

Article III

ARTICLE III. - NONDISCRIMINATION IN CITY CONTRACTS FOR CONSTRUCTION, RECONSTRUCTION, AND REMODELING, AND PROFESSIONAL DESIGN AND CONSTRUCTION SERVICES

DIVISION 1. - DIVISION OF SMALL BUSINESS OPPORTUNITY[3]

Footnotes:

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Editor's note— Ord. No. 760-06, § 1, adopted Nov. 13, 2006, repealed division 1, sections 28-31—28-33, in its entirety and replaced it with a new division 1, sections 28-31—28-36. Former division 1 pertained to the mayor's office of contract compliance and derived from Ord. No. 304-96, § 1, adopted April 15, 1996; Ord. No. 623-00, § 1, adopted Aug. 7, 2000.

Sec. 28-31. - Office functions.

The division of small business opportunity (DSBO) shall be responsible to the mayor for the performance of the functions, powers and duties assigned to DSBO by this chapter 28 or as may be assigned by the mayor or the director of the office of economic development. Such duties shall include development and enforcement of programs for enhancing minority, women and small business enterprise utilization in city construction, professional design and construction services, and DIA concession contracting, and promoting economic development of such minority, women and small business enterprises.

(Ord. No. 760-06, § 1, 11-13-06; Ord. No. 85-14, § 1, 2-18-14)

Sec. 28-32. - Powers and duties.

(a) The DSBO shall perform all tasks and responsibilities established by this chapter 28 together with such other tasks and responsibilities as may be assigned to the office by ordinance, executive order or otherwise or which may devolve upon such office by operation of federal law, including, but not limited to, administration and oversight of such federally-established disadvantaged business enterprise (DBE) or similar programs that may be made applicable to city contracting activities.

(b) The director is hereby delegated the authority to promulgate such rules and regulations or informal guidelines as may be necessary to effectuate the purposes of this chapter 28 and other programs within the purview of the DSBO.

(Ord. No. 760-06, § 1, 11-13-06; Ord. No. 85-14, § 1, 2-18-14)

Sec. 28-33. - Administrative review and court proceedings.

(a) Any person who disputes any determination made by or on behalf of the city pursuant to the authority of the director, which determination adversely affects such person, may petition the

director for a hearing concerning such determination no later than thirty (30) after the date of the determination. Compliance with the provisions of this section shall be a jurisdictional prerequisite to any action brought under the provisions of this section, and failure of compliance shall forever bar any such action. This section shall not be construed to create a right of standing that does not otherwise exist under Colorado law.

(b) The director may hold such hearing or in the director's sole discretion may designate and request an officer or employee of the DSBO, or an independent hearing officer retained by the city, as a hearing officer with authority to hold such hearing or hearings.

(c) Such petition shall be in writing, and the facts and figures submitted shall be submitted under oath or affirmation either in writing or orally at a hearing scheduled by the director or the hearing officer. The hearing, if any, shall take place in the city, and notice thereof and the proceedings shall otherwise be in accordance with rules and regulations issued by the director. The petitioner shall bear the burden of persuasion and the burden of going forward, and the standard of proof shall conform to that in civil, non-jury cases in state district court, provided that the director may provide, by rule and regulation, for either review of the record or for limited de novo review of different types of questions coming before the director.

(d) Thereupon, the director or designee shall make a final determination. Such final determination shall be considered a final order of the director and may be reviewed under Rule 106(a)(4) of the state rules of civil procedure by the petitioner or by the city. A request for reconsideration of the final determination may be made if filed with the director within fifteen (15) days from the date of determination, in which case the director shall review the record if the proceedings were conducted by a designated hearing officer, and the determination shall be considered a final order of the director upon the date the director rules on the request for reconsideration.

(e) Pursuant to Rule 106(a)(4) of the state rules of civil procedure, the district court of the second judicial district of the state shall have original jurisdiction in proceedings to review the final order.

(Ord. No. 760-06, § 1, 11-13-06; Ord. No. 85-14, § 1, 2-18-14)

Sec. 28-34. - Program administration.

(a) The DSBO shall perform additional duties in the administration of the programs established under this chapter 28 or otherwise, which duties shall include:

(1) Formulating, proposing and implementing rules and regulations for the development, implementation, administration and monitoring of the various programs established through chapter 28, by other city programs or by federal law.

(2) Providing information and assistance to MBEs, WBEs, SBEs and other business enterprises relating to city contracting practices and procedures, and bid specifications, requirements and prerequisites.

(3) Establishing uniform rules and regulations, procedures, and criteria for certification, renewal of certification, decertification and graduation, as a MBE, WBE or SBE and appeals of

and challenges to all such certification decisions and maintaining certification records and directories of such MBEs, WBEs and SBEs.

- (4) Establishing annual and project goals for the MBE and WBH contracting program established in division 3 of this article III of chapter 28.
 - (5) Evaluating contractors' and consultants' achievement of project goals or good faith efforts to meet project goals.
 - (6) Working with user departments to monitor contracts to ensure prompt payments to MBEs, WBEs and SBEs, and compliance with applicable project goals and commitments.
 - (7) Receiving, reviewing, and acting upon complaints and suggestions concerning the various programs established through chapter 28 or by federal law.
 - (8) Collecting data to evaluate the programs and other city contracting initiatives.
 - (9) Monitoring the various programs and the city's progress towards the established annual MBE/WBE goal. The director shall report on a quarterly and an annual basis to the mayor and the city council on the administration and operations of the various programs.
 - (10) Developing technical assistance programs to assist MBEs, WBEs, SBEs and other businesses relating to contracting, business and professional development.
 - (11) Establishing a mentor-protégé program to encourage majority and minority trade associations to work jointly to connect MBE and WBE protégés with well established mentor firms. DSBO shall facilitate the implementation and coordination of this program. The program may include appropriate incentives to encourage firms to mentor MBE and WBE protégés.
 - (12) Completing on or before April 1, 2019 an evaluation of DSBO to include the following:
 - a. Program goals, responsibilities, and staffing necessary to fulfill all compliance requirements and accomplish annual goals;
 - b. Documentation on total MBE, WBE and SBE completed work payments for each compliance program participant and its relationship to established goals;
 - c. Monitoring of SBE contractor billing and payment process procedures as well as MBE, WBE and SBE subcontractor billing and payment process procedures as required through this Chapter 28;
 - d. Number of certified MBE, WBE and SBE firms and their participation in city contracts over a defined period to establish a relevant participation trend;
 - e. Number of MBE, WBE and SBE educational activities and mentorships, the number of participants, and an evaluation of the educational programs, including education on how to utilize city systems for tracking activity and payments;
 - f. Compliance with section 28-59 regarding establishing project goals.
- (b) The user departments that receive appropriate delegation for project management, contract and concession agreement management, and/or construction and/or design contract responsibility

shall have the following duties and responsibilities with regard to the programs established through chapter 28, by other city programs or by federal law:

- (1) Assisting the DSBO with setting project goals for MBE/WBE participation on individual contracts.
- (2) Assisting in the identification of available MBEs and WBEs and providing other assistance in meeting the annual goal and project goals.
- (3) Assisting in the identification of contracts and concession agreements appropriate for the utilization of the SBE defined selection pool contracting established by article VII of chapter 28.
- (4) Assuring that MBEs, WBEs, SBEs and other business enterprises are informed of city contracting and concession opportunities.
- (5) Performing other activities to support the various programs established through this chapter 28, by other city programs or by federal law.
- (6) Gathering and maintaining contracting, consulting, subcontracting and subconsulting data for those contracts that the user departments manage, as provided under this chapter 28.
- (7) Submitting subcontracting and subconsulting data as required to the director.
- (8) Managing contracts and concession agreements in a consistent manner to assure contract and concession agreement compliance in utilization of MBEs, WBEs and SBEs.

(Ord. No. 760-06, § 1, 11-13-06; Ord. No. 85-14, § 1, 2-18-14; Ord. No. 1324-17, § 1, 12-18-17)

Sec. 28-35. - Race- and gender-neutral measures to promote equal opportunities for all business enterprises.

The city, through the DSBO, in cooperation with user departments, other governmental agencies and private parties and organizations, is authorized to develop and utilize discretionary programs and activities to provide outreach to and to facilitate the participation of all business enterprises in city contracting and concession activities, including but not limited to MBEs, WBEs and SBEs. These programs and activities may include, but are not limited to:

- (a) Commencement of collection and analysis, for informational purposes only, of data and information from each bidder or proposer on a city contract regarding the ongoing availability and utilization of minority and women-owned business enterprises, including MBEs and WBEs on such bidder's or proposer's private contracts in the construction and professional design and construction services industries in the city's marketplace. DSBO and the user departments will explore making provision of such data and information a condition precedent to or an element of prequalification for bidding or proposing on city contracts within the scope of this chapter 28.
- (b) Development of such other programs or activities as the director may from time to time recommend.

(Ord. No. 760-06, § 1, 11-13-06; Ord. No. 85-14, § 1, 2-18-14)

Sec. 28-36. - Collection of fees by dsbo to defray certification costs of chapter 28 programs.

DSBO shall charge a certification fee of not to exceed three hundred dollars (\$300.00) to each applicant business enterprise seeking to be certified or to have certification(s) renewed under the provisions of division 3 of article III and of article VII of this chapter 28.

(Ord. No. 760-06, § 1, 11-13-06; Ord. No. 85-14, § 1, 2-18-14)

Secs. 28-37—28-40. - Reserved.

DIVISION 2. - EQUAL EMPLOYMENT OPPORTUNITY

Sec. 28-41. - Legislative intent.

It is the policy of the city to provide equal opportunity in employment without regard to race, color, creed, sex, national origin, religion, marital status or political opinion or affiliation. It is hereby deemed and declared to be for the public welfare and in the best interests of the city to require bidders, contractors and subcontractors soliciting and receiving, directly or indirectly, compensation from or through the city for the performance of contracts as defined in this division to meet certain affirmative action and equal employment opportunity requirements for the hiring and promotion of members of ethnic groups subjected to differential treatment, including members of Black, Hispanic, Asian-American and American Indian groups, in order to further equal opportunity in employment objectives.

(Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-42. - Definitions.

As used in this division, the following words and phrases shall have the following meanings unless otherwise clearly indicated by the context:

Covered contract: Any contract for which bidding is required in order for the city to make an award and not exempted by rules and regulations adopted by the manager.

Director: The director of the office of contract compliance.

Manager: The manager of public works.

(Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-43. - Contractual provisions on affirmative action required.

(a) Unless exempted from the provisions of this section by rules and regulations adopted by the manager, every covered contract regardless of how financed shall be subject to the affirmative action and equal employment opportunity requirements of this division and such rules and regulations and bidding conditions authorized thereunder that the manager shall adopt.

(b) The bidding specifications for every covered contract shall require the bidder to commit the bidder's organization to the affirmative action and equal employment opportunity requirements set forth therein. Affirmative action and equal employment opportunity requirements similar to those in the bidding specifications shall be included in all subcontracts awarded under every covered contract regardless of tier unless exempted by the rules and regulations of the manager, and the bidding specifications shall so require. Failure to subscribe to

and accept such affirmative action and equal employment opportunity requirements shall render a bidder ineligible for contract award and a subcontractor ineligible to participate in the work for which an award is made.

(Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-44. - Compliance review.

The director shall have power to review the employment practices of contractors during the performance of every covered contract and of subcontractors during the performance of every subcontract awarded thereunder in order to obtain information relating to compliance or noncompliance with the affirmative action and equal employment opportunity requirements as follows:

(1) When a compliance review by the director indicates grounds for finding that a contractor awarded any covered contract or a subcontractor awarded any subcontract thereunder is not in compliance with the affirmative action and equal employment requirements of this section or of the bidding specifications or contractual provisions relating to such requirements and the manager is so informed by the director, the manager shall give the contractor written notice to correct or to cause to be corrected the deficiencies within such reasonable period of time as the manager shall allow.

(2) If a contractor who has received a written notice from the manager to correct such deficiencies fails to meet affirmative action and equal employment opportunity requirements within the period of time allowed by the manager, the director shall so advise the manager in writing so that a hearing before the manager may be held in order for the manager to determine whether such contractor or subcontractor has failed to comply with the affirmative action and equal employment opportunity requirements.

(3) After giving notice and holding a hearing and upon determining that a contractor awarded any covered contract or a subcontractor awarded any subcontract thereunder has failed to comply with the affirmative action and equal employment opportunity requirements, the manager may impose such sanctions as the manager deems appropriate, including but not limited to suspending or terminating the contract involved or any portion thereof, which suspension or termination shall be considered a default under section A2.3-1(4) of the Charter, and causing to be removed from the list of eligible prequalified contractors the names of contractors and subcontractors found by the manager to be in noncompliance with the affirmative action and equal employment opportunity requirements of any such contract or subcontract awarded thereunder until such time as the manager is satisfied that such contractors or subcontractors are in compliance with the affirmative action and equal employment opportunity requirements. In making such determination, the manager of public works shall be guided by those procedures and powers of C.R.S. 24-4-101 et seq. as amended from time to time, relating only to adjudication, provided that he may by rules and regulations adopt different procedures and powers. The provisions in such article relating to rulemaking shall not apply.

(4) Completion of work by the contractor or subcontractor found to be in noncompliance under any covered contract or subcontract awarded thereunder may be required by the manager and shall preclude neither completion of the administrative procedures nor imposition of sanctions authorized in this section.

(Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-45. - Rules and regulations.

The manager and the director shall each have power and authority and are hereby empowered and authorized to adopt consistent rules and regulations in relation to affirmative action and equal employment opportunity requirements for every covered contract and subcontracts awarded thereunder. Such rules and regulations shall pertain to:

- (1) Bidding specifications related to affirmative action and equal employment opportunity requirements which shall be incorporated in every covered contract and subcontract awarded thereunder regardless of tier;
- (2) The adequacy or acceptability of responses of bidders to the affirmative action and equal employment opportunity requirements of the bidding specifications;
- (3) The evaluation of the willingness and capability of bidders, contractors and subcontractors to meet affirmative action and equal employment opportunity requirements;
- (4) The establishment of affirmative action and equal employment opportunity steps to be required of bidders, contractors and subcontractors;
- (5) Standards for approval of affirmative action and equal employment opportunity programs to which bidders, contractors or subcontractors subscribe;
- (6) Standards of performance under bidding specifications relating to affirmative action and equal employment opportunity;
- (7) The procedures for reviewing contractors or subcontractors for compliance with affirmative action and equal employment opportunity requirements, including notice and hearing procedures;
- (8) Standards for exemptions from the affirmative action and equal employment opportunity requirements of this section and rules and regulations adopted thereunder; and
- (9) The form and content of reports and other information to be furnished to the affirmative action officer by such bidders, contractors or subcontractors.

(Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-46. - Federal requirements govern.

Whenever the requirements of this section or of the bidding specification or rules and regulations adopted by the manager relating to such requirements conflict in any way or to any degree with equal employment opportunity or affirmative action requirements of the United States of America and any such contract under consideration is funded in whole or in part by the United States of America or is otherwise subject to requirements having the force of law of the United States of America, then such requirements of the United States of America shall govern and control.

(Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-47. - Quarterly reports.

In the quarterly reports prepared by the director pursuant to section 28-77, the director shall provide information on the work force of all contractors and subcontractors for the covered contracts listed in such reports and shall list any contract exempted by rules and regulations adopted by the manager. The work force information shall be provided for each ethnic group and by gender and shall include only those contractors and subcontractors that actually work on each contract.

(Ord. No. 513-90, § 2, 9-4-90)

Secs. 28-48—28-50. - Reserved.

DIVISION 3. - NONDISCRIMINATION IN CITY CONTRACTS FOR CONSTRUCTION, RECONSTRUCTION, AND REMODELING, AND PROFESSIONAL DESIGN AND CONSTRUCTION SERVICES[4]

Footnotes:

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Editor's note— Ord. No. 760-06, § 2, adopted Nov. 13, 2006, repealed division 3, sections 28-51—28-84, in its entirety and replaced it with a new division 3, sections 28-52—28-83. Former division 3 pertained to similar material and derived from Ord. No. 304-96, § 1, adopted April 15, 1996; Ord. No. 948-98, §§ 1—22, adopted Dec. 28, 1998; Ord. No. 357-01, § 1, adopted April 23, 2001; Ord. No. 347-02, § 1, adopted April 29, 2002.

Sec. 28-51. - Reserved.

Sec. 28-52. - Purpose and scope.

The purpose of this division 3 is to enable the city, through the departments and agencies of the city, including the departments of public works, aviation and general services and other user departments, and the DSBO, to undertake specific activities to prevent discrimination and its effects against business enterprises that have been certified as MBEs and/or WBEs in the areas of construction, reconstruction and remodeling, and professional design and construction services, in the execution by the above departments of their duties pursuant to the Charter and ordinances of the City and County of Denver. The director and the user departments are hereby expressly delegated the necessary powers to effectuate the purpose of this division 3 and to undertake such additional studies or inquiries as they may deem appropriate.

(Ord. No. 760-06, § 2, 11-13-06; Ord. No. 85-14, § 2, 2-18-14)

Sec. 28-53. - Contracts excluded from coverage by this division 3.

(a) Contracts and concession agreements for which bids or proposals are sought under the SBE defined selection pool contracting program established pursuant to article VII of this chapter 28 are excluded from the coverage of this division 3. In addition, in the case of a contract hereunder for which a part of the contract price is to be paid with funds from the United States Government or the State of Colorado and for which the United States Government or the State of Colorado

has made applicable to such contract requirements, terms or conditions which are inconsistent with the provisions of this division 3, the provisions of this division 3 shall not apply to such contract to the extent of such inconsistency.

(b) Contracts authorized to be advertised by the director in collaboration with the user departments without project goals to assist in the determination of ongoing MBE and WBE utilization on city contracts in the absence of project goals are also excluded from the coverage of this division 3; provided, however, that this reference to contracts without project goals shall not include contracts that are advertised with a zero percent project goal after due assessment of availability.

(Ord. No. 760-06, § 2, 11-13-06; Ord. No. 85-14, § 2, 2-18-14)

Sec. 28-54. - Definitions.

As used in this division 3, the following words and phrases shall have the following meanings, unless otherwise clearly required by the context:

- (1) Affiliate means any business enterprise that is affiliated with an MBE or WBE or with the owner(s) of such MBE or WBE. Business enterprises are affiliates of each other when one (1) controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists. The director may utilize, in the interpretation of this definition, the definition of affiliate set forth in C.F.R. § 121 or successor regulation, including related SBA guidance documents, as from time to time amended.
- (2) Annual goal means the targeted level for the aspirational goal established by the city for the annual aggregate participation of MBEs and WBEs in city contracts.
- (3) Applicant business enterprise means a business enterprise seeking to be certified as a minority and/or woman business enterprise under this division 3.
- (4) Bidder means a business enterprise that submits a bid on a construction contract that is offered for competitive bidding by the city or otherwise offered by a private owner.
- (5) Broker means a business enterprise that performs a commercially useful function as an intermediary, for a fee, in the acquisition of materials, supplies or equipment, regardless of whether or not it takes title to such materials, supplies or equipment, for the city or a private owner or its contractors, consultants or suppliers, but is not a manufacturer, manufacturer's representative or regular dealer. Only bona fide commissions earned by a broker for its activities in performing a commercially useful function on a city contract shall be counted toward the project goal as set out in sections 28-63 and 28-68. A packager shall be considered and treated as a broker.
- (6) Business enterprise means an individual, sole proprietorship, corporation, limited liability company, partnership, limited partnership, limited liability limited partnership, joint stock company, joint venture, professional association or any other legal entity operated for profit that is properly licensed or registered, as applicable, owned and controlled by person(s) who are citizens of the United States or lawful permanent residents of the United States, and otherwise authorized to do business in the State of Colorado.

- (7) Certification means completion by a business enterprise of an application procedure to be developed by the DSBO, and formal authorization by the director to participate as an MBE and/or WBE under this division 3. Certification neither represents nor implies that a business enterprise is qualified to perform on a contract, nor that it performs a commercially useful function.
- (8) City means the City and County of Denver and its participating user departments.
- (9) City's marketplace means the geographic and procurement area in which the city contracts on an ongoing basis, as established by the findings of the Denver City Council.
- (10) City project; city contract; city construction practices mean any contract or project encompassed within the definition of contract in this division 3, regardless of whether the project owner is the city or a private owner. All provisions of this division 3 shall apply to such contracts let by private owners, provided that the city shall not dictate means and methods of construction to such private owners. Copies of all documents required to be provided by a subcontractor, subconsultant, supplier, manufacturer, manufacturer's representative or broker hereunder shall be sent to the director when the originals are sent to a private owner.
- (11) Commercially useful function means responsibility for the execution of a distinct element of the work of a contract that is carried out by a business enterprise actually performing, managing, and supervising the work involved, or fulfilling responsibilities as a joint venturer. To determine whether an MBE or WBE is performing a commercially useful function, the amount of work subcontracted, industry practices and other relevant factors shall be evaluated. Commercially useful function is measured for purposes of determining participation on a contract, not for determination of certification eligibility.
- (12) Competitive selection process has the meaning ascribed to that phrase in sections 2.3.3(A) and 2.11.3(8) of the Denver City Charter, and in D.R.M.C. sections 5-19 and 20-56, as that meaning may pertain to a contract(s) at issue.
- (13) Conduit means an MBE or WBE that knowingly agrees to pass the scope of work for which it is listed for participation and is scheduled to perform or supply on a contract, to a non-MBE or non-WBE. In this type of relationship, the MBE or WBE has not performed a commercially useful function and the arranged agreement between the two (2) parties is not consistent with standard industry practice. This arrangement does not meet the commercially useful function requirement, and therefore the MBE's or WBE's participation does not count toward the MBE/WBE goal on the contract.
- (14) Construction means those areas of construction, reconstruction and remodeling as encompassed within the city's contracting processes authorized by the Charter and ordinances of the city, including construction management services. This definition shall encompass design-build contracts as appropriate.
- (15) Consultant means a business enterprise that enters into a contract with the city, in privity of contract with the city, for professional design and construction services or enters into such a contract with a private owner, in privity of contract with such private owner, for such services on a building or aviation or aeronautical facility, or improvements thereto, situated on real property owned by the city.

- (16) Contract means any city contract for construction or for professional design and construction services authorized by any provision of the Charter or ordinances of the city, excepting only those contracts subject to article VII of this chapter 28 or to federal DBE requirements. Contract shall include other contracts ancillary to cooperative agreements or understandings with other public and private agencies for purposes of development of public facilities, park and recreational facilities, museums, zoological and other gardens, collections of natural history, and observatories, if such contracts provide for funding in whole or in part by the city and provide for utilization of such funds for the purpose of construction or professional design and construction services for any public facility or area owned or leased by the city or situated on real property owned or leased by the city. Notwithstanding the foregoing, contract shall also include construction or professional design and construction services contracts for buildings or aviation or aeronautical facilities or improvements thereto, constructed by private owners on real property owned by the city, without regard to the utilization of city funding.
- (17) Contractor means a business enterprise that enters into a competitively bid or otherwise competitively selected construction contract with the city, in privity of contract with the city, or enters into such a construction contract with a private owner, whether or not bid, in privity of contract with such private owner for such work on a building or aviation or aeronautical facility, or improvements thereto, situated on real property owned by the city. Contractor includes general contractors and prime contractors.
- (18) Day , unless otherwise indicated, means calendar day.
- (19) Department head means the manager or director of the city department entering into contract(s) utilizing MBE/WBE participation, or such person's designee.
- (20) Design-build contract means a contract for the procurement of both the design and the construction, reconstruction or remodeling of a public work in a single contract with a single design-build contractor or combination of such contractors that are capable of providing the necessary design and construction, reconstruction or remodeling services.
- (21) Director means the director of the division of small business opportunity or successor agency, or such director's designee.
- (22) DSBO means the division of small business opportunity.
- (23) Doing business means having a physical location from which to engage in for-profit activities in the scope(s) of expertise of the business enterprise.
- (24) Economically disadvantaged means an individual with a personal net worth equal to or less than the permissible net worth amount determined by the U.S. Department of Transportation to be applicable to its DBE programs, or as otherwise promulgated by the director by rule and regulation.
- (25) Expertise means demonstrated 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 or registration where required.

(26) Goal committees mean committees of persons engaged in the construction, reconstruction and remodeling, and professional design and construction services industries, which shall be established by the director to advise the director as to project goal setting.

(27) Good faith efforts means substantive and meaningful good faith actions undertaken by a contractor or consultant to achieve the MBE/WBE project goal as defined in more detail in sections 28-62 and 28-67 of this division 3.

