

ORDINANCE NO.

AN ORDINANCE AMENDING CITY CODE CHAPTERS 2-9A, 2-9B, 2-9C AND 2-9D, THE MINORITY-OWNED AND WOMEN-OWNED BUSINESS ENTERPRISE PROCUREMENT PROGRAM, TO CONSOLIDATE THE FOUR CHAPTERS INTO TWO; INCLUDE THE FINDINGS OF THE 2022 DISPARITY STUDY; AND IMPLEMENT KEY RECOMMENDATIONS OF THE STUDY AND THE FINAL REPORT OF THE INCLUSIVE PROCUREMENT WORKING GROUP.

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

PART 1. City Code Chapter 2-9A (*Minority-Owned and Women-Owned Business Enterprise Procurement Program: Construction*) is repealed and replaced to read:

CHAPTER 2-9A. - MINORITY-OWNED AND WOMEN-OWNED BUSINESS ENTERPRISE PROCUREMENT PROGRAM: CONSTRUCTION AND RELATED PROFESSIONAL SERVICES.

ARTICLE 1. - GENERAL PROVISIONS.

§2-9A-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 services of many kinds, including for construction and related professional services. 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 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 Economic Development 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 *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,

67 willing, and able to perform services on City contracts and the number
68 of such businesses engaged by the City or the City's prime contractors.

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

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

75 (4) The evidence continued to demonstrate that MBEs and WBEs had
76 been underutilized in contracting opportunities on City contracts as a
77 result of private sector discrimination.

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

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

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

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

96 (N) In 2005, the City engaged a consultant to conduct a further updated study to
97 assess the continued need for this program and whether the program could be
98 more narrowly tailored to meet such need. These studies indicated that, absent
99 the programs authorized under this ordinance, MBEs and WBEs would be
100 underutilized on City contracts relative to their availability.

- (O) In 2020, the City commissioned a consultant to conduct an updated review and analysis of qualitative and quantitative data to assess the effectiveness of the City's MBE/WBE procurement program and perform a review of other statistical and anecdotal investigations regarding the presence of disparities in the City's marketplace. The results and recommendations of those efforts are presented in two reports entitled "City of Austin Disparity Study, 2022" and "Recommendations for the City of Austin's Minority- and Woman-Owned Business Enterprise Program, 2022."
- (P) In 2006, the City updated the ordinance to repeal City Code Chapter 2-9 and replace it with four distinct chapters addressing separate aspects of the program: Ordinance No. 20060608-058 adding Chapter 2-9A (*Minority-Owned and Women-Owned Business Enterprise Procurement Program: Construction*); Ordinance No. 20060608-059 adding Chapter 2-9B (*Minority-Owned and Women-Owned Business Enterprise Procurement Program: Professional Services*); Ordinance No. 20060608-060 adding Chapter 2-9C (*Minority-Owned and Women-Owned Business Enterprise Procurement Program: Nonprofessional Services*); and Ordinance No. 20060608-061 adding Chapter 2-9D (*Minority-Owned and Women-Owned Business Enterprise Procurement Program: Commodities*).
- (Q) Based on the evidence from the 2022 study, the City determined that:
- (1) Despite the City's success, disparities still exist in the marketplace, with qualitative evidence identifying key issues such as systemic racial exclusion, discriminatory attitudes, negative perceptions of competence, gender bias, hostile work environments, exclusion from industry networks, lack of access to contract opportunities, financial barriers to contract opportunities, and barriers to equal contract terms.
 - (2) The 2022 study recommended that the City further pursue race-neutral measures as opposed to race-conscious measures, develop an annual procurement forecast, and establish annual aspirational goals.
 - (3) The 2022 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.

- 137 (5) The ordinance does not unduly burden third parties not eligible for
138 certification under the program.
- 139 (6) The sunset date contained in the ordinance ensures that the city
140 council will regularly review the program to verify its necessity and
141 that it remains tailored to the specific conditions found in the City's
142 marketplace.
- 143 (7) There are identifiable adverse and statistically significant disparities in
144 business formation, business owner earnings, and access to capital for
145 all M/WBE types in the City's marketplace.
- 146 (8) Despite the City's efforts to create equal opportunities in its
147 marketplace, the evidence continues to indicate that, absent the
148 programs authorized under this ordinance, MBEs and WBEs would be
149 underutilized on City contracts relative to their availability.
- 150 (9) The City's program continues to be narrowly tailored.
- 151 (R) This ordinance repeals and consolidates City Code Chapter 2-9A,
152 Construction, and Chapter 2-9B, Professional Services, into this one
153 ordinance.
- 154 (S) Texas law authorizes race- and gender-conscious contracting goals and
155 requires that goals be based on constitutional standards related to the City's
156 marketplace.
- 157 (T) Under these circumstances and based on the factual predicate which has
158 been established after careful study and review, the City still has a
159 compelling governmental interest in remedying the racial and gender
160 discrimination that exists in the market segments in which the City does
161 business, and in ensuring that the City is not a participant in such
162 discrimination, thereby allowing all segments of the Austin community to
163 share in the economic benefits of the City.
- 164 (U) The program adopted herein is narrowly tailored to remedy that
165 discrimination.

166 §2-9A-2 – POLICY.

167 It is the policy of the City to provide equal opportunities to all contractors, and to
168 redress the discrimination found in the City's marketplace and in public contracting
169 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 the City is not a passive participant in a discriminatory marketplace.
- (2) To ensure 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 areas of construction, professional services, nonprofessional services, and commodities procurement.
- (4) To provide opportunities for MBEs and WBEs to serve as contractors, subcontractors, consultants, and subconsultants for the supply of goods, professional services, nonprofessional services, and commodities to the City.
- (5) To administer this program in a manner consistent with applicable federal and state law.

§2-9A-3 - ESTABLISHMENT OF PROGRAM.

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

§2-9A-4 - DEFINITIONS.

In this chapter:

- (1) **ADVERSE DECISION** includes a notice of violation, denial of certification, decertification, sanction, or similar action taken by the director under the program with respect to a firm or business enterprise.
- (2) **AFFILIATE** means a person or entity that directly or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, another 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 ASPIRATIONAL GOALS means the targeted levels established for the annual aggregate participation of MBEs and WBEs in City contracts with respect to City procurement, as set forth in Section 2-9A-3 (*Establishment of Program*).
- (4) AUSTIN METROPOLITAN STATISTICAL AREA means the specific area defined by the Census Bureau, which is presently limited to Travis, Williamson, Hays, Bastrop, and Caldwell Counties.
- (5) BROKER means 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 the supplier and the customer.
- (6) BUSINESS ENTERPRISE or FIRM means a corporation, partnership, sole proprietorship, joint venture, joint stock company, professional association, or any other legal entity that is properly licensed or otherwise authorized to do business in the state.
- (7) CITY MANAGER includes the city manager's designee.
- (8) CITY MARKETPLACE means the geographic and procurement areas in which the City contracts on an annual basis.
- (9) COMMERCIALY USEFUL FUNCTION means a distinct element of the work of the contract, the responsibility for performance of which shall be carried out by a MBE/WBE firm by actually performing, managing, and supervising the work involved, or fulfilling responsibilities as joint venturer. To determine whether a MBE/WBE firm is performing a commercially useful function, the City will evaluate the amount of work subcontracted, normal industry practices, and other relevant factors, including:
- (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, 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.

(10) COMMODITIES includes 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.

(11) COMPLIANCE PLAN means the plan submitted with the respondent's response detailing the respondent's achievement of the goals or subgoals or its good faith efforts to meet the goals or subgoals for all elements of the solicitation, as defined in Section 2-9A-21 (*Pre-Award Compliance Procedures*), subject to the rules established by the relevant contract awarding authority.

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

(13) CONSULTANT means a person or business enterprise that submits a response to provide services to the City by contract, and any person who supplies or provides professional or nonprofessional services to the City by contract.

(14) 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 provided in this section, a contract does not include:

- 268 (a) awards made by the City with federal/state grant or City general fund
269 monies to a non-profit entity where the City offers assistance,
270 guidance, or supervision on a project or program and the recipient of
271 the grant award uses the grant monies to provide services to the
272 community;
- 273 (b) sales transactions where the City sells its personal or real property;
- 274 (c) a loan transaction where the City is acting as a debtor or a creditor;
- 275 (d) lease and franchise agreements;
- 276 (e) agreements to use City real property;
- 277 (f) gifts of materials, equipment, supplies, or services to the City;
- 278 (g) interlocal or intergovernmental agreements between or among
279 political subdivisions; or
- 280 (h) procurements of commodities or services that are sole source by virtue
281 of intellectual property rights or other exclusive rights and for which
282 there are no other subcontracting opportunities.

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

- 287 (15) CONTRACT AWARDING AUTHORITY means the City official or
288 department authorized to enter into contracts on behalf of the City.
- 289 (16) CONTRACTOR means any person or business enterprise that submits a
290 response to provide labor, goods, or services to the City by contract for
291 profit, and any person who supplies or provides labor, goods, or services to
292 the City by contract for profit.
- 293 (17) DEPARTMENT means the City's Small and Minority Business Resources
294 Department.
- 295 (18) DIRECTOR means the director of the department, and includes the
296 director's designee.

- (19) DISADVANTAGED BUSINESS ENTERPRISE or DBE has the meaning assigned in 49 Code of Federal Regulation Part 26 or other applicable federal regulations.
- (20) ECONOMIC DISADVANTAGE means, with respect to an individual owner of a business enterprise or firm, a personal net worth equal to or less than the amount established annually by the department. This figure shall be indexed annually.
- (21) EXPERTISE means 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.
- (22) FRONT means 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.
- (23) GENERAL SERVICES means any services not governed by Chapter 2254, Texas Government Code.
- (24) GOALS means the MBE/WBE goals or subgoals established for a particular solicitation or contract.
- (25) GOOD FAITH EFFORTS means the actions undertaken by a respondent to achieve a goal with respect to a contract. Minimum standards are as set forth in Section 2-9A-21 (*Pre-Award Compliance Procedures*).
- (26) JOINT VENTURE means 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, skill, 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 a written agreement specifying the terms and conditions of the relationships between the partners and their relationship, risks, and responsibilities under the contract.

