordinance

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 sunset deadline to June 30, 2006.

Boards and Commission Action: Recommended by the MBE/WBE Citizens' Advisory Committee. (Related to items 58 - 60)

Chapter 2-9, Subchapter D Commodities 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-D establishes a Minority-Owned and Women-Owned Business Enterprise Program in

the city with respect to commodity procurements. Section 2-9D-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 the procurement of Commodities is added to provide narrow tailoring of the program to achieve its goals. Commodities are defined to include goods, supplies, or equipment provided or supplied under a Contract by a Contractor to a City of Austin Contract Awarding Authority or to a City of Austin User Department. Additional Ordinance changes are the same as described in Chapter 2-9-A.

ORDINANCE NO.

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

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

PART 1. The City Code is amended to add Chapter 2-9D to read:

CHAPTER 2-9D. MINORITY-OWNED AND WOMEN-OWNED BUSINESS ENTERPRISE PROCUREMENT PROGRAM: COMMODITIES.

ARTICLE 1. GENERAL PROVISIONS.

§ 2-9D-1 FINDINGS.

The city council hereby adopts the following findings:

(A) The City of Austin regularly enters into contracts for the procurement of goods and commodities of many kinds. Through its procurement activities, the City has a substantial impact upon the economy of the Austin area.

(B) In 1987, the Economic Development Commission of the City was directed by the city council to review the City's policies and experiences relating to contracting opportunities for minority- and women-owned business enterprises with the City and to suggest revised policies and procedures, if determined necessary.

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

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

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

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

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

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

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

(J) The city council appointed a community-based Disparity Study Ordinance Committee to review the studies and the law, and to draft programmatic changes to the current ordinance. The committee met over several months and recommended certain changes to the current ordinance.

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

(1) Prior to the adoption of the City's 1987 ordinance, there were disparities between the number of qualified MBEs and WBEs ready, willing and able to perform services on City contracts and the number of such businesses actually engaged by the City or the City's prime contractors.

(2) Despite the implementation of the 1987 ordinance, disparities in the utilization of MBEs and WBEs on City contracts continued to exist.

(3) Although the City has undertaken since 1990 a variety of innovative race - and gender-neutral technical assistance, insurance and bonding programs, race- and gender-neutral programs alone have not been sufficient to remedy the effects of discrimination.

(4) The evidence continues to demonstrate that MBEs and WBEs have been underutilized in contracting opportunities on City contracts as a result of private sector discrimination.

(5) The existence of an exclusionary network in public contracting and other systemic barriers has excluded otherwise qualified MBEs and WBEs from receipt of contracts.

(6) Although the City has made substantial progress in eliminating discrimination in its own contracting practices, discrimination exists in private companies that contract on public projects. As a result of this discrimination, the City has been in the past a passive participant in a system of discrimination and, in the absence of programs to eliminate disparity in utilization, would continue to be a passive participant in such a system.

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

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

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

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

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

(2) As set forth in the 2005 study, race- and gender-neutral approaches alone are inadequate to remedy the lingering effects of past discrimination in the City's marketplace.

(3) The 2005 study found that the ordinance is narrowly tailored to address the identified current effects of past discrimination and private sector discrimination in the City's marketplace. The study also found

that the ordinance reduces the possibility that the City will be a passive participant in discrimination.

(4) All of the persons targeted by the ordinance have been affected by disparities in the City marketplace.

(5) The ordinance does not unduly burden third parties not eligible for certification under the program.

(6) The sunset date contained in the ordinance ensures that the city council will regularly review the program to verify its necessity and that it remains tailored to the specific conditions found in the City's marketplace.

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

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

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

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

§ 2-9D-2 POLICY.

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

(1) To ensure that the City is not a passive participant in a discriminatory marketplace.

(2) To ensure that the program is narrowly tailored.

(3) To provide opportunities for MBEs and WBEs to broaden and enhance their capacities to do business with the City in the area of commodities procurement.

(4) To provide opportunities for MBEs and WBEs to serve as contractors and subcontractors for the supply of goods and services to the City in the area of commodities procurement.

(5) To administer this program in a manner consistent with applicable federal and state law.

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

§ 2-9D-3 ESTABLISHMENT OF PROGRAM.

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

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

	Commodities Procurement Participation Goals
African-American Owned Business Enterprises	0.3%
Hispanic Owned Business Enterprises	2.5%
Asian-American and Native American Owned Business Enterprises	0.7%
Minority-Owned Business Enterprises	3.5%
Women-Owned Business Enterprises	6.2%

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

§ 2-9D-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 Commodities procurement, as set forth in Section 2-9D-3 *(Establishment of Program)*, and as may be amended from time to time.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(13) COMMODITIES. For purposes of this Section 2-9D, Commodities shall include goods, supplies, or equipment to be provided or supplied under a Contract by a Contractor to a Contract Awarding Authority or User Department, as the case may be.