(28) Individual or person means a natural human being, and not a legally-created or maintained entity.

(29) Joint venture means an association of two (2) or more business enterprises to constitute a single business enterprise to perform a city construction or professional design and construction services contract for which purpose they combine their property, capital, efforts, skills and knowledge and in which endeavor each joint venturer is responsible for a distinct, clearly defined portion of the work of the contract, performs a commercially useful function, and whose share in the capital contribution, control, management responsibilities, risks and profits of the joint venture are equal to its ownership interest. Joint ventures must have an agreement in writing specifying the terms and conditions of the relationships between the joint venturers and their relationship and responsibility to the contract.

(30) Letter of intent means a written communication from a project bidder or proposer to the city or a private owner with respect to a contract evidencing an understanding between an MBE or WBE and the bidder or proposer that such MBE or WBE has or will enter into a contractual relationship with the bidder or proposer on such contract or that such bidder or proposer will self-perform as an MBE or WBE on such contract.

(31) Manufacturer means a business enterprise that operates or maintains a factory or establishment that produces, or substantially alters on the premises the materials, supplies or equipment provided to contractors, consultants, subcontractors, subconsultants, suppliers, brokers or manufacturer's representatives on a contract, required under the contract and of the general character described by the contract specifications. The percentage of the value of the commercially useful function performed by a manufacturer on a city contract shall be counted toward the applicable project goal in the same manner as for a supplier to quantify the work performed.

(32) Manufacturer's representative means a business enterprise that sells products for one (1) or more manufacturers. A manufacturer's representative does not take legal title to or physical possession of the products that it sells, such products generally being sent directly from the manufacturer to the contractor or subcontractor purchasing the products. Only bona fide commissions earned by a manufacturer's representative in performing a commercially useful function on a contract shall be counted toward the project goal as set out in sections 28-63 and 28-68.

(33) Mentor-Protégé means a relationship between a subcontractor certified as a MBE or a WBE (protégé) and a more experienced contractor (mentor) approved by DSBO. In a mentor-protégé, the mentor provides guidance on technical, financial, bonding, equipment, and personnel assistance to the protégé. The purpose of the relationship is to increase the capacity of MBEs and WBEs to perform city contracts.

(34) Minority business enterprise or MBE means a business enterprise that is certified by the director under this division 3 as meeting all of the requirements for certification set forth in sections 28-55 and 28-56 as an MBE.

(35) Minority individual means:

(a) An individual whose lifelong cultural and social affiliation is with one of the following groups encompassed within the findings of the Denver City Council, which are rebuttably [reputably] presumed to be socially disadvantaged:

(i) Blacks/African-Americans, which includes persons having origins in any of the black racial groups of Africa;

(ii) Hispanic-Americans, which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;

(iii) Native-Americans, which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians; or

(iv) Asian-Americans (persons whose origins are in any of the original peoples of the far east, Southeast Asia, the islands of the Pacific or the Northern Marianas, or the Indian subcontinent); or

(b) Alternatively, on a case-by-case basis for the purposes of this division 3, an individual found by the city to have been subjected to individualized racial or ethnic prejudice or cultural bias within American society within the city's marketplace because of his or her identity as a member of a group other than the groups referenced in subsection (a) above, without regard to individual qualities, and therefore determined by the director to be individually socially disadvantaged under this subsection; and

(c) Individual social disadvantage must stem from circumstances beyond the individual's control. Evidence of individual social disadvantage must include:

(i) At least one (1) objective, distinguishing feature that has contributed to social disadvantage, such as disability, long-term residence in an environment isolated from the mainstream of American society within the city's marketplace or other similar barriers not common to individuals who are not socially disadvantaged.

(ii) Personal experiences of substantial and chronic social disadvantage in American society within the city's marketplace.

(iii) Negative impact on entry into or advancement in the city's marketplace and participating on city contracts because of the disadvantage, as demonstrated by the individual's education, employment and business history.

(36) On-call construction or design contracts or on-call projects means contracts that are procured and awarded without a pre-determined specific project or scope of work. Once a specific scope of work is identified, individual work orders or task orders are authorized, and the contractor proceeds to complete the work under the individual work order or task order.

(37) Packager means a business enterprise that performs a commercially useful function in the packaging of goods for the city or a private owner or its contractors, consultants, manufacturers, manufacturer's representatives or suppliers but is not itself a regular dealer, manufacturer, or manufacturer's representative. A packager shall be considered and treated as a broker.

(38) Personal net worth means the net value of the assets of an individual after total liabilities are deducted. An individual's personal net worth does not include the individual's ownership interest in an applicant business enterprise or participating MBE or WBE or the individual's equity, if any, in his or her primary place of residence. An individual's personal net worth includes only his or her share of assets held individually and jointly with the individual's spouse. For the purposes of certification as an MBE or WBE under this division 3, an individual must have a personal net worth equal to or less than the permissible personal net worth amount determined by the U.S. Department of Transportation to be applicable to its DBE programs or as otherwise promulgated by the director by rule and regulation.

(39) Private owner means a private or other non-city owner undertaking to contract for construction work or for design or construction management services on buildings or aviation or aeronautical facilities or improvements thereto, on real property owned by the city.

(40) Professional design and construction services means those areas of services ancillary to construction as encompassed within the city's contracting processes authorized by the charter and ordinances of the city, including, but not limited to, engineering, architectural, testing, and planning services related to construction projects.

(41) Project goal means the specific MBE/WBE goal established for a particular contract based upon the availability of MBEs and WBEs in the scope(s) of work of the contract.

(42) Proposal means an offer to perform construction or professional design and construction services pursuant to a negotiated or otherwise competitively selected city contract with either the city or a private owner, and whether in response to a request for qualifications, request for proposals or otherwise. The department head shall designate the final project-specific proposal, and the date of receipt for each solicitation of proposers subject to this division 3.

(43) Proposer means a business enterprise that submits a proposal on a city construction contract or professional design and construction services contract that is negotiated and not competitively bid or that utilizes a competitive selection process.

(44) Qualified , with respect to good faith efforts in this division 3, means that a business enterprise has the financial ability, expertise, skill, experience, and access to the necessary staff, facilities and equipment to complete contract(s) or subcontract(s) that it may undertake on projects. The city makes no representations as to the qualification of any applicant business enterprise MBE or WBE.

(45) Regular dealer means a business enterprise 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 contract specifications and required for the performance of the contract are bought and regularly sold or leased to the public in the usual course of business. To be a regular dealer, the business enterprise must be an established, regular business engaged in, as a substantial and material portion of its business, and in its own name, the purchase and sale or

lease of the products in question. A regular dealer is presumed to keep such materials, supplies, articles or equipment in stock, but must in any event bear the risk of loss of such items. A regular dealer in such bulk items as steel, cement, gravel, stone, asphalt and petroleum products need not own, operate or maintain a place of business if it both owns and operates distribution equipment for the products. Any supplementation of a regular dealer's distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis. Brokers, conduits, packagers, manufacturers and manufacturer's representatives shall not be regarded as regular dealers within the meaning of this term.

(46) Socially disadvantaged means a minority individual or woman who has been subjected to racial, ethnic or gender prejudice or significant cultural bias within American society in the city's marketplace because of his or her identity as a member of a group and without regard to individual qualities. Social disadvantage must stem from circumstances beyond the individual's control. A socially disadvantaged individual must be a citizen or lawfully admitted permanent resident of the United States.

(47) Subcontractor or subconsultant means a business enterprise that has entered into a contract with a general contractor or prime contractor to provide goods or services pursuant to a contract between the general contractor or prime contractor and the city. A subcontractor or subconsultant means a business enterprise that either directly contracts with a contractor or consultant or directly contracts with subcontractors or subconsultants under such contractor or consultant on a city contract, and which business enterprise will provide services or perform work under agreements with the contractor or consultant or with other subcontractors or subconsultants under such contractor or consultant.

(48) Supplier means a business enterprise that either directly contracts with a contractor or consultant or directly contracts with subcontractors or subconsultants under such contractor or consultant on a city contract, and which business enterprise will provide materials, supplies or equipment under agreements with the contractor or consultant, or with other subcontractors or subconsultants under such contractor or consultant. A supplier may be a regular dealer, manufacturer, manufacturer's representative or broker. On city contracts of less than five million dollars (\$5,000,000.00) at the time of bid opening or proposal selection, one hundred (100) percent of the value of the commercially useful function performed by an MBE or WBE supplier on such contract shall be counted toward the project goal. On city contracts of five million dollars (\$5,000,000.00) or more at the time of bid opening or proposal selection, sixty (60) percent of the value of the commercially useful function performed by an MBE or WBE supplier on such contract shall be counted toward the project goal.

(49) Teaming agreement means an agreement between a prime or general contractor and an MBE or WBE subcontractor or an agreement between a consultant and an MBE or WBE subconsultant to:

- (a) Develop the capacity of the MBE or WBE under the bid or proposal to the city; and
- (b) Describes how the parties are going to share work under the bid or proposal for the primary scope of work under the bid or proposal.

(50) Woman means a person of the female gender, encompassed within the findings of, the Denver City Council, who is reputedly presumed to be socially disadvantaged.

(51) Woman business enterprise or WBE means a business enterprise that is certified by the director under this division as meeting all of the requirements for certification set forth in sections 28-55 and 28-58 as a WBE.

For purposes of this division, the director shall classify business enterprises with both minority and women owners, and meeting the requirements for certification as an MBE or WBE, as MBEs if socially and economically disadvantaged minority individual(s) own fifty-one (51) percent or more of ownership, and as WBEs if socially and economically disadvantaged women own fifty-one (51) percent or more of ownership. A business enterprise owned by individuals who are both socially and economically disadvantaged minority individuals and women may be certified as both an MBE and a WBE.

(Ord. No. 760-06, § 2, 11-13-06; Ord. No. 85-14, § 2, 2-18-14)

Sec. 28-55. - MBE/WBE certification; eligibility of applicant business enterprises.

(a) Procedures and methods. The director shall, by rule and regulation or informal guidelines relating solely to internal management and procedure, establish reasonable procedures and methods for the certification of applicant business enterprises as MBEs and/or WBEs in order to effectuate the purposes of this division 3. The director may seek input and advice from appropriate industry sources as to appropriate aspects of work performance, equipment and staffing in these industry areas in which certification is being sought.

(b) Only applicant business enterprises that meet the criteria for certification as an MBE or WBE may participate in the goals program established under this division 3. The applicant business enterprise has the burden of persuasion by a preponderance of the evidence. Only an applicant business enterprise owned and managed and controlled by socially and economically disadvantaged individual(s) may be certified as an MBE or WBE, as applicable. MBEs and WBEs may be certified only for specific types of work for which they apply and in which they have had sustained business activity for a minimum of six (6) months. Certification areas shall correspond to the codes set forth in North American Industrial Classification Standard (NAICS) Codes, or successor classification system, Code of Federal Regulations § 121.201, as amended, or successor regulation.

(c) To determine whether the requirements set forth below are met, the division must consider all of the facts in the record, viewed as a whole.

(1) Ownership. In order for the socially and economically disadvantaged owner(s) to be found to own the applicant business enterprise for purposes of certification, as applicable, the applicant business enterprise or socially and economically disadvantaged owner(s) must meet the requirements set forth below.

a. To be an eligible MBE or WBE, each socially and economically disadvantaged owner must:

(i) Own in his or her own name the legal and equitable interest in the applicant business enterprise;

(ii) Have acquired the interest in a real and substantial arms-length transaction, utilizing real, substantial, and continuing consideration; going beyond pro forma ownership of the applicant business enterprise as reflected in ownership documents;

(iii) Enjoy customary incidents of ownership and share in the risks and profits commensurate with their ownership interests in practice, not merely in the form of arrangements; and

(iv) Have acquired the interest with a contribution of his or her own capital resources, by having put his or her own financial resources at risk in the operation of the applicant business enterprise, or, subject to requirements below, with a contribution of expertise. All contributions by the socially and economically disadvantaged owner(s) to acquire the ownership interest in the applicant business enterprise must be real, substantial, and continuing, which in part, requires that it be commensurate with the ownership interest acquired. All contributions to acquire an ownership interest, including any portion of it, must have been made at the time the socially and economically disadvantaged individuals acquired the interest in business enterprise.

(A) 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 operations of the applicant business enterprise, indispensable to the applicant business enterprise's potential success, specific to the type of work the applicant business enterprise performs and documented in the applicant business enterprise's records. These records must clearly show the contribution of expertise, including its equivalent monetary value. The socially and economically disadvantaged individual(s) whose expertise is relied upon must have a commensurate capital investment in the applicant business enterprise.

(B) Examples of insufficient contributions include a promise to contribute capital, an unsecured note payable to the business enterprise or to an owner who is not socially and economically disadvantaged individual, or mere participation in the business enterprise as an employee. Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render an applicant business enterprise ineligible, even if the debtor's ownership interest is security for the loan.

(2) Management and control. Only an applicant business enterprise that is managed and controlled by a socially and economically disadvantaged individual(s) may be certified as an MBE or WBE. The socially and economically disadvantaged minority or woman owner(s) shall direct the management, policies, and day-to-day business operations of the applicant business enterprise and shall have the power to and actually make routine and major decisions on matters of management, policy, and operations. The socially and economically disadvantaged minority or woman owner's(s') management and control must be real, substantial, and continuing and go beyond the pro forma ownership of the applicant business enterprise as reflected in its ownership documents. Ownership alone is not sufficient to establish management and control. To determine whether each socially and economically disadvantaged individual satisfies these requirements, the DSBO shall consider the criteria below:

a. If federal or 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 business enterprise, then the socially and economically disadvantaged owner(s) must possess the required license or credential. If federal or state law or city ordinance does not require that the owner possess the license or other credential to own or control the business enterprise, to determine whether the socially and economically disadvantaged owner(s) manage and control the business enterprise, DSBO may consider whether the socially and economically disadvantaged owner(s) hold the license or other

credential required to conduct the specific type of work in which certification is sought as a factor. If there is not a legal requirement for the owner to hold the license or other credential to own or control a certain type of business enterprise, failure of the owner to hold the license or other credential does not by itself indicate lack of management and control of a business enterprise without other factors indicating to the contrary.

b. The socially and economically disadvantaged minority or woman owner(s) shall have substantial experience in the trade or industry that would be necessary to make routine and major decisions for the applicant business enterprise.

c. The socially and economically disadvantaged minority or woman owner(s) shall regularly make decisions, hold themselves out to the public, and sign important documents and financial instruments in a manner that is indicative of primary management and control of daily business operations and responsibility for routine and major decisions.

d. There may not be any restriction through corporate charter provisions, by law provisions, contracts, or any other formal or informal devices that prevent the socially and economically disadvantaged owner(s), without the cooperation or vote of any non-socially and economically disadvantaged owner, from making any business decision of the applicant business enterprise, including the making of obligations or the dispersing of funds.

e. The socially and economically disadvantaged owner(s) must possess the power to direct or cause the direction of the management and policies of the applicant business enterprise and to make day-to-day as well as long-term decisions on management, policy, and operations.

f. The socially and economically disadvantaged owner(s) may delegate various areas of the management, policymaking or daily operations of the applicant business enterprise to other participants who are not socially and economically disadvantaged owner(s). Such delegations of authority must be revocable, and the socially and economically disadvantaged owner(s) must retain the power to hire and fire any such person. The socially and economically disadvantaged owner(s) must actually exercise control over the applicant business enterprise's operations, management, and policies.

g. 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 type of business in which the applicant business enterprise is engaged and its operations. The socially and economically disadvantaged owner(s) is not required to have experience or expertise in every critical area of the applicant business enterprise's operations or have greater experience or expertise in a given field than managers or key employees. The socially and economically disadvantaged owner(s) must have the ability to intelligently and critically evaluate information presented by other participants in the applicant business enterprise's activities and to make independent decisions concerning the applicant business enterprise's daily operations, management, and policymaking. Generally, expertise or responsibilities primarily in office management, administration, bookkeeping, or other functions unrelated to the principal business activities of the applicant business enterprise are insufficient to demonstrate management and control.

h. A socially and economically disadvantaged owner(s) may not engage in outside employment or other business interests that conflict with the management of the applicant

business enterprise or prevent the owner(s) from devoting sufficient time and attention to the affairs of the applicant business enterprise to manage and control its day to day activities. For example, absentee ownership of a business and part-time work in a full-time applicant business enterprise are not viewed as constituting management and control. An individual, however, could be viewed as controlling a part-time business that operates only evenings or weekends or both, provided the individual manages and controls it throughout all hours of operation.

i. An applicant business enterprise may 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 applicant business enterprise's operations and work. To become certified in an additional type of work, the enterprise must sufficiently demonstrate only that its socially and economically disadvantaged owners are able to control the enterprise with respect to that type of work. It is not required to be recertified, unless it is also seeking renewal, or submit a new application for certification, but DSBO must be able to verify the socially and economically disadvantaged owner(s) manages and controls the enterprise with regard to the additional type of work.

(3) Independence. Only an independent applicant business enterprise may be certified as a MBE or WBE. An independent applicant business enterprise is one whose viability does not depend on its relationship with another business enterprise. Recognition of an applicant business enterprise as a separate entity for tax or corporate purposes is not necessarily sufficient to demonstrate that the applicant business enterprise is independent and not an affiliate. In determining whether an applicant business enterprise is an independent business, the director shall:

a. Examine whether there is actual or potential affiliation between the applicant business enterprise and individuals or non-certified business enterprises. To determine whether affiliation exists, the division considers factors such as ownership, management, previous relationships with or ties to another individual or non-certified business entity, and contractual relationships. Affiliation may be based on common management, identity of interest, newly organized concern rule, joint venture, or any combination thereof.

b. Scrutinize relationships with non-certified business enterprises in areas of personnel, finance, facilities, other resources. The division may consider shared employees (including administrative staff), office space, phone numbers, and equipment and whether there is any support or sharing of bonding capacity, lines of credit, and other resources.

c. Consider present or recent employer/employee relationships between the socially and economically disadvantaged individuals of the applicant and non-certified business enterprises or persons associated with non-certified business enterprises.

d. Examine the applicant business enterprise's relationships with non-certified business enterprises to determine whether there is a pattern of exclusive or primary dealings with non-certified business enterprises.

e. Consider whether relationships between the applicant business enterprise and non-certified business enterprises is consistent with normal industry practice.

- (4) Actively in business for six (6) months. The applicant business enterprise may not be certified until six (6) months after the satisfaction of each of the following:
- a. Formation of the applicant business enterprise;
 - b. Commencement of sustained business activity in the trade or profession described on the certification application; and
 - c. Commencement of ownership, management and control of daily business operations by the identified socially and economically disadvantaged minority or woman owner(s).
- (5) Lawfully present in the United States. The socially and economically disadvantaged owner(s) must be a citizen of the United States or a lawfully admitted permanent resident of the United States, and must not have the status of an illegal alien or otherwise be disqualified from lawfully residing in the United States, engaging in business and seeking this certification. As a condition of certification, owner(s) must comply with all reporting, submittal and other requirements that may be imposed by the city, State of Colorado or United States governments regarding such lawful presence.
- (6) Eligibility; rebuttable presumption of social disadvantage; individualized showing of social disadvantage; evidence of discrimination.
- a. Reputably presumed social disadvantage. A socially and economically disadvantaged minority individual or woman upon whom the application for certification is based must supply credible evidence, by sworn affidavit, that such individual has suffered from past race- or gender-based (as applicable) discrimination in association with the conduct of business or the attempted conduct of business as a business enterprise, in the construction or the professional design and construction services industries in the city's marketplace; provided that, any applicant business enterprise owned and controlled by, or any socially and economically disadvantaged minority individual or woman upon whom certification of such applicant business enterprise is sought, who is a member of the racial or ethnic minority groups referenced in section 28-(34)(a), or is a woman, is reputably presumed to be socially disadvantaged under the provisions of section 28-54(34)(a) and (47) and, if such minority individual or woman further demonstrates that such minority individual or woman so conducted business or attempted to conduct business in the construction or professional design and construction services industries in the city's marketplace prior to January 1, 2006, such minority individual or woman shall in addition be reputably presumed to have suffered from discrimination within the city's marketplace and to therefore be eligible to be certified as an MBE or WBE under this division 3, subject to compliance with all other requirements of sections 28-55 and 28-56.
 - b. Individualized social disadvantage. An individualized socially disadvantaged minority individual upon whom the application for certification is based pursuant to section 28-54(34)(b) shall supply credible evidence, by sworn affidavit, that such individual has suffered from past individualized discrimination in association with the conduct of business or the attempted conduct of business as a business enterprise, in the construction or the professional design and construction services industries in general, that he has in addition suffered from such individualized discrimination within the city's marketplace and that he conducted business or attempted to conduct business in the city's marketplace as set out in a., above. An individual who makes such a showing shall be deemed to have suffered from individualized discrimination and

social disadvantage within the city's marketplace and to therefore be eligible to be certified as an MBE or WBE under this division 3, subject to compliance with all other requirements of sections 28-55 and 28-56.

(7) Eligibility; showing of economic disadvantage. A socially and economically disadvantaged minority individual or woman upon whom the application for certification is based shall also supply credible evidence, by personal financial statement or as otherwise required by the director, that such individual has a personal net worth equal to or less than the permissible personal net worth amount determined by the U.S. Department of Transportation to be applicable to its DBE programs, or as otherwise determined by the director by rule and regulation as defined in section 28-54(24). An individual who makes such a showing shall be deemed to have been economically disadvantaged within the city's marketplace and to therefore be eligible to be certified as an MBE or WBE under this division 3, subject to compliance with all other requirements of sections 28-55 and 28-56.

(8) Threshold size; continued eligibility and renewal of certification. No applicant business enterprise, MBE or WBE shall be eligible for initial or subsequent renewal of certification if such business enterprise, MBE or SBE combined with any affiliates meets the criteria set forth in section 28-56 for graduation from participation in the goals program established by this division 3. An MBE or WBE will be certified for a one-year period. Following initial certification, an MBE or WBE that desires to continue its certification shall, no later than thirty (30) days prior to each annual anniversary of the certification, submit a certification renewal application, which shall update and reaffirm all requirements for certification. A certification may be terminated by the director upon the failure of the MBE or WBE to satisfy any certification requirement set forth in this division 3.

(9) City officials, officers, and employees ineligible. No applicant business enterprise shall be eligible to be certified as an MBE or WBE if ownership or control of such business enterprise is held by a current official, officer or employee of the city.

(10) Interviews, investigation, and onsite visits. The DSBO shall personally interview all persons upon whom eligibility for certification is based, and is empowered to interview such other persons and conduct such onsite visits and investigations as may be appropriate in its sole discretion to verify eligibility for certification. An applicant business enterprise wishing to be certified as an MBE or WBE shall cooperate with the DSBO in supplying additional information that may be requested in order to make a determination.

(Ord. No. 760-06, § 2, 11-13-06; Ord. No. 85-14, § 2, 2-18-14)

Sec. 28-56. - MBE and WBE certification and graduation size standards; renewal of certification; decertification; graduation.

(a) No applicant business enterprise shall be certified as an MBE or WBE, and following certification of an MBE or WBE, no certification shall be renewed if on the effective date of the application or renewal the applicant business enterprise, MBE or WBE (combined with all affiliates) has achieved a size standard exceeding the following size standards:

(1) For construction, reconstruction and remodeling, and construction management services, applicant business enterprises cannot exceed one hundred (100) percent of the applicable size

standards established by the U.S. Small Business Administration ("SBA") at C.F.R. § 121.201, as amended, or successor SBA regulation or classification system, which are incorporated herein by reference. The size standard is based on annual receipts averaged over the three (3) preceding consecutive fiscal years; whether the applicant business has otherwise achieved a size standard based upon its number of employees; or other criteria applicable to any of the work activities for which the applicant business enterprise seeks certification or is certified. The director may adjust or modify such MBE/WBE graduation size standards if it appears, after further inquiry and review by the director, that such standards are no longer appropriate to the purposes of this division 3.

(2) For professional design and construction services (excluding construction management), applicant business enterprises cannot exceed fifty (50) percent of the applicable size standards established by the U.S. Small Business Administration ("SBA") at C.F.R. § 121.201, as amended, or successor SBA regulation or classification system, which are incorporated herein by reference. The size standard is based on annual receipts averaged over the three (3) preceding consecutive fiscal years; whether the applicant business has otherwise achieved a size standard based upon its number of employees; or other criteria applicable to any of the work activities for which the applicant business enterprise seeks certification or is certified. The director may adjust or modify such MBE/WBE graduation size standards if it appears, after further inquiry and review by the director, that such standards are no longer appropriate to the purposes of this division 3.