- (27) LEASE means a long-term agreement, contract, or instrument conveying property to another at the will of either lessor or lessee for compensation, not on an ad hoc or contract-by-contract basis.
- (28) LIKE-KIND means, for purposes of substitutions of previously designated MBEs/WBEs, a MBE for a MBE, a member of a racial or ethnic group for a member of the same racial or ethnic group, or a WBE for a WBE.
- (29) MBE/WBE AND SMALL BUSINESS ADVISORY COMMITTEE means the Minority-Owned and Women-Owned Business Enterprise and Small Business Enterprise Procurement Program Advisory Committee appointed by the city council to serve those functions described in Section 2-1-163 (*Minority-Owned and Women-Owned Business Enterprise and Small Business Enterprise Procurement Program Advisory Committee*) and Section 2-9A-12 (*MBE/WBE and Small Business Advisory Committee*). .
- (30) MANUFACTURER means a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.
- (31) MINORITY-OWNED BUSINESS ENTERPRISE or MBE means a business, including a sole proprietorship, partnership, corporation, joint venture, limited liability company, or any other business or professional entity:
- (a) which is at least 51 percent owned by one or more minority persons, or in the case of a publicly owned business, at least 51 percent of all classes of the stock of which is owned by one or more minority persons;
 - (b) whose management, policies, major decisions, and daily business operations are independently controlled by one or more such minority persons;
 - (c) which performs a commercially useful function;
 - (d) the size of which does not exceed the size limits established by the United States Small Business Administration;
 - (e) doing business in the state for at least three months prior to the date of application for certification;

(f) which is certified by the City; and

(g) which is economically disadvantaged.

(32) MINORITY PERSON means a citizen or lawful permanent resident of the United States and who is a member of one of the following groups that are rebuttably presumed to be socially disadvantaged:

(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, Puerto Rico, Cuba, Dominican Republic, Central or South America, or other Spanish or Portuguese culture or origin, regardless of race);

(c) Native Americans (persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives, or Native Hawaiians);

(d) Asian-Pacific Americans (persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), Commonwealth of the Northern Marianas Islands, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru, Federated States of Micronesia, or Hong Kong);

(e) Subcontinent Asian Americans (persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal, or Sri Lanka;

(f) Women;

(g) 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

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

- (33) OWNED, MANAGED, AND INDEPENDENTLY CONTROLLED means a business enterprise or firm is owned, managed, and independently controlled if one or more minority persons 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 the nonparticipating spouse's community property interest in the subject business (but by doing so is not required to transfer ownership interest or to characterize the property as the separate property of the spouse). The ownership and control of the firm shall be real, substantial, and continuing and shall go beyond the pro forma ownership of the firm as reflected in its ownership documents.
- (34) PROFESSIONAL SERVICES has the meaning assigned in Chapter 2254, Texas Government Code.
- (35) PROGRAM means the minority-owned and women-owned business enterprise procurement program authorized by this chapter.
- (36) REGULAR DEALER means 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 dealer's 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.
- (37) RESPONDENT means a person, business enterprise, or firm that submits a response in response to a solicitation. A respondent may be represented by an agent if such agent provides evidence demonstrating the agent's authority.

- 430 (38) RESPONSE means a complete, signed response to a competitive bidding
431 solicitation issued by the City, submitted on the prescribed forms required
432 by the relevant contract awarding authority, to perform or provide labor,
433 materials, equipment, supplies, or services to or for the City for a stated
434 price.
- 435 (39) SIGNIFICANT LOCAL BUSINESS PRESENCE means a firm that has an
436 established place of business in the Austin Metropolitan Statistical Area at
437 which one or more of its employees are regularly based. Such place of
438 business must have a substantial role in the MBE's/WBE's performance of a
439 commercially useful function. A location used solely as a post office box,
440 mail drop, telephone message center, or any combination thereof, with no
441 other substantial work function, does not constitute a significant local
442 business presence.
- 443 (40) SOCIALLY DISADVANTAGED means a minority person who has been
444 subjected to racial, ethnic, or gender prejudice or cultural bias within
445 American society because of the person's identity as a member of a group
446 and without regard to individual qualities. Social disadvantage must stem
447 from circumstances beyond the individual's control.
- 448 (41) SOLICITATION means as the case may be, an invitation for bids, a request
449 for proposals, a request for qualifications, or such other request as defined
450 by the City.
- 451 (42) SPONSOR DEPARTMENT means the department or office of the City that
452 is funding the contract for the goods or services procured by a contract and
453 is the consumer of the goods or services under contract on behalf of the City.
- 454 (43) SUBCONSULTANT means a person, firm, or business enterprise providing
455 professional or nonprofessional services to a prime consultant if such
456 professional or nonprofessional services are procured or used in fulfillment
457 of the prime consultant's obligations arising from a contract with the City.
458 Subconsultant includes every level of subconsulting required to fulfill a
459 contract with the City.
- 460 (44) SUBCONTRACTOR means any person, firm, or business enterprise
461 providing goods, labor, or services to a contractor if such goods, labor, or
462 services are procured or used in fulfillment of the contractor's obligations
463 arising from a contract with the City. Subcontractor includes every level of
464 subcontracting required to fulfill a contract with the City.

- 465 (45) SUBGOALS means the targeted levels for the participation of MBEs and
466 WBEs established by the City for a specific solicitation.
- 467 (46) WOMAN means a person who is a citizen or lawful permanent resident of
468 the United States and who identifies as female.
- 469 (47) WOMEN-OWNED BUSINESS ENTERPRISE or WBE means a business,
470 including a sole proprietorship, corporation, partnership, joint venture,
471 limited liability company, or any other business or professional entity:
- 472 (a) which is at least 51 percent owned by one or more women; or, in the
473 case of a publicly owned business, at least 51 percent of all classes of
474 the stock of which is owned by one or more such women;
- 475 (b) whose management, policies, major decisions and daily business
476 operations are independently controlled by one or more such women;
- 477 (c) which performs a commercially useful function;
- 478 (d) the size of which does not exceed size limits established by the United
479 States Small Business Administration;
- 480 (e) doing business in the state for at least three months prior to the date of
481 application for certification;
- 482 (f) which is certified by the City; and
- 483 (g) which is economically disadvantaged.
- 484 (h) Women who are members of another socially disadvantaged racial or
485 ethnic group may choose for the purposes of certification and
486 recertification to be certified as WBEs, MBEs, or both, but cannot be
487 double counted on a contract to meet a participation goal.

488 §2-9A-5 - RACE AND GENDER NEUTRAL MEASURES TO ENSURE EQUAL
489 OPPORTUNITY FOR ALL CONTRACTORS.

490 The City shall develop and use measures to facilitate the participation of all
491 business enterprises in City contracting activities. These measures include:

- 492 (1) developing an annual procurement forecast;

- (2) developing and offering training tools and refresher trainings covering topics such as certification criteria and processes, contract goal setting, good faith efforts, compliance monitoring, and other bid submission documents;
- (3) implementing strategies that increase awareness of existing City programs and resources via virtual workshops, online presentations, and websites;
- (4) conducting targeted outreach sessions devoted to single industries as well as a focus on specific groups of minority persons;
- (5) arranging solicitation times for the presentations of responses, quantities, specifications, and delivery schedules so as to facilitate the participation of interested contractors, subcontractors, consultants, and subconsultants;
- (6) segmenting contracts so as to facilitate the participation of business enterprises;
- (7) providing assistance to business enterprises in overcoming barriers such as difficulty in obtaining bonding and financing;
- (8) providing timely information programs on any or all of the following: contracting procedures, submission preparation, and specific contracting and consulting opportunities;
- (9) holding pre-bid conferences, where appropriate, to explain the projects and to encourage other contractors or consultants to use all available business enterprises as subcontractors or subconsultants;
- (10) adopting prompt payment procedures, including requiring by contract that prime contractors pay subcontractors, (and consultants pay subconsultants, as the case may be), within 10 days of receipt of payment from the City and, where appropriate, issuing joint checks to contractors and subcontractors (or, as the case may be, to consultants and subconsultants);
- (11) expediting payments and advancing payments to cover start-up and mobilization costs, where appropriate;
- (12) collecting information from all prime contractors (or consultants) on City contracts detailing the bids received from all subcontractors (or subconsultants) for City contracts and the expenditures to subcontractors (or subconsultants) used by prime contractors (or consultants) on City contracts;

- 524 (13) implementing a continuous process for information flow between
525 contractors, consultants, the department, and relevant City departments;
- 526 (14) reviewing bonding and insurance requirements to eliminate unnecessary
527 barriers to contracting with the City; and
- 528 (15) referring complaints of discrimination to the appropriate state or federal
529 agency for investigation and resolution, or taking other action as appropriate.

530 § 2-9A-6 – ADOPTION OF RULES.

531 The director is delegated the authority under Section 2-9A-10 (*Duties of Small and*
532 *Minority Business Resources Department*) of this chapter to administer this chapter,
533 including the authority to formulate and adopt such rules and regulations as may be
534 reasonable, necessary, and required to assist in the implementation, administration, or
535 enforcement of this chapter. Such adoption of rules and regulations shall be under
536 Chapter 1-2 (*Adoption of Rules*) of the Code.

537 **ARTICLE 2. – PROGRAM MANAGEMENT.**

538 §2-9A-10 – DUTIES OF DEPARTMENT.

539 The program shall be administered and executed by the department, whose director
540 shall report to the city manager. The director has final administrative authority over the
541 operations of the program. The duties and functions of the department when the program
542 has been applied to a solicitation include the following:

- 543 (1) Formulating, proposing, and adopting rules, regulations, and policies and
544 procedures for the further development, implementation, and monitoring of
545 the program, in accordance with the process established in Section 2-9A-6
546 (*Adoption of Rules*).
- 547 (2) Assuring that MBEs and WBEs are informed of City procurement
548 opportunities.
- 549 (3) Providing information and assistance to MBEs, WBEs, and DBEs relating to
550 City procurement practices and procedures and response specifications,
551 requirements and prerequisites.
- 552 (4) Certifying businesses as MBEs, WBEs, and DBEs, maintaining certification
553 records, and ensuring that all City departments have an up-to-date
554 certification register.

- 555 (5) Reviewing contractors' and consultants' achievement of the goals or
556 documentation of good faith efforts made to comply with the participation
557 goals for contracts, and rendering decisions on whether good faith efforts
558 have been sufficient.
- 559 (6) Working with sponsor departments to monitor contracts to ensure prompt
560 payments to MBEs, WBEs, and DBEs and compliance with participation
561 goals and commitments.
- 562 (7) Establishing project participation goals and subgoals in accordance with
563 Section 2-9A-19 (*Establishment of MBE/WBE Participation Levels for*
564 *Individual Contracts on City Procurements*).
- 565 (8) Receiving, reviewing, and acting upon complaints and suggestions
566 concerning the program, and reporting violations of this chapter when such
567 violations occur as provided in Section 2-9A-25 (*Sanctions*).
- 568 (9) Providing staff support and reports to the MBE/WBE and Small Business
569 Advisory Committee and forwarding its recommendations to the city
570 manager, city council, and City departments to further the policies and
571 objectives of the program.
- 572 (10) Reporting the availability of MBEs, WBEs, and DBEs certified by the City
573 to perform contracts for the City.
- 574 (11) Establishing annual aspirational MBE and WBE goals.
- 575 (12) Tracking the actual dollar amounts paid under subcontracts awarded to
576 MBEs, WBEs, and DBEs compared to total dollars paid on contracts where
577 goals or subgoals have been established. These payments shall be measured
578 against projected payments or goals;
- 579 (13) Assisting in the record-keeping functions by obtaining monthly reports from
580 project management departments on the status of a contract.
- 581 (14) Compiling and reporting to city council after the end of each fiscal year, the
582 participation of MBEs and WBEs for that year based on awards of contracts.

