

## Rules and Regs – Construction and Prof Services

CITY AND COUNTY OF DENVER

Office of Economic Development Division of Small Business Opportunity

RULES AND REGULATIONS FOR THE INTERPRETATION, ADMINISTRATION AND ENFORCEMENT OF DIVISION I, ARTICLE III OF CHAPTER 28, D.R.M.C., DIVISION 3, ARTICLE III OF CHAPTER 28, D.R.M.C. (REFERRED TO HEREIN AS THE "MBE/WBE ORDINANCE") AND ARTICLE VII OF CHAPTER 28, D.R.M.C. (REFERRED TO HEREIN AS THE "SBE/EBE ORDINANCE").

Division of Small Business Opportunity

Rules and Regulations for Interpretation, Administration and Enforcement of Divisions 1 and 3, Article III of Chapter 28, D.R.M.C. and Article VII of Chapter 28, D.R.M.C.

### RULE I. SCOPE OF RULE

These Rules are promulgated for the purposes of interpretation, administration and enforcement of Division 1, Article III of Chapter 28, D.R.M.C., Division 3, Article III of Chapter 28,

D.R.M.C. (referred to herein as the "MBE/WBE Ordinance") and Article VII of Chapter 28,

D.R.M.C. (referred to herein as the "SBE/EBE Ordinance"). The rules and regulations governing Division 1 of Article III of Chapter 28, D.R.M.C., Division 3 of Article III of Chapter 28,

D.R.M.C. and Article VII of Chapter 28, D.R.M.C. previously adopted by DSBO are hereby repealed and replaced by these rules and regulations.

### RULE II. SCOPE OF ADMINISTRATIVE REVIEW

A. ADMINISTRATIVE RECONSIDERATION OF CERTIFICATION DECISIONS AND DETERMINATIONS OF NONRESPONSIVENESS TO REQUESTS FOR BIDS OR PROPOSALS. (DIVISION 1, ARTICLE III OF CHAPTER 28, D.R.M.C.)

1. When the DSBO denies a request to be certified or to renew certification or finds that a bid or proposal is not responsive, it shall provide the business enterprise a written explanation of the reasons and the basis for the denial or finding of non-responsiveness.

2. In the event of either a denial or non-responsive finding under Rule II above, for a non-responsive bid or proposal the business enterprise shall have two (2) business days from receipt of the finding within which to request in writing an administrative reconsideration, for a denial of certification the business enterprises shall have thirty (30) days from receipt.

3. At the administrative reconsideration, the business enterprise may provide written documentation or oral argument in support of its reconsideration request. The business enterprise seeking certification, or demonstrating that it has met or made good faith efforts to meet project goals and is responsive to the MBE/WBE and SBE requirements of a request for bids or proposals, has the burden of demonstrating, by a preponderance of the evidence, that it meets the requirements of Denver's MBE/WBE and SBE/EBE Ordinances. The Division of Small Business Opportunity (DSBO) will consider all of the facts in the record viewed as a whole and determine whether business enterprises have met their burden by a preponderance of the evidence.

4. Upon completion of the administrative reconsideration, the DSBO will send the business enterprise a written reconsideration decision. The decision on certification reconsideration shall constitute a final decision, and the business entity may request a D.R.M.C. Sec 28-33 hearing.

5. City Departments shall stay the effect of DSBO certification decisions and determinations of nonresponsiveness only until the date of DSBO's final decision on reconsideration.

**B. ADMINISTRATIVE HEARINGS REGARDING CERTIFICATION DECISIONS AND DETERMINATIONS OF NONRESPONSIVENESS TO REQUESTS FOR BIDS OR PROPOSALS. (DIVISION 1, ARTICLE III OF CHAPTER 28, D.R.M.C.)**

1. Administrative Hearings under D.R.M.C. Section 28-33 will be conducted in accordance with the Rules and Regulations Governing Hearings before the Director of the Mayor's Office of Contract Compliance (promulgated on October 21, 1993), except to the extent there is a conflict between these Rules and the 1993 Rules in which case these Rules shall control.

2. The petition for appeal must be delivered to the Director no later than thirty (30) days after the date of the determination of nonresponsiveness or denial of certification. Compliance with the provisions of D.R.M.C. Section 28-33 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. Nothing in these Rules, the 1993 Rules or D.R.M.C. Section 28-33 shall be construed to create a right of standing that does not otherwise exist under Colorado law.

**D.R.M.C. Section 28-33(a).**

3. 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.

**D.R.M.C. Section 28-33(b).**

4. The petition for appeal 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.

5. 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.R.M.C. Section 28-33(c).** Pending the conclusion of the D.R.M.C. Section 28-33 hearing and the hearing officer's (the "Hearing Officer") decision in the matter, the decision of the DSBO remains in effect. The Hearing Officer shall not stay the effect of the decision while he or she is considering an appeal.

6. Upon receipt of an appeal, the Hearing Officer will request a copy of the DSBO's administrative record in the matter, which must be provided by the DSBO within ten (10)

business days of the Hearing Officer's request. The Hearing Officer may extend this time period on the basis of a showing of good cause. The record shall be well organized, indexed and paginated.

7. SCOPE OF ADMINISTRATIVE HEARING.

a. The Hearing Officer’s decision shall be made based solely on the administrative record. The Hearing Officer does not make a de novo review of the matter but may accept briefs with written arguments and allow oral argument by the parties.

b. The Hearing Officer will affirm the decision of the DSBO unless the Hearing Officer determines, based on the entire administrative record, that the decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of the applicable ordinances or regulations of the DSBO. The Hearing Officer is not required to reverse a decision if the Hearing Officer determines that a procedural error did not result in fundamental unfairness to the appellant or substantially prejudice the opportunity of the appellant to present its case.

c. If the Hearing Officer determines, after reviewing the entire administrative record, that the DSBO’s decision was unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of applicable ordinances or regulations, the Hearing Officer may reverse the DSBO’s decision and direct the DSBO to find the bid or proposal responsive or the business enterprise eligible for certification.

d. If it appears that the record is incomplete or unclear with respect to matters likely to have a significant impact on the outcome of the case, the Hearing Officer may remand the record to the DSBO with instructions seeking clarification or augmentation of the record before making a finding. The Hearing Officer may also remand a case for further proceedings consistent with the Hearing Officer’s instructions concerning the proper application of applicable ordinances or regulations.

e. The Hearing Officer shall not uphold the DSBO’s decision based on grounds not specified in the DSBO’s written decision.

f. The Hearing Officer will provide written notice of its decision to the business enterprise requesting an administrative review hearing. The notice shall include the reasons for the Hearing Officer’s decision, including specific references to the evidence in the record that supports each reason for the decision.

g. The DSBO will take the action directed by the Hearing Officer’s decision immediately upon receiving written notice of it.

h. The DSBO’s policy is that the Hearing Officer shall make his or her decision within sixty (60) calendar days of receiving the complete administrative record. If the Hearing Officer does not make a decision within this period, the Hearing Officer

shall provide written notice to concerned parties, including a statement of the reason for the delay and a date by which the appeal decision will be made.

C. ADMINISTRATIVE REVIEW OF ALL OTHER DECISIONS OF THE DIVISION OF SMALL BUSINESS OPPORTUNITY.

Review of all other matters reviewed under D.R.M.C. §28-33 shall allow for de novo review by the Hearing Officer of the facts and circumstances upon which the DSBO’s decision was based.

RULE III. DEFINITIONS

Certain terms utilized in the administration, enforcement, and interpretation of both Divisions 1 and 3 of Article III of Chapter 28, D.R.M.C. and in Article VII of Chapter 28, D.R.M.C. are defined in this Rule. The definitions of certain terms defined in D.R.M.C. §28-54 and D.R.M.C.

§28-204 are supplemented in this Rule. All definitions contained in D.R.M.C. §28-54 and D.R.M.C. §28-204 are incorporated herein by reference.

**A. MBE/WBE ORDINANCE DEFINITIONS (supplementing D.R.M.C. §28-54)**

1. Conducting business; attempting to conduct business; sustained business activity: all mean that the Applicant Business Enterprise is actively soliciting business in the construction or design industry in the trade or profession for which certification is sought, by submitting responsive bids, qualifications, or proposals, as applicable, for work on identified projects of which the Applicant Business Enterprise is notified or otherwise becomes aware.

2. DSBO website: means the posting location for various documents referenced in these Rules and Regulations. Current website address is [www.denvergov.org/dsbo](http://www.denvergov.org/dsbo).

3. General Construction Goals Committee: means the goals committee established pursuant to D.R.M.C. §28-59 to recommend project goals to the Director for City construction, reconstruction, remodeling, and construction management contracts relating to general construction, including but not limited to structures and buildings.

4. Heavy Highway Construction Goals Committee: means the goals committee established pursuant to D.R.M.C. §28-59 to recommend project goals to the Director for City construction, reconstruction, and remodeling contracts relating to highway and related heavy road construction or reconstruction.

5. Professional Design and Construction Services Goals Committee: means the goals committee established pursuant to D.R.M.C. §28-59 to recommend project goals to the Director for City professional design and construction services contracts, excluding construction management.

**B. SBE/EBE ORDINANCE DEFINITIONS (supplementing D.R.M.C. §28-204).**

1. Conducting business; attempting to conduct business; sustained business activity: all mean that the Applicant Business Enterprise is actively soliciting business in the construction or design industry in the trade or profession for which certification is sought, by submitting responsive bids or proposals, as applicable, for work on identified projects of which the Applicant Business Enterprise is notified or otherwise becomes aware.