(b) No applicant business enterprise shall be certified as an MBE or WBE, and following certification of an MBE or WBE, no certification shall be renewed if on the effective date of the application or renewal the socially and economically disadvantaged minority or woman upon which certification is based is not economically disadvantaged, as defined in section 28-54(24).

(c) If an MBE or WBE has been certified by the city in more than one (1) NAICS Code or has an affiliate that has been certified by the city in a NAICS Code other than that of the MBE or WBE, then the annual receipt level or employee or other criterion used as the graduation criterion for such MBE or WBE shall apply separately to each NAICS Code for which the MBE or WBE and its affiliate have been certified. Such an MBE or WBE and any affiliate that has exceeded the graduation criteria in one (1) NAICS Code shall be deemed to be graduated from this division 3 as to that code, and, if the graduation requirements of subsections (a) or (b) above do not apply, may continue to be certified in another NAICS Code having a higher monetary or employee number graduation level but shall no longer be considered eligible to be or remain certified in the NAICS Code with the lower size standard. Such an MBE or WBE or any affiliate that has exceeded the graduation criteria for the largest NAICS Code applicable to its activities shall be deemed to be graduated from this division 3 for the duration of the period in which the MBE or WBE exceeds the graduation criteria. Graduated MBEs or WBEs may reapply for certification if they meet the criteria for certification. Utilization of MBEs or WBEs shall count toward a goal, if any, to the extent that an MBE or WBE is performing a commercially useful function corresponding to a NAICS Code in which it is certified.

(d) Graduation of an MBE or WBE shall not affect the contribution made by the MBE or WBE toward satisfaction of a project goal if the work was bid or proposed to be performed by the MBE or WBE prior to the date of ineligibility for certification based on achievement of the graduation criterion.

(e) Application to affiliates. The graduation criteria set forth above shall be deemed to apply to the socially and economically disadvantaged minority individual or woman upon whom eligibility for certification is based and all affiliates of such minority individual or woman. No applicant business enterprise shall be certified based upon one (1) or more socially and economically disadvantaged minority individuals or women who owned or who was an affiliate of an MBE or WBE that has become ineligible for renewal of certification because of the achievement of graduation criteria.

(f) The certification status of all MBEs and WBEs shall be reviewed periodically by the DSBO. Failure of a certified and eligible MBE or WBE to seek timely renewal of certification by filing the necessary documentation with the DSBO may result in decertification.

(g) In accordance with the division's regulations, it shall decertify an MBE or WBE that does not continuously meet the eligibility criteria for certification.

(1) The MBE or WBE shall notify the DSBO of any change in its circumstances affecting its continued eligibility for certification under this division 3 within thirty (30) days of the MBE's or WBE's actual awareness of such change of circumstances. Failure to do so may result in the MBE's or WBE's decertification.

(2) The director may move to decertify an MBE or WBE that repeatedly fails to respond to requests for quotations from bidders or proposers who timely solicit participation on a contract, attend relevant pre-bid or pre-proposal conferences, honor quotations in good faith, or otherwise comply with the requirements of this division 3.

(h) An applicant business enterprise, MBE or WBE that has been denied certification or renewal or certification or been decertified may protest the denial of certification or decertification by the procedure set out in section 28-33. An applicant business enterprise, MBE or WBE found to be ineligible for certification or renewal of certification may not apply for certification or renewal of certification for one (1) year after the effective date of the final decision.

(Ord. No. 760-06, § 2, 11-13-06; Ord. No. 85-14, § 2, 2-18-14)

Sec. 28-57. - Third party challenge to certification; renewal of certification; or presumption of social disadvantage of minority individual or woman.

Subject to the provisions in this section, a third party may challenge the eligibility of an applicant business enterprise for certification, the eligibility of an MBE or WBE for renewal of certification, or the rebuttable presumption of social disadvantage of a minority individual or woman as provided in section 28-54(34)(a) and (47), respectively. The burden of demonstrating to the director's satisfaction the lack of such eligibility or the rebuttal of such presumption rests with such third party, and shall be demonstrated by a preponderance of the evidence.

(a) The eligibility of a challenged applicant business enterprise, MBE or WBE for certification or renewal of certification, or the presumption that a minority individual or woman is socially disadvantaged, shall remain in effect unless and until the city renders a final decision otherwise.

- (b) The challenge to such certification, renewal of certification or presumption shall be made in writing to the director by the challenging third party and shall include all information relied upon by such party.
- (c) The director shall notify the challenged applicant business enterprise, MBE or WBE or minority individual or woman in writing of the challenge, identify the challenging third party as required by law and summarize the grounds for the challenge. The notice may also require the challenged applicant business enterprise, MBE or WBE or minority individual or woman to provide the director, within a reasonable time, any information requested to permit the director to evaluate the eligibility of the applicant business enterprise or MBE or WBE or the validity of the presumption of social disadvantage with respect to a minority individual or woman.
- (d) Subject to the limitation in section 28-3(e), a third party putting forth a challenge under this section, and an applicant business enterprise, MBE, WBE or minority individual or woman that is the subject of such challenge, may seek review from a decision of the director pursuant to section 28-33.

(Ord. No. 760-06, § 2, 11-13-06; Ord. No. 85-14, § 2, 2-18-14)

Sec. 28-58. - Annual goal.

- (a) Of the total dollars spent annually for construction and for professional design and construction services contracts, the director, no later than six (6) months after the enactment of this division 3, shall establish an aspirational annual goal for MBE/WBE utilization based on the dollars to be spent for construction, reconstruction and remodeling contracts and such a goal for MBE/WBE utilization based on the dollars to be spent for professional design and construction services contracts. For the purpose of setting such goal, construction management services contracts shall be computed in and counted toward the construction area although construction management shall be considered a professional service. The following shall count toward the goal to the extent provided in sections 28-63 and 28-68; portions of work undertaken by MBEs and WBEs as contractors, consultants, subcontractors, subconsultants, suppliers, manufacturers, manufacturer's representatives, brokers, teaming agreements or joint venturers, including appropriate portions of work undertaken by subcontractors, subconsultants, suppliers, manufacturers, manufacturer's representatives, and brokers on subsidiary tiers under MBEs and WBEs, whether or not such subsidiary tier business enterprises are MBEs or WBEs.
- (b) The director as a basis for the establishment of the annual goal shall annually during the term hereof determine the present availability of all MBEs and WBEs doing business in the city by profession and trade groupings and recommend the annual goal to the city council for its review. The director shall conduct such inquiries, studies and hearings, and utilize information and assistance from such persons, consultants, entities or organizations, within or without the city, including, but not limited to, the department heads, as the director may, in the exercise of sole discretion, deem necessary to make such annual recommendation.
- (c) The city council shall review the annual goal recommended by the director, may undertake such additional inquiries as it deems appropriate, and may approve, disapprove or modify the recommended annual goal by ordinance in each succeeding year. Until the city council approves, disapproves or modifies the annual goal in a succeeding year, the initial annual goal established in this section shall continue in effect.

(Ord. No. 760-06, § 2, 11-13-06; Ord. No. 85-14, § 2, 2-18-14)

Sec. 28-59. - Project goals.

(a) The director shall assign for each construction, reconstruction, and remodeling contract, and for each professional design and construction services contract, a unitary project goal for MBE/WBE utilization based upon a percentage of the dollar value of all work on such contract, and, as set out below, the availability of MBEs and WBEs to perform the anticipated work and the city's progress toward meeting the annual goal; provided that, if the director determines it to be in the best interests of the city, the director may in his or her sole discretion waive the application of a project goal for a given contract. The goal percentage assigned by the director to each such contract may vary from contract to contract consistent with meeting the appropriate overall annual goals, when established. The DSBO shall establish a methodology for the setting of the project goal, including the methodology to be followed by the goal committees, through rules and regulations. Such methodology shall consider the following factors:

(1) To the extent applicable, the effect on the annual goal achievement of the varying levels of availability of MBEs and WBEs among industry groupings associated with individual projects and the effect on annual goal achievement of the project goal compliance being achieved through good faith efforts resulting in non-utilization of MBEs and WBEs.

(2) The reasonably known availability of MBEs and WBEs in specific industry groupings which are associated with individual projects.

(b) The following contributions shall count toward the project goal as more specifically provided below: portions of work undertaken by MBEs and WBEs as contractors, consultants, subcontractors, subconsultants, suppliers, manufacturers, manufacturer's representatives, brokers, packagers, regular dealers, teaming agreements or joint venturers.

(c) As an aid in the establishment of such an individual project goal, the director shall appoint goal committees to advise and assist the director in the determination of an individual project goal.

(d) The goal committees shall meet on a regular basis established by the director to consider and recommend an individual project goal pursuant to guidelines developed by the DSBO. The goal committees shall consider data as to availability of types of MBEs and WBEs doing business in the city with respect to the substantive work requirements of each individual contract under consideration. The director may utilize such advice and assistance from the goal committees to the extent that the director deems it to be appropriate and consistent with the purposes of this division 3 as well as other information helpful to a determination as to a project goal. The director shall in the director's sole discretion establish an individual project goal for each contract in bid or proposal instructions or as otherwise promulgated by regulations.

(e) The director, at the director's sole discretion, may cause a representative sample of city construction, reconstruction and remodeling, and professional design and construction services contracts to be bid or otherwise selected without a project goal, in order to determine MBE and WBE utilization on such contracts in the absence of such a goal. Following the first full year of operation of this division 3, the director shall analyze, based upon such representative sample and other contracts that may otherwise be let with a project goal of zero (0) percent, to what

extent the originally established annual goal has been met without the imposition of project goals. To the extent ascertainable, this information shall be utilized in the setting of the annual goal for the following year.

(Ord. No. 760-06, § 2, 11-13-06; Ord. No. 85-14, § 2, 2-18-14)

Sec. 28-60. - Contracts for construction, reconstruction and remodeling—Compliance with project goals—Exception for design-build contracts.

(a) The bid or competitive selection process specifications for each construction contract shall require that all bidders or proposers seeking to contract with the city or a private owner on such project shall address the project goal through one (1) or more of the following subsections, or by demonstrating good faith efforts as set out in section 20-62:

(1) If the bidder or proposer is an MBE or WBE, the value of the commercially useful function to be self-performed by the MBE or WBE shall count to the extent provided in section 28-63 toward satisfaction of the project goal, provided that the project goal to the extent not met by bidder or proposer self-performance shall be addressed as otherwise set out in this section;

(2) If the bidder or proposer submits a joint venture agreement that includes one (1) or more MBEs or WBEs, the value of the commercially useful function to be performed by the MBEs or WBEs in the joint venture as the distinct, clearly defined portion of the work of the joint venture agreement that the MBE or WBE performs with its own forces or for which it is separately at risk shall count to the extent provided in section 28-63 toward satisfaction of the project goal. The joint venture is subject to review and approval by the director, and the joint venture agreement shall be provided to the director at least ten (10) days prior to the date of bid opening or the date of final project-specific proposal, in the case of a competitive selection process unless otherwise set forth in the request for bids or proposals, as required by the director. Joint venturer participation will count toward the satisfaction of the project goal upon confirmation by the director of the utilization in the joint venture of joint management and full integration of work forces by the joint venturers; or

(3) If the bidder or proposer utilizes MBEs or WBEs as subcontractors, suppliers, manufacturer, manufacturer's representatives or brokers, the value of the commercially useful function to be performed by such MBEs and WBEs, shall count to the extent provided in section 28-63 toward satisfaction of the project goal.

(4) If the bidder or proposer submits a teaming agreement that includes one (1) or more MBEs or WBEs, the value of the commercially useful function to be performed by the MBEs or WBEs in the teaming agreement as the distinct, clearly defined portion of the work of the teaming agreement that the MBE or WBE performs with its own forces or for which it is separately at risk shall count to the extent provided in section 28-63 toward satisfaction of the project goal. The teaming agreement is subject to review and approval by the director, and the teaming agreement shall be provided to the director at least ten (10) days prior to the date of bid opening or the date of final project-specific proposal, in the case of a competitive selection process unless otherwise set forth in the request for bids or proposals, as required by the director. Teaming agreement participation will count toward the satisfaction of the project goal upon confirmation by the director of the utilization in the teaming agreement arrangement and full integration of work forces by the teaming agreement parties.

(b) For contracts selected in accordance with sections 2.3.3(A) and 2.11.3(8) of the Denver City Charter, and D.R.M.C. Sections 5-19 and 20-56, including design-build contracts, construction management/general contractor contracts, or on-call construction contracts, the department head may determine to address the project goal by means of a compliance plan for utilization of MBEs and WBEs on such contract, or for alternative demonstration of good faith efforts by the proposer. In that event, the department head shall request the director to approve the utilization of such a compliance plan, consistent with the scope and intent of this division 3. The development, scope and utilization of such compliance plans shall be addressed in rules and regulations promulgated by the director.

(c) Notwithstanding any other provision of this division 3, in the event that a department head finds with respect to a particular contract that the best interests of the city would be served by the negotiation of a contract, including but not limited to a design-build or construction management/general contractor contract, through a competitive selection process based wholly on quality, without reference to selection by low bid of the contractor or its subcontractors or suppliers, the analysis of the MBE/WBE utilization or alternative good faith effort by such contractor shall be determined on the basis set out in sections 28-65 through 28-68, provided that, in the event of such an analysis, all references in those sections to respectively, consultant or subconsultant, shall also be deemed to refer to, respectively, contractor or subcontractor.

(Ord. No. 760-06, § 2, 11-13-06; Ord. No. 85-14, § 2, 2-18-14)

Sec. 28-60.5. - Contracts for construction, reconstruction and remodeling—Joint ventures and teaming agreements.

(a) Based upon the scope of work and market availability, and whether permitted by law, the division of small business opportunity shall determine on a project-by-project basis, in consultation with the manager of the user agency or his or her designee, whether a joint venture with an MBE or WBE may be incentivized for a given project, or whether a teaming agreement with an MBE or WBE may be incentivized for a given project. Only projects valued at over ten million dollars (\$10,000,000.00) are eligible for consideration under this section.

(b) On such projects in which a joint venture relationship or a teaming agreement with an MBE or WBE is incentivized, the manager of the user agency or his or her designee and the director of the division of small business opportunity will establish prior to issuing the request for bids or the request for proposals any criteria to evaluate the use of joint ventures or teaming agreements for the project.

(c) As to each joint venture under this section, a written joint venture agreement must be completed by all parties to the joint venture and executed, which clearly delineates the rights and responsibilities of each member or partner, complies with any requirements of the division of small business opportunity as set forth in bid documents or otherwise, and provides that the joint venture shall continue for, at a minimum, the duration of the project.

(d) The division of small business opportunity shall review and approve all contractual agreements regarding the terms and provisions of each joint venture relationship prior to the award of a contract, including agreements pertaining to:

(1) The initial capital investment of each venture partner;

- (2) The proportional allocation of profits and losses to each venture partner; no MBE and WBE venture partner's liability should ever exceed said partners percentage of revenue earned while a participant in the joint venture;
- (3) The sharing of the right to control the ownership and management of the joint venture;
- (4) Actual participation of the venture partners on the project;
- (5) The method of and responsibility for accounting;
- (6) The method by which disputes are resolved; and
- (7) Any additional or further information required by the division of small business opportunity as set forth in bid documents or otherwise.

Nothing herein shall prevent the manager of the user agency determining appropriate contract terms for a joint venture on behalf of the city when entering into the contract with the selected contractor.

- (e) As to each teaming agreement under this section, a written teaming agreement must be completed by all parties to the teaming agreement and executed, which clearly delineates the rights and responsibilities of each teaming party, complies with any requirements of the division of small business opportunity as set forth in the bid documents or otherwise, and provides that the teaming agreement shall continue for, at a minimum, the duration of the project.
- (f) The division of small business opportunity shall review and approve all contractual agreements regarding the terms and provisions of each teaming agreement prior to the award of a contract, including agreements pertaining to:
 - (1) Actual participation of the teaming members on the project;
 - (2) The high value work to be performed by the teaming members;
 - (3) The method by which disputes are resolved; and
 - (4) Any additional or further information required by the division of small business opportunity as set forth in the bid documents or otherwise.
- (g) Joint ventures and teaming parties may submit agreements for pre-approval no later than ten (10) calendar days prior to the date set for receipt of bids or proposals on a project, but in no event later than designated in the bid documents or requests for proposals. A bid or proposal submitted by a joint venture or teaming relationship that does not include a satisfactory written joint venture agreement or teaming agreement as applicable, in accordance with the requirements of this section shall be deemed nonresponsive and rejected.
- (h) The joint venture, each member of the joint venture, or the teaming parties shall provide the division of small business opportunity access to review all records pertaining to joint venture agreements or teaming agreements before and after the award of a contract in order to reasonably assess compliance with this subdivision.
- (i) If, after the award of a contract to a joint venture or team, any member of the joint venture or team believes that the terms and conditions of the agreement as approved by the division of

small business opportunity have not been complied with, then such member may seek review and mediation of such agreement before the director of the division of small business opportunity. The request for review must be made in writing.

(j) If, after the award of a contract, a dispute arises between the prime contractor and a subcontractor regarding performance of work or provision of services or supplies on the eligible project, then such prime contractor or subcontractor may seek review and mediation of the issue before the director of the division of small business opportunity. The request for review must be made in writing.

(k) Within twenty (20) calendar days of receipt of a request for review, if the dispute has not already been resolved informally among the parties, the director shall set a mediation date, and the director shall provide written notice of the mediation date to each of the interested parties.

(l) The director shall have authority to make recommendations in an attempt to resolve the dispute.

(m) In the event that the mediation with the director of small business opportunity does not resolve all disputes, the director shall have the option of referring mediation proceedings to a qualified outside mediator, contingent upon the consent of the interested parties, the costs to be born by the interested parties.

(Ord. No. 85-14, § 2, 2-18-14)

Sec. 28-61. - Contracts for construction, reconstruction and remodeling—Pre-bid or competitive selection process meetings.

In order to permit bidders or proposers to inform MBEs and WBEs of teaming agreement, joint venturing, subcontracting, supplier, manufacturing, and broker opportunities, the department head in consultation with the director may conduct pre-bid or pre-selection meetings in which representatives of the director will explain the requirements of the DSBO pursuant to this division and appropriate rules and regulations for each bid or proposal for which project goals are set. If pre-bid or pre-proposal meetings are scheduled by the city at which MBEs and WBEs may be informed of subcontracting, teaming agreement or joint venture opportunities under a proposed contract to be bid, or procured pursuant to the competitive selection process, and attendance at such pre-bid or pre-proposal meetings is not mandatory, bidders and proposers remain responsible for the information provided at these meetings.

(Ord. No. 760-06, § 2, 11-13-06; Ord. No. 85-14, § 2, 2-18-14)

Sec. 28-62. - Contracts for construction, reconstruction and remodeling—Good faith efforts.

(a) If the bidder or proposer has not fully met the project goal as provided in section 28-60, then it shall demonstrate that it has made good faith efforts to meet such goal. The bidder or proposer shall furnish to the director, within three (3) working days after bid opening by the city or on or before the time of the final project-specific proposal submitted to and authorized by the city pursuant to a competitive selection process, or bid selection by a private owner, a detailed statement of its good faith efforts to meet the project goal set by the director. This statement shall address each of the items in subsection (b) and any additional criteria that the director may establish by rule or regulation consistent with the purposes of this division 3. Good faith efforts

must be demonstrated to be meaningful and not merely for formalistic compliance with this division 3. The scope and intensity of the efforts will be considered in determining whether the bidder or proposer has achieved a good faith effort.

(b) The statement of good faith efforts shall include a specific response and verification with respect to each of the following good faith effort categories, which may be further defined by rule or regulation. A bidder or proposer may include any additional information it believes may be relevant. Failure of a bidder or proposer to show good faith efforts as to any one (1) of the following categories shall render its overall good faith effort showing insufficient and its bid or proposal nonresponsive:

(1) The bidder or proposer must solicit through all reasonable and available means the interest of all MBEs and WBEs certified in the scopes of work of the contract. The bidder or proposer must solicit the interest of such MBEs and WBEs within sufficient time, prior to the bid opening or date of final project-specific proposal in the case of a competitive selection process, to allow such MBEs and WBEs to respond to the solicitation. The bidder or proposer must determine with certainty if the MBEs and WBEs are interested by demonstrating appropriate steps to follow up initial solicitations.

(2) The bidder or proposer must select portions of the work of the contract to be performed by MBEs and WBEs in order to increase the likelihood that the project goal will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate MBE and WBE participation as subcontractors, teaming agreement participants or joint venturers, and for bidder or proposer self-performed work, as suppliers, manufacturers, manufacturer's representatives and brokers, all reasonably consistent with industry practice, even when the bidder or proposer would otherwise prefer to perform these work items with its own forces. The bidder or proposer must identify what portions of the contract will be self-performed and what portions of the contract will be opened to solicitation of bids, proposals and quotes from MBE and WBEs. All portions of the contract not self-performed must be solicited for MSE and WBE participation. The ability or desire of a bidder or proposer to perform the work of a contract with its own forces does not relieve the bidder or proposer of the responsibility to meet the project goal or demonstrate good faith efforts to do so.

(3) The bidder or proposer, consistent with industry practice, must provide MBEs and WBEs at a clearly stated location with timely, adequate access to and information about the plans, specifications, and requirements of the contract, including bonding and insurance requirements, if any, to assist them in responding to a solicitation.

(4) The bidder or proposer must negotiate in good faith with interested MBEs and WBEs and provide written documentation of such negotiation with each such MBE or WBE.

(5) For each MBE or WBE that contacted the bidder or proposer or that the bidder or proposer contacted or attempted to subcontract, enter into a teaming agreement or joint venture with, consistent with industry practice, the bidder or proposer must supply a statement giving the reasons why the bidder or proposer and the MBE or WBE did not succeed in negotiating a subcontracting, supplier, manufacturer, manufacturer's representative, broker or joint venture agreement, as applicable.

(6) The bidder or proposer must provide verification that it rejected each non-utilized MBE and WBE because the MBE or WBE did not submit the lowest bid or it was not qualified. Such verification shall include a verified statement of the amounts of all bids received from potential or utilized subcontractors, suppliers, manufacturers, manufacturer's representatives, brokers or joint venturers on the contract, whether or not they are MBEs or WBEs. In making such a determination of not being qualified, the bidder or proposer shall be guided by the definition of qualified in section 28-54(42), but evidence of lack of qualification must be based on factors other than solely the amount of the MBE's or WBE's bid. For each MBE or WBE found not to be qualified by the bidder or proposer, the verification shall include a statement giving the bidder's or proposer's reasons for its conclusion. A bidder's or proposer's industry standing or group memberships may not be the cause of rejection of an MBE or WBE. A bidder or proposer may not reject an MBE or WBE as being unqualified without sound reasons based on a reasonably thorough investigation and assessment of the MBE's or WBE's capabilities and expertise.

(7) If requested by a solicited MBE or WBE, the bidder or proposer must make reasonable efforts to assist interested MBEs and WBEs in obtaining bonding, lines of credit, alternative payment or performance guarantees, or insurance as required by the city or by the bidder or proposer, provided that the bidder or proposer need not provide financial assistance toward this effort.

(8) If requested by a solicited MBE or WBE, the bidder or proposer must make reasonable efforts to assist interested MBEs and WBEs in obtaining necessary and competitively priced equipment, supplies, materials, or related assistance or services for performance under the contract, provided that the bidder or proposer need not provide financial assistance toward this effort.

(9) The bidder or proposer must use the DSBO MBE/WBE directories to identify, recruit, and place MBEs and WBEs.

(c) In determining whether a bidder or proposer has satisfied good faith efforts as to a project goal, the success or failure of other bidders or proposers on the contract in meeting such project goal may be considered.

(Ord. No. 760-06, § 2, 11-13-06; Ord. No. 85-14, § 2, 2-18-14)

Sec. 28-63. - Contracts for construction, reconstruction and remodeling—Identification of participating MBEs and WBEs.