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

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

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

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

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

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

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

(d) lease and franchise agreements;

(e) agreements to use City real property;

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

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

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

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

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

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

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

(21) DSMBR. The City's Department of Small and Minority Business Resources.

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

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

(24) EXPERTISE. Verifiable and demonstrable skills, knowledge or ability to perform in the field of endeavor in which certification is sought by the

Business Enterprise as defined by normal industry practices, including licensure where required.

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

(26) GOALS. The goals or Subgoals established for a particular Solicitation or Contract, as set forth in Section 2-9D-3 *(Establishment of Program)* and calculated as authorized in Section 2-9D-19 *(Establishment of MBE/WBE Participation Levels for Individual Contracts in Commodities Procurement)*.

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

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

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

(30) MBE/WBE ADVISORY COMMITTEE. The committee appointed by the city council to serve those functions described in Section 2-9D-13 *(MBE/WBE Advisory Committee)*. It is composed as set forth in Section 2-1-381 *(Establishment; Meeting)* of the Code.

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

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

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

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

(c) which performs a Commercially Useful Function;

(d) the size of which does not exceed the size limits established by 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.

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

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

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

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

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

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

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

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

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

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

(37) 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.

(38) 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.

(39) 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.

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

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

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

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

(44) SUBGOALS. The targeted levels established by the city council for the annual aggregate participation of each group of Minority Persons and Women with respect to Commodities procurement, or the targeted levels for the participation of each group of Minority Persons and Women as project

participation Goals established pursuant to Section 2-9D-19 *(Establishment of MBE/WBE Participation Levels for Individual Contracts in Commodities Procurement).*

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

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

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

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

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

(c) which performs a Commercially Useful Function;

(d) the size of which does not exceed size limits established by 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.

§ 2-9D-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 Commodities procurement. 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;

(6) adopting prompt payment procedures, including requiring by Contract that prime Contractors pay Subcontractors within 10 calendar days of receipt of payment from the City and, where appropriate, issuing joint checks to Contractors and Subcontractors;

(7) expediting payments and advancing payments to cover start-up and mobilization costs, where appropriate;

(8) collecting information from all prime Contractors on City Contracts detailing the bids received from all Subcontractors for City Contracts and the expenditures to Subcontractors utilized by prime Contractors on City Contracts;

(9) implementing a continuous process for information flow between Contractors, DSMBR, the Purchasing Office, and relevant City departments;

(10) reviewing bonding and insurance requirements to eliminate unnecessary barriers to contracting with the City; and

(11) referring complaints of discrimination to the appropriate state or federal agency for investigation and resolution, or taking other action as appropriate.

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

§ 2-9D-6 ADOPTION OF RULES.

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

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

ARTICLE 2. PROGRAM MANAGEMENT.

§ 2-9D-10 DUTIES OF DEPARTMENT OF SMALL AND MINORITY BUSINESS RESOURCES.

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

(1) Formulating, proposing and adopting rules and regulations for the further development, implementation and monitoring of the Program, in accordance with the process established in Section 2-9D-6 *(Adoption of Rules)*.

(2) Assuring that MBEs and WBEs are informed of City contracting opportunities.

(3) Providing information and assistance to MBEs, WBEs, and DBEs relating to City procurement practices and procedures and Bid specifications, requirements and prerequisites.

(4) Certifying businesses as MBEs, WBEs, and DBEs, maintaining certification records, and ensuring that all City departments have an up-to-date certification register.

(5) Reviewing Contractors' achievement of the Goals or documentation of Good Faith Efforts made to comply with the participation Goals for Contracts, and rendering decisions on whether Good Faith Efforts have been sufficient.

(6) Working with User Departments to monitor Contracts to ensure prompt payments to MBEs, WBEs, and DBEs and compliance with participation Goals and commitments.

(7) Establishing project participation Goals and/or Subgoals in accordance with Section 2-9D-19 *(Establishment of MBE/WBE Participation Levels for Individual Contracts in Commodities Procurement)*.

(8) Receiving, reviewing, and acting upon complaints and suggestions concerning the Program, and reporting violations of this chapter when such violations occur as provided in Section 2-9D-25 *(Sanctions)*.

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

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

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

§ 2-9D-11 DUTIES OF FINANCE AND ADMINISTRATIVE SERVICES DEPARTMENT.