2. DSBO website: means the posting location for various documents referenced in these Rules and Regulations. Current website address is [www.denvergov.org/dsbo](http://www.denvergov.org/dsbo).

3. Commercially Useful Function: If an SBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force, or the SBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, it is presumed that it is not performing a commercially useful function. When an SBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward SBE goals only if the SBE's subcontractor is itself an SBE. Work that an SBE subcontracts to a non-SBE firm does not count toward SBE goals.

RULE IV. CERTIFICATION, RENEWAL OF CERTIFICATION, DECERTIFICATION, AND GRADUATION OF MBE/WBEs AND SBE/EBEs. (APPLICABLE TO BOTH MBE/WBE AND SBE/EBE ORDINANCES).

A. CERTIFICATION, RENEWAL OF CERTIFICATION, DECERTIFICATION, AND GRADUATION OF MBE/WBEs.

1. An Applicant Business Enterprise seeking to be certified or recertified as a MBE/WBE shall apply online on the DSBO website. The DSBO shall (i) develop such forms, affidavits, and other documentation as the Director deems appropriate for such certification procedure; (ii) determine what information shall be required from the Applicant Business Enterprise or others as the Director deems appropriate for such procedure; and (iii) determine what reviews, examinations, and site visits the Applicant Business Enterprise shall submit to as the Director deems appropriate for such procedure.

2. Such Applicant Business Enterprise shall complete all documentation for certification developed by the DSBO, provide all information required by the DSBO, and cooperate with the DSBO in all reviews, examinations, and site visits required by the DSBO.

3. Formation of the Applicant Business Enterprise as required for certification shall presumptively be the date filed with the Secretary of State

4. An Applicant Business Enterprise seeking to be certified as a MBE/WBE shall provide adequate evidence, by execution of such forms and/or affidavit(s) as may be developed and promulgated by the Director, as follows:

a. If the Applicant Business Enterprise is owned and controlled by person(s) rebuttably presumed to be Socially Disadvantaged under D.R.M.C. §28-55(c)(6)(a), the Applicant Business Enterprise must demonstrate by affidavit that, while owned, managed, and controlled by minority or woman owners, as applicable:

(i) it conducted business or attempted to conduct business within the City's Marketplace, the State of Colorado, during the period prior to April 1, 2014; and

(ii) it conducted sustained business activity in the trade or profession described in the certification application for a minimum of six (6) months prior to the date of application.

b. If the Applicant Business Enterprise is owned and controlled by person(s) seeking to be certified under D.R.M.C. §28-55(c)(6)(a), and did not conduct business or attempt to conduct business within the City's Marketplace, the State of Colorado, during the period prior to April 1, 2014, the Applicant Business Enterprise must demonstrate by affidavit that, while owned, managed, and controlled by such minority owners:

(i) it conducted sustained business activity in the trade or profession described in the certification application for a minimum of six (6) months prior to the date of application; and

(ii) the individual(s) owning, managing and controlling the Applicant Business Enterprise 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 and within the City's marketplace.

5. A minority individual or woman owning and controlling an Applicant Business Enterprise shall supply information in a format prescribed by the Director in order to determine whether such individual or woman is Economically Disadvantaged.

6. Anyone seeking to mount a third-party challenge pursuant to D.R.M.C. §28-57 shall apply to the Director. The Director shall develop and promulgate forms and/or affidavits for the documentation and presentation of such challenges. Any such third-party challenger shall execute all documentation required by the Director.

**B. CERTIFICATION, RENEWAL OF CERTIFICATION, DECERTIFICATION, AND GRADUATION OF SBES AND EBES.**

1. An Applicant Business Enterprise seeking to be certified or recertified as an SBE or an EBE shall apply online on the DSBO website. The DSBO shall (i) develop such forms, affidavits, and other documentation as the Director deems appropriate for such certification procedure; (ii) determine what information shall be required from the Applicant Business

Enterprise or others as the Director deems appropriate for such procedure, and (iii) determine what reviews, examinations, and site visits the Applicant Business Enterprise shall submit to as the Director deems appropriate for such procedure.

2. Such Applicant Business Enterprise shall complete all documentation for certification developed by the DSBO, provide all information required by the DSBO, and cooperate with the DSBO in all reviews, examinations and site visits required by the DSBO.

3. Formation of the Applicant Business Enterprise as required for certification shall presumptively be the date filed with the Secretary of State.

4. An individual owning and controlling an Applicant Business Enterprise shall supply information in a format prescribed by the Director in order to determine whether such individual is Economically Disadvantaged.

5. In DSBO review of ownership criteria pursuant to D.R.M.C. §28-205(c)(4), Personal net worth shall be the amount of personal net worth described in D.R.M.C. §28- 204(30).

**RULE V. ESTABLISHMENT OF PROJECT GOALS (MBE/WBE ORDINANCE ONLY).**

**A. PROJECT GOALS:**

The Director shall consider all relevant and material information provided to the DSBO to set the project goals, consistent with the methodology set out in D.R.M.C. §28-59(a) and (b), including input from the Goal Committees. For on-call contracts that are for multiple trades or categories of service, the Director shall determine in consultation with the Department Head, whether project goals shall be set on an overall contract basis or task / work order basis, taking into consideration all relevant and material information including but not limited to the size of the contract, the scope(s) of work, the size and number of task / work orders. For task / work orders that are less than Four Hundred Thousand Dollars (\$400,000), project goals shall be set by the Director or by the Goals Committee, at the Director's discretion.

**B. GOALS COMMITTEE:**

The purpose of the following subsection of this Rule is to establish guidelines for the composition, appointments, committee operations, procedures, and goal-setting methodology for the Goal Committee established under D.R.M.C. §28-59, Project Goals.

1. COMPOSITION.

a. Each Committee shall consist of nine (9) members. Alternates may be used upon prior written approval of the Director.

b. The General Construction Goal Committee shall consist of: (i) three (3) members from the non-MBE/WBE construction industry; (ii) three (3) members from among certified MBEs; and (iii) three (3) members from among certified WBEs. Each member must be directly engaged in general construction, reconstruction, remodeling, and/or construction management contracts of the type encompassed within Article III, Division 3 of Chapter 28 D.R.M.C. relating to general construction, including but not limited to structures and buildings, or an industry expert or representative approved by the Director.

c. The Heavy Highway Construction Goal Committee shall consist of: (i) three (3) members from the non-MBE/WBE construction industry; (ii) three (3) members from among certified MBEs; and (iii) three (3) members from among certified WBEs. Each member must be directly engaged in heavy highway construction, reconstruction, and/or remodeling contracts of the type encompassed within Article III, Division 3 of Chapter 28, D.R.M.C. relating to highway and related heavy road construction or reconstruction, or an industry expert or representative approved by the Director.

.d. The Professional Design and Construction Service Goal Committee membership shall consist of: (i) three (3) non-MBE/WBE professional design engineers and/or architects; (ii) three (3) certified MBEs in such design industries; and (iii) three

(3) certified WBEs in such design industries. Each member must be directly engaged in professional engineering, design, architecture, and/or professional consulting services of the type encompassed within Article III, Division 3 of Chapter 28, D.R.M.C. or an industry expert or representative approved by the Director.

.e. Quorum for each Goal Committee to meet and transact business under these rules shall be five (5). If there is not a quorum the averaged recommendation of the participating committee members will be presented to the director OR the Director may set the goal(s). MBE/WBEs and non-MBE/WBE members shall be represented in each quorum to the extent possible. At the discretion of the Director, meetings of each Goal Committee may be conducted in person or by conference call, and unless the context indicates otherwise, references to “meetings” shall mean face to face meetings or meetings via conference call. Conference call meetings shall originate from the room where the scheduled face to face meeting would have taken place.

f. The Director shall determine the assignment of projects to the appropriate Goal Committee.

2. TERMS. Members shall be appointed for one (1), two (2), and three (3) year terms. Terms may be assigned or drawn by lot, as determined by the Director in his or her sole discretion. Reappointment shall be at the sole discretion of the Director.

3. APPOINTMENTS.

a. Those members who are MBE/WBEs must be affiliated with MBE/WBEs currently certified by the City as Minority and/or Women Business Enterprises, and such members will be required to maintain such certification status while serving on any of the Goal Committees. Committee members representing non-MBE/WBE business enterprises on all Goal Committees will be selected from non-MBE/WBE business enterprises that have previously or are currently performing work for the City.

b. At his or her sole discretion, the Director will appoint all members of all Goal Committees.

#### 4. ATTENDANCE.

Any member absent for whatever reason from three (3) meetings in any given six (6) month period will automatically be terminated from his/her Goal Committee. A representative of the DSBO will chair each meeting. Meetings shall be held face to face if three (3) members desire and communicate such preference in writing to the other members a minimum of five (5) business days in advance of the subject meeting.

#### 5. MEETING DATES.

Meetings may be held at a central location or may be conducted via conference call at the Director's discretion. Scheduled meetings shall be in a designated Conference Room in the Wellington E. Webb Municipal Office Building, 201 W. Colfax Avenue, Denver, Colorado. Time and locations may be changed by prior posting on the DSBO website. All notifications or changes shall also be posted on the DSBO website and emailed to interested parties known to the City.

a. The General Construction Goal Committee will meet every second (2nd) and fourth (4th) Tuesday of each month at 1:30 p.m.

b. The Heavy Highway Goal Committee will meet on the first (1st) and third (3rd) Wednesday of each month at 9:00 a.m.

c. The Professional Design and Construction Service Goal Committee will meet every first (1st) and third (3rd) Tuesday of each month at 1:30 p.m.