(a) At the time of bid opening or date of final project-specific proposal in the case of a competitive selection process, the bidder or proposer shall provide to the city or private owner a list of all MBEs and WBEs that are being utilized toward the satisfaction of the project goal whether as a self-performing bidder or proposer or as subcontractors, suppliers, manufacturers, manufacturer's representatives, brokers or members of a joint venture or teaming agreement. The list shall specify:

(1) The name and contact name for the MBE or WBE;

(2) The dollar value and description of the commercially useful function to be performed by the MBE or WBE, consistent with subsections (d) and (e). In the case of utilization of a supplier, manufacturer, manufacturer's representative, or broker, the appropriate percentage of dollar value

attributable to such MBE or WBE as a commercially useful function shall be calculated with all underlying data supplied. If the proposer provides a dollar fee value amount, then both the dollar value and percentage must be listed in the proposal;

(3) If applicable, the percentage of the value of the commercially useful function to be performed by the MBE or WBE, consistent with subsections (d) and (e), as compared to the total contract amount;

(4) The designation of each business enterprise as either an MBE or WBE;

(5) An adequate statement from the bidder or proposer that the dollar amount of work to be performed by such MBE or WBE on the contract, other than that self-performed by the bidder or proposer, was furnished to the bidder or proposer and agreed upon prior to bid opening or date of final project-specific proposal in the case of a competitive selection process; and

(6) An adequate statement from the bidder or proposer that it understands that a letter of intent, including, but not limited to, values provided by self-performing bidders or proposers, joint venturers, teaming agreement participants, subcontractors, suppliers, manufacturers, manufacturer's representatives, and brokers, expressed in dollar values and as a percentage of the overall work, must be submitted to the director for each MBE or WBE listed, including a self-performing bidder or proposer, within three (3) business days after bids are opened by the city or by the date of final project-specific proposal in the case of a competitive selection process, or bid selection made by a private owner.

(b) Only that level of MBE/WBE utilization demonstrated in accordance with this section at the time of such bid opening, date of final project-specific proposal in the case of a competitive selection process or private selection may be counted in satisfaction of the project goal, except as otherwise set out in sections 28-72 and 28-73. Bidders or proposers must submit an executed letter of intent for each MBE or WBE listed by the bidder or proposer, including a self-performing bidder or proposer, within three (3) business days after bids are opened, final project-specific proposals are received, in the case of a competitive selection process, or bid selection is made. Failure to do so will render the bid or proposal nonresponsive.

(c) For on-call construction contracts, the department head may determine to utilize a compliance plan, pursuant to section 28-60(b). In such event, proposer shall not be required to demonstrate MBE/WBE utilization at the time of bid opening or date of final project-specific proposal, but will be required to develop an approved compliance plan to demonstrate compliance with the requirements of division 3. For on-call construction contracts that are not determined to utilize a compliance plan and that do not delineate the dollar amount of specific on-call projects, the proposer need list only the anticipated percentage of participation of MBEs and WBEs rather than specific dollar amounts, as required in subsection (a)(2), above.

(d) All MBE or WBE contractors, subcontractors, joint venturers, suppliers, manufacturers, manufacturer's representatives, or brokers listed in a bid or proposal must actually perform a commercially useful function in the work of a contract within the area(s) for which they are certified, and must not function as a conduit. Consistent with industry or professional practice, and as permitted by rules and regulations adopted by the director, MBEs and WBEs may enter into subcontracts, including subcontracts with non-MBEs and non-WBEs. In no case, however,

shall an MBE or WBE act as a conduit, nor shall the participation of an MBE or WBE count toward a project goal to the extent it fails to perform a commercially useful function.

(e) All expenditures for materials, supplies, and equipment obtained from an MBE or WBE manufacturer, manufacturer's representative or supplier shall count toward the appropriate project goal as specified in section 28-54(48). Expenditures for materials, supplies, and equipment paid to MBEs and WBEs that are not manufacturers, manufacturer's representatives or suppliers may count toward an appropriate project goal only to the extent offers or commissions charged for providing a bona fide service, such as professional, technical, consultant, or managerial services and assistance in the procurement of essential personnel, facilities, equipment, materials, or supplies required for performance of the contract, provided that the fee or commission is determined by the director to be reasonable and not excessive as compared with fees customarily allowed for similar services.

(f) Any agreement between a bidder or proposer and an MBE or WBE in which the bidder or proposer requires that the MBE or WBE not provide subcontracting quotations to other bidders or proposers is prohibited and shall render a bidder's bid or proposer's proposal nonresponsive.

(Ord. No. 760-06, § 2, 11-13-06; Ord. No. 85-14, § 2, 2-18-14)

Sec. 28-64. - Contracts for construction, reconstruction and remodeling—Responsive and nonresponsive bids or proposals.

(a) Responsive; compliance with requirements. If the low monetary bid or competitive selection process final project-specific proposal subject to a project goal meets such goal or shows adequate good faith as set out in sections 28-60 or 28-62, then the director shall notify the department head to regard the bid or proposal as nonresponsive as to compliance with this division 3.

(b) Failure to meet requirements. If a bid or proposal subject to a project goal does not meet such goal or show good faith as set out in sections 28-60 or 28-62, or provide timely information as set out in section 28-63, then the director shall notify the department head to regard the bid or proposal as nonresponsive, and such determinate shall result in no further consideration by the city or private owner of the bid or proposal.

(c) Good faith efforts—Informal meeting. If the director finds inadequacies in a bidder or proposer's demonstration of good faith efforts under section 28-62, the director will provide written notice of such inadequacies to the bidder or proposer prior to notifying the appropriate department head of bid or proposal responsiveness. Within two (2) business days from the date that the city notifies the bidder or proposer of the inadequacies of its demonstration of good faith efforts, the bidder or proposer may request an informal meeting with the director. Such informal meeting shall be scheduled by the director. All deficiencies in good faith efforts shall be explained to the bidder or proposer at such informal meeting. Within twenty-four (24) hours after the informal meeting, the bidder or proposer shall be allowed to submit additional information or to clarify the original good faith efforts. The director will at no time, however, allow additional subcontractors, joint venturers, suppliers, manufacturers, manufacturer's representatives or brokers that may later be added to the contract or to the original MBE/WBE participation submitted at the time of the bid or date of final project-specific proposal in the case of a

competitive selection process to be counted toward meeting of the project goal. After this informal meeting, the director will:

- (1) Determine whether the bidder or proposal will be responsive or nonresponsive;
- (2) Make the notification as stated in subsection (b) above, as applicable; and
- (3) Provide written notice to the bidder or proposer of the director's final determination.

(Ord. No. 760-06, § 2, 11-13-06; Ord. No. 85-14, § 2, 2-18-14)

Sec. 28-65. - Contracts for professional design and construction services—Compliance with project goals.

(a) The proposal specifications for each professional design and construction services contract shall require that all proposers seeking to contract with the city or a private owner on such project shall address the project goal through one (1) or more of the following subsections, or by demonstrating good faith efforts as set out in section 28-67:

(1) If the proposer is an MBE or WBE, the value of the commercially useful function to be self-performed by the MBE or WBE, shall count to the extent provided in section 28-68 toward satisfaction of the project goal, provided that the project goal not met by proposer self-performance shall be addressed as otherwise set out in this section;

(2) If the proposer submits a joint venture agreement that includes one (1) or more MBEs or WBEs, the value of the commercially useful function to be performed by the MBEs or WBEs in the joint venture as the distinct, clearly defined portion of the work of the joint venture agreement that the MBE or WBE performs with its own forces or for which it is separately at risk shall count to the extent provided in section 28-68 toward satisfaction of the project goal. The joint venture is subject to review and approval by the director, and the joint venture agreement shall be provided to the director within a time period before the date of final project-specific proposal as defined by the director. Joint venturer participation will count toward the satisfaction of the project goal upon confirmation by the director of the utilization in the joint venture of joint management and full integration of work forces by the joint venturers; or

(3) If the proposer utilizes MBEs or WBEs as subconsultants, suppliers, manufacturers, manufacturer's representatives or brokers, the value of the commercially useful function to be performed by such MBEs or WBEs shall count to the extent provided in section 28-68 toward satisfaction of the project goal.

(Ord. No. 760-06, § 2, 11-13-06; Ord. No. 85-14, § 2, 2-18-14)

Sec. 28-65.5. - Contracts for professional design and construction services—Joint ventures and teaming agreements.

(a) Based upon the scope of work and market availability, and whether permitted by law, the division of small business opportunity shall determine on a project-by-project basis, in consultation with the manager of the user agency or his or her designee, whether a joint venture with an MBE or WBE may be incentivized for a given project, or whether a teaming agreement with an MBE or WBE may be incentivized for a given project. Only projects where the

professional design and construction services are valued at over five hundred thousand dollars (\$500,000.00) are eligible for consideration under this section.

(b) On such projects in which a joint venture relationship or a teaming agreement with an MBE or WBE is incentivized, the manager of the user agency or his or her designee and the director of the division of small business opportunity will establish prior to issuing the request for bids or the request for proposals any criteria to evaluate the use of joint ventures or teaming agreements for the project.

(c) As to each joint venture under this section, a written joint venture agreement must be completed by all parties to the joint venture and executed, which clearly delineates the rights and responsibilities of each member or partner, complies with any requirements of the division of small business opportunity as set forth in bid documents or otherwise, and provides that the joint venture shall continue for, at a minimum, the duration of the project.

(d) The division of small business opportunity shall review and approve all contractual agreements regarding the terms and provisions of each joint venture relationship to the award of a contract, including agreements pertaining to:

- (1) The initial capital investment of each venture partner;
- (2) The proportional allocation of profits and losses to each venture partner; no MBE or WBE venture partner's liability should ever exceed said partners percentage of revenue earned while a participant in the joint venture;
- (3) The sharing of the right to control the ownership and management of the joint venture;
- (4) Actual participation of the venture partners on the project;
- (5) The method of and responsibility for accounting;
- (6) The method by which disputes are resolved; and
- (7) Any additional or further information required by the division of small business opportunity as set forth in bid documents or otherwise.

Nothing herein shall prevent the manager of the user agency determining appropriate contract terms for a joint venture on behalf of the city when entering into the contract with the selected contractor.

(e) As to each teaming agreement under this section, a written teaming agreement must be completed by all parties to the teaming agreement and executed, which clearly delineates the rights and responsibilities of each teaming party, complies with any requirements of the division of small business opportunity as set forth in the bid documents or otherwise, and provides that the teaming agreement shall continue for, at a minimum, the duration of the project.

(f) The division of small business opportunity shall review and approve all contractual agreements regarding the terms and provisions of each teaming agreement prior to the award of a contract, including agreements pertaining to:

- (1) Actual participation of the teaming members on the project;

- (2) The high value work to be performed by the teaming members;
 - (3) The method by which disputes are resolved; and
 - (4) Any additional or further information required by the division of small business opportunity as set forth in the bid documents or otherwise.
- (g) Joint ventures and teaming parties may submit agreements for pre-approval no later than ten (10) calendar days prior to the date set for receipt of bids or proposals on a project, but in no event later than designated in the bid documents or requests for proposals. A bid or proposal submitted by a joint venture or teaming relationship that does not include a satisfactory written joint venture agreement or teaming agreement as applicable, in accordance with the requirements of this section shall be deemed nonresponsive and rejected.
- (h) The joint venture, each member of the joint venture, or the teaming parties shall provide the division of small business opportunity access to review all records pertaining to joint venture agreements or teaming agreements before and after the award of a contract in order to reasonably assess compliance with this subdivision.
- (i) If, after the award of a contract to a joint venture or team, any member of the joint venture or team believes that the terms and conditions of the agreement as approved by the division of small business opportunity have not been complied with, then such member may seek review and mediation of such agreement before the director of the division of small business opportunity. The request for review must be made in writing. If, after the award of a contract, a dispute arises between the prime contractor and a subcontractor regarding performance of work or provision of services or supplies on the eligible project, then such prime contractor or subcontractor may seek review and mediation of the issue before the director of the division of small business opportunity. The request for review must be made in writing.
- (k) Within twenty (20) calendar days of receipt of a request for review, if the dispute has not already been resolved informally among the parties, the director shall set a mediation date, and the director shall provide written notice of the mediation date to each of the interested parties.
- (l) The director shall have authority to make recommendations in an attempt to resolve the dispute.
- (m) In the event that the mediation with the director of small business opportunity does not resolve all disputes, the director shall have the option of referring mediation proceedings to a qualified outside mediator, contingent upon the consent of the interested parties, the costs to be born by the interested parties.

(Ord. No. 85-14, § 2, 2-18-14)

Sec. 28-66. - Contracts for professional design and construction services—Pre-proposal meetings.

In order to permit proposers to inform MBEs and WBEs of subconsulting, supplier, manufacturer, manufacturer's representative, broker and joint venture opportunities, the department head in consultation with the director may conduct pre-proposal meetings in which representatives of the director will explain the requirements of the DSBO pursuant to this division and appropriate rules and regulations for each proposal for which a project goal is set.

(Ord. No. 760-06, § 2, 11-13-06; Ord. No. 85-14, § 2, 2-18-14)

Sec. 28-67. - Contracts for professional design and construction services—Good faith efforts.

(a) If the proposer has not fully met the project goal as provided in section 28-65, then it shall demonstrate that it has made good faith efforts to meet such goal. The proposer shall furnish to the director on or before the time of the final project-specific proposal submitted to and authorized by the city or a private owner, a detailed statement of its good faith efforts to meet the project goal set by the director. This statement shall address each of the items in subsection (b) and any additional criteria that the director may establish by rule or regulation consistent with the purposes of this division 3. Good faith efforts must be demonstrated to be meaningful and not merely for formalistic compliance with this division 3.

(b) The statement of good faith efforts shall include a specific response and verification with respect to each of the following good faith effort categories, which may be further defined by rule or regulation. A proposer may include any additional information it believes may be relevant. Failure of a proposer to show good faith efforts as to any one (1) of the following categories shall render its overall good faith effort showing insufficient and its proposal nonresponsive:

(1) If pre-proposal meetings are scheduled by the city at which MBEs and WBEs may be informed of subconsulting or joint venture opportunities under a proposed negotiated professional design and construction services contract, attendance at such pre-proposal meetings is not mandatory; however, proposers are responsible for the information provided at these meetings.

(2) The proposer must solicit through all reasonable and available means the interest of all MBEs and WBEs certified in the scopes of work of the contract. The proposer must solicit the interest of such MBEs and WBEs within sufficient time, prior to the date of final project-specific proposal, to allow such MBEs and WBEs to respond to the solicitation. The proposer must determine with certainty if the MBEs and WBEs are interested by demonstrating appropriate steps to follow up initial solicitations.

(3) The proposer must select portions of the services of the contract to be performed by MBEs and WBEs in order to increase the likelihood that the project goal will be achieved. This includes, where appropriate, using best efforts to break out contract service items into economically feasible units to facilitate MBE and WBE participation as subconsultants or joint venturers, and for proposer self-performed work, as suppliers, manufacturers, manufacturer's representative and brokers, all reasonably consistent with industry and professional practice, even when the proposer would otherwise prefer to perform these services with its own staff. The proposer must identify what portions of the contract will be self-performed and what portions of the contract were selected for solicitation of statements of qualification or proposals from MBE and WBEs. All portions of the contract not self-performed must be solicited for MBE and WBE participation. The ability or desire of a proposer to perform the services of a contract with its own staff does not relieve the proposer of the responsibility to meet the project goal or demonstrate good faith efforts to do so.

(4) The proposer, consistent with industry and professional practice, must provide MBEs and WBEs at a clearly stated location with timely, adequate access to and information about the

plans, specifications, and requirements of the contract, including insurance requirements, if any, to assist them in responding to a solicitation.

- (5) The proposer must negotiate in good faith with interested MBEs or WBEs and provide written documentation of such negotiation with each such MBE or WBE.
 - (6) For each MBE or WBE that contacted the proposer or that the proposer contacted or attempted to subconsult or joint venture with, consistent with industry and professional practice, the proposer must supply a statement giving the reasons why the proposer and the MBE or WBE did not succeed in negotiating a subconsulting, supplier, manufacturer, manufacturer's representative, broker or joint venture agreement, as applicable.
 - (7) The proposer must provide verification that it rejected each non-utilized MBE and WBE because the MBE or WBE was not qualified. Such verification shall include a verified statement of the proposals received from potential or utilized subconsultants, suppliers, manufacturers, manufacturer's representative or brokers on the contract, whether or not they are MBEs or WBEs. In making such a determination of not being qualified, the proposer shall be guided by the definition of qualified in section 28-54(42). For each MBE or WBE found not to be qualified by the proposer, the verification shall include a statement giving the proposer's reasons for its conclusion. A proposer's industry or professional standing or group memberships may not be the cause of rejection of an MBE or WBE. A proposer may not reject an MBE or WBE as being unqualified without sound reasons based on a reasonably thorough investigation and assessment of the MBE's or WBE's capabilities and expertise.
 - (8) If requested by a solicited MBE or WBE, the proposer must make reasonable efforts to assist interested MBEs and WBEs in obtaining alternative payment or performance guarantees or insurance as required by the city or by the proposer, provided that the proposer need not provide financial assistance toward this effort.
 - (9) If requested by a solicited MBE or WBE, the proposer must make reasonable efforts to assist interested MBEs and WBEs in obtaining necessary and competitively priced equipment, supplies, materials, or related assistance or services for performance under the contract, provided that the proposer need not provide financial assistance toward this effort.
 - (10) The proposer must use the DSBO MBE/WBE directories to identify, recruit and place MBEs and WBEs.
- (c) In determining whether a proposer has satisfied good faith efforts as to a project goal, the success or failure of other proposers on the contract in meeting such project goal may be considered.

(Ord. No. 760-06, § 2, 11-13-06; Ord. No. 85-14, § 2, 2-18-14)

Sec. 28-68. - Contracts for professional design and construction services—Identification of participating MBEs and WBEs.

- (a) At the time of the final project-specific proposal submitted to and authorized by the city or a private owner, the proposer shall provide to the city or private owner a list of all MBEs and WBEs that are being utilized toward the satisfaction of the project goal whether as a self-performing proposer, or as subconsultants, suppliers, manufacturers, manufacturer's

representatives, brokers or members of a joint venture. Unless otherwise specified in a request for qualifications, request for proposal or other proposal solicitation, in the event that a proposal is requested for the provision of on-call services for a period of time, with no delineation of the dollar amount of specific on-call projects, the proposer need list only the anticipated percentage participation of MBEs and WBEs rather than specific dollar amounts. The list shall specify:

- (1) The name and contact name for the MBE or WBE;
 - (2) The dollar value and description of the commercially useful function to be performed by the MBE/WBE consistent with subsections (c) and (d). In the case of utilization of a supplier, manufacturer, manufacturer's representative or broker, the appropriate percentage of dollar value attributable to such business enterprise as a commercially useful function shall be calculated with all underlying data supplied. If the proposer provides a dollar fee amount, then both the dollar value and percentage must be listed in the proposal;
 - (3) If applicable, the percentage of the value of the commercially useful function to be performed by the MBE or WBE consistent with subsections (c) and (d) as compared to the total contract amount;
 - (4) The designation of each business enterprise as either an MBE or a WBE;
 - (5) An adequate statement from the proposer that the dollar amount of work or the percentage of the work (whichever is applicable) to be performed by such MBEs and WBEs on the contract, other than that self-performed by the proposer, was furnished to the proposer and agreed upon prior to the time of submission of the final project-specific proposal submitted to and authorized by the city or a private owner; and
 - (6) An adequate statement from the proposer that it understands that a letter of intent, including, but not limited to, values provided by self-performing proposers, joint venturers, subconsultants, suppliers, manufacturers, manufacturer's representatives and brokers, expressed in dollar values and as a percentage of the overall work, must be submitted to the director for each MBE and WBE listed, including a self-performing proposer, at the time of submission of the final project specific proposal submitted to and authorized by the city or a private owner.
- (b) Only that level of MBE/WBE utilization demonstrated in accordance with this section at the time of the final project-specific proposal submitted to and authorized by the city or a private owner may be counted in satisfaction of the project goal except as otherwise set out in sections 28-72 and 28-73. Proposers must submit such an executed letter of intent for each MBE or WBE listed by the proposer, including a self-performing proposer, at the time of the submission of the final project-specific proposal submitted to and authorized by the city or a private owner. Failure to do so will render the proposal nonresponsive.
- (c) All MBE/WBE consultants, subconsultants, joint venturers, suppliers, manufacturers, manufacturer's representatives or brokers listed in a proposal must actually perform a commercially useful function in the work of a contract within the area(s) for which they are certified, and must not function as a conduit. Consistent with industry or professional practice, and as permitted by rules and regulations adopted by the director, MBEs and WBEs may enter into subcontracts, including subcontracts with non-MBEs and non-WBEs. In no case, however,

shall an MBE or WBE act as a conduit, nor shall the participation of an MBE or WBE count toward a project goal to the extent it fails to perform a commercially useful function.

(d) All expenditures for materials, supplies and equipment obtained from an MBE or WBE manufacturer, manufacturer's representative or supplier shall count toward the project goal as specified in section 28-54(48). Expenditures for materials, supplies and equipment paid to MBEs or WBEs that are not manufacturers, manufacturer's representatives or suppliers may count toward the project goal only to the extent of fees or commissions charged for providing a bona fide service, such as professional, technical, consultant or managerial services and assistance in the procurement of essential personnel, facilities, equipment, materials or supplies required for performance of the contract, provided that the fee or commission is determined by the director to be reasonable and not excessive as compared with fees customarily allowed for similar services.

(e) Any agreement between a proposer and an MBE or WBE in which the proposer requires that the MBE or WBE not provide subconsulting quotations to other proposers is prohibited and shall render a proposer's proposal nonresponsive.

(Ord. No. 760-06, § 2, 11-13-06; Ord. No. 85-14, § 2, 2-18-14)

Sec. 28-69. - Contracts for professional design and construction services—Responsive and nonresponsive proposals.

(a) Responsive; compliance with requirements. If the final project-specific proposal submitted to and authorized by the city or a private owner subject to a project goal meets such goal or shows adequate good faith efforts as set out in sections 28-65 or 28-67, then the director shall notify the department head that the proposal is responsive as to compliance with this division 3.

(b) Failure to meet requirements. If such a proposal subject to a project goal does not meet such goal or show good faith efforts as set out in sections 28-65 or 28-67, or provide timely information as set out in section 28-68, then the director shall notify the department head that the proposal is nonresponsive, and such determination shall result in no further consideration by the city or private owner of the proposal.

(c) Good faith efforts—Informal meeting. In the event the director finds inadequacies in a bidder or proposer's demonstration of good faith efforts under section 28-67, the director will provide written notice of such inadequacies to the bidder or proposer prior to notifying the appropriate department head of bid or proposal responsiveness. Within two (2) business days from the date that the city notifies the bidder or proposer of the inadequacies of its demonstration of good faith efforts, the bidder or proposer may request an informal meeting with the director. Such informal meeting shall be scheduled by the director. All deficiencies in good faith efforts shall be explained to the bidder or proposer at such informal meeting. Within twenty-four (24) hours after the informal meeting, the bidder or proposer shall be allowed to submit additional information or to clarify the original good faith efforts. The director will at no time, however, allow additional subconsultants, joint venturers, suppliers, manufacturers, manufacturer's representatives or brokers that may later be added to the contract or to the original project goal participation submitted at the time of the submission of the final project-specific proposal submitted to and authorized by the city or a private owner to be counted toward meeting of the project goal. After this informal meeting, the director will:

- (i) Determine whether the proposal will be responsive or nonresponsive;
- (ii) Make the notification as stated in subsection (b) above, as applicable; and
- (iii) Provide written notice to the proposer of the director's final determination.

(Ord. No. 760-06, § 2, 11-13-06; Ord. No. 85-14, § 2, 2-18-14)

Sec. 28-70. - Time periods for documentation submitted to the city.

The documentation of good faith efforts of a bidder or proposer and as applicable, its subcontractors, subconsultants, joint venturers, suppliers, manufacturers, manufacturer's representatives or brokers, or of letters of intent to perform, shall be submitted to the director within three (3) business days after bid opening, date of final project-specific proposal in the case of a competitive selection process or private owner selection for a construction contract, or at the time of submission of the final project-specific proposal submitted to and authorized by the city or a private owner for a professional design and construction services contract.

(Ord. No. 760-06, § 2, 11-13-06; Ord. No. 85-14, § 2, 2-18-14)

Sec. 28-71. - Schedule of work to be performed by MBEs and WBEs.

(a) Within five (5) business days following commencement of work on a contract, the contractor or consultant shall submit to the director a duplicate of the project schedule, which sets forth in detail the anticipated utilization of all MBEs and WBEs on the contract. In the event of a contract performance delay of more than one-third (1/3) of the originally estimated length of time between project notice to proceed and completion, such contractor or consultant shall submit to the director not later than the originally estimated date of project completion, a revised schedule for utilization of all MBEs and WBEs on the contract.