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

(1) Maintaining records of:

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

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

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

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

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

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

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

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

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

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

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

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

(ii) the dollar value of Contracts so awarded;

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

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

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

(2) Assisting in the record-keeping functions by obtaining monthly reports from the Public Works Department, Transportation, Planning, and Sustainability Department, and other project management departments on the status of 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.

§ 2-9D-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 and/or design Contract responsibility shall have the following duties and responsibilities with regard to the Program:

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

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

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

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

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

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

(7) managing Commodities procurement Contracts in a consistent manner to assure Contract compliance in utilization of MBE, WBE, and DBE Subcontractors; and

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

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

§ 2-9D-13 MBE/WBE ADVISORY COMMITTEE.

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

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

ARTICLE 3. PROGRAM ELEMENTS.

§ 2-9D-15 PROGRAM ELIGIBILITY.

(A) Only Business Enterprises that meet the criteria of Minority-Owned Business Enterprises, as defined in Section 2-9D-4 *(Definitions)* or Women-Owned Business Enterprises, as defined in Section 2-9D-4 *(Definitions)* may be certified for participation. The applicant has the burden of production and persuasion by a preponderance of the evidence.

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

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

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

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

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

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

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

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

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

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

(5) If state law or City ordinance requires the owner(s) to have a particular license or other credential to own and/or control a certain type of Firm, then the Socially and Economically Disadvantaged owner(s) must possess the required license or credential. If state law or City ordinance does not require that the owner posses the license or credential, the fact that the owner(s) lacks such license or credential is

a factor in determining whether the Socially and Economically Disadvantaged owner(s) actually controls the Firm.

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

(F) Only an independent Firm may be certified as a MBE/WBE. An independent Firm is one whose viability does not depend on its relationship with another Firm. Recognition of an applicant as a separate entity for tax or 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.

§ 2-9D-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.

§ 2-9D-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 2-9D-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.

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

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

§ 2-9D-18 PROGRAM REVIEW.

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

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

(C) The city council will review this report and the City's progress towards eliminating discrimination in its contracting activities and Marketplace and revise the Program as necessary to meet legal and Program requirements. As new evidence becomes available to the City, the city council may revise

this chapter if necessary. Annual Participation Goals and Subgoals may be revised for the balance of the term of the Program if the city council finds that:

(1) the Program has yet to redress the effects of discrimination in the City's Marketplace against MBEs and WBEs and that in the absence of race- and gender-conscious remedial measures the City would necessarily be a passive participant in a discriminatory marketplace;

(2) the Goals and Subgoals are narrowly tailored to redress that 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 2-9D-19 *(Establishment of MBE/WBE Participation Levels for Individual Contracts in Commodities Procurement).*

(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 2-9D-18(C) *(Program Review).*

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

§ 2-9D-19 ESTABLISHMENT OF MBE/WBE PARTICIPATION LEVELS FOR INDIVIDUAL CONTRACTS IN COMMODITIES PROCUREMENT.

(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 Commodities procurement, 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.

(C) The Director shall rely on the information systems operated and maintained by the Finance and Administrative Services Department for the availability percentages used to establish project participation Goals or Subgoals.

(D) The Director shall establish by rule a process for Contract awarding authorities to apply for project participation Goals or Subgoals in a timely manner.

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

§ 2-9D-20 COUNTING PARTICIPATION OF MBES AND WBES.

(A) When a MBE/WBE participates in a Contract, only the value of the work actually performed by the MBE/WBE toward MBE/WBE Goals shall be counted towards the overall Goal.

(1) The entire amount of that portion of a Contract that is performed by the MBE's/WBE's own forces shall be counted, including the cost of supplies and materials obtained by the MBE/WBE for the work of the Contract, and supplies purchased or equipment leased by the MBE/WBE (except supplies and equipment the MBE/WBE Subcontractor purchases or leases from the prime Contractor or its Affiliate).

(2) Notwithstanding clause (1) above, on a single Contract, a MBE that is also a WBE may only be counted once (i.e., toward the MBE Goal or toward the WBE Goal, but not both).

(3) The entire amount of fees or commissions charged by a MBE/WBE Firm for providing a bona fide service, such as professional, technical, Consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a Contract, toward MBE/WBE Goals, provided the fee is reasonable and not excessive as compared with fees customarily allowed for similar services shall be counted.

(4) When a MBE/WBE subcontracts part of the work of its Contract to another Firm, the value of the subcontracted work may be counted toward Goals only if the MBE/WBE Subcontractor is itself a MBE/WBE. Work that a MBE/WBE subcontracts to a non-MBE/non-WBE Firm does not count toward MBE/WBE Goals.