583 §2-9A-11 - DUTIES OF SPONSOR AND PROJECT MANAGEMENT
584 DEPARTMENTS.

- 585 (A) The sponsor departments and any other departments or offices of the City
586 which receive appropriate delegation for project management, contract

management, construction 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 subgoals for contracts as authorized by Section 2-9A-19 on City procurements.
 - (2) performing other activities to support the department.
 - (3) managing contracts in a consistent manner to assure contract compliance in utilization of MBEs, WBEs, and DBEs.
- (B) No sponsor or project management department shall have the authority to conduct any activities without express ordinance or rule delegation to such department.

§2-9A-12 - MBE/WBE AND SMALL BUSINESS ADVISORY COMMITTEE.

The MBE/WBE and Small Business Enterprise Procurement Program Advisory Committee shall perform those functions as set forth in Section 2-1-163 of the Code.

ARTICLE 3. - PROGRAM ELEMENTS.

§2-9A-15 - PROGRAM ELIGIBILITY.

- (A) Only business enterprises that meet the criteria of minority-owned business enterprises, as defined in Section 2-9A-4 (*Definitions*) or women-owned business enterprises, as defined in Section 2-9A-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 the department or its designee, as approved by the city council.
- (D) Only a firm or a business enterprise owned by a socially and economically disadvantaged person(s) may be certified as a MBE/WBE. If socially and economically disadvantaged individuals own and control a firm through a parent or holding company, established for tax, capitalization, or other purposes consistent with industry practice, and the parent or holding company in turn owns and controls an operating subsidiary, it may certify the subsidiary if it otherwise meets all requirements of the program. In this

situation, the individual owners and controllers of the parent or holding company are deemed to control the subsidiary through the parent or holding company.

The department may certify such a subsidiary only if there is cumulatively 51 percent ownership of the subsidiary by socially and economically disadvantaged individuals and all other certification criteria is met.

(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, bylaws, 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.

- 654 (3) The socially and economically disadvantaged owner(s) may delegate
655 various areas of the management or daily operations of the firm to
656 persons who are not socially and economically disadvantaged. Such
657 delegations of authority must be revocable, and the socially and
658 economically disadvantaged owner(s) must retain the power to hire
659 and fire any such person. The socially and economically
660 disadvantaged owner(s) must exercise control over the firm's
661 operations, work, management, and policy.
- 662 (4) The socially and economically disadvantaged owner(s) must have an
663 overall understanding of, and managerial and technical competence,
664 experience and expertise, directly related to the firm's operations and
665 work. The socially and economically disadvantaged owner(s) must
666 have the ability to intelligently and critically evaluate information
667 presented by other participants in the firm's activities and to make
668 independent decisions concerning the firm's daily operations, work,
669 management, and policymaking.
- 670 (5) If state law or City ordinance requires the owner(s) to have a
671 particular license or other credential to own or control a certain type
672 of firm, then the socially and economically disadvantaged owner(s)
673 must possess the required license or credential. If state law or City
674 ordinance does not require that the owner possess the license or
675 credential, the fact that the owner(s) lacks such license or credential is
676 a factor in determining whether the socially and economically
677 disadvantaged owner(s) controls the firm.
- 678 (6) A socially and economically disadvantaged owner cannot engage in
679 outside employment or other business interests that conflict with the
680 management of the firm or prevent the owner from devoting sufficient
681 time and attention to the affairs of the firm to manage and control its
682 day-to-day activities.
- 683 (F) Only an independent firm may be certified as a MBE/WBE. An independent
684 firm is one whose viability does not depend on its relationship with another
685 firm. Recognition of an applicant as a separate entity for tax or corporate
686 purposes is not necessarily sufficient to demonstrate that a firm is
687 independent and non-affiliated. In determining whether an applicant is an
688 independent business, the director will:

- (1) Scrutinize relationships with non-certified firms in areas such as personnel, facilities, equipment, financial and 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 the department 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 non-WBE contractors.
- (J) In lieu of conducting its own certifications, the department by rule may accept formal certifications of WBEs and MBEs by other entities as meeting the requirements of this chapter, provided that the department determines that the certification standards of such entities are comparable to those of the City. The department should strive to coordinate certification activities with other agencies to implement a universal certification process.
- (K) The department shall review the certification status of all MBEs and WBEs every four years from the initial date of certification. firms will remain certified until the department removes the certification because the firm graduates from the program or does not meet program requirements, or when a MBE/WBE withdraws from the program by submitting a written request to the department's certification division. A certified firm shall inform the department in writing within 30 days of any changes to its

management or ownership structure. Failure to inform the department may result in a loss of certification.

- (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 respondents 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.

§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 of intent to impose an adverse decision, is entitled to appeal the adverse decision in accordance with this section.
 - (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 timely file a written notice of intent waives all rights to appeal or protest the adverse decision.
 - (2) The department will set forth by rule the procedures a firm must follow to file a written appeal. The appeal must be filed within 21 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 days. The appeals hearing is an informal meeting, not subject to the Texas Open Meetings Act, and is not an adversarial proceeding. The department by rule will designate the persons who may attend an appeal hearing.
 - (4) The director shall determine based on 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 to

an independent hearing examiner, and shall be communicated to the firm in writing within 10 days of the hearing.

- (B) A firm that is subject to an adverse decision after appeal to the director may protest the adverse decision to an independent hearing examiner appointed by the City. The firm must submit a notice of intent to protest to the Purchasing Office or relevant contract awarding authority within four days of receipt of the final adverse decision, in accordance with the procedures established by the Purchasing Office or relevant contract awarding authority.
- (C) Protests or appeals regarding a specific solicitation(s) will follow the prescribed protest procedures outlined in the solicitation documents.

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

- (A) A third party may challenge the eligibility of a firm that has been certified as a MBE/WBE by presenting 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 remains 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 of the challenge. 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) Section 2-9A-16 (*Procedure for Appealing and Protesting Adverse Decision*) applies to challenges to certification.

§2-9A-18 - PROGRAM REVIEW.

- (A) The annual aspirational goals shall be expressed as a cumulative goal for all groups of minority persons and composed of each group of minority persons. The annual aspirational goals shall be based on the availability of MBEs and WBEs in the City's marketplace as required by federal and state law. Project participation goals and subgoals may be established based on the availability of certified firms to perform the work of the contract.

- 788 (B) The city council shall receive an annual report from the city manager
789 detailing the City's performance under this chapter, for each department, for
790 the preceding fiscal year. The report shall contain the utilization of MBEs
791 and WBEs based on the audited financial records for the preceding fiscal
792 year and provide the percentages of MBEs and WBEs on the City's list of
793 certified vendors.
- 794 (C) The city council will review this report and the City's progress towards
795 eliminating discrimination in its contracting activities and marketplace and
796 revise the program as necessary to meet legal and program requirements. As
797 new evidence becomes available to the City, the city council may revise this
798 chapter if necessary.
- 799 (D) For ease of program administration, solicitations may contain goals and
800 subgoals, if applicable, expressed as round numbers, using mathematical
801 rounding principles.

802 §2-9A-19 - ESTABLISHMENT OF MBE/WBE PARTICIPATION LEVELS FOR
803 INDIVIDUAL CONTRACTS.

- 804 (A) The city council recognizes that the availability of MBEs and WBEs is not
805 uniformly present across all areas of contracting. Therefore, the director,
806 where appropriate, and pursuant to criteria established by rule, may establish
807 project participation goals and subgoals for individual contracts, based on:
- 808 (1) normal industry practice with respect to construction, professional
809 services, nonprofessional services, and commodities procurement, as
810 determined in consultation with the sponsor department;
- 811 (2) the availability of at least three certified MBEs or WBEs to perform
812 the functions of those individual contracts;
- 813 (3) the City's utilization of MBEs and WBEs to date, so as to achieve the
814 annual aspirational goals; and
- 815 (4) any additional relevant factors.
- 816 (B) For ease of program administration, solicitations may contain goals and
817 subgoals, if applicable, expressed as round numbers, using mathematical
818 rounding principles.

819 §2-9A-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, supplies purchased or equipment leased by the MBE/WBE, or services obtained by a MBE/WBE subconsultant, as the case may be (except supplies and equipment the MBE/WBE subcontractor purchases or leases from the prime contractor or its affiliate, or services that the MBE/WBE subcontractor or subconsultant obtains from the prime consultant, as the case may be).
 - (2) Notwithstanding Subdivision (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, nonprofessional, 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 or subconsultant 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 or subconsultant 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 or subconsultant 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 or consultant, 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. The department 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.

§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 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 at the time the response is due, the requirement of documentation of the respondent's good faith efforts, including the good faith efforts of minority persons respondents, to achieve the goals or subgoals.

When the City has established subgoals, respondents who do not achieve each of the subgoals at the time the response is due must document good faith efforts to achieve the goals or 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 respondent 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 respondent shall establish the minimum universe from which a respondent may solicit subcontractors to meet the goals or subgoals. The compliance plan shall be due at the time set out in the solicitation documents.
- (C) Any agreement between a respondent and a MBE/WBE in which the respondent requires that the MBE/WBE not provide subcontracting quotations to other respondents 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 respondent cannot achieve the goals or subgoals, its compliance plan shall document its good faith efforts to achieve the goals or subgoals. The department will determine whether the respondent has made such good faith efforts. In making this determination, the department will consider, at a minimum, the respondent's efforts to do the following. These factors are not intended to be a mandatory checklist, nor are they intended to

921 be exclusive or exhaustive. Other factors or types of efforts may be relevant
922 in appropriate cases:

- 923 (1) Solicit through at least two reasonable, available, and verifiable means
924 MBEs/WBEs with significant local business presence (SLBP) who
925 have the capability to perform the contract work. The respondent must
926 solicit MBEs/WBEs within sufficient time of the date the response is
927 due to allow the MBEs/WBEs to respond. The respondent must take
928 appropriate steps to follow up initial solicitations with interested
929 MBEs/WBEs. The respondent must state a specific and verifiable
930 reason for not contacting each certified firm with a SLBP. For some
931 solicitations, the department shall make the initial contact with
932 MBEs/WBEs, in which case a respondent's efforts under this
933 Subsection (E)(1) shall not be considered.
- 934 (2) Provide interested MBEs/WBEs with adequate information about the
935 plans, specifications, and requirements of the contract, including
936 addenda, in a timely manner to assist them in responding to the
937 solicitation.
- 938 (3) (a) Negotiate in good faith with interested MBEs/WBEs that have
939 submitted a response to the prospective respondent. An MBE/WBE
940 that has submitted a response to a prospective respondent may contact
941 the department to request a meeting with the prospective respondent
942 to determine if their response will be used on the project. The
943 department will schedule a meeting between the MBE/WBE and the
944 prospective respondent. If such a meeting does not occur and the
945 MBE/WBE submitting the response to the prospective respondent is
946 not selected, the prospective respondent must explain the reason for
947 not selecting the MBE/WBE and provide written documentation
948 supporting the stated reason. Bid shopping is prohibited.
- 949 (b) That there may be some additional costs involved in soliciting
950 and using MBEs and WBEs is not a sufficient reason for a
951 respondent's failure to meet the goals and subgoals, as long as such
952 costs are reasonable.
- 953 (4) Publish notice via electronic mail or social media.
- 954 (5) Not rejecting MBEs/WBEs as being unqualified without sound
955 reasons based on a thorough investigation of their capabilities. The
956 MBE's/WBE's standing within its industry, membership in specific

groups, organizations, or associations and political or social affiliations (e.g., union vs. non-union employee status) are not legitimate causes for rejecting or not soliciting responses to meet the goals and subgoals. Respondents are not required to accept higher quotes to meet the goals or subgoals.