(b) The anticipated utilization of all MBEs and WBEs shall conform to the individual letters of intent submitted for each MBE/WBE at the time of the final project-specific proposal or bid to and accepted by the city or a private owner. If the MBE or WBE listed on the letter of intent is not the MBE or WBE listed on the MBE/WBE utilization project schedule, then contractor or consultant shall comply with section 28-75 with respect to modified good faith efforts.

(Ord. No. 760-06, § 2, 11-13-06; Ord. No. 85-14, § 2, 2-18-14; Ord. No. 1324-17, § 2, 12-18-17)

Sec. 28-72. - Compliance with achieved project goal level required throughout performance of contract.

(a) Upon award of a contract by the city that includes a project goal, the project goal becomes a covenant of performance by the contractor or consultant in favor of the city.

(b) All contracts subject to this division 3 shall be reviewed by the DSBO for compliance with the provisions hereof. This review shall examine, but not be limited to, whether the MBE and WBE participation dollar amounts and percentages and achieved project goal levels upon which the contract was awarded are maintained over the term or duration of the contract.

(c) For any contract for which the director has set a project goal, it shall be an ongoing, affirmative obligation of the contractor or consultant on such contract to maintain, at a minimum, compliance with the originally achieved level of MBE and WBE participation upon which the

contract was awarded, for the duration of the contract, unless the city initiates a material alteration to the scope of work affecting MBEs or WBEs performing on the contract through change order, contract amendment, force account or as otherwise described in section 28-73.

(d) The DSBO shall evaluate the utilization of MBEs and WBEs to determine whether such MBEs and WBEs are performing a commercially useful function. The evaluation shall examine the amount of work subcontracted, industry practice and other relevant factors. The amount of MBE and WBE participation credited toward a project goal shall be based upon an analysis of the specific duties performed by the MBE or WBE, and the extent to which such duties constitute a commercially useful function. The director may undertake such inquiries or studies, engage such employees or retain such consultants to assist the director in rendering these determinations. In order for DSBO to accurately track utilization of MBEs and WBEs, MBEs and WBEs shall submit regularly the following information to DSBO in a method prescribed by DSBO;

- (1) Prime contractor information and identification (name, address, contact person, and telephone);
- (2) MBE/WBE subcontractor information and identification (name, address, contact person, telephone, email address, and certification number);
- (3) Contract information and identification (report for month of, contract reference number, contract name and date executed);
- (4) Subcontract information (services, task order number, or work order number);
- (5) Original subcontract amount;
- (6) Change order amount and approval date;
- (7) Current subcontract amount;
- (8) Payment received in current month;
- (9) Total payments received;
- (10) Percent of work completed;
- (11) Billing request rejection date and reason for rejection;
- (12) Past due invoices (invoice date, reference number, number of days past due, and amount outstanding); and
- (13) Comments.

If DSBO finds that there has been a delay in payment to MBE or WBE subcontractors or subconsultants that exceeds sixty (60) days, DSBO shall investigate the reason for the delay in payment and shall document the reason for the delay in its records.

(e) The work performed by an MBE or WBE not providing a commercially useful function, or functioning as a conduit, shall not count toward meeting the project goal.

(Ord. No. 760-06, § 2, 11-13-06; Ord. No. 85-14, § 2, 2-18-14; Ord. No. 1324-17, § 3, 12-18-17)

Editor's note— Ord. No. 1324-17, § 3, adopted December 18, 2017, included provisions for § 28-72 pertaining to the tracking of subcontractor information which shall be effective as of March 1, 2018.

Sec. 28-73. - Project change orders, amendments and modifications.

(a) Contractors and consultants on contracts hereunder shall have a continuing obligation to immediately inform the DSBO in writing of any agreed-upon increase or decrease in the scope of work of such contract, upon any of the bases discussed in this section 28-73, regardless of whether such increase or decrease in scope of work has been reduced to writing at the time of notification.

(b) Any increase in the scope of work of a contract for construction, reconstruction, or remodeling, whether by amendment, change order, force account or otherwise, or any increase in the scope of services of a contract for professional design or construction services, whether by amendment or any other addition of special, additional or other services to the contract, which increases the dollar value of the contract, whether or not such change is within the scope of work designated for performance by a MBE or WBE at the time of contract award, shall be contemporaneously submitted to the DSBO. Those amendments, change orders, force accounts or other contract modifications that involve a changed scope of work that cannot be performed by existing project subcontractors, subconsultants, joint venturers, suppliers, manufacturer, manufacturer's representatives or brokers, or by the contractor or consultant, shall be subject to a goal for MBHs and WBEs equal to the original project goal on the contract that was included in the bid or proposal requirements. The contractor or consultant shall satisfy such goal as respects such changed scope of work by soliciting new MBEs or WBEs in accordance with section 28-60 or 28-65 as applicable, or the contractor or consultant must show each element of modified good faith set out in section 28-75(c) hereof. The contractor or consultant shall supply to the director the documentation described in section 28-75(c) with respect to the increased dollar value of the contract.

(Ord. No. 760-06, § 2, 11-13-06; Ord. No. 85-14, § 2, 2-18-14)

Sec. 28-74. - Payments to subcontractors, subconsultants, joint venturers, suppliers, manufacturers, manufacturer's representatives and brokers.

All contractors and consultants shall promptly render payment to all subcontractors, subconsultants, joint venturers, suppliers, manufacturers, manufacturer's representatives and brokers on a contract. Each contractor and consultant shall provide with each pay request to the city or private owner on each contract, beginning with the second pay request, partial claim releases from subcontractors, subconsultants, joint venturers, suppliers, manufacturers, manufacturer's representatives and brokers in form and content satisfactory to the city, or shall provide, at the city's sole option, alternative proof of payment to subcontractors, subconsultants, joint venturers, suppliers, manufacturers, manufacturer's representatives and brokers, in form and content approved by the department head and the director, evidencing that all subcontractors, subconsultants, suppliers, manufacturers, manufacturer's representatives and brokers have been duly paid by the contractor or consultant unless a bona fide dispute, documented in writing, exists between the contractor or consultant and the unpaid subcontractor, subconsultant, joint venturer, supplier, manufacturer, manufacturer's representative or broker. As provided by city and state law and city contracts, an agency, upon request from a contractor, may authorize

payments to contractors from withheld retainage for contractors who have completed their work in a manner acceptable to the city.

(Ord. No. 760-06, § 2, 11-13-06; Ord. No. 85-14, § 2, 2-18-14; Ord. No. 1324-17, § 4, 12-18-17)

Sec. 28-75. - Potential violations during contract performance.

(a) A contractor or consultant that has been awarded a contract based upon a given level of MBE and WBE participation shall not, at any time before or during the performance of such contract:

(1) Fail to in fact utilize an MBE or WBE that was originally listed at bid opening or proposal submission in order to satisfy the project goal, and that submitted a timely letter of intent, without substituting another MBE or WBE performing the same commercially useful function and dollar amount, or demonstrating each element of modified good faith efforts, as defined in subsection (c) hereof, to substitute another MBE or WBE; or

(2) Fail to allow an MBE or WBE functioning as a subcontractor, subconsultant, joint venturer, supplier, manufacturer, manufacturer's representative, or broker to perform the commercially useful function, the value of which was originally counted for that MBE or WBE in awarding the contract; or

(3) Modify or eliminate all or a portion of the scope of work attributable to an MBE or WBE upon which the contract was awarded, unless directed by the city; or

(4) Terminate an MBE or WBE originally utilized as a subcontractor, subconsultant, joint venturer, supplier, manufacturer, manufacturer's representative or broker in order to be awarded the contract without replacing such MBE or WBE with another MBE or WBE, performing the same commercially useful function and dollar amount, or demonstrating each element of modified good faith efforts, as defined in subsection (c) hereof, to substitute another MBE or WBE, or retaliate against any MBE or WBE who reports issues to DSBO; or

(5) Participates in a conduit relationship with an MBE or WBE scheduled to perform work on the contract; or

(6) Commits any other violation of this division 3, or rules and regulations promulgated thereunder, which constitutes a material breach of the contract, not mentioned above.

(b) Any action by a contractor or consultant in violation of subsections (a)(1) through (4) hereof, shall constitute a material breach of the contract that shall entitle the city or private owner to exercise all of its rights at law or equity for such material breach, in addition to exercising any of the other sanctions set out in section 28-77. If, following contract award, an MBE or WBE has its certification terminated for reasons other than expiration of certification, or graduation from certification under section 28-56, or an MBE or WBE fails to perform a commercially useful function, the value of which was originally counted for that MBE or WBE, as applicable, in awarding the contract, or an MBE or WBE voluntarily withdraws its MBE or WBE participation on the contract and the contractor or consultant can demonstrate that such termination or failure did not result from any action or inaction, whether direct or indirect, of or by the contractor or consultant, such termination of certification or failure to perform a commercially useful function shall not be deemed to affect compliance with the project goal, and shall not be deemed a breach

of the contract; provided, however, that the terminated MBE or WBE is substituted with another MBE or WBE, performing the same commercially useful function and dollar amount, or that modified good faith efforts to substitute another MBE or WBE, as defined in subsection (c) hereof, are demonstrated.

(c) The following modified good faith requirements shall apply to sections 28-72 and 28-73. In the event that a contractor or consultant must add or replace an MBE or WBE subcontractor, subconsultant, joint venturer, supplier, manufacturer, manufacturer's representative or broker or in the event that a new scope of work is added to the ongoing contract, and the contractor or consultant in such event is in noncompliance with maintenance of the original project goal upon which the contract was awarded, due to failure to utilize additional MBEs or WBEs, the following modified good faith efforts must be completed. Failure of a contractor or consultant to show good faith efforts as to any one (1) of the following categories shall render its overall good faith efforts showing insufficient; and its contract performance in noncompliance with this division 3.

(1) Verification in writing to the DSBO of the contractor's or consultant's intention to terminate or replace an MBE or WBE originally identified for participation in the bid, proposal or competitive selection process proposal upon which the contract was awarded. The reason for the termination or replacement must be stated and the type of work or services must be identified.

(2) Verification that the contractor or consultant used the most current MBE and WBE directory from the DSBO in order to contact MBs and WBEs that are certified in the applicable area of work or supply at the time of the modified good faith effort.

(3) Verification of efforts to contact appropriate MBEs and WBEs within the same identified subcontractor, subconsultant, joint venturer, supplier, manufacturer, manufacturer's representative or broker area must be documented. Facsimile transmission, e-mail and telephone communication will be acceptable. The director may verify such contacts as he deems appropriate.

(4) Documentation of the modified good faith efforts must be submitted to the DSBO prior to the payment to the contractor or consultant of the next progress or other partial payment or fund release under the contract.

(Ord. No. 760-06, § 2, 11-13-06; Ord. No. 85-14, § 2, 2-18-14; Ord. No. 1324-17, § 5, 12-18-17)

Sec. 28-76. - Burden of proof; investigations of compliance.

Any business enterprise affected by the operation of this division 3 shall have the burden of proving its compliance with the requirements and obligations of the division 3. The DSBO is empowered to receive and investigate complaints and allegations by MBEs, WBEs, third parties or city personnel, or to initiate its own investigations regarding compliance with the requirements and obligations of this division 3. If the DSBO determines in its sole discretion that an investigation is warranted, upon written notice of such investigation the affected party shall be obligated to cooperate fully with the investigation and shall have a continuing burden of providing complete, truthful information to the director and of otherwise proving compliance with the requirements and obligations of this division 3.

(Ord. No. 760-06, § 2, 11-13-06; Ord. No. 85-14, § 2, 2-18-14)

Sec. 28-77. - Contract sanctions for failure to comply with division 3 requirements.

(a) If a contractor or consultant is found to be in violation of the provisions of division 3, to otherwise be in breach of a contract, to perform as or to utilize MBEs or WBEs for a non-commercially useful function or as a conduit, to fail to submit information required in section 28-70, to submit false, misleading or materially incomplete statements, documentation or records, including, but not limited to, good faith efforts or letters of intent, or to fail to cooperate in an investigation, it shall be subject to sanctions. The city may exercise any or all of its rights, including, but not limited to, withholding funds, imposition of monetary penalty, suspension or termination, contained in the contract terms and conditions. If the contract is suspended or terminated, the city reserves all its rights at law or equity, with such suspension or termination being deemed a response to a contractor or consultant default, as appropriate, by applicable law.

(b) In the event that the director determines, in his or her sole discretion, that a contractor or consultant is in noncompliance with division 3, the contractor or consultant may be assessed a civil, remedial penalty, of not more than one hundred fifty (150) percent of the contract amount for each MBE or WBE involved. In assessing such civil penalty:

(1) The director shall calculate the applicable amount of civil penalty, and may reduce or waive all or part of such penalty, in his or her sole discretion, in consideration of the following factors:

- a. The length of the period of noncompliance;
- b. The history of previous noncompliance with any provision of this division 3;
- c. The monetary impact of the civil penalty on the contractor or consultant in correcting such noncompliance; or
- d. The other facts and circumstances relevant to the noncompliance of the contractor or consultant;

(2) The director shall collect assessed and unpaid civil penalties under this subsection by action initiated in state district court for collection of such penalty. A stay of any order of the director pending judicial review shall not relieve any contractor or consultant from any civil penalty obligation imposed under this section.

(3) Any such assessed civil penalties may also be offset against any amount, including, but not limited to, contract retainage, otherwise due and owing to the contractor or consultant on the contract.

(4) The contract may be suspended or terminated with the city reserving all its rights at law or equity, with such suspension or termination being deemed a response to a contractor or consultant default, as appropriate, by applicable law.

(5) The debarment board established under Denver Revised Municipal Code Section 20-77, upon request of the director, may suspend or debar the contractor or consultant from participation in city or private contracting covered hereunder for a period as may be determined by the debarment board, in its sole discretion, based upon the grounds of violating this division

3, pursuant to such suspension and debarment procedures as may be established by the city, as set forth in Denver Revised Municipal Code Section 20-77. The director in that event shall regard as nonresponsive any bid, proposal or competitive selection process proposal received during this time period that includes the contractor or consultant as a contractor, consultant, subcontractor, subconsultant, joint venturer, supplier, manufacturer, manufacturer's representative, or broker.

(6) If a contractor or consultant or other business enterprise knowingly receives new or additional work on a contract as a result of actions set out in this section, then the penalties in this section may be applied to such business enterprise.

(7) The DSBO may suspend or revoke an offending MBE's or WBE's eligibility for certification, may suspend its participation from counting toward a project goal, and, subject to other city law, may suspend or debar it from participating in future city contracts, based upon such MBE's or WBE's acting as a conduit, failing to comply with the provisions of division 3, failing to perform a commercially useful function on a contract, failing to submit information as required by section 28-70, submitting false, misleading or materially incomplete statements, documentation or records, or failing to cooperate in investigations.

(c) The director may, in his or her sole discretion, impose any one (1) or more of the sanctions set out in this section against any contractor, consultant, subcontractor, subconsultant, joint venturer, supplier, manufacturer, manufacturer's representative, or broker determined to be in violation of the section, provided that the director shall first advise the affected department head of the proposed sanction in writing. If the department head advises the director in writing that the department head believes that imposition of such sanction would not be in the best interests of the city, the director shall consult with the department head prior to making a final decision as to whether to impose such sanctions.

(d) Suspected criminal violations shall be referred to the proper authorities for prosecution. If a conviction or a guilty plea is obtained pursuant to such prosecution, the perpetrator may be barred from contracting with the city to the extent authorized by law.

(Ord. No. 760-06, § 2, 11-13-06; Ord. No. 85-14, § 2, 2-18-14)

Sec. 28-78. - State or federal law and other guidelines.

In making any findings required herein, the director may incorporate by reference rules, procedures and powers of C.R.S. § 24-4-101 et seq. as they may exist on the date of enactment of this division or as they may be amended. In making any findings required herein or in aid of definition or interpretation of any term or phrase herein, or by way of procedure or process, the director may utilize as a guide, insofar as they are consistent with the purposes of this division 3, provisions of federal law, including without limitation the provisions of 49 Code of Federal Regulations and 13 Code of Federal Regulations, or successor regulations, as they exist on the date of enactment of this division or as they may be amended, provided that no substantive provision of such federal law that is inconsistent with or contradictory to the provisions of this division shall be used.

(Ord. No. 760-06, § 2, 11-13-06; Ord. No. 85-14, § 2, 2-18-14)

Sec. 28-79. - Quarterly reports.

The director shall prepare written reports four (4) times each year which shall describe progress in meeting the annual goal set out in section 28-58. Copies of such reports shall be provided to the affected department heads, city council and the mayor according to the following schedule:

Period Covered	Date Due
January 1—March 31	June 1
April 1—June 30	September 1
July 1—September 30	December 1
October 1—December 31	March 1

In addition, the quarterly report shall encompass the implementation of this division 3 as well as a project by project report and justification of individual project goals by contract including all change orders, amendments and modifications.

In calculating MBE/WBE participation, all funds paid on city contracts during the year shall be counted whether or not such funds were used to accomplish project goals applicable at the time of bid opening, date of final project-specific proposal in the case of a competitive selection process, or other proposal receipt.

(Ord. No. 760-06, § 2, 11-13-06; Ord. No. 85-14, § 2, 2-18-14)

Sec. 28-80. - Annual report; explanation of failure to achieve annual goal.

If the annual goal in section 28-58 is not met in any year, then by March 1 of the following year, the director shall submit to the mayor and city council a report comparing MBE and WBE utilization achieved in the year to the aspirational annual goal, stating the reasons why the goal was not met, and advising and making recommendations as to continuing or further efforts that the city should make in remedying the effects of discrimination in city construction, reconstruction and remodeling, and professional design and construction services contracting, and recommending what should be done to assist in meeting such goal in the future.

(Ord. No. 760-06, § 2, 11-13-06; Ord. No. 85-14, § 2, 2-18-14)

Sec. 28-81. - Severability.

If any provision of this division 3 or its application is held invalid or unenforceable, such invalidity or unenforceability shall not affect other provisions or applications of this division that can be given effect without the invalid provisions or applications and the remaining provisions are to be severable and shall remain in full force and effect.

(Ord. No. 760-06, § 2, 11-13-06; Ord. No. 85-14, § 2, 2-18-14)

Sec. 28-82. - Effective date of division.

This division 3 shall become effective on April 1, 2014, and shall apply to all contracts within the scope of the division for which bids or proposals are publicly advertised on or after April 1, 2014.

(Ord. No. 760-06, § 2, 11-13-06; Ord. No. 85-14, § 2, 2-18-14)

Sec. 28-83. - Review and sunset.

(a) This division 3 shall be reviewed by the mayor, director and department heads on the third anniversary of its enactment, in order to determine whether adjustments or revisions to division 3 or additional studies or inquiries in furtherance of division 3 are deemed appropriate and should be undertaken or recommended, in order to further and maintain the purpose and intent of division 3.

(b) This division 3 shall be repealed effective April 1, 2019.

(Ord. No. 760-06, § 2, 11-13-06; Ord. No. 85-14, § 2, 2-18-14)

Secs. 28-84—28-90. - Reserved.

Goods and Services Ordinance

ARTICLE V. - NONDISCRIMINATION IN CITY CONTRACTS AND PURCHASE ORDERS FOR COVERED GOODS AND COVERED SERVICES AND OPPORTUNITIES FOR MINORITY AND WOMAN-OWNED BUSINESSES AND SMALL BUSINESS ENTERPRISES IN PROCUREMENTS FOR COVERED GOODS AND COVERED SERVICES[6]

Footnotes:

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Editor's note— Ord. No. 86-14, adopted Feb. 18, 2014, amended art. V in its entirety to read as herein set out. Former art. V consisted of §§ 28-117—28-146, pertained to a similar subject matter, and derived from Ord. No. 305-96, adopted Apr. 15, 1996.

Sec. 28-117. - Purpose and scope of programs.

(a) The purpose of this article V is to enable the city, through the department of general services, user departments, and the DSBO, to undertake specific activities to prevent discrimination and its effects against business enterprises that have been certified as MBEs and/or WBEs in the award of city contracts and purchase orders for covered goods and covered services and to increase opportunities for all small business enterprises that have been certified as SBEs to compete for city contracts and purchase orders for covered goods and covered services, as awarded by the department of general services or user departments pursuant to the provisions of the Charter, ordinances, and executive orders of the City and County of Denver. The director of the division of small business opportunity, the manager of the department of general services, and city department heads are hereby expressly delegated the necessary powers to effectuate the purpose of this article V and to undertake such additional studies or inquiries as they deem appropriate.

(b) The scope of this article V will encompass an MBE and WBE goal program, an SBE defined procurement pool program, an SBE preference program, a program to encourage independent partnerships with MBEs, WBEs, SBEs, and other business enterprises, and other outreach and education programs.

(c) The city, through the DSBO or the purchasing division, is authorized to develop and utilize programs and activities to provide outreach to and to facilitate the participation of all business enterprises in the city's purchasing activities, including, but not limited to, MBEs, WBEs, and SBEs. These programs and activities include, but are not limited to:

(1) Commencement of collection and analysis, for informational purposes only, of data and information from each bidder or proposer on a city procurement contract or purchase order regarding the ongoing availability and utilization of minority and women-owned business enterprises, including MBEs and WBEs, on such bidder's or proposer's private contracts in the covered goods and covered services industries in the city's market area.

(2) Development of such other programs or activities as the DSBO director, purchasing director, or manager of the department of general services may from time to time recommend.

(Ord. No. 86-14, § 1, 2-18-14)

Sec. 28-118. - Contracts and purchase orders excluded from article V.

Article V excludes from coverage the following purchases:

(a) Contracts and purchase orders for which bids or proposals are sought under the minority and women business enterprise ordinance for construction, reconstruction, and remodeling, and professional design and construction services set forth in article III of this chapter 28 and under the small business enterprise ordinance set forth in article VII of this chapter 28.

(b) Contracts and purchase orders paid with funds from the United States Government or the State of Colorado and for which the United States Government or the State of Colorado have made applicable contract requirements, terms or conditions that are inconsistent with the terms of this article V in which event the provisions of this article V shall not apply to such contract or purchase order to the extent of the inconsistency.

(c) Contracts and purchase orders excluded by the purchasing division from procurement bidding procedures as identified in section 20-64 of this Code.

(d) Contracts and purchase orders made pursuant to section 20-64.5 of this Code concerning cooperative purchases under purchase contracts of the United States Government, State of Colorado, or other governmental jurisdictions.

(e) Contracts or purchase orders, or parts thereof, excluded by the manager by implementing order.

(f) Purchases made through the city's non-purchase order voucher procedures as identified in City Fiscal Rule 8.1.

Sec. 28-119. - Procurement advisory committee.

The DSBO director, in consultation with the purchasing director, may establish an advisory committee to advise and recommend to the DSBO director and manager, as appropriate, policy and initiatives to assist MBEs, WBEs, SBEs, and other business enterprises in seeking procurement opportunities for covered goods and covered services under this article V. The details of this committee will be established by rules and regulations promulgated by the DSBO director, in consultation with the purchasing director and manager of the department of general services.

(Ord. No. 86-14, § 1, 2-18-14)

Sec. 28-120. - Administrative review of court proceedings.

All disputes concerning any determination made by or on behalf of the city pursuant to the authority of the DSBO director as set forth in this article V will be governed by administrative review and court proceedings provision contained in section 28-33 of this Code.

(Ord. No. 86-14, § 1, 2-18-14)

Sec. 28-121. - Collection of fees by DSBO to defray certification costs for procurement programs.

DSBO shall charge a certification fee of not to exceed three hundred dollars (\$300.00) to each applicant business enterprise seeking to be certified or to have certification(s) renewed under the provisions this article V of chapter 28.

(Ord. No. 86-14, § 1, 2-18-14)

Sec. 28-122. - MBE/WBE/SBE certification eligibility; renewal of certification; decertification; graduation; graduation size standards.

(a) Procedures and methods. The DSBO director shall, by rule and regulation or informal guidelines relating solely to internal management and procedure, establish reasonable procedures and methods for the certification of applicant business enterprises as MBEs, WBEs or SBEs in order to effectuate the purposes of this article V. The DSBO director may seek input and advice from appropriate industry sources as to appropriate aspects of work performance, equipment and staffing in these industry areas in which certification is being sought.