(5) If a Subcontractor contracts part of its work to a MBE/WBE Firm, the value of that work may be counted toward MBE/WBE Goals. Work that a MBE/WBE Subcontractor contracts to another MBE/WBE Firm shall not be counted twice towards the Goal.

(B) When a MBE/WBE performs as a participant in a Joint Venture, only the portion of the total dollar value of the Contract equal to the distinct, clearly defined portion of the work of the Contract that the MBE/WBE performs with its own forces and for which it is at risk shall be counted towards MBE/WBE Goals.

(C) Only expenditures to a MBE/WBE Contractor that is performing a Commercially Useful Function shall be counted.

(D) When a MBE/WBE is presumed not to be performing a Commercially Useful Function as provided in this section, the MBE/WBE may present evidence to rebut this presumption. DSMBR may determine that the Firm is performing a Commercially Useful Function given the type of work involved and normal industry practices.

(E) Expenditures with MBEs/WBEs for materials or supplies shall be counted toward MBE/WBE Goals as follows:

(1) If the materials or supplies are obtained from a MBE/WBE Manufacturer or Regular Dealer, 100 percent of the cost of the materials or supplies toward MBE/WBE Goals shall be counted.

(2) With respect to materials or supplies purchased from a MBE/WBE that is neither a Manufacturer nor a Regular Dealer, count the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site, toward MBE/WBE Goals only if the payment of such fees are a customary industry practice and such fees are reasonable and not excessive as compared with fees customarily allowed for similar services. Do not count any portion of the cost of the materials and supplies themselves toward MBE/WBE Goals, however.

(F) If a Firm ceases to be a certified MBE/WBE during a Contract, the dollar value of work performed under a Contract with that Firm after it has ceased to be certified shall not be counted.

(G) In determining achievement of MBE/WBE Goals, the participation of a MBE/WBE Subcontractor shall not be counted until the amount being 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.

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

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

(3) (a) Negotiating in good faith with interested MBEs/WBEs that have submitted Bids to the Bidder/Proposer. A MBE/WBE that has submitted a Bid to a Bidder/Proposer but has not been contacted within five business days of submission of the Bid may contact DSMBR to request a meeting with the Bidder/Proposer. DSMBR will schedule a meeting between the MBE/WBE and the Bidder/Proposer to facilitate negotiation. If such a meeting does not occur and the MBE/WBE submitting the Bid to the Bidder/Proposer is not selected, the Bidder/Proposer must explain the reason for not selecting the MBE/WBE and provide written documentation supporting the stated reason. Written documentation of negotiation may include the names, addresses, and telephone numbers of MBEs/WBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why

additional agreements could not be reached for MBEs/WBEs to perform the work.

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

(4) Not rejecting MBEs/WBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The MBE's/WBE's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union employee status) are not legitimate causes for rejecting or not soliciting Bids to meet the Goals and Subgoals.

(5) It is the Bidder/Proposer's responsibility to make a portion of the work available to MBE/WBE Subcontractors and suppliers and to select those portions of the work or material needs consistent with the available MBE/WBE Subcontractors and suppliers, so as to facilitate meeting the Goals or Subgoals.

(6) The ability or desire of a Bidder/Proposer to perform the work of a Contract with its own organization does not relieve the Bidder/Proposer of the responsibility to make Good Faith Efforts. A Bidder/Proposer who desires to self perform the work of a Contract must demonstrate Good Faith Efforts unless the Goals or Subgoals have been met.

(7) Bidders/Proposers are not required to accept higher quotes in order to meet the Goals or Subgoals.

(F) The following factors may also be considered by DSMBR in determining that a Bidder/Proposer has made Good Faith Efforts. These factors are not intended to be a mandatory checklist, nor are they intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases:

(1) Selecting portions of the work to be performed by MBEs/WBEs in order to increase the likelihood that the Goals or Subgoals will be met. This includes, where appropriate, breaking out Contract work items into economically feasible units to facilitate MBE/WBE participation, even when the Bidder/Proposer might otherwise prefer to perform these work items with its own forces.

(2) Making efforts to assist interested MBEs/WBEs in obtaining bonding, lines of credit, or insurance as required by the City or Contractor.

(3) Making efforts to assist interested MBEs/WBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.

(4) Effectively using the services of Minority Person/Women community organizations; Minority Person/Women Contractors groups; local, state, and federal Minority Person/Women business assistance offices; and other organizations to provide assistance in the recruitment and placement of MBEs, WBEs and/or DBEs. It is the Bidder/Proposer's responsibility to seek guidance from DSMBR on any questions regarding compliance with this section.