#### 6. COMMITTEE OPERATIONS, PROCEDURES, AND GOAL RECOMMENDATION.

a. City Departments proposing projects to the Goal Committees will prepare a scope of work. Proposed projects for review at a Goal Committee meeting must be submitted to the DSBO by the appropriate City Department prior to such Goal Committee meeting. Project presentation and goal justification will be made by the City Department proposing the project. The Project presentation will also include information on any similarly-scoped project previously submitted to that Goal Committee, as well as the Project Goal, if any, recommended by such Goal Committee and set by the Director.

Project information is submitted to DSBO on a "Goal Committee Information Form." Project information must be received by DSBO no later than ten (10) business days prior to Goal Committee meetings (time limit may be shortened at the sole discretion of the Director). Project information received after the deadline will be scheduled for the next Goal Committee meeting.

b. Project information received by DSBO shall be e-mailed to the appropriate Goal Committee members forty-eight (48) hours prior to the Goal Committee meeting (time limit may be shortened at the sole discretion of the Director). DSBO prepares project information based on the "description of work" and other appropriate factors for Goal Committee's consideration.

- c. Project sponsor (Public Works, user agency, or design consultant official or their representative) is responsible for attending or participating in Goal Committee meetings and presenting project(s) to the Goal Committees.
- d. DSBO staff will be responsible for advising Goal Committee members of meeting dates and cancellation of such meetings if there is no business to be conducted or if no quorum is available. Cancellation of meetings will be announced by notices posted on the DSBO website and e-mailed to interested persons known to the City.
- e. In rendering advice as to a goal for each project, the Goal Committees shall consider but shall not be limited to data regarding availability and capacity of types of MBE/WBEs doing business in the City with respect to the substantive trade, material, or professional requirements of each individual project contract under consideration. This data will be presented in the context of a “description of work” for each individual project under consideration. The Goal Committees will then render recommendations based on such information and their own practical awareness of MBE/WBE availability and capacity for such description of work for the particular project.
- f. The Goal Committees in arriving at the appropriate recommended level of goal(s) for the project shall consider all relevant information, including but not limited to the following:
- (i) The reasonably known availability and capacity of MBE/WBEs in specific industry groupings that are associated with individual projects, utilizing directories of certified MBE/WBEs prepared in compliance with law, the City’s Disparity Study, and the DSBO’s reports on MBE/WBEs having contracts with the City.
  - (ii) The City’s Disparity Study methodology, or related methodology, of utilizing a floor/ceiling concept for recommending project goals.
  - (iii) The members’ practical knowledge of the industry, including but not limited to practical awareness of MBE/WBE availability and capacity pertaining to the particular project.
  - (iv) Other resources available to the DSBO or other studies undertaken by the City relating to availability and capacity.
- g. The DSBO will maintain Goal Committee records; record the meeting or conference call; prepare and provide agenda and meeting notices; schedule space for meetings; schedule conference calls; and prepare and submit Goal Committee advice and recommendations to the Director.
- h. Meetings will be conducted in accordance with Robert’s Rules of Order; however, the provisions of these Rules and Regulations shall control over any contained in Robert’s Rules of Order. All meetings shall be open to the general public.
- i. All Goal Committee recommendations are presented to the Director.
- j. All actions resulting in a tie vote will be referred to the Director for final resolution.
- k. All recommendations to the Director must indicate the Goal Committee members participating in such recommendations and will be posted for a minimum of forty-eight (48) hours on the DSBO website. Comments on proposed goals are addressed to the Director.

l. After the posting of the recommended project goals, the Director shall determine what the final project goals shall be. DSBO will advise the project sponsor of the project goal. The project sponsor is responsible for incorporating the final project goals in the bid or proposal solicitation, contract documents, and specifications.

m. Final decisions by the Director as to project goals will be included in all bid or proposal invitations for such project.

n. The City agency initiating the bid or proposal shall transmit a copy of the project bid solicitation or request for proposals to the DSBO when it is published.

7. **FEDERAL REQUIREMENTS.** In addition, the Goal Committees shall render project goal recommendations to the Director, including but not limited to, Disadvantaged Business Enterprise (“DBE”) goals as requested by the City, including federally-funded Denver International Airport (“DIA”) projects as approved by the Federal Aviation Administration (“FAA”), the Federal Highway Administration (“FHA”) or the Federal Transit Administration (“FTA”) on the basis of United States Government mandated statutory and/or regulatory authority applicable to those City contracts utilizing in whole or in part funding by the United States Government, including but not limited to the provisions of Title 49, Code of Federal Regulations (“C.F.R.”), Part 23 and 13 C.F.R. Part 1. For the purposes of this Rule, the provisions of Article III, Divisions 1 and 3 of Chapter 28, D.R.M.C. of said federal law, these rules and regulations shall be interpreted

consistently so far as possible. But in the event of any contradiction or inconsistency between City and federal legislation or regulation, the federal statute and/or regulation shall control.

#### **RULE VI. DEFINED SELECTION POOL REQUIREMENTS AND MINIMUM UTILIZATION REQUIREMENTS (SBE/EBE ORDINANCE ONLY).**

##### **A. DEFINED SELECTION POOL:**

1. In consultation with the Department Heads of the affected City agencies, the Director shall develop guidelines and criteria for the determination of which contracts shall be made part of the Defined Selection Pool.

2. If determined to be within the Defined Selection Pool, such requests for proposals and other advertisements for contracts shall clearly provide that responsive bids or proposals for such contracts or concession agreements will be accepted only from certified SBEs or EBEs, as applicable, within the work scope for which bids or proposals are being sought by the City. Contracts determined to be within the Defined Selection Pool for which responsive bids or proposals will be accepted only from EBEs shall generally be contracts with an estimated value of \$100,000 or less.

3. Bidders or proposers seeking to submit bids or proposals on such contracts that have been advertised as being within the Defined Selection Pool shall submit such information documenting their certification as an SBE or EBE, as applicable, at the time of bid opening, bid date, or final project-specific proposal in the case of a competitive selection process, as the Director may require.

##### **B. JOINT VENTURES:**

1. If two or more business entities wish to form a joint venture to bid or propose on a city construction contract, or professional design and construction services contract, which proposed joint venture includes one or more SBEs, then the joint venture must submit its joint venture agreement to the Director for review by the time stated in the contract bid/proposal documents for submitting prequalification applications, or if none stated, then at least ten (10) business days prior to bid opening or due date of final project-specific proposal. The Director will review the joint venture agreement to determine whether it contains the following:

- a. Whether the joint venture agreement includes provisions setting out the scope and extent of each member's responsibility for performing the work described in the contract;
- b. Whether the joint venture agreement includes provisions for the SBE member to perform a commercially useful function under the contract;
- c. Whether each member of the joint venture's share in the capital contribution, control, management responsibilities, risks and profits are equal to its ownership interest in the joint venture;
- d. Whether there is utilization in the joint venture of joint management and full integration of work forces by the joint venturers.

2. In addition to submitting its joint venture agreement in advance of the bid opening/date of final project-specific proposal, the joint venture must also complete and submit a joint venture eligibility form with its bid or proposal, the form of which will be included in requests for bids or proposals. A bid or proposal submitted by a joint venture that has not timely submitted a satisfactory written joint venture agreement and a joint venture eligibility form in accordance with the requirements of this section shall be deemed non-responsive.

**C. TEAMING AGREEMENTS:**

Where based upon the scope of work and market availability the Director determines that a teaming agreement with an SBE or EBE may be incentivized for a given project, parties to a proposed teaming agreement must submit their teaming agreement to the Director for review by the time stated in the contract bid/proposal documents for submitting prequalification applications, or if none stated, then at least ten (10) business days prior to bid opening or due date of final project-specific proposal. The Director will review the teaming agreement to determine whether it meets the requirements of D.R.M.C. and contains the following:

1. Actual participation of the teaming members on the project;
2. The high value work to be performed by the teaming members;
3. A statement of work setting forth expertise and capabilities of the subcontractor or subconsultant which would be valuable for the primary scope of work for the project, and a requirement that the subcontractor or subconsultant submit a subcontractor or subconsultant proposal, which is consistent with the statement of work, for the bid or proposal;
4. Agreement by the prime or general contractor or the consultant not to use any other subcontractor or subconsultant for the work described in the statement of work;

5. Agreement by the prime or general contractor or the consultant that in the event they are awarded the prime contract pursuant to the bid or proposal, they will award the subcontract in accordance with the agreement and statement of work;
6. The method by which disputes are resolved;
7. Any additional or further information required by the Director as set forth in the bid documents or otherwise.