- (6) Make economically feasible portions of the work available to MBE/WBEs and to select those portions of the work, services, or material needs consistent with the available MBE/WBEs so as to facilitate meeting the goals or subgoals.
- (7) Make good faith efforts, despite the ability or desire of a respondent to perform the work of a contract with its own organization. A respondent who desires to self-perform the work of a contract must demonstrate good faith efforts unless the goals or subgoals have been met.
- (8) Make efforts to assist interested MBEs/WBEs in obtaining bonding, lines of credit, or insurance as required by the City or contractor.
- (9) Make efforts to assist interested MBEs/WBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.
- (10) Effectively use the services of minority person community organizations; minority person/women contractors groups; local, state, and federal minority person business assistance offices; and other organizations to provide assistance in soliciting and using MBEs, WBEs or DBEs.

(F) In assessing minimum good faith efforts, the department may consider:

- (1) Whether the respondent sought guidance from the department on any questions regarding compliance with this chapter.
- (2) The performance of other respondents in meeting the contract goals. For example, when other respondents meet the goals or subgoals, it may be reasonably questioned whether, with additional reasonable efforts, the apparent successful respondent could have met the goals or subgoals. Similarly, if the apparent successful respondent fails to meet the goals but meets or exceeds the average MBE/WBE participation obtained by other respondents, this may be evidence that the apparent successful respondent made good faith efforts.

(G) The director shall review the compliance plan prior to award, including the scope of work, within a reasonable time so as not to unduly delay award of the contract.

(1) If the director determines that the compliance plan demonstrates that the goals or subgoals have been achieved, then the contract awarding authority, with the concurrence of the director, after the contract awarding authority and director review the letters of intent, shall recommend award to the city council. For all competitively bid projects, signed letter(s) of intent between the certified low respondent and the MBE or WBE subcontractor(s)/subconsultant(s) must be received by the contract awarding authority within three business days of notification of the status as certified low respondent. For procurements conducted through the request for proposal or request for qualifications process, 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 or WBE subcontractor(s)/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 respondent's good faith efforts to achieve those goals or subgoals as documented in the compliance plan. The director shall evaluate the compliance plan based on the criteria established in Subsection (E) of this section. The director may request clarification in writing of items listed in the compliance plan, provided such clarification is minor and shall not include the opportunity to augment listed MBE/WBE participation or good faith efforts.

(3) If the director finds that a respondent did not make sufficient good faith efforts, the director shall communicate such finding to the contract awarding authority or other appropriate City official. The director shall recommend to the contract awarding authority that the response be rejected based on failure to comply with this chapter. The contract awarding authority may reject the response as not in compliance with this chapter or may advise the city manager of additional considerations which may form the basis for accepting the response as being in the best overall interest of the program and the City.

- 1029 (4) If the contract awarding authority finds that the response does not
1030 comply with this chapter, a respondent may request a protest hearing.
1031 The city manager has the authority to make the final decision. In
1032 determining whether compliance with this section has been met, the
1033 city manager may determine that the effort of the respondent
1034 substantially complies with the purpose of this chapter and such
1035 determination is in the best interest of the program and the City.
- 1036 (H) A response that is deemed non-compliant with the program under this
1037 section does not affect the ability of the contract awarding authority to
1038 continue to evaluate and consider the remaining responses that achieve the
1039 goals or subgoals or demonstrate good faith efforts and to develop a
1040 recommendation to city council for award of the contract.
- 1041 (I) The director, in consultation with the contract awarding authority, may
1042 waive minor informalities in the compliance plan. A minor informality is
1043 one that does not affect the competitiveness of the response.

1044 §2-9A-22 - POST-AWARD COMPLIANCE PROCEDURES.

- 1045 (A) Upon award of a contract by the city council that includes goals or subgoals
1046 that are met, the goals or subgoals become covenants of performance by the
1047 contractor in favor of the City.
- 1048 (B) All contractors shall provide subcontractor payment information to the City
1049 with each request for payment submitted to the City. The director shall
1050 monitor subcontractor participation during the course of the contract and
1051 shall have reasonable access to all contract-related documentation held by
1052 the contractor, as established by rule.
- 1053 (C) All consultants shall provide subconsultant payment information to the City
1054 with each request for payment/invoice submitted to the City. The director
1055 shall monitor subconsultant participation during the course of the contract
1056 and shall have reasonable access to all contract-related documentation held
1057 by the prime consultant, as established by rule.
- 1058 (D) Prior to contract closeout by the contract awarding authority, project
1059 manager, or contract manager, the director shall evaluate the contractor's
1060 fulfillment of the contracted goals or subgoals, taking into account all
1061 approved substitutions, terminations, and changes to the contract's scope of
1062 work. If the director finds that the contractor fulfilled the contracted goals or
1063 subgoals, the director shall so state in writing to the contractor, the contract

awarding authority, and the project or contract manager. If the director finds that 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 the contract manager. Adverse decisions under this section will follow the procedure found in Section 2-9A-16.

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

- (A) The contractor or consultant cannot make changes to the compliance plan or substitute subcontractors or subconsultants listed in the compliance plan without the prior written approval of the director. Unauthorized changes or substitutions by the contractor or consultant may violate this chapter and constitute grounds for rejection of the response, termination of the contract for breach, and may subject the respondent to contract penalties or other sanctions.
- (B) All requests for changes or substitutions of the subcontractors or subconsultants 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/consultant shall not substitute a subcontractor/subconsultant or perform the work designated for a subcontractor/subconsultant in the compliance plan with its own forces unless and until the director approves such substitution in writing. A contractor/consultant shall not allow a substituted subcontractor/subconsultant 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/consultant must meet with the subcontractor/subconsultant and negotiate with the subcontractor/subconsultant 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/subconsultant 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/subconsultant to honor the response 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/subconsultant to meet insurance, licensing, or bonding requirements; or
- (7) the subcontractor's/subconsultant's withdrawal of its response.
- (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 after the date the director receives the request for change or substitution.
- (F) Where the contractor/consultant has established the basis for the substitution to the satisfaction of the director, the contractor/consultant shall make good faith efforts to fulfill the compliance plan. The contractor/consultant may seek the assistance of the department in obtaining a new MBE/WBE subcontractor/subconsultant. To fulfill the compliance plan, the contractor/consultant shall first make good faith efforts to substitute with a like-kind MBE/WBE subcontractor/subconsultant. If a competitive agreement considering price, quality, and delivery cannot be reached with such subcontractor/subconsultant, the contractor/consultant shall make good faith efforts to obtain other MBE/WBE substitutes so as to meet the goals or subgoals, in conformance with Section 2-9A-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/consultant may substitute with a non-MBE/non-WBE subcontractor/subconsultant.
- (G) When a MBE/WBE is included in a respondent'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.

- 1132 (H) If the City, as owner under the contract, requires the substitution of a
1133 subcontractor/subconsultant listed in the compliance plan, the
1134 contractor/consultant shall undertake good faith efforts to substitute with a
1135 like-kind MBE/WBE subcontractor/subconsultant. If a competitive
1136 agreement considering price, quality, and delivery cannot be reached with
1137 such subcontractor/subconsultant, the contractor/consultant shall make good
1138 faith efforts to obtain other MBE/WBE substitutes so as to meet the goals or
1139 subgoals, in conformance with Section 2-9A-21 (*Pre-Award Compliance*
1140 *Procedures*). If the goals or subgoals cannot be reached and good faith
1141 efforts have been made to meet the goals, the contractor/consultant may
1142 substitute with a non-MBE/non-WBE subcontractor/subconsultant.
- 1143 (I) If a contractor/consultant plans to hire a subcontractor/subconsultant on any
1144 scope of work that was not previously disclosed in the compliance plan, the
1145 contractor/consultant shall obtain the approval of the director to modify the
1146 compliance plan and must make good faith efforts to ensure that
1147 MBEs/WBEs have a fair opportunity to bid on the new scope of work.

1148 §2-9A-24 - POST-AWARD CHANGES TO THE SCOPE OF WORK.

- 1149 (A) Changes to the scopes of work shall be documented by the contract
1150 awarding authority at the time they arise, to establish the reasons for the
1151 change and to document resulting changes in the applicable goals for the
1152 contract.
- 1153 (B) For construction contracts, where there is a change order that requires work
1154 beyond the scope of trades originally required to accomplish the project,
1155 then it is the duty of the contractor to fulfill the goals or to make good faith
1156 efforts to fulfill the goals for that change order. Change orders that do not
1157 alter the type of trades originally required to accomplish the project may be
1158 undertaken using the subcontractors and suppliers already under contract to
1159 the contractor.
- 1160 (C) For services contracts, when there is a change to the scope of work which
1161 requires new, additional services beyond the services originally required to
1162 accomplish the project, then it is the duty of the contractor/consultant to
1163 fulfill the applicable contracted goals or subgoals or to make good faith
1164 efforts to fulfill the applicable contracted goals or subgoals for that change.
1165 Changes to the scope of work which do not alter the type of services as
1166 originally required to accomplish the project may be undertaken using the

subconsultants, subcontractors, and suppliers already under contract to the contractor/consultant.

§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 response, 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;
- (4) bid shopping;
- (5) contract changes made without an approved request for change; or
- (6) committing any other violations of the provisions of this chapter.

(B) A respondent, contractor/consultant, subcontractor/subconsultant, or applicant for certification is subject to being suspended, debarred, 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 response 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 relevant contract awarding authority for evaluation of proper sanctions. Such evaluation shall include consultation with the law department prior to any recommendation for sanctions.
- (D) A MBE/WBE that repeatedly and knowingly refuses to honor response prices is subject to being decertified by the director, after notice and hearing.
- (E) 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.
- (F) Where appropriate and lawful, the City may by contract impose a fixed sum as a penalty to be paid by the respondent for an unexcused failure to meet the goals or subgoals or to otherwise comply with the program. In addition, the City may deduct from retainage any difference in subcontract prices from substitutions not approved by the City.
- (G) 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.
- (H) For federally funded contracts administered pursuant to federal regulations, sanctions may be imposed as provided therein.