(b) Eligibility and application procedures. Only applicant business enterprises who meet the applicable certification criteria may participate as MBEs, WBEs, or SBEs in the programs established under this article V. The certification criteria, requirements, and application procedures contained in sections 28-54 and 28-55 through 28-57 of this Code will apply to the certification, renewal of certification, decertification, and graduation of MBEs and WBEs under

this article V. The certification criteria, requirements, and application procedures contained in sections 28-205 and 28-206 of this Code will apply to the certification, renewal of certification, decertification, and graduation of SBEs under this article V.

(c) No applicant business enterprise shall be certified as an MBE, WBE or SBE, and following certification of an MBE, WBE or SBE, no certification shall be renewed if on the effective date of the application or renewal the applicant business enterprise, the MBE, WBE, or SBE (combined with all affiliates) has achieved a size standard exceeding one hundred (100) percent of the applicable size standards established by the U.S. Small Business Administration ("SBA") at C.F.R. § 121.201, as amended, or successor SBA regulation or classification system, which are incorporated herein by reference. The size standard is based on annual receipts averaged over the three (3) preceding consecutive fiscal years; whether the applicant business has otherwise achieved a size standard based upon its number of employees; or other criteria, applicable to any of the work activities for which the applicant business enterprise seeks certification or is certified. The DSBO director may adjust or modify such MBE/WBE/SBE graduation size standards if it appears, after further inquiry and review by the DSBO director, that such standards are no longer appropriate to the purposes of this article V.

(Ord. No. 86-14, § 1, 2-18-14)

Sec. 28-123. - Definitions.

As used in this article V, the following words and phrases shall have the following meanings, unless otherwise clearly required by the context:

- (1) Affiliate, for purposes of this article V, will have the meaning set forth in section 28-54(1) and the meaning set forth in section 28-204(1), as applicable.
- (2) Annual goal means the targeted level for the aspirational goal established by the city for the annual aggregate participation of MBEs and WBEs in city contracts and city purchase orders.
- (3) Applicant business enterprise means a business enterprise seeking to be certified as a minority, woman, or small business enterprise, as appropriate, to provide covered goods or covered services under this article V.
- (4) Bid means an offer to provide covered goods or perform covered services for a price under a city contract or purchase order with the city in response to a bidding procedure.
- (5) Bidder means a business enterprise that submits a bid on a city contract or purchase order that is offered for bidding by the city to acquire covered goods or covered services.

(6) Bid preference means an amount deducted from the total bid price in order to evaluate and calculate the price of a bid, to be awarded solely on the basis of price, submitted in response to a request for bid for covered goods or covered services for which the estimated cost is from fifty thousand dollars (\$50,000.00) to two hundred fifty thousand dollars (\$250,000.00).

(7) Broker means a business enterprise that performs a commercially useful function as an intermediary, for a fee, in the acquisition of covered goods regardless of whether it takes title to such goods for the city or its vendors, contractors, consultants, or suppliers, but is not a manufacturer, manufacturer's representative, supplier, or distributor. Acting as a broker as required and sought by the city or as is normal industry practice for a specific purchase of covered goods is considered a commercially useful function. A packager shall be considered and treated as a broker.

(8) Business enterprise means an individual, sole proprietorship, corporation, limited liability company, partnership, limited partnership, limited liability limited partnership, joint stock company, joint venture, professional association or any other legal entity operated for profit that is properly licensed or registered, as applicable, owned, and controlled by persons who are citizens of the United States or lawful permanent residents of the United States, and otherwise authorized to do business in the State of Colorado.

(9) Certification means completion by a business enterprise of an application procedure to be developed by the DSBO, and formal authorization by the DSBO director to participate as an MBE, WBE, or SBE under this article V. Certification neither represents nor implies that a business enterprise is qualified to perform on a city procurement contract, nor that it performs a commercially useful function.

(10) City means the City and County of Denver and its participating user departments.

(11) City contract or city purchase order means any city contract, purchase order, or master purchase order for the acquisition of covered goods or covered services authorized by the Charter, Municipal Code, and executive orders of the city, including, but not limited to, contracts and purchase orders awarded by a formal or informal bidding procedure or competitive selection process, but will not include a contract or purchase order excluded under section 28-118 of this Code or a contract or purchase order for professional services that are not covered services.

City contract or city purchase order shall include the acquisition of covered goods or covered services by the city through other contracts and purchase orders ancillary to cooperative agreements or understandings with other public and private agencies for the maintenance, repair, management, or operation of public facilities, park and recreational facilities, museums, zoological and other gardens, collections of natural history, and observatories or for the provision of public services, programs, or activities by public or private agencies at public facilities, park and recreational facilities, museums, zoological and other gardens, collections of natural history, and observatories.

(12) Commercially useful function means responsibility for the provision of covered goods or a distinct element of covered services of a contract or purchase order that is carried out by a business enterprise actually performing, managing, and supervising the goods or services provided.

(13) Conduit means an MBE, WBE, or SBE that knowingly agrees to pass all or part of the goods or services for which it is listed for participation, and is scheduled to perform or supply on a city contract or purchase order to a business entity that is not an MBE, WBE, or SBE. In this type of relationship, the MBE, WBE, or SBE has not performed a commercially useful function and the arranged agreement between the two (2) parties is not consistent with standard industry practice. This arrangement does not meet the commercially useful function requirement, and therefore the participation of the MBE, WBE, or SBE does not count toward the procurement goal or annual goal, as appropriate.

(14) Contractor, consultant or vendor means a business enterprise that enters into a city contract or purchase order for acquisition of covered goods or covered services pursuant to the Charter, Municipal Code, and executive orders of the city. The terms contractor, consultant or vendor include prime contractors and general contractors.

(15) Covered goods means:

- (a) Electronic parts and equipment,
- (b) Office equipment,
- (c) Machinery, equipment and supplies,
- (d) Electrical and industrial equipment including parts and supplies, and
- (e) Communication equipment purchased by the city pursuant to the Charter, Municipal Code, and executive orders, but shall not include goods expressly excluded by section 28-118 above. The DSBO will establish, in consultation with the purchasing division, subcategories of covered goods corresponding to the codes set forth in the North American Industrial Classification Standard (NAICS) codes system, or successor classification system.

(16) Covered services means all:

- (a) Building management and maintenance services including janitorial services,
- (b) Parking services,

- (c) Security services,
 - (d) Maintenance and repair services including landscaping,
 - (e) Communication equipment related services, and
 - (f) General business services consisting of staffing, interpretation, graphic design, printing and photocopying, transportation, and courier delivery services purchased by the city pursuant to the Charter, Municipal Code, and executive orders, but shall not include goods expressly excluded by section 28-118 above. The DSBO will establish, in consultation with the purchasing division, subcategories of covered services corresponding to the codes set forth in the North American Industrial Classification Standard (NAICS) codes system, or successor classification system.
- (17) Day , unless otherwise indicated, means calendar day.
- (18) Defined procurement pool means city bid opportunities for covered goods or covered services for which the estimated cost is less than fifty thousand dollars (\$50,000.00).
- (19) Department head means the manager or director of the city department or agency or the elected official initiating or requesting the city enter into contract(s) for covered goods or covered services utilizing MBE/WBE or SBE participation, or such person's designee.
- (20) Distributor has the same definition as the term "supplier" as set forth in section 28-123(45) below.
- (21) DSBO means the division of small business opportunity.
- (22) DSBO director means the director of the division of small business opportunity or successor agency, or such director's designee.
- (23) Doing business means having a physical location from which to engage in for-profit activities in the scope(s) of expertise of the business enterprise.
- (24) Expertise means demonstrated 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 or registration where required.
- (25) Goal committee or goal committees mean a committee or committees of persons engaged in the covered goods or covered services industries or experienced in the implementation of MBE/WBE or SBE programs, that will be established by the DSBO director to advise the director as to procurement goal setting.

(26) Good faith efforts means substantive and meaningful good faith actions undertaken by a contractor, consultant, or vendor to achieve the MBE/WBE procurement goal as defined in more detail in section 28-128 of this article V.

(27) Goods means tangible, physical items that may or may not be fungible and that are not a service. The term "goods" includes "supplies" as such term is set forth in subsection 20-61(i) of this Code.

(28) Invitation for bid or request for bid means a written invitation or request to prospective vendors, contractors, or consultants to submit a bid to provide covered goods or perform covered services for a price in response to bidding procedures conducted by user departments as authorized by the charter, ordinances, or executive orders of the city.

(29) Joint venture means an association of two (2) business enterprises to constitute a single business enterprise to perform a city contract or purchase order for covered goods or covered services for which purpose they combine their property, capital, efforts, skills, and knowledge, and in which endeavor each joint venturer is responsible for a distinct, clearly defined portion of the work of the contract or purchase order, performs a commercially useful function, and whose share in the capital contribution, control, management responsibilities, risks, and profits of the joint venture are equal to its ownership interest. Joint ventures must have an agreement in writing specifying the terms and conditions of the relationships between the joint venturers and their relationship and responsibility to the contract or purchase order.

(30) Letter of intent means a written communication from a bidder or proposer to the city with respect to a contract or purchase order evidencing an understanding between an MBE or WBE and the bidder or proposer that such MBE or WBE has or will enter into a contractual relationship with the bidder or proposer on such contract or purchase order or that such bidder or proposer will self-perform as an MBE or WBE on such contract or purchase order.

(31) Manufacturer means a business enterprise that operates or maintains a factory or establishment that produces or substantially alters on the premises the covered goods to a vendor, contractor, or consultant, or to subcontractors, subconsultants, subvendors, suppliers, brokers, manufacturer's representatives, or distributors on a city contract or purchase order in connection with a city contract or purchase order.

(32) Manufacturer's representative means a business enterprise that sells products for one (1) or more manufacturers. A manufacturer's representative does not take legal title to or physical possession of the products that it sells, such products generally being sent directly from the manufacturer to the vendor, contractor, consultant or subcontractor purchasing such products. Acting as a manufacturer's representative, as is required and sought by the city or as is normal industry practice for a specific purchase of covered goods is considered a commercially useful function.

- (33) Manager means the manager of the department of general services, or such manager's designee.
- (34) Minority business enterprise or MBE for purposes of this article V will have the meaning set forth in section 28-54(34) of this Code.
- (35) On-call procurement contracts means contracts for covered goods or covered services that are awarded in accordance with section 20-68 of this Code or that are procured and awarded without a pre-determined specific quantity in the case of covered goods or scope of work in the case of covered services. Once a specific quantity or scope of work is identified, individual work orders or task orders are authorized, and the contractor, consultant, or vendor proceeds to provide the covered goods or covered services under the individual work order or task order.
- (36) Packager means a business enterprise that performs a commercially useful function in the packaging of covered goods used in or delivered under a city contract regardless of whether it takes title to such goods for the city or their vendors, contractors, or consultants, but is not itself a manufacturer, manufacturer's representative, supplier, or distributor. Acting as a packager, as is required and sought by the city or as is normal industry practice for a specific purchase of covered goods is considered a commercially useful function. A packager shall be considered and treated as a broker.
- (37) Procurement goal means the specific MBE/WBE goal established for a particular city contract or purchase order for covered goods or covered services based upon the availability of MBEs and WBEs in the statement of goods or work to be provided in the contract.
- (38) Proposal means an offer to provide covered goods or perform covered services under a city contract or purchase order with either the city in response a competitive selection process.
- (39) Proposer means a business enterprise that submits a proposal on a city contract or purchase order for covered goods or covered services that utilizes a competitive selection process.
- (40) Purchasing director means the director of the division of purchasing of the department of general services or successor agency, or such director's designee.
- (41) Purchase order or master purchase order means an approved document to a bidder or proposer formalizing all the terms and conditions of a proposed transaction, such as a description of the requested items, delivery schedule, terms of payment, and transportation.
- (42) Qualified , with respect to good faith efforts in this article V, means that a business enterprise has the financial ability, expertise, skill, experience, and access to the necessary staff, facilities and equipment to complete contract(s) or subcontract(s) that it may undertake on

projects. The city makes no representations as to the qualifications of any applicant business enterprise, MBE, WBE, or SBE.

(43) Request for proposal means a written request to prospective vendors, contractors, or consultants to submit a proposal to provide covered goods or perform covered services where an award is made in consideration of best value and not necessarily lowest price in response to a selection procedure conducted by user departments as authorized by the Charter, ordinances, or executive orders of the city.

(44) Services means all work offered for public or private use that are purchased by user departments under authority of the Charter, Municipal Code, and executive orders of the city and that does not consist primarily of goods. This definition does not include services expressly excluded under section 28-118 or professional or technical services that are not covered services.

(45) Small business enterprise or SBE will have the meaning set forth in subsection 28-204(35) of this Code.

(46) Solicitation means a written bid or selection procedure to procure covered goods or covered services.

(47) Subcontractor, subconsultant, or subvendor means a business enterprise that either:

(a) Directly contracts with a contractor, consultant, or vendor to provide covered goods pursuant to a city contract or purchase order; or

(b) Directly contracts with subcontractors, subconsultants, or subvendors under such contractors, consultants, or vendors on a city contract or purchase order, and which business enterprise will provide covered goods or covered services under agreements with the vendor, contractor, or consultant, or with other subcontractors, subconsultants, or subvendors under such contractor, consultant, or vendor.

(48) Supplier means a business enterprise that will provide covered goods on a city contract or purchase order under agreements with a vendor, contractor, or consultant, or with subcontractors, subconsultants, or subvendors under such a vendor, contractor, or consultant.

(49) Woman business enterprise or WBE for purposes of this article V will have the meaning set forth in subsection 28-54(51) of this Code.

(50) User department means the city department, agency, board, commission, authority, officer, or elected official, excluding the board of water commissioners but including without limitation the county courts, library commission, civil service commission, career service authority (office of human resources), auditor, city council, and clerk and recorder, initiating or

requesting a city contract or city purchase order for the acquisition of covered goods or covered services, utilizing MBE/WBE/SBE participation, under authority of the Charter, Municipal Code, or executive orders of the city.

(Ord. No. 86-14, § 1, 2-18-14)

Sec. 28-124. - Annual goal.

(a) Of the total dollars spent annually for covered goods and covered services, the DSBO director, in consultation with the purchasing director, no later than six (6) months after the enactment of this article V, shall establish an aspirational annual goal for MBE/WBE utilization based on the dollars to be spent for covered goods and covered services. The DSBO will establish, in consultation with the purchasing division, subcategories of covered goods corresponding to the codes set forth in the North American Industrial Classification Standard (NAICS) codes system, or successor classification system. The DSBO director may also consult with user departments in establishing the annual goal.

(b) The DSBO director, in consultation with the purchasing director, as a basis for the establishment of the annual goal shall annually determine the present availability of all MBEs and WBEs providing covered goods or performing covered services in the relevant market area and recommend the annual goal to the city council for its review. The DSBO shall conduct such inquiries, studies and hearings, and utilize such information and assistance from such persons, consultants, entities or organizations, within or without the city, including the purchasing director and city department heads as the DSBO director at his or her sole discretion deems necessary to make such annual recommendation.

(c) The city council shall review the annual goal recommended by the DSBO director, may undertake such additional inquiries as it deems appropriate, and may approve, disapprove or modify the recommended annual goal by ordinance in each succeeding year.

(d) The following participation shall count toward the annual goal, to the extent provided in section 28-129, concerning individual procurement goals; section 28-138 concerning defined procurement pool; section 28-142, concerning SBE bid preference; and section 28-151, concerning independent partnerships, portions of work undertaken by MBEs and WBEs as contractors, consultants, vendors, subcontractors, subconsultants, subvendors, suppliers, manufacturers, manufacturer's representatives, brokers, distributors, or joint venturers, including appropriate portions of work undertaken by subcontractors, subconsultants, suppliers, manufacturers, manufacturer's representatives, brokers and distributors on subsidiary tiers under MES and WBEs. whether or not such subsidiary tier business enterprises are MBEs or WBEs.

(e) The DSBO director, in the best interests of the city, may waive a representative sample of city contracts or purchase orders for covered goods or covered services to be bid or otherwise selected without a goal, in order to determine MBE and WBE utilization on such contracts in the

absence of such a goal. A written justification for such a waiver will be included in DSBO's annual report. Following the first full year of operation of this article V, the DSBO director shall analyze, based upon such representative sample and other contracts that may otherwise be let with a procurement goal of zero percent, to what extent the originally established annual goal has been met without the imposition of procurement goals. To the extent ascertainable, this information shall be utilized in the setting of the annual goal.

(Ord. No. 86-14, § 1, 2-18-14)

Sec. 28-125. - Prebid/preproposal meetings.

(a) In order to inform bidders and proposers of procurement contracting opportunities under this article V, the purchasing director or user department, in consultation with the DSBO director, may conduct prebid or preselection meetings in which representatives of the purchasing division or user department and DSBO will explain the opportunities and requirements of this article V and the appropriate rules and regulations for each bid or proposal.

(b) If prebid or preproposal meetings are scheduled by the city at which SBEs, MBEs and WBEs may be informed of procurement contracting opportunities for covered goods or covered services, and attendance at such prebid or preproposal meetings is not mandatory, bidders and proposers remain responsible for the information provided at these meetings.

(Ord. No. 86-14, § 1, 2-18-14)

Sec. 28-126. - City procurement goals—Contracts/purchase orders of \$1,000,000.00 or more.

(a) The DSBO director, in consultation with the purchasing director or department head, as appropriate, shall assign for each purchase of covered goods or covered services with an estimated cost of one million dollars (\$1,000,000.00) or more a unitary procurement goal for MBE/WBE utilization based upon a percentage of the dollar value of all covered goods and covered services to be provided on such contract and, as set out below, the availability of MBEs and WBEs to perform the anticipated work and the city's progress toward meeting the annual goal; provided that, the DSBO director may in his or her sole discretion waive the application of a procurement goal for a given contract or purchase order. The DSBO director will provide a written justification to the purchasing director or department head, as appropriate, for each waiver granted. The goal percentage assigned by the DSBO director to each such contract or purchase order may vary from contract to contract consistent with meeting the appropriate overall annual goals, when established. The DSBO shall establish a methodology for the setting of the procurement goal, including the methodology to be followed by the goal committee(s), through rules and regulations. Such methodology shall consider the following factors:

(1) To the extent applicable, the effect on annual goal achievement of the varying levels of availability of MBEs and WBEs among covered goods and covered services industry groupings

associated with individual procurements and the effect on annual goal achievement of the procurement goal compliance being achieved through good faith efforts resulting in non-utilization of MBEs and WBEs.

(2) The reasonably known availability of MBEs and WBEs in specific industry groupings that are associated with individual procurements.

(b) The following contributions shall count toward the procurement goal as more specifically provided below: portions of goods and services procurement undertaken by WBEs and MBEs as vendors, contractors, consultants, subcontractors, subconsultants, suppliers, manufacturers, manufacturer's representatives, brokers, packagers, joint venturers, or distributors.

(c) As an aid in the establishment of such an individual procurement goal, the DSBO director shall appoint at least one (1) goal committee to advise and assist the DSBO director in the determination of an individual procurement goal. Membership on the goal committee(s) shall include as a nonvoting member(s) such representatives of the purchasing division of the department of general services as may be appointed by the purchasing director, with the concurrence of the manager.

(d) The DSBO will establish procedures for committee operations, records maintenance, and goal recommendation through rules and regulations.

(e) The goal committee(s) shall meet on a regular basis established by the DSBO goal committee(s) shall consider data as to availability of types of MBEs and WBEs doing business in the city with respect to each individual procurement for covered goods or covered services under consideration. The DSBO director may utilize such advice and assistance from the goal committee(s) to the extent that the director deems it to be appropriate and consistent with the purposes of this article V, as well as other information helpful to a determination as to a procurement goal. The DSBO director shall in the director's sole discretion establish a goal for each procurement in bid or proposal instructions or as otherwise promulgated by regulations.

(Ord. No. 86-14, § 1, 2-18-14)

Sec. 28-127. - Procurement goals—Compliance with assigned goal.

(a) The bidding or competitive selection instructions for each purchase of covered goods or covered services shall require that all bidders or proposers seeking to contract with the city shall address the procurement goal through one (1) or more of the following subsections, or by demonstrating good faith efforts as set out in section 28-128:

(1) If the bidder or proposer is an MBE or WBE, the value of the commercially useful function to be self performed by the MBE or WBE shall count to the extent provided in section 28-129

toward satisfaction of the goal as assigned, provided that the goal to the extent not met by bidder or proposer self-performance shall be addressed as otherwise set out in this section;

(2) If the bidder or proposer submits a joint venture agreement that includes one (1) or more MBEs or WBEs, the value of the commercially useful function to be performed by the MBEs or WBEs in the joint venture as the distinct, clearly defined portion of the work of the joint venture agreement that the MBE or WBE performs with its own forces or for which it is separately at risk shall count to the extent provided in section 28-129 toward satisfaction of the procurement goal. The joint venture is subject to review and approval by the DSBO director. The joint venture agreement shall be provided to the DSBO director at least ten (10) days prior to the date of bid or proposal opening or as set forth in the bidding or selection instructions. Joint venturer participation will count toward the satisfaction of the procurement goal upon confirmation by the DSBO director of the utilization in the joint venture of joint management and full integration of work forces by the joint venturers; or

(3) If the bidder or proposer utilizes MBEs or WBEs as subcontractors, suppliers, manufacturer, manufacturer's representatives, brokers, distributors, or packagers, the value of the commercially useful function to be performed by such MBEs and WBEs, shall count to the extent provided in section 28-129 toward satisfaction of the procurement goal.

(b) For on-call contracts and purchase orders awarded in accordance with section 20-68 of this Code and any other on-call procurement contract, the purchasing director or department head may determine to address the procurement goal by means of a compliance plan for utilization of MBEs and WBEs on such contract or purchase order, or for alternative demonstration of good faith efforts by the bidder or proposer. In that event, the purchasing director or department head shall request the DSBO director to approve the utilization of such a compliance plan, consistent with the scope and intent of this article V. The development, scope and utilization of such compliance plans shall be addressed in rules and regulations promulgated by the DSBO director.

(Ord. No. 86-14, § 1, 2-18-14)

Sec. 28-128. - Procurement goals—Good faith efforts.

(a) If the bidder or proposer has not fully met the procurement goal as provided in section 28-127, then it shall demonstrate that it has made good faith efforts to meet such goal. The bidder or proposer shall submit with its bid or proposal a detailed statement of its good faith efforts to meet the procurement goal set by the DSBO director. This statement shall address each of the items in subsection (b) and any additional criteria that the DSBO director may establish by rule or regulation consistent with the purposes of this article V. Good faith efforts must be demonstrated to be meaningful and not merely for formalistic compliance with this article V. The scope and intensity of the efforts will be considered in determining whether the bidder or proposer has achieved a good faith effort.

(b) The statement of good faith efforts shall include a specific response and verification with respect to each of the following good faith effort categories, which may be further defined by rule or regulation. A bidder or proposer may include any additional information it believes may be relevant. Failure of a bidder or proposer to show good faith efforts as to any one (1) of the following categories shall render its overall good faith showing insufficient and its bid or proposal nonresponsive.

(1) The bidder or proposer must solicit through all reasonable and available means the interest of all MBEs and WBEs certified in the covered goods or covered services category set forth in the bid or proposal instructions. The bidder or proposer must solicit the interest of such MBEs and WBEs within sufficient time, prior to the date bids or proposals are submitted to the purchasing division or user department, to allow such MBEs and WBEs to respond to the solicitation. The bidder or proposer must determine with certainty if the MBEs and WBEs are interested by demonstrating appropriate steps to follow up initial solicitations.

(2) The bidder or proposer must select portions of the covered goods to be provided or covered services to be performed by MBEs and WBEs in order to increase the likelihood that the procurement goal will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate MBE and WBE participation as subcontractors or joint venturers, and for bidder or proposer self-performed work, as suppliers, manufacturers, manufacturer's representatives, brokers, distributors, or packagers, all reasonably consistent with industry practice, even when the bidder or proposer would otherwise prefer to perform these work items with its own forces. The bidder or proposer must identify what portions of the contract will be self-performed and what portions of the contract will be opened to solicitation of bids, proposals and quotes from MBE and WBEs. All portions of the contract not self-performed must be solicited for MBE and WBE participation. The ability or desire of a bidder or proposer to perform the work of a contract with its own forces does not relieve the bidder or proposer of the responsibility to meet the procurement goal or demonstrate good faith efforts to do so.

(3) The bidder or proposer, consistent with industry practice, must provide MBEs and WBEs at a clearly stated location with timely, adequate access to and information about the plans, documents, specifications, and requirements of the contract or purchase order, including bonding and insurance requirements, if any, to assist them in responding to a solicitation.