D. COMPLIANCE PLANS:

1. D.R.M.C. Section 28-211 of the SBE/EBE Ordinance provides that for contracts secured through a competitive selection process rather than a competitive bid process, a department head may require proposers to address the project goal by means of a compliance plan. Such a plan allows a contract to address the project goal by means of commitments to utilize SBE/EBEs for Project work or by the demonstration of a good faith effort at the point where the project is sufficiently defined and the process of procuring the subcontractors to perform the work is about to begin. The development, scope, and utilization of such compliance plans will be governed by the following considerations and requirements.
  2. Basis for Determination. Unless otherwise authorized in writing by the Director, a department head may only require proposers to address a project goal by means of a compliance plan under the following conditions:
    - a. The project solicitation must be issued under the authority of either Section 2.3.3 (A) or 2.11.3 (B) of the City Charter;
    - b. The project solicitation must include the procurement of construction services.
    - c. At the time of the solicitation the project design must not be complete or at a level of completeness allowing for final competitive pricing proposal; and
    - d. The project solicitation must not require a lump sum price proposal for the construction of the project upon which a contract award will be made.
  3. Development of Compliance Plan. Upon a determination that a compliance plan will be required for a project, the compliance plan shall be developed in accordance with the following requirements:
    - a. The Director may require separate goals for project professional services and project construction services or an aggregate goal and may require that the compliance plan address both professional and construction goals, only the construction goal, or any aggregate goal.
    - b. The construction goal established for each project shall be expressed as a percentage of either: 1) the total amount of any lump sum construction contract awarded to complete a project; 2) the total estimated "cost of the work," as that term is defined in any guaranteed maximum price contract awarded to complete a project, OR; 3) on a task /work order basis.
    - c. The department head shall provide a good faith estimate of the construction cost upon which a goal shall be set, and the compliance plan proposer shall provide a refined estimate at the time of the submission of a proposed compliance plan, if the amount is not reflected in an executed contract.

- d. After consultation with the agency head or a designated representative, the Director shall establish a timetable for submittal and review of any proposed compliance plan.
  - e. The Director, in consultation with the department head, may require that submission and review of proposed compliance plans occur:
    - (i) During the solicitation process as solicitation submittal requirement; or
    - (ii) After the conclusion of the solicitation process as a component of contract negotiations and award.
  - f. Failure to comply with any submittal timetable established by the Director may, at the sole discretion of the Director, result in no further consideration of the proposed compliance plan.
4. Elements of Compliance Plan. At a minimum, a proposed compliance plan shall address the following elements:
- a. To the maximum extent applicable, the proposed compliance plan shall comply with the requirements of the SBE/EBE Ordinance and all Rules and Regulations and shall be consistent with the scope and intent of the SBE/EBE Ordinance.
  - b. The proposed compliance plan shall set forth a detailed program for community outreach and support calculated to enhance participation opportunities.
  - c. The proposed compliance plan shall set forth a detailed program describing how the proposer will divide up the anticipated work into economically feasible units calculated to enhance participation opportunities.
  - d. The proposed compliance plan shall set forth a detailed methodology by which the Contractor shall meet the project goal.
  - e. The proposed compliance plan may be based upon a phased or packaged buy out of the project construction work and, if that is the case, will describe the process by which the proposer will address the project goal on a phased, package, or cumulative basis.
  - f. If appropriate, the proposed compliance plan shall address the subcontracting of normally self-performed work to meet the project goal.
  - g. The proposed compliance plan shall set forth how the proposer will comply with the requirements of the SBE/EBE Ordinance as part of the subcontractor buyout of the construction work, including use of commitment forms, letters of intent, joint venture forms or proposal pricing worksheet to adequately document committed participation attained
  - h. The proposed compliance plan shall contain a specific acknowledgement of the proposer's continuing duty, pursuant to the SBE/EBE Ordinance, to maintain, throughout the duration of any project contract, compliance with the level of SBE/EBE participation committed to under any approved compliance plan, and such commitment will be the basis for award of any contract. The plan will also detail the methodology the proposer will employ for maintaining participation commitments.
  - i. The proposed compliance plan shall set forth a detailed methodology for tabulation of participation performance and plan administration, as well as monitoring and reporting progress and

participation performance to DSBO. The plan shall provide for review and reconciliation milestones during the project and for review and audit opportunities for DSBO.

j. The proposed compliance plan will recommend methods for supporting DSBO administration and oversight of the plan, if approved.

k. The proposed compliance plan will affirm that DSBO shall have prompt, full and complete access to all contractor and subcontractor personnel, books and records required to monitor and assure performance of the approved compliance plan. Additionally, the plan will acknowledge the City's right to impose monetary penalties and/or withhold payment in the event of non-compliance.

l. The proposed compliance plan shall set forth a detailed methodology for issuance of notice(s) of non-compliance with the plan and a reasonable opportunity to cure.

m. The proposed compliance plan shall set forth a detailed methodology for final reconciliation of participation performance, measured against the established goal and plan close out.

#### 5. Approval of Compliance Plan.

a. Upon receipt of a proposed compliance plan, DSBO shall review and either approve or initially reject, with comments, the proposed plan. In the event of a rejection of the proposed plan, the DSBO shall set a date for re-

submission and if warranted, schedule a meeting to discuss any deficiencies that must be addressed in the re-submittal.

b. In the event the Director formally rejects a proposed compliance plan, the Director shall notify the agency head in writing of its determination and such determination shall result in no further consideration of the contractor's proposal or in termination of the contract for cause, in the event a contract has been awarded. In no event shall a contract to construct a project be executed or continue without a compliance plan approved by the Director.

c. Upon approval, the compliance plan shall be incorporated and made a part of the contract with the plan proposer.

#### 6. Sanctions. The Contractor shall be subject to sanctions in accordance with

D.R.M.C. Section 28-255 if upon approval, the Contractor acknowledges and accepts that any failure to comply with any material term or condition of an approved compliance plan or applicable provision of the MBE/WBE Ordinance or any Rules and Regulations promulgated pursuant to the MBE/WBE Ordinance, including failure to satisfactorily address the project goal, maintain participation commitments or otherwise comply with any applicable requirements.

#### E. EVALUATION OF REPSONSIVE BIDS OR PROPOSALS:

As provided under D.R.M.C. §28-220, the Director may prioritize review of individual bids or proposals to efficiently process review for responsiveness.

#### RULE VII. COMPLIANCE WITH PROJECT GOALS OR DEMONSTRATION OF GOOD FAITH EFFORTS (MBE/WBE ORDINANCE ONLY)

The DSBO shall (i) develop such forms, affidavits, and other documentation as the Director deems appropriate for the showing by bidders or proposers of compliance with project goals or demonstration

of good faith efforts; (ii) determine what information shall be required from the bidder or proposer, MBE, WBE, or others as the Director deems appropriate for such compliance with project goals or demonstration of good faith effort process; and (iii) determine what reviews, examinations, and assessments of information are appropriate for such compliance with project goals or demonstration of good faith effort process.

A. JOINT VENTURES:

1. If two or more business entities wish to form a joint venture to bid or propose on a city construction contract, or professional design and construction services contract, which proposed joint venture includes one or more MBEs or WBEs, then the joint venture must submit its joint venture agreement to the Director for review by the time stated in the contract bid/proposal documents for submitting prequalification applications, or if none stated, then at least ten (10) business days prior to bid opening or due date of

final project-specific proposal. The Director will review the joint venture agreement to determine whether it contains the following:

- a. Whether the joint venture agreement includes provisions setting out the scope and extent of each member's responsibility for performing the work described in the contract;
- b. Whether the joint venture agreement includes provisions for the MBE/WBE member to perform a commercially useful function under the contract;
- c. Whether each member of the joint venture's share in the capital contribution, control, management responsibilities, risks and profits are equal to its ownership interest in the joint venture;
- d. Whether there is utilization in the joint venture of joint management and full integration of work forces by the joint venturers.

2. In addition to submitting its joint venture agreement in advance of the bid opening/date of final project-specific proposal, the joint venture must also complete and submit a joint venture eligibility form with its bid or proposal, the form of which will be included in requests for bids or proposals. A bid or proposal submitted by a joint venture that has not timely submitted a satisfactory written joint venture agreement and a joint venture eligibility form in accordance with the requirements of this section shall be deemed non-responsive.

B. TEAMING AGREEMENTS:

Where based upon the scope of work and market availability the Director determines that a teaming agreement with an MBE or WBE may be incentivized for a given project pursuant to

D.R.M.C. Section 28-60.5, parties to a proposed teaming agreement must submit their teaming agreement to the Director for review by the time stated in the contract bid/proposal documents for submitting prequalification applications, or if none stated, then at least ten (10) business days prior to bid opening or due date of final project-specific proposal. As defined by D.R.M.C. Section 28-54(49), a teaming agreement is 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, and (b) describes how the parties are going to share work under the bid or proposal for the primary scope of work. The Director will review the teaming agreement to determine whether it meets the requirements of D.R.M.C. Sections 28-54(49) and 28-60.5, and contains the following:

1. Actual participation of the teaming members on the project;
  2. The high value work to be performed by the teaming members;
  3. A statement of work setting forth expertise and capabilities of the subcontractor or subconsultant which would be valuable for the primary scope of work for the project, and a requirement that the subcontractor or subconsultant submit a subcontractor or subconsultant proposal, which is consistent with the statement of work, for the bid or proposal;
  4. Agreement by the prime or general contractor or the consultant not to use any other subcontractor or subconsultant for the work described in the statement of work;
  5. Agreement by the prime or general contractor or the consultant that in the event they are awarded the prime contract pursuant to the bid or proposal, they will award the subcontract in accordance with the agreement and statement of work;
  6. The method by which disputes are resolved;
  7. Any additional or further information required by the Director as set forth in the bid documents or otherwise.
- C. COMPLIANCE PLANS:
1. D.R.M.C. Section 28-60(b) of the MBE/WBE Ordinance provides that for contracts secured through a competitive selection process rather than a competitive bid process, a department head may require proposers to address the project goal by means of a compliance plan. Such a plan allows a contract to address the project goal by means of commitments to utilize MBE/WBEs for Project work or by the demonstration of a good faith effort at the point where the project is sufficiently defined and the process of procuring the subcontractors to perform the work is about to begin. The development, scope, and utilization of such compliance plans will be governed by the following considerations and requirements.
    2. Basis for Determination. Unless otherwise authorized in writing by the Director, a department head may only require proposers to address a project goal by means of a compliance plan under the following conditions:
      - a. The project solicitation must be issued under the authority of either Section 2.3.3 (A) or 2.11.3 (B) of the City Charter;
      - b. The project solicitation must include the procurement of construction services.
      - c. At the time of the solicitation the project design must not be complete or at a level of completeness allowing for final competitive pricing proposal; and
      - d. The project solicitation must not require a lump sum price proposal for the construction of the project upon which a contract award will be made.
    3. Development of Compliance Plan. Upon a determination that a compliance plan will be required for a project, the compliance plan shall be developed in accordance with the following requirements:
      - a. The Director may require separate goals for project professional services and project construction services or an aggregate goal and may require that the compliance plan address both professional and construction goals, only the construction goal, or any aggregate goal.

b. The construction goal established for each project shall be expressed as a percentage of either: 1) the total amount of any lump sum construction contract awarded to complete a project; or in the alternative, 2) the total estimated “cost of the work,” as that term is defined in any guaranteed maximum price contract awarded to complete a project, OR; 3) on a task /work order basis

c. The department head shall provide a good faith estimate of the construction cost upon which a goal shall be set, and the compliance plan proposer shall provide a refined estimate at the time of the submission of a proposed compliance plan, if the amount is not reflected in an executed contract.

d. After consultation with the agency head or a designated representative, the Director shall establish a timetable for submittal and review of any proposed compliance plan.

e. At the Director’s sole discretion, the Director may require that submission and review of proposed compliance plans occur:

(i) During the solicitation process as solicitation submittal requirement; or

(ii) After the conclusion of the solicitation process as a component of contract negotiations and award.

f. Failure to comply with any submittal timetable established by the Director may, at the sole discretion of the Director, result in no further consideration of the proposed compliance plan.

4. Elements of Compliance Plan. At a minimum, a proposed compliance plan shall address the following elements:

a. To the maximum extent applicable, the proposed compliance plan shall comply with the requirements of the MBE/WBE Ordinance and all Rules and Regulations and shall be consistent with the scope and intent of the MBE/WBE Ordinance.

b. The proposed compliance plan shall set forth a detailed program for community outreach and support calculated to enhance participation opportunities.

c. The proposed compliance plan shall set forth a detailed program describing how the proposer will divide up the anticipated work into economically feasible units calculated to enhance participation opportunities.

d. The proposed compliance plan shall set forth a detailed methodology by which the Contractor shall meet the project goal.

e. The proposed compliance plan may be based upon a phased or packaged buy out of the project construction work and, if that is the case, will describe the process by which the proposer will address the project goal on a phased, package, or cumulative basis.

f. If appropriate, the proposed compliance plan shall address the subcontracting of normally self-performed work to meet the project goal.

g. The proposed compliance plan shall set forth how the proposer will comply with the requirements of D.R.M.C. Sections 28-61 through 28-64 as part of the subcontractor buyout of the construction work, including use of commitment forms, letters of intent, joint venture forms or proposal pricing worksheet to adequately document committed participation attained.

h. The proposed compliance plan shall contain a specific acknowledgement of the proposer's continuing duty, pursuant to D.R.M.C. Sections 28-72, 28-73 and 28-75, to maintain, throughout the duration of any project contract, compliance with the level of minority and women business enterprise participation committed to under any approved compliance plan, and such commitment will be the basis for award of any contract. The plan will also detail the methodology the proposer will employ for maintaining participation commitments.

i. The proposed compliance plan shall set forth a detailed methodology for tabulation of participation performance and plan administration, as well as monitoring and reporting progress and participation performance to DSBO. The plan shall provide for review and reconciliation milestones during the project and for review and audit opportunities for DSBO.

j. The proposed compliance plan will recommend methods for supporting DSBO administration and oversight of the plan, if approved.

k. The proposed compliance plan will affirm that DSBO shall have prompt, full and complete access to all contractor and subcontractor personnel, books and records required to monitor and assure performance of the approved

compliance plan. Additionally, the plan will acknowledge the City's right to impose monetary penalties and/or withhold payment in the event of non-compliance.

l. The proposed compliance plan shall set forth a detailed methodology for issuance of notice(s) of non-compliance with the plan and a reasonable opportunity to cure.

m. The proposed compliance plan shall set forth a detailed methodology for final reconciliation of participation performance, measured against the established goal and plan close out.

#### 5. Approval of Compliance Plan.

a. Upon receipt of a proposed compliance plan, DSBO shall review and either approve or initially reject, with comments, the proposed plan. In the event of a rejection of the proposed plan, the DSBO shall set a date for re-submission and if warranted, schedule a meeting to discuss any deficiencies that must be addressed in the re-submittal.

b. In the event the Director formally rejects a proposed compliance plan, the Director shall notify the agency head in writing of its determination and such determination shall result in no further consideration of the contractor's proposal or in termination of the contract for cause, in the event a contract has been awarded. In no event shall a contract to construct a project be executed or continue without a compliance plan approved by the Director.

c. Upon approval, the compliance plan shall be incorporated and made a part of the contract with the plan proposer.

#### 6. Sanctions. The Contractor shall be subject to sanctions in accordance with

D.R.M.C. Section 28-77 if upon approval, the Contractor acknowledges and accepts that any failure to comply with any material term or condition of an approved compliance plan or applicable provision of the MBE/WBE Ordinance or any Rules and Regulations promulgated pursuant to the MBE/WBE Ordinance, including failure to satisfactorily address the project goal, maintain participation commitments or otherwise comply with any applicable requirements.

D. SPECIFIC REQUIREMENTS FOR ADEQUATE COMPLIANCE WITH GOOD FAITH EFFORTS FOR CONTRACTS FOR CONSTRUCTION, RECONSTRUCTION, AND REMODELING:

1. DEFINITION SUPPLEMENT D.R.M.C. §28-62(b)(2).

a. Requirement to solicit through all reasonable and available means: Acceptable contact modes for solicitation shall be letters, facsimile transmissions, telephone communication, and e-mail.

b. Requirement to solicit in sufficient time: Solicitation must be made at least ten (10) business days before the bid date or the date of proposal submission.

c. Requirement to demonstrate appropriate steps to follow up initial solicitation: Appropriate steps may be demonstrated by second contact attempts by letter, facsimile transmission, telephone communication, or e-mail, if the bidder/proposer failed to make contact on its first attempt.

2. DEFINITION SUPPLEMENT D.R.M.C. §28-62(b)(3).

a. Requirement to break out work into economically feasible units: The bidder or proposer makes an effort to break up scopes of work into smaller units that could be bid on by MBE/WBEs.

b. Condition of reasonably consistent with industry practice: The bidder or proposer shall make a moderate and reasonable adjustment to the normal and practiced industry standard that demonstrates a reasonable willingness to divide up scopes of work to provide more opportunities for MBE/WBEs to bid/quote.

3. DEFINITION SUPPLEMENT D.R.M.C. §28-62(b)(4).

Requirement of provision of timely adequate access: Such access shall be provided at least ten (10) business days before the bid date or the date of proposal submission.

4. DEFINITION SUPPLEMENT D.R.M.C. §28-62(b)(5).

Requirement to negotiate in good faith: Good faith negotiation shall mean scheduled meaningful discussions that demonstrably seek to find reasonable ways to utilize the MBE/WBE on the contract.

5. DEFINITION SUPPLEMENT D.R.M.C. §28-62(b)(7).

Requirement of verification and verified statements: An attested transmittal of copies of actual bids received by the bidder or proposer that evidences the MBE/WBEs' bids/quotes received were not the lowest competitive monetary bids in the scopes of work or supplies that the MBE/WBEs were competing for shall be supplied to the DSBO. The bidder must submit copies of each MBE/WBE and non-MBE/WBE subcontractor quote submitted to the bidder when a non- MBE/WBE is selected over a MBE/WBE for work on the contract.

E. DETERMINATION OF MBE/WBE PARTICIPATION ON BID CONTRACTS:

In accordance with the provisions of the MBE/WBE Ordinance, DSBO will evaluate each bid to determine the responsiveness of the bid to the requirements of the MBE/WBE Ordinance. In determining whether a bidder's committed level of participation meets or exceeds the stated MBE/WBE goal, DSBO shall base its calculation of applicable amounts and percentages on the total base bid amount, not including any listed alternates, of each bid as follows:

1. The bid information provided by the agency will be used to determine the total base bid amount of each bid. Each bidder's total base bid amount will be multiplied by the MBE/WBE percentage established for the project to determine the exact dollar amount of required MBE/WBE participation for the Project. This amount will then be compared against the exact dollar amounts for the MBE/WBE committed for participation by the bidder. If the total dollar amount of participation listed meets or exceeds the established MBE/WBE dollar amount goal listed, then DSBO will determine that the goal has been met.