§2-9A-26 - SUNSET PROVISION.

This chapter expires at 5:00 p.m. on September 30, 2028, unless before that date the city council reauthorizes the program.

§2-9A-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.

§2-9A-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.

PART 2. City Code Chapter 2-9B (*Minority-Owned and Women-Owned Business Enterprise Procurement Program: Professional Services*) is repealed and replaced to read:

CHAPTER 2-9B. -MINORITY-OWNED AND WOMEN-OWNED BUSINESS ENTERPRISE PROCUREMENT PROGRAM: GENERAL GOODS AND SERVICES NOT OTHERWISE INCLUDED IN CONSTRUCTION AND RELATED PROFESSIONAL SERVICES.

ARTICLE 1. - GENERAL PROVISIONS.

§2-9B-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 services of many kinds, not included in construction and related professional services. 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 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 Economic Development 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 *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 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 had undertaken since 1990 a variety of innovative race- and gender-neutral technical assistance, insurance, and bonding programs, race- and gender-neutral programs alone had not been sufficient to remedy the effects of discrimination.

- 1294 (4) The evidence continued to demonstrate that MBEs and WBEs had
1295 been underutilized in contracting opportunities on City contracts as a
1296 result of private sector discrimination.
- 1297 (5) The existence of an exclusionary network in public contracting and
1298 other systemic barriers excluded otherwise qualified MBEs and WBEs
1299 from receipt of contracts.
- 1300 (6) Although the City had made substantial progress in eliminating
1301 discrimination in its own contracting practices, discrimination existed
1302 in private companies that contract on public projects. As a result of
1303 this discrimination, the City had been in the past a passive participant
1304 in a system of discrimination and, in the absence of programs to
1305 eliminate disparity in utilization, would continue to be a passive
1306 participant in such a system.
- 1307 (L) The City engaged a consultant to conduct an updated study of availability of
1308 minority- and women-owned firms within the Austin area. The 2003 study
1309 indicated that there continued to be minority- and women-owned firms
1310 available to perform the work of City contracts and subcontracts.
- 1311 (M) In 2003, the City examined various availability and disparity studies
1312 conducted for Texas governments. These studies indicated that minority-
1313 and women-owned businesses suffered discrimination in access to
1314 opportunities in the State of Texas.
- 1315 (N) In 2005, the City engaged a consultant to conduct a further updated study to
1316 assess the continued need for this program and whether the program could
1317 be more narrowly tailored to meet such need. These studies indicated that,
1318 absent the programs authorized under this ordinance, MBEs and WBEs
1319 would be underutilized on City contracts relative to their availability.
- 1320 (O) In 2020, the City commissioned a consultant to conduct an updated review
1321 and analysis of qualitative and quantitative data to assess the effectiveness of
1322 the City's MBE/WBE procurement program and perform a review of other
1323 statistical and anecdotal investigations regarding the presence of disparities
1324 in the City's marketplace. The results and recommendations of those efforts
1325 are presented in two reports entitled "City of Austin Disparity Study, 2022"
1326 and "Recommendations for the City of Austin's Minority- and Woman-
1327 Owned Business Enterprise Program, 2022."

(P) In 2006, the City updated the ordinance to repeal City Code Chapter 2-9 and replace it with four distinct chapters addressing separate aspects of the program: Ordinance No. 20060608-058 adding Chapter 2-9A (*Minority-Owned and Women-Owned Business Enterprise Procurement Program: Construction*); Ordinance No. 20060608-059 adding Chapter 2-9B (*Minority-Owned and Women-Owned Business Enterprise Procurement Program: Professional Services*); Ordinance No. 20060608-060 adding Chapter 2-9C (*Minority-Owned and Women-Owned Business Enterprise Procurement Program: Nonprofessional Services*); and Ordinance No. 20060608-061 adding Chapter 2-9D (*Minority-Owned and Women-Owned Business Enterprise Procurement Program: Commodities*).

(Q) Based on the evidence from the 2022 study, the City determined that:

- (1) Despite the City's success, disparities still exist in the marketplace, with qualitative evidence identifying key issues such as systemic racial exclusion, discriminatory attitudes, negative perceptions of competence, gender bias, hostile work environments, exclusion from industry networks, lack of access to contract opportunities, financial barriers to contract opportunities, and barriers to equal contract terms.
- (2) The 2022 study recommended that the City further pursue race-neutral measures as opposed to race-conscious measures, develop an annual procurement forecast, and establish annual aspirational goals.
- (3) The 2022 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.

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

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

(9) The City's program continues to be narrowly tailored.

(R) This ordinance repeals and consolidates City Code Chapter 2-9C, Nonprofessional Services, and Chapter 2-9D, Commodities, into one ordinance.

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

(T) 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.

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

§2-9B-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 the City is not a passive participant in a discriminatory marketplace.

(2) To ensure the program is narrowly tailored.

- 1395 (3) To provide opportunities for MBEs and WBEs to broaden and enhance their
1396 capacities to do business with the City in the areas of construction,
1397 professional services, nonprofessional services, and commodities
1398 procurement.
- 1399 (4) To provide opportunities for MBEs and WBEs to serve as contractors,
1400 subcontractors, consultants, and subconsultants for the supply of goods,
1401 professional services, nonprofessional services, and commodities to the City.
- 1402 (5) To administer this program in a manner consistent with applicable federal
1403 and state law.

1404 §2-9B-3 - ESTABLISHMENT OF PROGRAM.

1405 Based upon the foregoing findings and pursuant to the foregoing declaration of
1406 policy, there hereby is established a Minority-Owned and Women-Owned Business
1407 Enterprise Procurement Program for the City with respect to City procurement. .

1408 §2-9B-4 - DEFINITIONS.

1409 In this chapter:

- 1410 (1) ADVERSE DECISION includes a notice of violation, denial of certification,
1411 decertification, sanction or similar action taken by the director under the
1412 program with respect to a firm or business enterprise.
- 1413 (2) AFFILIATE means a person or entity that directly or indirectly through one
1414 or more intermediaries, controls or is controlled by, or is under common
1415 control with, another person or entity. In determining affiliation, the City
1416 shall consider all appropriate factors, including common ownership,
1417 common management, and contractual relationships. Affiliates must be
1418 considered together in determining whether a firm is a MBE/WBE.
- 1419 (3) ANNUAL ASPIRATIONAL GOALS means the targeted levels established
1420 for the annual aggregate participation of MBEs and WBEs in City contracts
1421 with respect to City procurement, as set forth in Section 2-9B-3
1422 (*Establishment of Program*).
- 1423 (4) AUSTIN METROPOLITAN STATISTICAL AREA means the specific area
1424 defined by the Census Bureau, which is presently limited to Travis,
1425 Williamson, Hays, Bastrop, and Caldwell Counties.

- 1426 (5) BROKER means a person or entity that fills orders by purchasing or
1427 receiving supplies from a third party supplier rather than out of its own
1428 existing inventory and provides no commercially useful function other than
1429 acting as a conduit between the supplier and the customer.
- 1430 (6) BUSINESS ENTERPRISE or FIRM means a corporation, partnership, sole
1431 proprietorship, joint venture, joint stock company, professional association,
1432 or any other legal entity that is properly licensed or otherwise authorized to
1433 do business in the state.
- 1434 (7) CITY MANAGER includes the city manager's designee.
- 1435 (8) CITY MARKETPLACE means the geographic and procurement areas in
1436 which the City contracts on an annual basis.
- 1437 (9) COMMERCIALLY USEFUL FUNCTION means a distinct element of the
1438 work of the contract, the responsibility for performance of which shall be
1439 carried out by a MBE/WBE firm by actually performing, managing, and
1440 supervising the work involved, or fulfilling responsibilities as joint venturer.
1441 To determine whether a MBE/WBE firm is performing a commercially
1442 useful function, the City will evaluate the amount of work subcontracted,
1443 normal industry practices and other relevant factors, including:
- 1444 (a) A MBE/WBE performs a commercially useful function when it is
1445 responsible for the work of the contract and is carrying out its
1446 responsibilities by actually performing, managing, and supervising the
1447 work involved. To perform a commercially useful function, the
1448 MBE/WBE must also be responsible, with respect to materials and
1449 supplies used on the contract, for negotiating price, determining
1450 quality and quantity, ordering the material, installing (where
1451 applicable), and paying for the material itself. The determination that
1452 a MBE/WBE is performing a commercially useful function will be
1453 determined by the amount of work subcontracted, normal industry
1454 practices, whether the amount the firm is to be paid under the contract
1455 is commensurate with the work it is actually performing, and other
1456 relevant factors.
- 1457 (b) A MBE/WBE does not perform a commercially useful function if its
1458 role is limited to that of an extra participant in a transaction, contract,
1459 or project through which funds are passed in order to obtain the
1460 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.

(10) COMMODITIES includes 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.

(11) COMPLIANCE PLAN means the plan submitted with the respondent's response detailing the respondent'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 2-9B-21 (*Pre-Award Compliance Procedures*), subject to the rules established by the relevant contract awarding authority.

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

(13) CONSULTANT means a person or business enterprise that submits a response to provide services to the City by contract, and any person who supplies or provides professional or nonprofessional services to the City by contract.

(14) 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 provided 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.

- (15) **CONTRACT AWARDING AUTHORITY** means the City official or department authorized to enter into contracts on behalf of the City.
- (16) **CONTRACTOR** means any person or business enterprise that submits a response 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.
- (17) **DEPARTMENT** means the City's Small and Minority Business Resources Department.
- (18) **DIRECTOR** means the director of the department and includes the director's designee.
- (19) **DISADVANTAGED BUSINESS ENTERPRISE** or DBE has the meaning assigned in 49 Code of Federal Regulation Part 26 or other applicable federal regulations.
- (20) **ECONOMIC DISADVANTAGE** means, with respect to an individual owner of a business enterprise or firm, a personal net worth equal to or less than the amount established annually by the department. This figure shall be indexed annually.
- (21) **EXPERTISE** means 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.