(4) The bidder or proposer must negotiate in good faith with interested MBEs and WBEs and provide written documentation of such negotiation with each such MBE or WBE.

(5) For each MBE or WBE that contacted the bidder or proposer or that the bidder or proposer contacted or attempted to subcontract or joint venture with, consistent with industry practice, the bidder or proposer must supply a statement giving the reasons why the bidder or proposer and the MBE or WBE did not succeed in negotiating a subcontracting, supplier, manufacturer, manufacturer's representative, broker, distributor, packager, or joint venture agreement, as applicable.

(6) The bidder or proposer must provide verification that it rejected each non-utilized MBE and WBE because the MBE or WBE did not submit the lowest bid or it was not qualified. Such verification shall include a verified statement of the amounts of all bids received from potential or utilized subcontractors, suppliers, manufacturers, manufacturer's representatives, brokers, distributors, packagers, or joint venturers on the contract, whether or not they are MBEs or WBEs. In making such a determination of not being qualified, the bidder or proposer shall be guided by the definition of qualified in subsection 28-123(42). For each MBE or WBE found not to be qualified by the bidder or proposer, the verification shall include a statement giving the bidder's or proposer's reasons for its conclusion. A bidder's or proposer's industry standing or group memberships may not be the cause of rejection of an MBE or WBE. A bidder or proposer may not reject an MBE or WBE as being unqualified without sound reasons based on a reasonably thorough investigation and assessment of the MBE's or WBE's capabilities and expertise.

(7) If requested by a solicited MBE or WBE, the bidder or proposer must make reasonable efforts to assist interested MBEs and WBEs in obtaining bonding, lines of credit, alternative payment or performance guarantees, or insurance as required by the city or by the bidder or proposer, provided that the bidder or proposer need not provide financial assistance toward this effort.

(8) If requested by a solicited MBE or WBE, the bidder or proposer must make reasonable efforts to assist interested MBEs and WBEs in obtaining necessary and competitively priced equipment, supplies, materials, or related assistance or services for performance under the contract or purchase order, provided that the bidder or proposer need not provide financial assistance toward this effort.

(9) The bidder or proposer must use the DSBO MBE/WBE directories to identify, recruit, and place MBEs and WBEs.

(c) In determining whether a bidder or proposer has satisfied good faith efforts as to a procurement goal, the success or failure of other bidders or proposers on the contract or purchase order in meeting such procurement goal may be considered.

(Ord. No. 86-14, § 1, 2-18-14)

Sec. 28-129. - Procurement goals—Identification of participating MBEs and WBEs.

(a) At the time a bid or proposal is submitted to the city, the bidder or proposer shall provide to the city a list of all MBEs and WBEs that are being utilized toward the satisfaction of the procurement goal whether as a self-performing bidder or proposer or as a subcontractor, supplier, manufacturer, manufacturer's representative, broker, distributor, packager, or member of a joint venture. The list shall specify:

- (1) The name and contact number for the MBE or WBE;
 - (2) The dollar value and description of the commercially useful function to be performed by the MBE or WBE, consistent with subsections (d) and (e). In the case of utilization of a supplier, manufacturer, manufacturer's representative, broker, distributor, or packager, the appropriate percentage of dollar value attributable to such MBE or WBE as a commercially useful function shall be calculated with all underlying data supplied. If the bidder or proposer provides a dollar value amount, then both the dollar value and percentage must be listed in the bid or proposal;
 - (3) If applicable, the percentage of the value of the commercially useful function to be performed by the MBE or WBE, consistent with subsections (d) and (e), as compared to the total contract or purchase order amount;
 - (4) An adequate statement from the bidder or proposer that the dollar amount of covered goods or covered services to be performed or provided by such MBEs or WBEs on the contract or purchase order, other than that self-performed by the bidder or proposer, was furnished to the bidder or proposer and agreed upon prior to bid or proposal opening; and
- (b) Only that level of MBE/WBE utilization demonstrated in accordance with this section at the time of bid or proposal submission may be counted in satisfaction of the procurement goal, except as otherwise set out in sections 28-132 and 28-133. Bidders or proposers must submit an executed letter of intent for each MBE or WBE listed by the bidder or proposer, including a self-performing bidder or proposer, with its bid or proposal. Failure to do so will render the bid or proposal nonresponsive.
- (c) For on-call procurement contracts, the purchasing director or department head may determine to utilize a compliance plan, pursuant to section 28-127(b). In such event, the bidder or proposer shall not be required to demonstrate MBE/WBE utilization at the time of bid opening, but will be required to develop an approved compliance plan to demonstrate compliance with the requirements of this article V. For on-call procurement contracts that are not determined to utilize a compliance plan and that do not delineate the dollar amount of specific on-call projects, the bidder or proposer need list only the anticipated percentage of participation of MBEs and WBEs rather than specific dollar amounts, as required in subsection (a)(2), above.
- (d) All MBE or WBE vendors, contractors, consultants, subcontractors, subconsultants, joint venturers, manufacturers, manufacturer's representatives, suppliers, brokers, distributors, or packagers listed in a bid or proposal must actually perform a commercially useful function in the work of a contract within the area(s) for which they are certified, and must not function as a conduit. Consistent with industry or professional practice, and as permitted by rules and regulations adopted by the DSBO director, MBEs and WBEs may enter into subcontracts, including subcontracts with non-MBEs and non-WBEs. In no case, however, shall an MBE or WBE act as a conduit, nor shall the participation of an MBE or WBE count toward a procurement goal to the extent it fails to perform a commercially useful function.

(e) All expenditures for covered goods obtained from an MBE or WBE manufacturer, supplier, distributor shall count toward the appropriate procurement goal as specified herein. Expenditures for covered goods obtained from MBE and WBE broker, manufacturer's representatives or packager may count toward an appropriate procurement goal only to the extent of fees or commissions charged for providing a bona fide service, such as professional, technical, consultant, or managerial services and assistance in the procurement of essential personnel, facilities, equipment, materials, or supplies required for performance of the contract or purchase order, provided that the fee or commission is determined by the DSBO director to be reasonable and not excessive as compared with fees customarily allowed for similar services.

(f) Any agreement between a bidder or proposer and an MBE or WBE in which the bidder or proposer requires that the MBE or WBE not provide subcontracting quotations to other bidders or proposers is prohibited and shall render a bidder's or proposer's bid or proposal nonresponsive.

(Ord. No. 86-14, § 1, 2-18-14)

Sec. 28-130. - Procurement goals—Responsive and nonresponsive bids.

(a) Responsive; compliance with requirements. If the low monetary bid or proposal subject to a procurement goal meets such goal, as set out in sections 28-127, or shows adequate good faith, as set out in section 28-128, then the DSBO director shall notify the purchasing director or department head to regard the bid or proposal as responsive as to compliance with this article V.

(b) Failure to meet requirements. If a bid or proposal subject to a procurement goal does not meet such goal, as set out in section 28-127, or show good faith, as set out in section 28-128, or if a bidder or proposer fails to provide timely information, as set out in section 28-129, then the DSBO director shall notify the purchasing director or department head to regard the bid or proposal as nonresponsive, and such determination shall result in no further consideration by the city of the bid or proposal.

(c) Statement of good faith efforts—Informal meeting. If the DSBO director finds inadequacies in a bidder or proposer's demonstration of good faith efforts, as such good faith efforts are described in section 28-128, the DSBO director will provide written notice of such inadequacies to the bidder or proposer prior to notifying the purchasing director or department head of bid or proposal responsiveness. Within two (2) business days from the date that the city notifies the bidder or proposer of the inadequacies of its demonstration of good faith efforts, the bidder or proposer may request an informal meeting with the DSBO director. Such informal meeting shall be scheduled by the DSBO director. All deficiencies in good faith efforts shall be explained to the bidder or proposer at such informal meeting. Within twenty-four (24) hours after the informal meeting, the bidder or proposer shall be allowed to submit additional information or to clarify the original good faith efforts. The DSBO director will at no time, however, allow additional subcontractors, joint venturers, suppliers, manufacturers, manufacturer's representatives, brokers, packagers, or distributors that may later be added to the contract or to

the original MBEE/WBE participation submitted in the bid or proposal to be counted toward meeting of the procurement goal. After this informal meeting, the DSBO director will:

- (1) Determine whether the bidder or proposal will be responsive or nonresponsive;
- (2) Make the notification as stated in subsection (b) above, as applicable; and
- (3) Provide written notice to the bidder or proposer of the DSBO director's final determination.

(Ord. No. 86-14, § 1, 2-18-14)

Sec. 28-131. - Procurement goals—Time periods for documentation submitted to the city.

The documentation of good faith efforts of a bidder or proposer and, as applicable, its subcontractors, subconsultants, subvendors, joint venturers, suppliers, manufacturers, manufacturer's representatives, brokers, packagers, or distributors, of letters of intent to perform, shall be submitted to the DSBO director at the time of submission of the bid or proposal.

(Ord. No. 86-14, § 1, 2-18-14)

Sec. 28-132. - Procurement goals—Compliance with achieved goal level a requirement of contract.

- (a) Upon award of a city contract or purchase order that includes a procurement goal, the procurement goal becomes a covenant of performance by the vendor, contractor or consultant in favor of the city.
- (b) All contracts or purchase order subject to this article V shall be reviewed by the DSBO for compliance with the provisions hereof. This review shall examine, but not be limited to, whether the MBE and WBE participation dollar amounts and percentages and achieved procurement goal levels upon which the contract or purchase order was awarded are maintained over the term or duration of the contract or purchase order.
- (c) For any contract or purchase order for which the DSBO director has set a procurement goal, it shall be an ongoing, affirmative obligation of the vendor, contractor or consultant on such contract to maintain, at a minimum, compliance with the originally achieved level of MBE and WBE participation upon which the contract or purchase order was awarded, for the duration of the contract or purchase order, unless the city initiates a material alteration to the covered goods or covered services affecting MBEs or WBEs performing on the contract or purchase order through a contract amendment, or as otherwise described in section 28-133.

(d) The DSBO shall evaluate the utilization of MBEs and WBEs to determine whether such MBEs and WBEs are performing a commercially useful function. The evaluation shall examine the amount of work subcontracted, industry practice and other relevant factors. The amount of MBE and WBE participation credited toward a procurement goal shall be based upon an analysis of the specific duties performed by the MBE or WBE, and the extent to which such duties constitute a commercially useful function. The DSBO director may undertake such inquiries or studies, engage such employees or retain such consultants as may be necessary to assist the director in rendering these determinations.

(e) The work performed by an MBE or WBE not providing a commercially useful function, or functioning as a conduit, shall not count toward meeting the procurement goal.

(Ord. No. 86-14, § 1, 2-18-14)

Sec. 28-133. - Procurement goals—Amendments and modifications to contracts and purchase orders.

(a) Vendors, contractors, and consultants on contracts and purchase orders for covered goods or covered services shall have a continuing obligation to immediately inform the DSBO in writing of any agreed upon increase or decrease in the covered goods or covered services to be provided under such contract or purchase order, upon any of the bases discussed in this section 28-133, regardless of whether such increase or decrease in covered goods or covered services has been reduced to writing at the time of notification.

(b) Any increase in the covered goods or covered services to be provided under a contract or purchase order for covered goods or covered services, whether by amendment or otherwise, which increases the dollar value of the contract or purchase order, whether or not such change, is within the scope of covered goods or covered services designated to be provided by an MBE or WBE at the time of contract award, shall be contemporaneously submitted to the DSBO. Those amendments or other contract modifications that involve a change in covered goods or covered services that cannot be performed by existing subcontractors, subconsultants, subvendors, joint venturers, suppliers, manufacturer, manufacturer's representative, brokers, distributors, or packagers or by the vendor, contractor, or consultant, shall be subject to a goal for MBEs and WBEs equal to the original goal on the contract which were included in the bid or proposal requirements. The vendor, contractor or consultant shall satisfy such goal as respects such changed covered goods or covered services by soliciting new MBEs or WBEs in accordance with section 28-127, or the vendor, contractor or consultant must show each element of modified good faith set out in subsection 28-135(d). The vendor, contractor, or consultant, shall supply to the DSBO director the documentation described in subsection 28-135(d) with respect to the increased dollar value of the contract or purchase order.

(Ord. No. 86-14, § 1, 2-18-14)

Sec. 28-134. - Procurement goals—Payments to subcontractors, subconsultants, joint venturers, suppliers, manufacturers, manufacturer's representatives and brokers.

All vendors, contractors and consultants shall promptly render payment to all subcontractors, subconsultants, joint venturers, suppliers, manufacturers, manufacturer's representatives, brokers, distributors, and packagers on a contract or purchase order.

(Ord. No. 86-14, § 1, 2-18-14)

Sec. 28-135. - Procurement goals—Potential violations.

(a) A vendor, contractor or consultant that has been awarded a city contract or purchase order based upon a given level of MBE and WBE participation shall not, at any time before or during the performance of such contract or purchase order:

(1) Fail to in fact utilize an MBE or WBE that was originally listed at bid or proposal opening in order to satisfy the procurement goal, and that submitted a timely letter of intent, without substituting another MBE or WBE performing the same commercially useful function and dollar amount, or demonstrating each element of modified good faith efforts, as defined in subsection (d) hereof, to substitute another MBE or WBE; or

(2) Fail to allow an MBE or WBE functioning as a subcontractor, subconsultant, joint venturer, supplier, manufacturer, manufacturer's representative, or broker to perform the commercially useful function, the value of which was originally counted for that MBE or WBE in awarding the contract or purchase order; or

(3) Modify or eliminate all or a portion of the covered goods or covered services attributable to an MBE or WBE upon which the contract was awarded, unless directed by the city; or

(4) Terminate an MBE or WBE originally utilized as a subcontractor, subconsultant, joint venturer, supplier, manufacturer, manufacturer's representative or broker in order to be awarded the contract without replacing such MBE or WBE with another MBE or WBE, performing the same commercially useful function and dollar amount, or demonstrating each element of modified good faith efforts, as defined in subsection (c) hereof, to substitute another MBE or WBE; or

(5) Participate in a conduit relationship with an MBE or WBE scheduled to perform work on the contract or purchase order; or

(6) Commit any other violation of this article V, or rules and regulations promulgated hereunder, which constitutes a material breach of the contract, not mentioned above.

(b) Any action by a vendor, contractor or consultant in violation of subsections (a)(1) through (6) hereof, shall constitute a material breach of the city contract or purchase order that shall entitle the city to exercise all of its rights at law or equity for such material breach, in addition to exercising any of the other sanctions set out in subsection 28-137(c).

(c) If, following award of a contract or purchase order, an MBE or WBE has its certification terminated for reasons other than:

(1) Expiration from certification;

(2) Graduation from certification;

(3) Nonperformance of a commercially useful function, the value of which was originally counted for that MBE or WBE, as applicable, when the contract or purchase order was awarded; or

(4) The voluntary withdrawal of MBE or WBE participation on the contract or purchase order, such termination of certification or failure to perform a commercially useful function shall not be deemed to affect compliance with the procurement goal, and shall not be deemed a breach of the contract or purchase order as long as the vendor, contractor or consultant can demonstrate that such termination or failure did not result from any action or inaction, whether direct or indirect, of or by the vendor, contractor or consultant. In such event, the vendor, contractor, or consultant will substitute another MBE or WBE, performing the same commercially useful function and dollar amount, or will demonstrate modified good faith efforts to substitute another MBE or WBE, as defined in subsection (d) below.

(d) The following modified good faith requirements shall apply to sections 28-132 and 28-133. In the event that a vendor, contractor or consultant must add or replace an MBE or WBE subcontractor, subconsultant, joint venturer, supplier, manufacturer, manufacturer's representative, broker or distributor or in the event that a new covered good or covered services is added to the ongoing contract or purchase order, and the vendor, contractor or consultant in such event is in noncompliance with maintenance of the original procurement goal upon which the contract or purchase order was awarded, due to failure to utilize additional MBEs or WBEs, the following modified good faith efforts must be completed. Failure of a vendor, contractor or consultant to show good faith efforts as to any one (1) of the following categories shall render its overall good faith efforts showing insufficient; and its contract performance in noncompliance with this article V.

(1) Verification in writing to the DSBO of the vendor's, contractor's or consultant's intention to terminate or replace an MBE or WBE originally identified for participation in the bid or proposal upon which the contract or purchase order was awarded. The reason for the termination or replacement must be stated and the type of work or services must be identified.

(2) Verification that the vendor, contractor or consultant used the most current MBE and WBE directory from the DSBO in order to contact MBEs and WBEs that are certified in the applicable area of work or supply at the time of the modified good faith effort.

(3) Verification of efforts to contact appropriate MBEs and WBEs within the same identified covered goods or covered services area must be documented. The DSBO director may verify such contacts as he or she deems appropriate.

(4) Documentation of the modified good faith efforts must be submitted to the DSBO prior to the payment to the vendor, contractor or consultant of the next progress or other partial payment or fund release under the contract or purchase order.

(Ord. No. 86-14, § 1, 2-18-14)

Sec. 28-136. - Procurement goals—Burden of proof; investigations of compliance.

Any business enterprise affected by the operation of this article V shall have the burden of proving its compliance with the requirements and obligations of the division. The DSBO is empowered to receive and investigate complaints and allegations by MBEs, WBEs, third parties or city personnel, or to initiate its own investigations regarding compliance with the requirements and obligations of this article V. If the DSBO determines in its sole discretion that an investigation is warranted, upon written notice of such investigation the affected party shall be obligated to cooperate fully with the investigation and shall have a continuing burden of providing complete, truthful information to the DSBO director and of otherwise proving compliance with the requirements and obligations of this article V.

(Ord. No. 86-14, § 1, 2-18-14)

Sec. 28-137. - Procurement goals—Sanctions for failure to comply with article V requirements.

(a) If a vendor, contractor or consultant is found to be in violation of the provisions of article V, to otherwise be in breach of a contract, to perform as or to, utilize MBEs or WBEs for a non-commercially useful function or as a conduit, to fail to submit information required in section 28-131, to submit false, misleading, or materially incomplete statements, documentation or records, including, but not limited to, good faith efforts or letters of intent, or to fail to cooperate in an investigation, it shall be subject to sanctions. The city may exercise any or all of its rights, including, but not limited to, withholding funds, imposition of monetary penalty, suspension or termination, contained in the terms and conditions of the contract or purchase order. If the contract or purchase order is suspended or terminated, the city reserves all its rights at law or equity.

(b) In the event that the DSBO director determines, in his or her sole discretion, that a vendor, contractor or consultant is in noncompliance with article V, the vendor, contractor or consultant

may be assessed a civil, remedial penalty, of not more than one hundred fifty (150) percent of the total amount of MBE/WBE utilization demonstrated in the contract or purchase order for each MBE or WBE involved. In assessing such civil penalty:

(1) The DSBO director shall calculate the applicable amount of civil penalty, and may reduce or waive all or part of such penalty, in his or her sole discretion, in consideration of the following factors:

- a. The length of the period of noncompliance;
- b. The history of previous noncompliance with any provision of this article V;
- c. The monetary impact of the civil penalty on the vendor, contractor or consultant in correcting such noncompliance; or
- d. The other facts and circumstances relevant to the noncompliance of the vendor, contractor or consultant;

(2) The DSBO director shall collect assessed and unpaid civil penalties under this subsection by action initiated in state district court for collection of such penalty. A stay of any order of the DSBO director pending judicial review shall not relieve any vendor, contractor or consultant from any civil penalty obligation imposed under this section.

(3) Any such assessed civil penalties may also be offset against any amount otherwise due and owing to the vendor, contractor or consultant on the contract or purchase order.

(4) The city contract or purchase order may be suspended or terminated with the city reserving all its rights at law or equity.

(5) The debarment board, established under section 20-77 of this Code, upon request of the DSBO director, may suspend or debar the vendor, contractor or consultant from participation in city or private contracting covered hereunder for a period as may be determined by the debarment board, in its sole discretion, based upon the grounds of violating this article V, pursuant to such suspension and debarment procedures as may be established by the city, as set forth in section 20-77. The DSBO director in that event shall regard as nonresponsive any bid or proposal received during this time period that includes the vendor, contractor or consultant as a vendor, contractor, consultant, subcontractor, subconsultant, joint venturer, supplier, manufacturer, manufacturer's representative, broker or distributor.

(6) If a vendor, contractor or consultant or other business enterprise knowingly receives new or additional work on a contract or purchase order as a result of actions set out in this section, then the penalties in this section may be applied to such business enterprise.

(7) The DSBO may either suspend or revoke an offending MBE's or WBE's eligibility for certification as an MBE or WBE or may suspend its participation from counting toward a procurement goal, and, the city subject to other city law, may suspend or debar MBEs or WBEs from participating in future city contracts, based upon such MBE's or WBE's acting as a conduit, failing to comply with the provisions of article V, failing to perform a commercially useful function on a contract or purchase order, failing to submit information as required by section 28-131, submitting false, misleading or materially incomplete statements, documentation or records, or failing to cooperate in investigations.

(c) The DSBO director may, in his or her sole discretion, impose any one (1) or more of the sanctions set out in this section against any vendor, contractor, consultant, subcontractor, subconsultant, joint venturer, supplier, manufacturer, manufacturer's representative, broker, or distributor determined to be in violation of the section, provided that the DSBO director shall first advise the manager and purchasing director or department head, as appropriate, of the proposed sanction in writing. If the manager, purchasing director, or department head advises the DSBO director in writing that the imposition of such sanction would not be in the best interests of the city, the DSBO director shall consult with the appropriate official to make a final decision as to whether to impose such sanctions.

(d) Suspected criminal violations shall be referred to the proper authorities for prosecution. If a conviction or a guilty plea is obtained pursuant to such prosecution, the perpetrator may be barred from contracting with the city to the extent authorized by law.

(Ord. No. 86-14, § 1, 2-18-14)

Sec. 28-138. - SBE defined procurement pool for contracts/purchase orders less than \$50,000.00.

The purpose of the defined procurement pool is to enable the city, through the DSBO, the purchasing division of the department of general services, and other user departments to undertake specific activities to promote the use of SBEs, that are not brokers, packagers, or manufacturer's representatives, in contracts and purchase orders for covered goods and covered services awarded by the purchasing division and user departments pursuant to the Charter, revised Municipal Code, and executive orders of the City and County of Denver. The scope of the procurement pool will be limited to procurement opportunities for covered goods or covered services for which the estimated cost is less than fifty thousand dollars (\$50,000.00).

(Ord. No. 86-14, § 1, 2-18-14)

Sec. 28-139. - Defined procurement pool—Administration of defined pool.

(a) When the purchasing division or user department seeks to acquire covered goods or covered services with an estimated cost of less than fifty thousand dollars (\$50,000.00) pursuant to the Charter, revised Municipal Code, and executive orders of the City and County of Denver,

it will notify the DSBO of the proposed procurement. The DSBO director will determine if there are three (3) or more SBEs, that are not brokers, packagers, or manufacturer's representatives, listed in the most current DSBO certification directory for the covered goods or covered services to be acquired. The DSBO in consultation with the purchasing division and user departments will adopt rules and regulations or informal guidelines to timely notify the purchasing director or department head of such determinations.

(b) If there are three (3) or more SBEs, that are not brokers, packagers, or manufacturer's representatives, on the most current DSBO certification list, the purchasing division or user department will provide the procurement opportunity to such SBEs through bidding or selection procedures authorized by the charter, municipal code, or executive orders for that specific contract or purchase order. The bidding or proposal instructions will require that such SBEs will self-perform no less than seventy-five (75) percent of the total amount of the contract or purchase order with their own forces.

(c) If there are not three (3) or more SBEs, that are not brokers, packagers, or manufacturer's representatives, on the most current DSBO certification list, or if the purchasing division or user department does not receive a bid or proposal from such an SBE offering to self-perform no less than seventy-five (75) percent of the total amount of the contract or purchase order with its own forces, the purchasing division or user department will obtain the covered goods or covered services through procurement methods required or authorized by the Charter, Municipal Code, or executive orders for that specific contract or purchase order.

(d) Certification by DSBO as an SBE shall thereupon be established as a condition of responsiveness to a bid or proposal on such selected contracts and purchase orders. Defined procurement pool contracts and purchase orders shall be evaluated and awarded in accordance with sections 28-140 through 28-142 below and any other procedure and method required or authorized by the Charter, Municipal Code, or executive orders for that specific contract or purchase order.

(e) User departments will not split, combine, revise, restructure, or modify purchases of covered goods or covered services with other goods or one (1) or more other services to avoid the dollar thresholds for inclusion in the defined procurement pool or perform other actions with the intent of avoiding the requirements of this article V.