(5) In determining whether a Bidder/Proposer has made Good Faith Efforts, the performance of other Bidders/Proposers in meeting the Contract may be considered. For example, when other Bidders/Proposers meet the Goals or Subgoals, it may be reasonably questioned whether, with additional reasonable efforts, the apparent successful Bidder/Proposer could have met the Goals or Subgoals. Similarly, if the apparent successful Bidder/Proposer fails to meet the Goals, but meets or exceeds the average MBE/WBE participation obtained by other Bidders/Proposers, this may be evidence that the apparent successful Bidder/Proposer made Good Faith Efforts.

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

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

Subcontractor(s) and/or Subconsultant(s) for the scope of work reflected in the Proposal as awarded.

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

§ 2-9D-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.

(B) The following schedules shall apply:

(1) For Commodities procurement Contracts, the Contractor must present a work schedule that includes when the MBE/WBE Subcontractors shall be utilized at the job site. This schedule is due on or before the meeting with the project manager.

(2) For professional and nonprofessional services Contracts, the Contractors or Consultants, as the case may be, must present a written schedule of when the MBE/WBE Subcontractors shall be utilized on the project. This written schedule is due on or before execution of the Contract for services, when the final scope of work is determined.

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

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

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

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

§ 2-9D-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;

(3) financial incapacity;

(4) refusal by the Subcontractor to honor the Bid or Proposal price;

(5) mistake of fact or law about the elements of the scope of work of a Solicitation where a reasonable price cannot be agreed;

(6) failure of the Subcontractor to meet insurance, licensing or bonding requirements; or

(7) the Subcontractor's withdrawal of its Bid or Proposal.

(E) The Director's decision whether to permit or deny the proposed substitution, and the basis therefore, will be communicated to the parties in writing by the Director within seven business days.

(F) Where the Contractor has established the basis for the substitution to the satisfaction of the Director, he shall make Good Faith Efforts to fulfill the compliance plan. The Contractor may seek the assistance of DSMBR in obtaining a new MBE/WBE Subcontractor. To fulfill the compliance plan, the Contractor shall first make Good Faith Efforts to substitute with a Like-Kind MBE/WBE Subcontractor. If a competitive agreement considering price, quality and delivery cannot be reached with such Subcontractor, the Contractor shall make Good Faith Efforts to obtain other MBE/WBE substitutes so as to meet the Goals or Subgoals, in conformance with Section 2-9D-21 *(Pre-Award Compliance 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.

(G) When a MBE/WBE is included in a Bidder's compliance plan and is decertified or becomes ineligible to participate on contracts after issuance of a Solicitation but prior to award, or subsequent to award of a Contract, the participation of such a Business Enterprise may be counted as provided in the rules.

(H) If the City, as owner under the Contract, requires the substitution of a Subcontractor listed in the compliance plan, the Contractor shall undertake Good Faith Efforts to substitute with a Like-Kind MBE/WBE Subcontractor.

If a competitive agreement considering price, quality and delivery cannot be reached with such Subcontractor, the Contractor shall make Good Faith Efforts to obtain other MBE/WBE substitutes so as to meet the Goals or Subgoals, in conformance with Section 2-9D-21 *(Pre-Award Compliance 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 or 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.

§ 2-9D-24 POST-AWARD CHANGES TO THE SCOPE OF WORK.

(A) Changes to the Contract 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) It is the duty of the Contractor to fulfill the Goals or to make Good Faith Efforts to fulfill the Goals for that changed Contract.

(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.

§ 2-9D-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.

(F) Nothing in this chapter shall be deemed to prevent the city attorney from seeking criminal sanctions at municipal court or referring the matter to other appropriate law enforcement authorities, as authorized by this section.

(G) Where appropriate and lawful, the City may by Contract impose a fixed sum as a penalty to be paid by the Bidder/Proposer for an unexcused failure to meet the Goals or Subgoals or to otherwise comply with the Program.

(H) In addition to other sanctions available to the City, the violation of any provision of this chapter may be included as an incident of breach in each Contract.

(I) For federally funded contracts administered pursuant to federal regulations, sanctions may be imposed as provided therein.

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

§ 2-9D-26 SUNSET PROVISION.

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

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

§ 2-9D-27 INTERPRETATION.

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

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

§ 2-9D-28 SEVERABILITY.

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

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

PART 2. This ordinance takes effect on _____, 2006.

PASSED AND APPROVED

§
§
§

_____, 2006

_____
Will Wynn
Mayor

APPROVED: _____
David Allan Smith
City Attorney

ATTEST: _____
Shirley A. Gentry
City Clerk