- (22) FRONT means 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.
- (23) GENERAL SERVICES means any services not governed by Chapter 2254, Texas Government Code.
- (24) GOALS means the MBE/WBE goals or subgoals established for a particular solicitation or contract.
- (25) GOOD FAITH EFFORTS means the actions undertaken by a respondent to achieve a goal with respect to a contract. Minimum standards are as set forth in Section 2-9B-21 (*Pre-Award Compliance Procedures*).
- (26) GOODS AND SERVICES means those goods and services procured under state law other than Chapter 2254, Texas Government Code.
- (27) JOINT VENTURE means 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, skill, 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 a written agreement specifying the terms and conditions of the relationships between the partners and their relationship, risks, and responsibilities under the contract.
- (28) LEASE means a long-term agreement, contract, or instrument conveying property to another at the will of either lessor or lessee for compensation, not on an ad hoc or contract-by-contract basis.
- (29) LIKE-KIND means, for purposes of substitutions of previously designated MBEs/WBEs, a MBE for a MBE, a member of a racial or ethnic group for a member of the same racial or ethnic group, or a WBE for a WBE.
- (30) MBE/WBE AND SMALL BUSINESS ADVISORY COMMITTEE means the Minority- Owned and Women-Owned Business Enterprise and Small

Business Enterprise Procurement Program Advisory Committee appointed by the city council to serve those functions described in Section 2-1-163 (*Minority-Owned and Women-Owned Business Enterprise and Small Business Enterprise Procurement Program Advisory Committee*) and Section 2-9B-12 (*MBE/WBE and Small Business Advisory Committee*).

- (31) MANUFACTURER means 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 means a business including, a sole proprietorship, partnership, corporation, joint venture, limited liability company, or any other business or professional entity:
- (a) which is at least 51 percent owned by one or more minority persons, or in the case of a publicly owned business, at least 51 percent of all classes of the stock of which is owned by one or more minority persons;
 - (b) whose management, policies, major decisions and daily business operations are independently controlled by one or more such minority persons;
 - (c) which performs a commercially useful function;
 - (d) the size of which does not exceed the size limits established by the United States Small Business Administration;
 - (e) doing business in the state 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 means a citizen or lawful permanent resident of the United States and who is a member of one of the following groups that are rebuttably presumed to be socially disadvantaged:
- (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, Puerto Rico, Cuba, Dominican Republic, Central or South America, or other Spanish or Portuguese culture or origin, regardless of race);
- (c) Native Americans (persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives, or Native Hawaiians);
- (d) Asian-Pacific Americans (persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), Commonwealth of the Northern Marianas Islands, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru, Federated States of Micronesia, or Hong Kong);
- (e) Subcontinent Asian Americans (persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;
- (f) Women;
- (g) 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
- (h) for purposes of contracts funded by other sources, groups found to be eligible for the designation of DBE by such governmental sources.

(34) **NONPROFESSIONAL SERVICES** means any services not governed by Chapter 2254, Texas Government Code.

(35) **OWNED, MANAGED AND INDEPENDENTLY CONTROLLED** means a business enterprise or firm is owned, managed and independently controlled if one or more minority persons 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 the nonparticipating spouse's 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.

- (36) PROFESSIONAL SERVICES has the meaning assigned in Chapter 2254, Texas Government Code.
- (37) PROGRAM means the minority-owned and women-owned business enterprise procurement program authorized by this chapter.
- (38) REGULAR DEALER means 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) RESPONDENT means a person, business enterprise or firm that submits a response in response to a solicitation. A respondent may be represented by an agent if such agent provides evidence demonstrating the agent's authority.
- (40) RESPONSE means a complete, 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.
- (41) SIGNIFICANT LOCAL BUSINESS PRESENCE means a firm that 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 used solely as a post office box, mail drop, telephone message center, or any combination thereof, with no other substantial work function, does not constitute a significant local business presence.

- (42) **SOCIALLY DISADVANTAGED** means a minority person who has been subjected to racial, ethnic or gender prejudice or cultural bias within American society because of the person's identity as a member of a group and without regard to individual qualities. Social disadvantage must stem from circumstances beyond the individual's control.
- (43) **SOLICITATION** means, as the case may be, an invitation for bids, a request for proposals, a request for qualifications, or such other request as defined by the City.
- (44) **SPONSOR DEPARTMENT** means 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 or services under contract on behalf of the City.
- (45) **SUBCONSULTANT** means 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. Subconsultant includes every level of subconsulting required to fulfill a contract with the City.
- (46) **SUBCONTRACTOR** means any person, firm, 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.
- (47) **SUBGOALS** means the targeted levels for the participation of MBEs and WBEs established by the City for a specific solicitation.
- (48) **WOMAN** means a person who is a citizen or lawful permanent resident of the United States and who identifies as female.

- 1692 (49) WOMEN-OWNED BUSINESS ENTERPRISE or WBE means a business,
1693 including a sole proprietorship, corporation, partnership, joint venture,
1694 limited liability company, or any other business or professional entity:
- 1695 (a) which is at least 51 percent owned by one or more women; or, in the
1696 case of a publicly owned business, at least 51 percent of all classes of
1697 the stock of which is owned by one or more such women;
- 1698 (b) whose management, policies, major decisions and daily business
1699 operations are independently controlled by one or more such women;
- 1700 (c) which performs a commercially useful function;
- 1701 (d) the size of which does not exceed size limits established by the United
1702 States Small Business Administration;
- 1703 (e) doing business in the state for at least three months prior to the date of
1704 application for certification;
- 1705 (f) which is certified by the City; and
- 1706 (g) which is economically disadvantaged.
- 1707 (h) Women who are members of another socially disadvantaged racial or
1708 ethnic group may choose for the purposes of certification and
1709 recertification to be certified as WBEs, MBEs, or both, but cannot be
1710 double counted on a contract to meet a participation goal.

1711 §2-9B-5 - RACE AND GENDER NEUTRAL MEASURES TO ENSURE EQUAL
1712 OPPORTUNITY FOR ALL CONTRACTORS.

1713 The City shall develop and use measures to facilitate the participation of all business
1714 enterprises in City contracting activities. These measures include:

- 1715 (1) developing an annual procurement forecast;
- 1716 (2) developing and offering training tools and refresher trainings covering
1717 topics, such as certification criteria and processes, contract goal setting, good
1718 faith efforts, compliance monitoring, and other bid submission documents;
- 1719 (3) implementing strategies that increase awareness of existing City programs
1720 and resources via virtual workshops, online presentations and websites;

- (4) conducting targeted outreach sessions devoted to single industries as well as a focus on specific groups of minority persons;
- (5) arranging solicitation times for the presentations of responses, quantities, specifications, and delivery schedules so as to facilitate the participation of interested contractors, subcontractors, consultants and subconsultants;
- (6) segmenting contracts so as to facilitate the participation of business enterprises;
- (7) providing assistance to business enterprises in overcoming barriers such as difficulty in obtaining bonding and financing;
- (8) providing timely information programs on any or all of the following: contracting procedures, submission preparation, and specific contracting and consulting opportunities;
- (9) holding pre-bid conferences, where appropriate, to explain the projects and to encourage other contractors or consultants to use all available business enterprises as subcontractors, or subconsultants;
- (10) adopting prompt payment procedures, including requiring by contract that prime contractors pay subcontractors, (and consultants pay subconsultants, as the case may be), within 10 days of receipt of payment from the City and, where appropriate, issuing joint checks to contractors and subcontractors (or, as the case may be, to consultants and subconsultants);
- (11) expediting payments and advancing payments to cover start-up and mobilization costs, where appropriate;
- (12) collecting information from all prime contractors (or consultants) on City contracts detailing the bids received from all subcontractors (or subconsultants) for City contracts and the expenditures to subcontractors (or subconsultants) used by prime contractors (or consultants) on City contracts;
- (13) implementing a continuous process for information flow between contractors, consultants, the department, and relevant City departments;
- (14) reviewing bonding and insurance requirements to eliminate unnecessary barriers to contracting with the City; and
- (15) referring complaints of discrimination to the appropriate state or federal agency for investigation and resolution, or taking other action as appropriate.

1753 §2-9B-6 – ADOPTION OF RULES.

1754 The director is delegated the authority under Section 2-9B-10 (*Duties of Small and*
1755 *Minority Business Resources Department*) of this chapter to administer this chapter,
1756 including the authority to formulate and adopt such rules and regulations as may be
1757 reasonable, necessary and required to assist in the implementation, administration or
1758 enforcement of this chapter. Such adoption of rules and regulations shall be under
1759 Chapter 1-2 (*Adoption of Rules*) of the Code.

1760 **ARTICLE 2. – PROGRAM MANAGEMENT.**

1761 §2-9B-10 – DUTIES OF DEPARTMENT.

1762 The program shall be administered and executed by the department, whose director
1763 shall report to the city manager. The director has final administrative authority over the
1764 operations of the program. The duties and functions of the department when the program
1765 has been applied to a solicitation include the following:

- 1766 (1) Formulating, proposing and adopting rules, regulations, and policies and
1767 procedures for the further development, implementation and monitoring of
1768 the program, in accordance with the process established in Section 2-9B-6
1769 (*Adoption of Rules*).
- 1770 (2) Assuring that MBEs and WBEs are informed of City procurement
1771 opportunities.
- 1772 (3) Providing information and assistance to MBEs, WBEs, and DBEs relating to
1773 City procurement practices and procedures and response specifications,
1774 requirements and prerequisites.
- 1775 (4) Certifying businesses as MBEs, WBEs, and DBEs, maintaining certification
1776 records, and ensuring that all City departments have an up-to-date
1777 certification register.
- 1778 (5) Reviewing contractors' and consultants' achievement of the goals or
1779 documentation of good faith efforts made to comply with the participation
1780 goals for contracts, and rendering decisions on whether good faith efforts
1781 have been sufficient.
- 1782 (6) Working with sponsor departments to monitor contracts to ensure prompt
1783 payments to MBEs, WBEs, and DBEs and compliance with participation
1784 goals and commitments.

- 1785 (7) Establishing project participation goals and subgoals in accordance with
1786 Section 2-9B-19 (*Establishment of MBE/WBE Participation Levels for*
1787 *Individual Contracts on City Procurements*).
- 1788 (8) Receiving, reviewing, and acting upon complaints and suggestions
1789 concerning the program, and reporting violations of this chapter when such
1790 violations occur as provided in Section 2-9B-25 (*Sanctions*).
- 1791 (9) Providing staff support and reports to the MBE/WBE and Small Business
1792 Advisory Committee and forwarding its recommendations to the city
1793 manager, city council, and City departments to further the policies and
1794 objectives of the program.
- 1795 (10) Reporting the availability of MBEs, WBEs, and DBEs certified by the City
1796 to perform contracts for the City.
- 1797 (11) Establishing annual aspirational MBE and WBE goals.
- 1798 (12) Tracking the actual dollar amounts paid under subcontracts awarded to
1799 MBEs, WBEs, and DBEs compared to total dollars paid on contracts where
1800 goals or subgoals have been established. These payments shall be measured
1801 against projected payments or goals;
- 1802 (13) Assisting in the record-keeping functions by obtaining monthly reports from
1803 project management departments on the status of a contract.
- 1804 (14) Compiling and reporting to city council after the end of each fiscal year, the
1805 participation of MBEs and WBEs for that year based on awards of contracts.

1806 §2-9B-12 - DUTIES OF SPONSOR AND PROJECT MANAGEMENT
1807 DEPARTMENTS.