Sec. 28-140. - Defined procurement pool—Commercially useful function.

(a) An SBE awarded a contract or purchase order through the defined procurement pool will self-perform no less than seventy-five (75) percent of the total amount of the contract or purchase order with its own forces. All SBE contractors, consultants, or vendors listed in a bid or proposal; must actually perform a commercially useful function on a defined procurement pool contract or purchase order within the area(s) for which they are certified, and must not function as a conduit. The bidding or proposal instructions for each defined procurement pool contract or purchase order shall require that all bidders and proposers seeking to provide covered goods or

covered services under a city contract or purchase order shall provide a commercially useful function on such contract or purchase order.

(b) All expenditures for covered goods or covered services obtained from such an SBE who is also an MBE or WBE manufacturer, supplier, or distributor will be counted toward the annual goal set forth in section 28-124 based upon an analysis by DSBO of the specific duties performed by the MBE or WBE and the extent to which such duties constitute a commercially useful function for each defined procurement pool contract or purchase order. All expenditures for covered goods or covered services obtained from an SBE who is not an MBE or WBE manufacturer, supplier, or distributor will be calculated separately by DSBO based upon an analysis of the specific duties performed by the SBE and the extent to which such duties constitute a commercially useful function for each defined procurement pool contract or purchase order.

(c) The DSBO director or manager may undertake such inquiries or studies, engage such employees or retain such consultants as may be necessary to assist the director in rendering these determinations.

(Ord. No. 86-14, § 1, 2-18-14)

Sec. 28-141. - Defined procurement pool—Review of bid or proposal responses.

(a) Review of bids or proposals; compliance with requirements. The DSBO director shall review bid or proposals submitted for defined procurement pool opportunities and will notify the purchasing director or department head to regard the submission as responsive to the requirements of this article V if such bid or proposal establishes that the bidder or proposer will perform a commercially useful function on the defined procurement pool contract or purchase order.

(b) Failure to meet requirements. The DSBO director shall notify the purchasing director or department head to regard the submission as nonresponsive to the requirements of this article V if such bid does not establish that the bidder or proposer will perform a commercially useful function on the defined procurement pool contract or purchase order. Such determination that the bid as submitted is nonresponsive shall result in no further consideration by the city of the bid.

(c) Commercially useful function—Informal meeting. In the event the DSBO director finds inadequacies in a bidder or proposer's demonstration of commercially useful function under section 28-140, the DSBO director will provide written notice of such inadequacies to the bidder or proposer. Within two (2) business days from the date that the city notifies the bidder or proposer of such inadequacies, the bidder or proposer may request an informal meeting with the DSBO director. Such informal meeting shall be scheduled by the DSBO director or the director's designee. All deficiencies shall be explained to the bidder or proposer at such informal meeting. Within twenty-four (24) hours after the informal meeting, the bidder or proposer shall be allowed

to submit additional information or to clarify its performance of a commercially useful function. After this informal meeting, the DSBO director will:

- (1) Determine whether the bid will be responsive or nonresponsive;
- (2) Make the notification as stated in subsection (b) above, as applicable; and
- (3) Provide written notice to the bidder or proposer of the DSBO director's final determination.

(Ord. No. 86-14, § 1, 2-18-14)

Sec. 28-142. - SBE bid preference for city contracts and purchase orders for covered goods and covered services from \$50,000.00 to \$250,000.00.

The SBE bid preference invites small businesses to compete for city procurement opportunities for covered goods and covered services. The SBE bid preference will enable the city, through the DSBO, the purchasing division of the department of general services, and other user departments to promote the use of SBEs that are not brokers, packagers, or manufacturer's representatives, in contracts and purchase orders for covered goods and covered services awarded by the purchasing division and user departments pursuant to the Charter, revised Municipal Code, and executive orders of the City and County of Denver. The scope of the preference will be limited to procurement opportunities for covered goods or covered services for which the estimated cost is from fifty thousand [dollars] (\$50,000.00) to two hundred fifty thousand dollars (\$250,000.00). The bidding instructions will require that such sees will self-perform no less than seventy-five (75) percent of the total amount of the contract or purchase order with their own forces.

(Ord. No. 86-14, § 1, 2-18-14)

Sec. 28-143. - SBE bid preferences—Request for bids/invitation for bid.

- (a) An SBE, whose bid is otherwise responsive and responsible, will be given a bid preference on bids equal to ten (10) percent of the total bid price. The bid preference shall be used only to evaluate the bid or bids and shall not affect the contract price.
- (b) At bid opening, the city department or agency managing the bidding procedure will reduce the bids of SBEs by the amount of the bid preference set forth in subsection 28-143(a) in order to establish the apparent low bidder. The adjusted bid price of any SBE bid will then be used to determine the lowest, responsive, qualified bidder based on the bid price submitted.
- (c) "Low tie bids" means low responsible bids from bidders that are identical in amount and that meet all the requirements and criteria set forth in the invitation for bid or request for bid pursuant to this article V. Where an SBE bid preference causes or results in low tie bids from an

SBE and a non-SBE, then the preference will be given to the SBE apparent low bidder. Where an SBE bid preference causes or results in low tie bids from two (2) SBEs, then the purchasing director or department head, in consultation with the DSBO director, will use a fair and reasonable procedure for determining which apparent low SBE bidder receives the preference. The procedure will at a minimum provide for the presence, at the time and place the determination is made, of the bidders or the bidders' representatives and an impartial witness designated by the purchasing director or department head who is not an employee of the purchasing division or user department, as appropriate.

(d) Each invitation for bid or request for bid subject to an SBE bid preference will contain a clause explaining the SBE bid preference. The DSBO director, in consultation with the purchasing director, will provide guidance to user departments to implement, monitor, and enforce the requirements contained in this section.

(Ord. No. 86-14, § 1, 2-18-14)

Sec. 28-144. - SBE bid preferences—SBEs to provide commercially useful function.

(a) An SBE awarded a contract or purchase order through the bid preference will self-perform no less than seventy-five (75) percent of the total amount of the contract or purchase order with its own forces. All SBE contractors, consultants, or vendors listed in a bid, must actually perform a commercially useful function on a contract or purchase order within the area(s) for which they are certified, and must not function as a conduit. The bidding instructions for each such contract or purchase order shall require that all bidders seeking to provide covered goods or covered services under a city contract or purchase order shall provide a commercially useful function on such contract or purchase order.

(b) All expenditures for covered goods or covered services obtained from such an SBE who is also an MBE or WBE manufacturer, supplier, or distributor will be counted toward the annual goal set forth in section 28-124 based upon an analysis by DSBO of the specific duties performed by the MBE or WBE and the extent to which such duties constitute a commercially useful function for each contract or purchase order. All expenditures for covered goods or covered services obtained from an SBE who is not an MBE or WBE manufacturer, supplier, or distributor will be calculated separately by DSBO based upon an analysis of the specific duties performed by the SBE and the extent to which such duties constitute a commercially useful function for each contract or purchase order.

(c) The DSBO director or manager may undertake such inquiries or studies, engage such employees or retain such consultants as may be necessary to assist the director in rendering these determinations.

(Ord. No. 86-14, § 1, 2-18-14)

Sec. 28-145. - SBE bid preferences—Review of bid responses.

- (a) Review of bids; compliance with requirements. Except as permitted herein, the DSBO director shall review bids subject to an SBE bid preference and will notify the purchasing director or user department to regard the submission as responsive to the requirements of this article V if such bid establishes that the bidder will perform a commercially useful function on the contract or purchase order. The DSBO director may delegate this review to the purchasing director for bids solicited by the purchasing division.
- (b) Failure to meet requirements. The DSBO director shall notify the purchasing director or department head to regard the submission as nonresponsive to the requirements of this article V if such bid does not establish that the bidder or proposer will perform a commercially useful function on the contract or purchase order. Such determination that the bid as submitted is non-responsive shall result in no further consideration by the city of the bid.
- (c) Commercially useful function—Informal meeting. In the event the DSBO director finds inadequacies in a bidder's demonstration of commercially useful function under section 28-144, the DSBO director will provide written notice of such inadequacies to the bidder. Within two (2) business days from the date that the city notifies the bidder of such inadequacies, the bidder may request an informal meeting with the DSBO director. Such informal meeting shall be scheduled by the DSBO director or the director's designee. All deficiencies shall be explained to the bidder at such informal meeting. Within twenty-four (24) hours after the informal meeting, the bidder shall be allowed to submit additional information or to clarify its performance of a commercially useful function. After this informal meeting, the DSBO director will:
- (1) Determine whether the bid will be responsive or nonresponsive;
 - (2) Make the notification as stated in subsection (b) above, as applicable; and
 - (3) Provide written notice to the bidder of the DSBO director's final determination.

Sec. 28-146. - SBE defined procurement pool/bid preference—Compliance by SBEs required throughout performance of city contract or purchase order.

- (a) Upon award of a city contract or city purchase order, compliance with the commercially useful function requirement and other performance requirements required under this article V by the SBE becomes a covenant of performance by the SBE vendor, contractor or consultant in favor of the city. It shall be an ongoing, affirmative obligation of the SBE on such contract or purchase order to perform all requirements, including, but not limited to, the provision of a commercially useful function, for the duration of the city contract or purchase order, unless the city initiates a material alteration to the goods to be provided or services to be performed affecting the SBE's performance of a commercially useful function on the contract or purchase order through a written amendment.

(b) The DSBO shall review all contracts and purchase orders to determine compliance by SBEs with the provisions contained in sections 28-138 through 28-150. The review shall include, but not be limited to:

(1) An examination of the goods provided, work performed, industry practice, and other relevant factors to determine whether the commercially useful function on the contract or purchase order has been maintained over the term or duration of the contract or purchase order; and

(2) A determination of whether the SBE has performed its other contract performance obligations over the term or duration of the contract or purchase order.

The purchasing division or user department, as appropriate, will provide bid documentation for each specific procurement opportunity to the DSBO director within three (3) business days after bid opening.

(c) All participation by SBEs who are also MBEs or WBEs will be credited toward the annual goal based upon an analysis by DSBO of the specific duties performed by the MBE or WBE and the extent to which such duties constitute a commercially useful function for each contract or purchase order. SBE participation on contracts or purchase orders that does not include utilization of or by MBEs or WBEs shall be calculated separately by DSBO based upon an analysis of the specific duties performed by the SBE and the extent to which such duties constitute a commercially useful function for each contract or purchase order. The DSBO director or manager may undertake such inquiries or studies, engage such employees or retain such consultants as may be necessary to assist the director in rendering these determinations.

(Ord. No. 86-14, § 1, 2-18-14)

Sec. 28-147. - Defined procurement pool/SBE bid preference—Amendments and modifications.

(a) User departments will have a continuing obligation to immediately inform the DSBO in writing of any agreed upon increase or decrease to the dollar value of a contract or purchase order, as appropriate, whether by amendment or any other modification to the contract or purchase order regardless of whether such increase or decrease concerning the covered goods or covered services to be provided has been reduced to writing at the time of notification.

(b) The SBE shall provide a commercially useful function as respects the changed goods or services by providing such goods or services itself, by retaining additional SBEs listed in the most current DSBO certification list for the additional covered goods or covered services to be acquired, or showing each element of modified good faith set out in subsection 28-148(c). The SBE shall supply to the DSBO director all documentation establishing the revised dollar value of the contract or purchase order as well as the SBE's maintenance of the commercially useful function requirement.

(Ord. No. 86-14, § 1, 2-18-14)

Sec. 28-148. - Defined procurement pool/SBE bid preference—Potential violations during contract performance.

(a) An SBE that has been awarded a city contract or purchase order through the defined procurement pool or a bid preference shall not, at any time before or during the performance of such contract or purchase order:

(1) Fail to in fact self-perform, as a certified vendor, contractor, or consultant, no less than seventy-five (75) percent of the total amount of the contract or purchase order for covered goods or covered services with its own forces as originally listed at bid or proposal opening, as appropriate; or

(2) Modify or eliminate all or a portion of the covered goods or covered services to be provided and attributable to the certified vendor, contractor, or consultant, unless directed by the city in writing.

(b) Any action by an SBE in violation of subsections (a)(1) or (2) hereof, shall constitute a material breach of the contract or purchase order that shall entitle the city to exercise all of its rights at law or equity for such material breach, in addition to exercising any of the other sanctions set out in section 28-150 below. If, following award of a contract or purchase order, an SBE has its certification terminated for reasons other than expiration or graduation from certification, such termination of certification shall not be deemed to affect compliance with the contract or purchase order and shall not be deemed a breach of the contract or purchase order as long as the vendor, contractor or consultant can demonstrate that such termination or failure did not result from any action or inaction, whether direct or indirect, of or by the vendor, contractor or consultant.

(c) The following modified good faith requirements shall apply to sections 28-146 and 28-147. In the event that additional covered goods or covered services are added to an on-going contract or purchase order and the SBE in such event is in noncompliance with either the requirement to self-perform no less than seventy-five (75) percent of the total amount of the contract or purchase order with its own forces or to perform a commercially useful function for the provision of the additional covered goods or covered services, the following modified good faith efforts must be completed. Failure of a vendor, contractor or consultant to show good faith efforts as to any one (1) of the following categories shall render its overall good faith efforts showing insufficient; and its contract performance in noncompliance with this article V:

(1) Verification that the vendor, contractor or consultant used the most current SBE directory from the DSBO in order to contact SBEs that are certified in the identified covered goods or covered services area(s) at the time of the modified good faith effort.

(2) Verification of efforts to contact appropriate SBEs within the same identified covered goods or covered services area must be documented. The DSBO director may verify such contacts as he or she deems appropriate.

(3) Documentation of the modified good faith efforts must be submitted to the DSBO prior to the payment to the vendor, contractor or consultant of the next progress or other partial payment or fund release under the contract or purchase order.

(Ord. No. 86-14, § 1, 2-18-14)

Sec. 28-149. - Defined procurement pool/SBE bid preference—Burden of proof; investigations of compliance.

Any business enterprise affected by the operation of sections 28-138 through 28-150, shall have the burden of proving its compliance with the requirements and obligations herein. The DSBO is empowered to receive and investigate complaints and allegations by SBEs, third parties, or city personnel, or to initiate its own investigations regarding compliance with the requirements and obligations of this article V. If the DSBO determines in its sole discretion that an investigation is warranted, upon written notice of such investigation the affected party shall be obligated to cooperate fully with the investigation and shall have a continuing burden of providing complete, truthful information to the DSBO director and of otherwise proving compliance with the requirements and obligations of this article V.

(Ord. No. 86-14, § 1, 2-18-14)

Sec. 28-150. - Defined procurement pool/SBE bid preference—Sanctions for failure to comply with bid preference requirements.

(a) If a vendor, contractor, or consultant is found to be in violation of the provisions of article V, to otherwise be in breach of a contract or purchase order, to perform a non-commercially useful function or act as a conduit, to fail to submit information required under this article V, to submit false, misleading, or materially incomplete statements, documentation, or records, or to fail to cooperate in an investigation, it shall be subject to sanctions. The city may exercise any or all of its rights, including withholding funds, imposition of monetary penalty, suspension, or termination, contained in the contract or purchase order terms and conditions. If the contract or purchase order is suspended or terminated, the city reserves all its rights at law or equity.

(b) If the DSBO director determines, in his or her sole discretion, that an SBE is in noncompliance with the defined procurement pool or bid preference requirements contained in sections 28-138 through 28-150, the SBE may be assessed a civil, remedial penalty of not more than one hundred fifty (150) percent of the contract or purchase order. In assessing such civil penalty:

(1) The DSBO director shall calculate the applicable amount of civil penalty and may reduce or waive all or part of such penalty, in his or her sole discretion, in consideration of the following factors:

- a. The length of the period of noncompliance;
- b. The history of previous noncompliance with this article V;
- c. The monetary impact of the civil penalty on the SBE vendor, contractor, or consultant in correcting such noncompliance; or
- d. The other facts and circumstances relevant to the noncompliance of the SBE vendor, contractor, or consultant.

(2) The DSBO director shall collect assessed and unpaid civil penalties under this subsection by action initiated in the state district court for collection of such penalty. A stay of any order of the DSBO director pending judicial review shall not relieve any SBE vendor, contractor, or consultant from any civil penalty obligation imposed under this subsection.

(3) Any such assessed civil penalties may also be offset against any amount otherwise due and owing to the SBE vendor, contractor, or consultant on the contract or purchase order.

(4) The contract or purchase order may be suspended or terminated with the city reserving all its rights at law or equity.

(5) The debarment board established under section 20-77 of this Code, upon request of the DSBO director, may suspend or debar the vendor, contractor, or consultant from participation in city contracting covered hereunder for a period as may be determined by the debarment board, in its sole discretion, based upon the grounds of violating this article V, pursuant to such suspension and debarment procedures as may be established by the city, as set forth in section 20-77. The DSBO director, in that event, shall regard as nonresponsive any bid or proposal received during this time period that includes the vendor, contractor, or consultant as a vendor, contractor, consultant, subcontractor, subconsultant, supplier, manufacturer, or distributor.

(6) If a vendor, contractor, consultant, or other business enterprise knowingly receives new or additional work as a result of actions set out in this section, then the penalties in this section may be applied to such business enterprise.

(7) The DSBO may suspend or revoke an offending SSE's eligibility for certification, as an SBE, may suspend its participation in a city contract or purchase order from the calculation of annual goals, and, subject to other city law, may suspend or debar the SBE from participating in future city contract's, based upon the SSE's acting as a conduit, failing to comply with the

provisions of article V, failing to perform a commercially useful function on a contract or purchase order, failing to submit information as required by section 28-147, or submitting false, misleading, or materially incomplete statements, documentation, or records, or failing to cooperate in investigations.

(c) The DSBO director may, in his or her sole discretion, impose any one (1) or more of the sanctions set out in this section against any vendor, contractor, or consultant determined to be in violation of the section, provided that the director shall first advise the affected department head of the proposed sanction in writing. If the department head advises the DSBO director in writing that the department head believes that imposition of such sanction would not be in the best interests of the city, the DSSO director shall consult with the department head prior to making a final decision as to whether to impose such sanctions.

(d) Suspected criminal violations shall be referred to the proper authorities for prosecution. If a conviction or a guilty plea is obtained pursuant to such prosecution, the perpetrator may be barred from contracting with the city to the extent authorized by law.

(Ord. No. 86-14, § 1, 2-18-14)

Sec. 28-151. - Procurement opportunities for contracts/purchase orders through independent partnerships.

(a) For all purchases of covered goods or covered services that are not included in the goal, bid preference, or defined procurement pool programs contained in this article V, the purchasing division or user department, as appropriate, will include a clause in the solicitation encouraging, but not requiring, participation by and independent partnerships with SBEs, MBEs, WBEs, and other business enterprises in supply chain activities, prime/subcontractor arrangements including partnerships, and joint ventures on city contracts and purchase orders. The purchasing division or user department will not, in encouraging participation by and independent partnerships with SBEs, MBEs, WBEs, and other business enterprises, require or compel a specific outcome in favor of an MBE or WBE. The purchasing division or user department will not score responses or lack of responses to the solicitation clause for contract or purchase order award purposes.

(b) Voluntary disclosures of such independent partnerships to the city, if any, by the vendor awarded the contract or purchase order, will be forwarded by the purchasing division or user department to the DSBO for review. If such review reveals participation of or performance by an SBE who is also an MBE or WBE, then such participation or performance will be credited toward the annual goal based upon an analysis of the specific duties performed by the MBE or WBE and the extent to which such duties constitute a commercially useful function for each contract or purchase order. If the city's review reveals participation of or performance by an SBE who is not an MBE or WBE, then such participation or performance will be calculated separately, based upon an analysis of the specific duties performed by SBE and the extent to which such duties constitute a commercially useful function for each contract or purchase order. The DSBO director or the manager may undertake such inquiries or studies, engage such

employees or retain such consultants as may be necessary to assist the DSBO director in rendering these determinations.

(Ord. No. 86-14, § 1, 2-18-14)

Sec. 28-152. - State or federal law and other guidelines.

In making any findings required herein, the DSBO director may incorporate by reference rules, procedures and powers of C.R.S. § 24-4-101 et seq. as they may exist on the date of enactment of this article V or as they may hereinafter be amended. In making any findings required herein, or in aid of definition or interpretation of any term or phrase herein, the DSBO director may utilize as a guide, insofar as they are consistent with the purposes of this article V, provisions of federal law, including without limitation the provisions of 49 Code of Federal Regulations and 13 Code of Federal Regulations, or successor regulations, as they exist on the date of enactment of this article V or as they may hereafter be amended.

(Ord. No. 86-14, § 1, 2-18-14)

Sec. 28-153. - Quarterly reports.

The DSBO director shall prepare written reports four (4) times each year which shall describe progress in meeting the annual goals set out in section 28-124, as well as progress under defined procurement pool, bid preference, and independent partnerships as applied to city contracts and purchase orders for covered goods and covered services under this article V. Copies of quarterly reports shall be provided to the manager, purchasing director, affected department heads, city council, and the mayor according to the following schedule:

Period Covered	Date Due
January 1—March 31	June 1
April 1—June 30	September 1
July 1—September 30	December 1
October 1—December 31	March 1

In addition, the quarterly report shall describe the implementation of this article V and provide an evaluation of individual contracts and purchase orders, including all change orders, amendments, and modifications awarded for covered goods and covered services through the procurement goal, defined procurement pool, bid preference, and independent partnerships provisions of this article V.

In calculating MBE/WBE participation under this article V, all funds paid to such firms on city contracts and purchase orders for covered goods and covered services during the year shall be counted independent of whether or not such funds were (1) used to accomplish procurement goal applicable at the time of bid opening or other proposal receipt; or (2) used to compensate SBEs who are MBEs or WBES for the performance of a commercially useful function under an independent partnership, defined procurement pool, or bid preference contract or purchase order.

(Ord. No. 86-14, § 1, 2-18-14)

Sec. 28-154. - Annual report.

(a) MWBE utilization. If the annual goal in section 28-124 is not met in any year, then by March 1 of the following year, the DSBO director shall submit to the mayor, city council, manager, purchasing director, and affected department heads a report comparing MBE/WBE utilization achieved in the year to the aspirational annual goal through the procurement goals, defined procurement pool, bid preferences, and independent partnerships, stating the reasons why the goal was not met, substantiating any waivers for procurement goals granted under section 28-124, and advising and making recommendations as to continuing or further efforts that the city should make in remedying discrimination and its effects in contracting for covered goods and covered services, and recommending what should be done to assist in meeting such goal in the future.

(b) SBE utilization. The DSBO director will submit to the mayor, city council, manager, purchasing director, and affected department heads a report that does the following:

(1) Describe utilization levels achieved for SBEs in the preceding year through the defined procurement pool, bid preferences; and independent partnerships;

(2) Make recommendations as to further efforts that the city should make to assist in the development and utilization of such firms in the acquisition of covered goods and covered services; and

(3) Recommending what should be done to assist in achieving such participation by SBEs in the future.

(Ord. No. 86-14, § 1, 2-18-14)

Sec. 28-155. - Rules and regulations; informal guidelines.

The DSBO director shall have the power and authority to adopt rules and regulations or informal guidelines to effectuate the purpose, procedures, and operations of this article V. The manager and department heads shall each have the power and authority to adopt policies, procedures, or informal guidelines consistent with DSBO rules to effectuate the purpose, procedures, and operations of this article V.

(Ord. No. 86-14, § 1, 2-18-14)

Sec. 28-156. - Severability.

If any provision of this article V or its application is held invalid or unenforceable, such invalidity or unenforceability shall not affect other provisions or applications of this article V which can be given effect without the invalid provisions or applications, and the remaining provisions are to be severable and shall remain in full force and effect.

(Ord. No. 86-14, § 1, 2-18-14)

Sec. 28-157. - Effective date of article.

This article V shall become effective on April 1, 2014, and shall apply to all contracts and purchase orders within the scope of the article for which bids or proposals are made available for bidding or competitive selection on or after April 1, 2014.

(Ord. No. 86-14, § 1, 2-18-14)

Sec. 28-158. - Review and sunset.

(a) This article V shall be reviewed by the mayor, manager, purchasing director, and DSBO director on the third anniversary of its enactment, in order to determine whether adjustments or revisions to article V or additional studies or inquiries in furtherance of article V are deemed appropriate and should be undertaken or recommended to further and maintain the purpose and intent of article V.

(b) This article V shall be repealed effective April 1, 2019.

(Ord. No. 86-14, § 1, 2-18-14) Secs. 28-159—28-199. - Reserved.