2. In addition, DSBO will determine the exact commitment percentage for each listed MBE/WBE by dividing the dollar amount listed for each MBE/WBE by the total base bid dollar amount submitted by the bidder. These individual percentages when totaled for all listed MBE/WBE will establish the total committed percentage level of MBE/WBE participation that the bidder must comply with during the life of the contract. In all cases, the committed percentage level of MBE/WBE participation must equal or exceed the assigned MBE/WBE goal for the Project.

3. In providing the exact dollar amount of participation for each listed MBE/WBE, a bidder should take care never to round up in determining whether or not the total of these amounts meets or exceeds the established percentage goal. The goal must be met or exceeded by dollar amounts and percentages in order for DSBO to determine that the bidder has met or exceeded the applicable MBE/WBE goal.

4. As previously mentioned, compliance with the MBE/WBE goal will be determined on the base bid alone. If a bid contains alternates, participation contained in any alternate will not count towards satisfaction of the Project goal. However, should any designated alternate be selected by the City for inclusion in the contract ultimately awarded, the MBE/WBE goal percentage level submitted at bid time on the base bid will also apply to the selected alternates and must be maintained for the life of the contract on the total contract amount, including any alternate work. Thus, even though such participation will not be considered in evaluating bids, bidders are urged to consider participation in preparing bids for designated alternates.

5. On projects where force account or allowance bid items have been included, bidders must meet the MBE/WBE goal percentage based upon the total base bid, including all such items that are submitted to the City. However, when a force account or allowance is designated by the City to be either performed or purchased from a specific company, the bidder may back out the dollar amount of the force account or

allowance from the total base bid and meet the MBE/WBE goal on the remaining reduced amount. The term force account shall mean the direct performance of work by the City by use of labor, equipment, materials, and supplies furnished by them and used under their direct control.

6. On bids that at the time of bid opening are equal to or exceed Five Million Dollars (\$5,000,000), including any alternates which may be selected, only Sixty Percent (60%) of the value of the commercially useful function performed by MBE/WBE suppliers shall count toward satisfaction of the Project goal. On Projects under Five Million (\$5,000,000) the value of the commercially useful function of MBE/WBE supplier(s) will count at a One Hundred Percent (100%) level. Manufacturer's representatives and packagers shall be counted in the same manner as brokers.

7. In utilizing the MBE/WBE participation of a Broker, only the bona fide commissions earned by such Broker for its performance of a commercially useful function will count toward meeting the Project goals. The bidder must separate the bona fide brokerage commissions from the actual cost of the

supplies or materials provided to determine the actual dollar amount of participation that can be counted towards meeting the goal.

F. SPECIFIC REQUIREMENTS FOR ADEQUATE COMPLIANCE WITH GOOD FAITH EFFORTS FOR CONTRACTS FOR PROFESSIONAL DESIGN AND CONSTRUCTION SERVICES:

1. DEFINITION SUPPLEMENT D.R.M.C. §28-67(b)(2).

a. Requirement to solicit through all reasonable and available means: Acceptable contact modes for solicitation shall be letters, facsimile transmissions, telephone communication, and e-mail.

b. Requirement to solicit in sufficient time: Solicitation must be made at least ten (10) business days before the date of proposal submission.

c. Requirement to demonstrate appropriate steps to follow up initial solicitation: Appropriate steps may be demonstrated by second contact attempts by letter, facsimile transmission, telephone communication, or e-mail, if proposer failed to make contact on its first attempt.

2. DEFINITION SUPPLEMENT D.R.M.C. §28-67(b)(3).

a. Requirement to break out service items into economically feasible units: The proposer makes an effort to break up scopes of service into smaller units that could be proposed on by MBE/WBEs.

b. Condition of being reasonably consistent with industry and professional practice: The proposer shall make economically reasonable

adjustment to the normal and practiced industry and professional standard that demonstrates a willingness to divide up scopes of service to provide more opportunities for MBE/WBEs to submit proposals.

3. DEFINITION SUPPLEMENT D.R.M.C. §28-67(b)(4).

Requirement of provision of timely adequate access: Such access shall be provided at least ten (10) business days before the date of proposal submission.

4. DEFINITION SUPPLEMENT D.R.M.C. §28-67(b)(5).

Requirement to negotiate in good faith: Good faith negotiation shall mean scheduling meaningful discussions that demonstrably seek to find reasonable ways to increase utilization of MBE/WBEs on the contract without preconceptions or assumptions that tend to discourage or defeat potential MBE/WBE utilization.

5. DEFINITION SUPPLEMENT D.R.M.C. §28-67(b)(6).

Requirement that communications with MBE/WBE be consistent with industry and professional practice: The communication shall be in accordance with normal and practiced standards in the industry and the profession for communication between proposers and prospective subconsultants or suppliers.

6. DEFINITION SUPPLEMENT D.R.M.C. §28-67(b)(8).

Requirement of reasonable efforts to assist interested MBE/WBEs: Reasonable efforts shall mean practical and rational attempts to refer MBE/WBEs to companies or organizations that provide direct services related to insurance and financial institutions that assist small growing business, consistent with the proposer's industry and professional knowledge, experience, and contacts.

7. DEFINITION SUPPLEMENT D.R.M.C. §28-64(c).

Documentation of Informal Meetings: Upon conclusion of requested informal meeting for nonresponsive bids or proposals, the Director will include correspondence from DSBO confirming final determination of whether good faith efforts have been satisfied.

G. EVALUATION OF RESPONSIVE BIDS OR PROPOSALS:

As provided under D.R.M.C. §28-70, the Director may prioritize review of individual bids or proposals to efficiently process review for responsiveness.

**RULE VIII. MEDIATION OF DISPUTES IN THE EVENT OF FAILURE TO UTILIZE A MBE/WBE OR SBE ORIGINALLY IDENTIFIED FOR PROJECT PARTICIPATION**

In the event a Contractor or Consultant intends to modify or eliminate all or a portion of the scope of work attributable to a MBE/WBE or SBE upon which a contract has been awarded, or intends to terminate a MBE/WBE or SBE originally utilized as a subcontractor, subconsultant, joint venturer, supplier, manufacturer, manufacturer's representative or broker in order to be awarded the contract, as set forth in D.R.M.C. §28-75 (3) and (4), and in D.R.M.C. §28-225 (a)(2) and (3), and such proposed modification or elimination of work or proposed termination is related to or results in a dispute ("Dispute") between the Contractor or Consultant and the MBE/WBE or SBE (the "Parties"), then the Director may order the Parties to submit such Dispute to mediation prior to modifying or eliminating such work or terminating its agreement with the MBE/WBE or SBE firm.

**RULE IX. APPOINTMENT AND UTILIZATION OF ADVISORY GROUPS BY DIRECTOR (MAY INCLUDE BOTH MBE/WBE AND SBE/EBE ORDINANCE ISSUES)**

The Director may appoint such ad hoc or permanent groups, task forces, or committees as he or she determines to be useful to provide assistance in the interpretation, administration, and enforcement of Divisions 1 and 3, Article III of Chapter 28, D.R.M.C. (referred to herein as the "MBE/WBE Ordinance") and Article VII of Chapter 28, D.R.M.C. (referred to herein as the "SBE/EBE Ordinance"). The Director, at his or her sole discretion, may establish term limits, rules and procedures for members of such appointed groups, task forces, or committees.

## Rules and Regs – Purchasing

RULES AND REGULATIONS FOR THE INTERPRETATION, ADMINISTRATION AND ENFORCEMENT OF ARTICLE V OF CHAPTER 28, D.R.M.C. (REFERRED TO HEREIN AS THE "PURCHASING ORDINANCE").

Division of Small Business Opportunity  
Rules and Regulations for Interpretation, Administration and Enforcement  
of Article V of Chapter 28, D.R.M.C.

### RULE 1. SCOPE OF RULES

**1.1.** Procurement of Covered Goods and Covered Services. Article V of Chapter 28, D.R.M.C. (referred to herein as the “Purchasing Ordinance” or Article V) concerns efforts to prevent race and gender based discrimination and its effects against certified Minority or Woman Owned Business Enterprises (MBE/WBE) and to increase opportunities for all certified Small Business Enterprises (SBE) in the award of City contracts and purchase orders for Covered goods and Covered services. These Rules are promulgated for the purposes of interpretation, administration and enforcement of the Purchasing Ordinance. Unless otherwise stated, all references in these Rules to “Director” means the Director of DSBO.

**1.1.1.** Covered Goods. The term Covered goods, as set forth in D.R.M.C. Section 28-123(15) 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 unless such communication equipment has been excluded by D.R.M.C. Section 28-118.

**1.1.2.** Covered Services. The term Covered services, as set forth in D.R.M.C. Section 28-123(16), 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 City User departments pursuant to the charter, municipal code, and executive orders unless such general business services has been excluded by D.R.M.C. Section 28-118.

**12.** Consultation with DSBO. DSBO will assist User departments and the Purchasing Division in determining the applicability of the Purchasing Ordinance on proposed procurements and provide technical assistance to User departments and the Purchasing Division in order to further the goals and objectives of the Purchasing Ordinance.

**13.** Computation of Time. In computing time for any act to be done by a User department, the Purchasing Division, DSBO, a Proposer, Bidder, Contractor, Consultant, or Vendor under the Purchasing Ordinance of these Rules, the following rules control:

**13.1.** Specific requirements in Purchasing Ordinance control. Unless provided otherwise in the Purchasing Ordinance, the terms of this Rule 1.3 control.