- 1808 (A) The sponsor departments and any other departments or offices of the City
1809 which receive appropriate delegation for project management, contract
1810 management, or design contract responsibility shall have the following
1811 duties and responsibilities with regard to the program:
- 1812 (1) assisting the director with setting project participation goals and
1813 subgoals for contracts as authorized by Section 2-9B-19 on City
1814 procurements.
- 1815 (2) performing other activities to support the department.

(3) managing contracts in a consistent manner to assure contract compliance in utilization of MBEs, WBEs, and DBEs.

(B) No sponsor or project management department shall have the authority to conduct any activities without express ordinance or rule delegation to such department.

§2-9B-13 - MBE/WBE AND SMALL BUSINESS ADVISORY COMMITTEE.

The MBE/WBE and Small Business Enterprise Procurement Program Advisory Committee shall perform those functions as set forth in Section 2-1-163 of the Code.

ARTICLE 3. - PROGRAM ELEMENTS.

§2-9-15 - PROGRAM ELIGIBILITY.

- (A) Only business enterprises that meet the criteria of minority-owned business enterprises, as defined in Section 2-9B-4 (*Definitions*) or women-owned business enterprises, as defined in Section 2-9B-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 the department or its designee, as approved by the city council.
- (D) Only a firm or business enterprise owned by a socially and economically disadvantaged person(s) may be certified as a MBE/WBE. If socially and economically disadvantaged individuals own and control a firm through a parent or holding company, established for tax, capitalization, or other purposes consistent with industry practice, and the parent or holding company in turn owns and controls an operating subsidiary, it may certify the subsidiary if it otherwise meets all requirements of the program. In this situation, the individual owners and controllers of the parent or holding company are deemed to control the subsidiary through the parent or holding company.

The department may certify such a subsidiary only if there is cumulatively 51 percent ownership of the subsidiary by socially and economically disadvantaged individuals and all other certification criteria is met.

(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, bylaws, 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 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 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 possess 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) 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 areas such as personnel, facilities, equipment, financial and 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.

- 1919 (3) Examine the applicant's relationships with non-certified firms to
1920 determine whether a pattern of exclusive or primary dealings with
1921 non-certified firm compromises the applicant's independence.
- 1922 (4) Consider the consistency of relationships between the applicant and
1923 non-certified firms with normal industry practice.
- 1924 (G) An applicant shall be certified only for specific types of work in which the
1925 socially and economically disadvantaged owner(s) has the ability and
1926 expertise to manage and control the firm's operations and work.
- 1927 (H) Applications for certification shall be on standard forms prepared by the
1928 department and adopted by rule and shall be designed to ensure that the
1929 criteria for participation in the program are satisfied.
- 1930 (I) To ensure that the program only benefits eligible business enterprises, the
1931 City shall also certify the eligibility of joint ventures involving MBEs and
1932 WBEs and non-MBE and non-WBE contractors.
- 1933 (J) In lieu of conducting its own certifications, the department by rule may
1934 accept formal certifications of WBEs and MBEs by other entities as meeting
1935 the requirements of this chapter, provided that the department determines
1936 that the certification standards of such entities are comparable to those of the
1937 City. The department should strive to coordinate certification activities with
1938 other agencies to implement a universal certification process.
- 1939 (K) The department shall review the certification status of all MBEs and WBEs
1940 every four years from the initial date of certification. firms will remain
1941 certified until the department removes the certification because the firm
1942 graduates from the program or does not meet program requirements, or
1943 when a MBE/WBE withdraws from the program by submitting a written
1944 request to the department's certification division. A certified firm shall
1945 inform the department in writing within 30 days of any changes to its
1946 management or ownership structure. Failure to inform the department may
1947 result in a loss of certification.
- 1948 (L) The director may move to decertify a business enterprise that does not
1949 continuously meet the criteria set forth in this section.
- 1950 (M) The director may move to decertify a certified MBE/WBE that repeatedly
1951 fails to respond to requests for quotations from respondents 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.

§2-9B-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 of intent to impose an adverse decision, is entitled to appeal the adverse decision in accordance with this section.

- (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 timely file a written notice of intent waives all rights to appeal or protest the adverse decision.
- (2) The department will set forth by rule the procedures a firm must follow to file a written appeal. The appeal must be filed within 21 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 days. The appeals hearing is an informal meeting, not subject to the Texas Open Meetings Act and is not an adversarial proceeding. The department by rule will designate the persons who may attend an appeal hearing.
- (4) The director shall determine based on 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 to an independent hearing examiner, and shall be communicated to the firm in writing within 10 days of the hearing.

- (B) A firm that is subject to an adverse decision after appeal to the director may protest the adverse decision to an independent hearing examiner appointed by the City. The firm must submit a notice of intent to protest to the Purchasing Office or relevant contract awarding authority within four days

of receipt of the final adverse decision, in accordance with the procedures established by the Purchasing Office or relevant contract awarding authority.

- (C) Protests or appeals regarding a specific solicitation(s) will follow the prescribed protest procedures outlined in the solicitation documents.

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

- (A) A third party may challenge the eligibility of a firm that has been certified as a MBE/WBE by presenting information under oath that the firm does not meet the criteria contained in Section 2-9B-15 (*Program Eligibility*). The presumption that the challenged party is eligible remains 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 of the challenge. 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) Section 2-9B-16 (*Procedure for Appealing and Protesting Adverse Decision*) applies to challenges to certification.

§2-9B-18 - PROGRAM REVIEW.

- (A) The annual aspirational goals shall be expressed as a cumulative goal for all groups of minority persons and composed of each group of minority persons. The annual aspirational goals shall be based on the availability of MBEs and WBE' in the City's marketplace as required by federal and state laws. Project participation goals and subgoals may be established based on the availability of certified firms to perform the work of the contract.
- (B) The city council shall receive an annual report from the city manager detailing the City's performance under this chapter, for each 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.

(D) For ease of program administration, solicitations may contain goals and subgoals, if applicable, expressed as round numbers, using mathematical rounding principles.

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

(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 subgoals for individual contracts, based on:

- (1) normal industry practice with respect to construction, professional services, nonprofessional services, and commodities procurement, as determined in consultation with the sponsor department;
- (2) the availability of at least three certified MBEs or WBEs to perform the functions of those individual contracts;
- (3) the City's utilization of MBEs and WBEs to date, so as to achieve the annual aspirational goals; and
- (4) any additional relevant factors.

(B) For ease of program administration, solicitations may contain goals and subgoals, if applicable, expressed as round numbers, using mathematical rounding principles.

§2-9B-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, supplies purchased or equipment leased by the MBE/WBE, or services obtained by a MBE/WBE subconsultant, as the case may be (except supplies and equipment the MBE/WBE sub-contractor purchases or leases from the prime contractor or its affiliate, or services that the MBE/WBE subcontractor or subconsultant obtains from the prime consultant, as the case may be).

(2) Notwithstanding Subdivision (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, nonprofessional, 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 or subconsultant 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 or subconsultant 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 or subconsultant 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 or consultant, 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. The department 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.

§2-9B-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 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 at the time the response is due, the requirement of documentation of the respondent's good faith

efforts, including the good faith efforts of minority persons
respondents, to achieve the goals or subgoals.

When the City has established subgoals, respondents who do not achieve each
of the subgoals at the time the response is due, must document good faith
efforts to achieve the goals or 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 respondent 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 respondent shall establish the minimum universe
from which a respondent may solicit subcontractors to meet the goals or
subgoals. The compliance plan shall be due at the time set out in the
solicitation documents.
- (C) Any agreement between a respondent and a MBE/WBE in which the
respondent requires that the MBE/WBE not provide subcontracting
quotations to other respondents 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 respondent cannot achieve the goals or subgoals, its compliance
plan shall document its good faith efforts to achieve the goals or subgoals.
The department will determine whether the respondent has made such good
faith efforts. In making this determination, the department will consider, at a
minimum, the respondent's efforts to do the following. 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) Solicit through at least two reasonable, available, and verifiable means
MBEs/WBEs with significant local business presence (SLBP) who
have the capability to perform the contract work. The respondent must
solicit MBEs/WBEs within sufficient time of the date the response is
due to allow the MBEs/WBEs to respond. The respondent must take
appropriate steps to follow up initial solicitations with interested
MBEs/WBEs. The respondent must state a specific and verifiable

reason for not contacting each certified firm with a SLBP. For some solicitations, the department shall make the initial contact with MBEs/WBEs, in which case a respondent's efforts under this Subsection (E)(1) shall not be considered.

- (2) Provide 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 the solicitation.
- (3)
 - (a) Negotiate in good faith with interested MBEs/WBEs that have submitted a response to the prospective respondent. An MBE/WBE that has submitted a response to a prospective respondent may contact the department to request a meeting with the prospective respondent to determine if their response will be used on the project. The department will schedule a meeting between the MBE/WBE and the prospective respondent. If such a meeting does not occur and the MBE/WBE submitting the response to the prospective respondent is not selected, the prospective respondent must explain the reason for not selecting the MBE/WBE and provide written documentation supporting the stated reason. Bid shopping is prohibited.
 - (b) That there may be some additional costs involved in soliciting and using MBEs and WBEs is not a sufficient reason for a respondent's failure to meet the goals and subgoals, as long as such costs are reasonable.
- (4) Publish notice via electronic mail or social media.
- (5) 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 (e.g., union vs. non-union employee status) are not legitimate causes for rejecting or not soliciting responses to meet the goals and subgoals. Respondents are not required to accept higher quotes to meet the goals or subgoals.
- (6) Make economically feasible portions of the work available to MBE/WBEs and to select those portions of the work, services or material needs consistent with the available MBE/WBEs so as to facilitate meeting the goals or subgoals.

- 2189 (7) Make good faith efforts, despite the ability or desire of a respondent to
2190 perform the work of a contract with its own organization. A
2191 respondent who desires to self-perform the work of a contract must
2192 demonstrate good faith efforts unless the goals or subgoals have been
2193 met.
- 2194 (8) Make efforts to assist interested MBEs/WBEs in obtaining bonding,
2195 lines of credit, or insurance as required by the City or contractor.
- 2196 (9) Make efforts to assist interested MBEs/WBEs in obtaining necessary
2197 equipment, supplies, materials, or related assistance or services.
- 2198 (10) Effectively use the services of minority person community
2199 organizations; minority person contractors groups; local, state, and
2200 federal minority person business assistance offices; and other
2201 organizations to provide assistance in soliciting and using MBEs,
2202 WBEs or DBEs.
- 2203 (F) In assessing minimum good faith efforts, the department may consider:
2204
- 2205 (1) Whether the respondent sought guidance from the department on any
2206 questions regarding compliance with this chapter.
- 2207 (2) The performance of other respondents in meeting the contract goals.
2208 For example, when other respondents meet the goals or subgoals, it
2209 may be reasonably questioned whether, with additional reasonable
2210 efforts, the apparent successful respondent could have met the goals
2211 or subgoals. Similarly, if the apparent successful response fails to
2212 meet the goals but meets or exceeds the average MBE/WBE
2213 participation obtained by other respondents, this may be evidence that
2214 the apparent successful respondent made good faith efforts.
- 2215 (G) The director shall review the compliance plan prior to award, including the
2216 scope of work, within a reasonable time so as not to unduly delay award of
2217 the contract.
- 2218 (1) If the director determines that the compliance plan demonstrates that
2219 the goals or subgoals have been achieved, then the contract awarding
2220 authority, with the concurrence of the director, after the contract
2221 awarding authority and director review the letters of intent, shall

2222 recommend award to the city council. For all competitively bid
2223 projects, signed letter(s) of intent between the certified low respondent
2224 and the MBE or WBE subcontractor(s)/subconsultant(s) must be
2225 received by the contract awarding authority within three business days
2226 of notification of the status as certified low respondent. For
2227 procurements conducted through the request for proposal or request
2228 for qualifications process, after final execution of a professional or
2229 nonprofessional services agreement but before the issuance of a notice
2230 to proceed, the successful respondent must deliver signed subcontracts
2231 between itself and the MBE or WBE
2232 subcontractor(s)/subconsultant(s) for the scope of work reflected in
2233 the proposal as awarded.

2234 (2) In the event the applicable goal(s) or subgoals have not been achieved,
2235 then the director shall evaluate the respondent's good faith efforts to
2236 achieve those goals or subgoals as documented in the compliance
2237 plan. The director shall evaluate the compliance plan based on the
2238 criteria established in Subsection (E) of this section. The director may
2239 request clarification in writing of items listed in the compliance plan,
2240 provided such clarification is minor and shall not include the
2241 opportunity to augment listed MBE/WBE participation or good faith
2242 efforts.

2243 (3) If the director finds that a respondent did not make sufficient good
2244 faith efforts, the director shall communicate such finding to the
2245 contract awarding authority or other appropriate City official. The
2246 director shall recommend to the contract awarding authority that the
2247 response be rejected based on failure to comply with this chapter. The
2248 contract awarding authority may reject the response as not in
2249 compliance with this chapter or may advise the city manager of
2250 additional considerations which may form the basis for accepting the
2251 response as being in the best overall interest of the program and the
2252 City.

2253 (4) If the contract awarding authority finds that the response does not
2254 comply with this chapter, a respondent may request a protest hearing.
2255 The city manager has the authority to make the final decision. In
2256 determining whether compliance with this section has been met, the
2257 city manager may determine that the effort of the respondent
2258 substantially complies with the purpose of this chapter and such
2259 determination is in the best interest of the program and the City.

(H) A response that is deemed non-compliant with the program under this section does not affect the ability of the contract awarding authority to continue to evaluate and consider the remaining responses 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 director, in consultation with the contract awarding authority may waive minor informalities in the compliance plan. A minor informality is one that does not affect the competitiveness of the response.

§2-9B-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) All contractors shall provide subcontractor payment information to the City 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.

(C) All consultants shall provide subconsultant payment information to the City with each request for payment/invoice 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.

(D) 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. If the director finds the contractor fulfilled the contracted goals or subgoals, the director shall so state in writing to the contractor, the contract awarding authority, and the project or contract manager. If the director finds 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 the contract manager. Adverse decisions under this section will follow the procedure found in Section 2-9B-16.

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

- (A) The contractor or consultant cannot make changes to the compliance plan or substitute subcontractors or subconsultants listed in the compliance plan without the prior written approval of the director. Unauthorized changes or substitutions by the contractor or consultant may violate this chapter and constitute grounds for rejection of the response termination of the contract for breach, and may subject the respondent to contract penalties or other sanctions.
- (B) All requests for changes or substitutions of the subcontractors or subconsultants 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/consultant shall not substitute a subcontractor/subconsultant or perform the work designated for a subcontractor/subconsultant in the compliance plan with its own forces unless and until the director approves such substitution in writing. A contractor/consultant shall not allow a substituted subcontractor/subconsultant 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/consultant must meet with the subcontractor/subconsultant and negotiate with the subcontractor/subconsultant 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/subconsultant 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/subconsultant to honor the response's 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/subconsultant to meet insurance, licensing or bonding requirements; or
- (7) the subcontractor's/subconsultant's withdrawal of its response.
- (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 after the date the director receives the request for change or substitution.
- (F) Where the contractor/consultant has established the basis for the substitution to the satisfaction of the director, the contractor/consultant shall make a good faith efforts to fulfill the compliance plan. The contractor/consultant may seek the assistance of the department in obtaining a new MBE/WBE subcontractor/subconsultant. To fulfill the compliance plan, the contractor/consultant shall first make good faith efforts to substitute with a like-kind MBE/WBE subcontractor/subconsultant. If a competitive agreement considering price, quality and delivery cannot be reached with such subcontractor/subconsultant, the contractor/consultant shall make good faith efforts to obtain other MBE/WBE substitutes so as to meet the goals or subgoals , in conformance with Section 2-9B-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/consultant may substitute with a non-MBE/non-WBE subcontractor/subconsultant.
- (G) When a MBE/WBE is included in a respondent'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/subconsultant listed in the compliance plan, the contractor/consultant shall undertake good faith efforts to substitute with a like-kind MBE/WBE subcontractor/subconsultant. If a competitive agreement considering price, quality and delivery cannot be reached with such subcontractor/subconsultant, the contractor/consultant shall make good faith efforts to obtain other MBE/WBE substitutes so as to meet the goals or subgoals , in conformance with Section 2-9B-21 (*Pre-Award Compliance*

2365 *Procedures*). If the goals or subgoals cannot be reached and good faith
2366 efforts have been made to meet the goals, the contractor/consultant may
2367 substitute with a non-MBE/non-WBE subcontractor/subconsultant.

- 2368 (I) If a contractor/consultant plans to hire a subcontractor/subconsultant on any
2369 scope of work that was not previously disclosed in the compliance plan, the
2370 contractor/consultant shall obtain the approval of the director to modify the
2371 compliance plan and must make good faith efforts to ensure that
2372 MBEs/WBEs have a fair opportunity to bid on the new scope of work.

2373 §2-9B-24 - POST-AWARD CHANGES TO THE SCOPE OF WORK.

- 2374 (A) Changes to the scopes of work shall be documented by the contract
2375 awarding authority at the time they arise, to establish the reasons for the
2376 change and to document resulting changes in the applicable goals for the
2377 contract.
- 2378 (B) For construction contracts, where there is a change order that requires work
2379 beyond the scope of trades originally required to accomplish the project,
2380 then it is the duty of the contractor to fulfill the goals or to make good faith
2381 efforts to fulfill the goals for that change order. Change orders that do not
2382 alter the type of trades originally required to accomplish the project may be
2383 undertaken using the subcontractors and suppliers already under contract to
2384 the contractor.
- 2385 (C) For services contracts, when there is a change to the scope of work which
2386 requires new, additional services beyond the services originally required to
2387 accomplish the project, then it is the duty of the contractor/consultant to
2388 fulfill the applicable contracted goals or subgoals or to make good faith
2389 efforts to fulfill the applicable contracted goals or subgoals for that change.
2390 Changes to the scope of work which do not alter the type of services as
2391 originally required to accomplish the project may be undertaken using the
2392 subconsultants, subcontractors and suppliers already under contract to the
2393 contractor/consultant.

2394 §2-9B-25 - SANCTIONS.

- 2395 (A) The following violations of this chapter are unlawful and may result in
2396 sanctions:

- 2397 (1) providing false or misleading information to the City in connection
2398 with an application for or challenge to certification, recertification or
2399 decertification as a MBE/WBE;
- 2400 (2) providing false or misleading information to the City in connection
2401 with submission of a response, responses to requests for qualifications
2402 or proposals, good faith efforts documentation, post-award
2403 compliance, or other program operations;
- 2404 (3) substituting MBE/WBE subcontractors without first receiving
2405 approval for such substitutions;
- 2406 (4) bid shopping;
- 2407 (5) contract changes made without an approved request for change; or
- 2408 (6) committing any other violations of the provisions of this chapter.
- 2409 (B) A respondent, contractor/consultant, subcontractor/subcontractor or
2410 applicant for certification is subject to being suspended, debarred, or deemed
2411 non-responsible in future City solicitations and contracts for a period up to
2412 five years, if it is found to have:
- 2413 (1) provided false or misleading information in connection with an
2414 application for certification or recertification;
- 2415 (2) provided false or misleading information in connection with the
2416 submission of a response or documentation of good faith efforts, post-
2417 award compliance, or other program operations;
- 2418 (3) failed to fulfill contractual goals or subgoals and thereby materially
2419 breached the contract; or
- 2420 (4) repeatedly failed to comply in good faith with substantive provisions
2421 of this chapter.
- 2422 (C) When the director, the contract awarding authority, or any other City official
2423 identifies a violation of this chapter, such violation must be referred to the
2424 relevant contract awarding authority for evaluation of proper sanctions. Such
2425 evaluation shall include consultation with the law department prior to any
2426 recommendation for sanctions.

- (D) A MBE/WBE that repeatedly and knowingly refuses to honor response prices is subject to being decertified by the director, after notice and hearing.
- (E) 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.
- (F) Where appropriate and lawful, the City may by contract impose a fixed sum as a penalty to be paid by the respondent for an unexcused failure to meet the goals or subgoals or to otherwise comply with the program. In addition, the City may deduct from retainage any difference in subcontract prices from substitutions not approved by the City.
- (G) 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.
- (H) For federally funded contracts administered pursuant to federal regulations, sanctions may be imposed as provided therein.

§2-9B-26 - SUNSET PROVISION.

This chapter expires at 5:00 p.m. on September 30, 2028, unless before that date the city council reauthorizes the program.

§2-9B-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.

§2-9B-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.

PART 3. City Code Chapters 2-9C (*Minority-Owned and Women-Owned Business Enterprise Procurement Program: Nonprofessional Services*) and 2-9D (*Minority-Owned and Women-Owned Business Enterprise Procurement Program: Commodities*) are repealed.

PART 4. Subsection (B) of City Code Section 2-1-163 (*Minority-Owned and Women-Owned Business Enterprise and Small Business Enterprise Procurement Program Advisory Committee*) is amended to read:

(B) The committee shall:

(1) review the city manager's report, as described in Sections 2-9A-18 (*Program Review*), 2-9B-18 (*Program Review*)[, 2-9C-18 (*Program Review*), and 2-9D-18 (*Program Review*)]; and

(2) recommend changes to the City Code provisions, adopted rules and regulations, and program operations.

PART 5. This ordinance takes effect on September 1, 2023.

PASSED AND APPROVED

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_____, 20____

Kirk Watson
Mayor

APPROVED:

Anne L. Morgan
City Attorney

ATTEST:

Myrna Rios
City Clerk