**13.2.** Calendar Days. Unless Business Days are expressly specified, calendar days will be used in all computations of time made under the Purchasing Ordinance of these Rules. D.R.M.C. Section 28-123(17).

**13.3.** Business Days. A “Business Day” means a day that the City is open to the public for business that is not a Saturday, Sunday, a legal holiday, City furlough day, or day when the City is fully or partially closed for business.

**13.4.** Period Stated in Days. In computing a period of days, the first day is excluded and the last day is included. If the last day of any period is a Saturday, Sunday, a legal holiday, City furlough day, or day when the City is fully or partially closed for business, the period is extended to include the next day which is not a Saturday, Sunday, a legal holiday, City furlough day, or day when the City is fully or partially closed for business.

**13.5.** Period Stated in Hours: In computing a period of hours:

**A.** begin counting immediately on the occurrence of the event that triggers the period;

**B.** count every hour, including hours during intermediate Saturdays, Sundays, a legal holiday, City furlough day, or day when the City is fully or partially closed for business;

**C.** if the period ends on a Saturday, Sunday, a legal holiday, City furlough day, or day when the City is fully or partially closed for business, the period is extended to include the same time on the next day that is not a Saturday, Sunday, a legal holiday, City furlough day, or day when the City is fully or partially closed for business.

**13.6.** Method of Delivery of Communications. The Purchasing Ordinance and

these Rules require or permit the delivery of information, including without limitation, notices of responsiveness and nonresponsiveness, letters of intent, documents concerning procurements, meeting notices and agendas, and other communications between DSBO and User departments, the Purchasing Division, Proposers and Bidders, Goal Committee members, and other interested parties. Such information will collectively be referred to as “a Communication” or “Communications”.

**A.** Communications to MBEs/WBEs and SBEs.

**(i)** Required Communications. Whenever the Purchasing Ordinance or these Rules require DSBO to provide a Communication to an MBE/WBE or SBE, the Communication will be (1) hand-delivered, (2) sent by overnight courier service, or (3) mailed by certified mail, return receipt requested. The DSBO may at its sole option provide an additional, courtesy copy by electronic email if the MBE/WBE or SBE requests in writing that such a communication be sent electronically by email (in addition to U.S. mail).

**(ii)** Elective Communications. Whenever the DSBO elects to provide a Communication to an MBE/WBE or SBE, the Communication will be delivered by U.S. mail, postage prepaid. If the MBE/WBE or SBE requests in writing that such a communication be sent by facsimile or electronically by email (instead of by U.S. mail), the DSBO will send the communication only by facsimile or email, as requested.

**B.** Communications Between DSBO and User Departments or Purchasing Division Will Only Be Emailed. Whenever the Purchasing Ordinance or these Rules require or permit User departments or the Purchasing Division to provide notices or documents to DSBO or for DSBO to provide notices or documents to User departments or the Purchasing Division, such notices or documents will be delivered only by electronic email as follows:

**(i)** Emails to DSBO. Documents or notices from User departments or the Purchasing Division to DSBO will be emailed to [dsbo@denvergov.org](mailto:dsbo@denvergov.org).

**(ii)** Emails to User Departments or Purchasing Division. Documents or notices from DSBO to User departments or the Purchasing Division will be emailed to the email address provided by the User department or the Purchasing Division for that specific notice or document.

**C.** Communications to Goal Committees. Whenever the Purchasing Ordinance or these Rules require or permit DSBO, a User department or the Purchasing Division to provide documents or information to a Goal Committee, such documents or information will be delivered by electronic email to each committee member at the email address provided by the member. Private email addresses of Goal Committee members will be deemed confidential.

**D.** Communications to DSBO, User departments, or the Purchasing Division from MBEs/WBEs, SBEs, Proposers, Bidders, Contractors, Consultants, or Vendors. Whenever the Purchasing Ordinance or these Rules require or permit an MBE/WBE, SBE, Proposer, Bidder, Contractor, Consultant, or Vendor to provide a Communication to the DSBO, the Communication will be (i) hand-delivered, (ii) sent by overnight courier service, (iii) mailed by certified mail, return receipt requested, (iv) sent by facsimile or (v) sent electronically by email.

**13.7.** Effective Date of Delivery or Receipt.

**A.** By Hand Delivery or Overnight Courier. Communications hand delivered or sent by overnight courier are effective upon delivery.

**B.** By U.S. Mail. Communications sent by certified mail will be effective upon receipt. Communications sent by non-certified mail are effective upon deposit with the U.S. Postal Service.

**C.** By Facsimile. Communications sent by facsimile will be effective on the date sent with confirmation of successful transmission.

**D.** By Email. Email Communications will be effective on the date and at the time of transmission provided that the recipient, by an email sent to the email address for the sender or by a written notice delivered by hand delivery, overnight courier service, certified or registered mail, or facsimile, confirms having received that email. An automatic “read receipt” will not, by itself, constitute acknowledgment of that email. Further, an email sent on or after 8:00 a.m., M.T., and on or before 5:00 p.m., M.T., on a Business Day, will be deemed to be complete on the date and time of a confirmed transmission. A email sent before 8:00 a.m., M.T., or after 5:00 p.m., M.T., on a Business Day, or on a Saturday, Sunday, a legal holiday, City furlough day, or day when the City is fully or partially closed for business will be deemed to be complete as of 8:00 a.m., M.T., on the next day that is not a Saturday, Sunday, legal holiday, or City furlough day, or day when the City is fully or partially closed for business, if the transmission is otherwise confirmed as received.

**13.8.** Substitute Addresses. A User department, the DSBO, the Purchasing Division, a Goal Committee member, an MBE/WBE or an SBE entitled to receive Communications under these Rules may designate substitute addresses where or persons to whom notices are to be mailed or delivered. These substitutions will become effective upon receipt of written notification.

**RULE 2. CONTRACTS AND PURCHASE ORDERS EXCLUDED FROM PURCHASING ORDINANCE**

**21.** Exclusions. D.R.M.C. Section 28-118 of the Purchasing Ordinance excludes certain categories of purchases even if the procurement will include the acquisition of one or more Covered good or Covered service. This Rule 2 clarifies the language for each such category of contracts and purchases orders excluded from the requirements of the Purchasing Ordinance as such provisions are set forth in D.R.M.C. Section 28-118(a) - (f).

**211.** D.R.M.C. § 28-118(a) – User Departments and Purchasing. D.R.M.C. Section 28-118(a) excludes contracts and purchase orders for construction, reconstruction, remodeling, professional design, and construction services awarded in connection with the Denver’s Minority and Women Business Enterprise ordinance (set forth in Article III of Chapter 28 and commonly known as the MBE/WBE Construction Ordinance) and Denver’s Small Business Enterprise ordinance (set forth in Article VII of this Chapter 28 and commonly known as the SBE Construction Ordinance). For the avoidance of doubt, all contracts for construction, reconstruction, remodeling, professional design, and construction services will be subject to the requirements of the MBE/WBE Construction Ordinance or the SBE Construction Ordinance, as applicable, and the rules and regulations applicable to such ordinances.

**212.** D.R.M.C. § 28-118(b) – User Departments and Purchasing Division. D.R.M.C. Section 28-118(b) addresses the use of federal or state funds to purchase Covered goods or Covered services. Section 28-118(b) provides that the Purchasing Ordinance applies to purchases of Covered goods or Covered services paid with federal or state funds unless a specific federal or state contract requirement, term or condition governing the use of such funds is inconsistent with the provisions of the Purchasing Ordinance. When the Purchasing Ordinance is inconsistent with a specific federal or state contract requirement, term, or condition, the requirements made applicable by the United States Government or State of Colorado concerning the purchase of the Covered good or Covered service will control but only to the extent of the inconsistency. For the avoidance of doubt, the Purchasing Ordinance applies to a purchase of Covered goods or Covered services paid with federal or state funds when that specific purchase is consistent with federal or state objectives, requirements, terms, or conditions.

**213.** D.R.M.C. § 28-118(c) – Purchasing Division Only. D.R.M.C. Section 28- 118(c) addresses contracts and purchase orders awarded by the Purchasing Division under D.R.M.C. Section 20-64. Section 20-64 outlines the specific emergency and nonemergency situations under which the Purchasing Division may forego bidding procedures for purchases. For the avoidance of doubt, Section 28-118(c) allows only the Purchasing Division to exclude a contract or purchase order for Covered goods or Covered services from the requirements of the Purchasing Ordinance when the Executive Director of the Department of General Services has determined that the purchase is not subject to bidding procedures under D.R.M.C. Section 20-64.

**214.** D.R.M.C. § 28-118(d) – Purchasing Division Only. D.R.M.C. Section 28-118(d) addresses contracts and purchase orders awarded by the Purchasing Division under D.R.M.C. Section 20-64.5. Section 20-64.5 allows the Purchasing Division to make cooperative purchases under purchase contracts of the United States Government, State of

Colorado, or other governmental jurisdictions. For the avoidance of doubt, Section 28-118(d) allows only the Purchasing Division to exclude a contract or purchase order for Covered goods or Covered services from the requirements of the Purchasing Ordinance when the Executive Director of the Department of General Services has determined that the purchase may be made under a cooperative purchases as set forth in D.R.M.C. Section 20-64.5.

**215.** D.R.M.C. § 28-118(e) – Purchasing Division Only. D.R.M.C. Section 28- 118(e) addresses contracts or purchase orders, or parts thereof, that may be excluded from the requirements of the Purchasing Ordinance by order of the Executive Director of the Department of General Services. An implementing order for purposes of Section 28-118(e) is a written administrative directive from the Executive Director of the Department of General Services to exclude a contract or purchase order for Covered goods or Covered services from the requirements of the Purchasing Ordinance. Each such Order will include the specific reasons for the exclusion. The Executive Director of the Department of General Services shall deliver a copy of each such order to the Director no later than three (3) Business Days from the date of such order. For the avoidance of doubt, Section 28-118(e) provides authority for only the Executive Director of the Department of General Services to exclude a contract or purchase order for Covered goods or Covered services from the requirements of the Purchasing Ordinance.

**216.** D.R.M.C. § 28-118(f) – User Departments and Purchasing Division. D.R.M.C. Section 28-118(f) excludes purchases made with a Non-PO Voucher pursuant to City Fiscal Accountability Rule 8.1. For the avoidance of doubt, Section 28-118(f) allows User departments to exclude a purchase from the requirements of Article V but only to the extent that a Non-PO Voucher is properly used to pay for the purchase in accordance with Rule 8.1.

### RULE 3. SOLE SOURCE CONTRACTS FOR COVERED GOODS OR COVERED SERVICES

3.1. Purchasing Division Only. The Purchasing Division only, when acting under authority of D.R.M.C. Section 20-64(a)(1) and Section 28-118(c), may approve a sole source justification in the award of a contract or purchase order for Covered goods or Covered services. User departments may not independently approve a sole source contract for Covered service and must comply with the requirements of the Purchasing Ordinance when awarding a contract for a Covered service. A User department must obtain approval from the Purchasing Director for a sole source justification for a contract for Covered service.

### RULE 4. PROCUREMENT ADVISORY COMMITTEE

**4.1.** Establishment. An advisory committee to be known as the Procurement Advisory Committee is created. The Procurement Advisory Committee may:

**4.1.1.** Advise the Director of special problems pertaining to MBEs/WBEs or SBEs, and other business enterprises seeking procurement opportunities for Covered goods and Covered services;

**4.1.2.** Review and recommend necessary policies, procedures, programs, legislation, or administrative action to promote procurement opportunities for MBEs/WBEs, SBEs, and other business enterprises for Covered goods and Covered services under the Purchasing Ordinance; and

**4.1.3.** Provide advice and recommendations to the Director, Director of the Purchasing Division, or the Executive Director of the Department of General Services, as appropriate, concerning procurement policies, procedures, programs, legislation, or administrative action managed exclusively by the Division of Purchasing.

**4.2.** Membership. The Procurement Advisory Committee shall have no more than twenty-five (25) members. The Director and the Director of the Purchasing Division will alternate making appointments to the Procurement Advisory Committee. The membership of the Procurement Advisory Committee will include owners, officers, or employees of Minority or Women Owned Business Enterprises (MBEs or WBEs) non MBE/WBE businesses, Small Business Enterprises (SBEs) conducting business in Covered goods and Covered services industries, and industry experts or representatives experienced in the implementation of MBE/WBE/SBE procurement programs.

**4.3.** No Compensation. The members of the Procurement Advisory Committee shall serve without compensation, except that members may be reimbursed for reasonable expenses incurred in performance of their duties pursuant to the rules and regulations of the City for such reimbursement and as approved by the Director.

**4.4.** Terms. The terms of the members of the Procurement Advisory Committee will be three (3) years; the terms will be staggered so that one-third (1/3) of the members will be appointed each year.

**4.5.** Death or Resignation. In the event of the death or resignation of any member, his or her successor shall be appointed by the Director or the Director of Purchasing in the manner provided for original appointment, to serve for the unexpired portion of the term for which such member has been appointed.

**4.6.** Co-Chairs. The Procurement Advisory Committee members shall elect two (2) individuals to serve as co-chairpersons each of whom will serve for a period of one (1) year. No committee member elected co-chairperson will serve more than two (2) consecutive terms as co-chairperson.

**4.7.** Meetings. Procurement Advisory Committee shall establish a schedule of regular meetings that occur, at a minimum, on a quarterly basis. Additional meetings may be called as needed by the chairperson of the committee.

**RULE 5. PROCUREMENT OF MULTIPLE COVERED GOODS/MULTIPLE COVERED SERVICES**

**5.1.** Consultation Required by User Departments. When a User department intends to acquire multiple goods or services under a single contract or purchase order and one or more of such goods or services are a Covered good or Covered service, the User department will consult with the DSBO prior to conducting a competitive selection procedure and will follow the direction of the DSBO

as to whether the procurement for Covered goods or Covered services will be acquired separately from the non-Covered goods or non-Covered services.

**5.2.** No Disaggregation of Procurements. User departments will not aggregate, split, combine, revise, restructure, or modify purchases of Covered goods or Covered services with other goods or one or more other services to avoid or frustrate the acquisition of Covered goods or Covered services with City funds from MBEs/WBEs or SBEs.

#### RULE 6. ASPIRATIONAL ANNUAL GOAL

6.1. Setting of Annual Goal. D.R.M.C. Section 28-124 of the Purchasing Ordinance establishes an aspirational annual goal for MBE/WBE utilization for the total dollars spent annually by User departments and the Purchasing Division for Covered goods and Covered services. The term “annual goal” means the targeted level for the aspirational goal established by the City for the annual aggregate participation of MBEs/WBEs in City contracts and City purchase orders for Covered goods and Covered services. D.R.M.C. Section 28-123(2). The annual goal takes into account the number of MBEs and WBEs providing Covered goods and Covered services procurement industries in the Denver metropolitan area marketplace to determine the target level for MBE/WBE participation in City contracts and City purchase orders for Covered goods and Covered services. D.R.M.C. Section 28-124(a) and (b).

6.2 Participation for annual goal. In accordance with D.R.M.C. Section 28-124(d), the following participation by MBEs/WBEs will be included in the annual goal: (i) contracts and purchase orders with assigned individual procurement goals. D.R.M.C. Section 28-126; (ii) contracts and purchase orders awarded to MBEs/WBEs who are also SBEs under the SBE Defined Procurement Pool in D.R.M.C. Section 28-138; (iii) contracts and purchase orders awarded to MBEs/WBEs who are also SBEs under the SBE bid preference in D.R.M.C. Section 28-143; and (iv) contracts and purchase orders awarded to MBEs/WBEs through independent partnerships. D.R.M.C. Section 28-151.

#### RULE 7. PROCUREMENT GOALS - CONTRACTS/PURCHASE ORDERS WITH ESTIMATED COST OF ONE MILLION DOLLARS (\$1,000,000) OR MORE.

**7.1.** Assignment of Procurement Goal. D.R.M.C. Section 28-126 of the Purchasing Ordinance authorizes the Director, in consultation with the Purchasing Director or Department head, as appropriate, to assign a unitary procurement goal for MBE/WBE utilization for each purchase of Covered goods or Covered services with an estimated total contract amount of one million dollars (\$1,000,000) or more. The Director shall consider all relevant and material information provided to the DSBO to assign a procurement goal, consistent with the methodology set out in D.R.M.C. D.R.M.C. Section 28-126(a) and (b), including input from the Procurement Goal Committee(s) (as such term is defined in D.R.M.C. Section 28-123(25). Section 28-126(a)

allows the Director to waive the application of a procurement goal for a specific contract or purchase order. For each such waiver granted, the Director shall provide a written justification to the Purchasing Director or Department head, as appropriate. The Director may assign a zero (0%) percent procurement goal on a contract or purchase order when such assignment is consistent with the methodology for the setting of the procurement goal set out in D.R.M.C. Section 28-126(a) and (b). If the goal is waived or set at zero percent (0%), the procurement will be made through an

Independent Partnership.

**7.2** Procurement Goal Committee(s). The purpose of this Rule 7.2 is to establish guidelines for the composition, appointments, committee operations, procedures, and goal-setting methodology for the Procurement Goal Committee(s) established under D.R.M.C. Section 28-126.

**7.2.1.** Appointments.

**A.** MBE and WBE members must be certified by the City as an MBE/WBE at the time of appointment. In order to continue serving on any Procurement Goal Committee, MBE and WBE members will be required to maintain its certification status. Committee members representing non-MBE/WBE business enterprises on all Procurement Goal Committee(s) will be selected from non-MBE/WBE business enterprises that have previously or are currently providing a Covered good or Covered service for the City.

**B.** The Director, in consultation with the Director of the Purchasing Division and the Executive Director of the Department of General Services, shall appoint all members of all Procurement Goal Committee(s).

**7.2.2.** Composition.

**A.** Each appointed Procurement Goal Committee will consist of nine (9) members. Alternates may be used upon prior written approval of the Director.

**B.** Each appointed Procurement Goal Committee will consist of: (i) three (3) non MBE/WBE members; (ii) three (3) members from among certified MBEs; and (iii) three (3) members from among certified WBEs. Each member must be directly engaged in the industries for Covered goods, Covered services, or an industry expert or representative experienced in the implementation of MBE/WBE or SBE procurement programs approved by the Director. Appointed business entity members may be represented by an owner, officer, or employee.

**C.** At least five (5) members of the Procurement Goal Committee are necessary to have quorum. If there is no quorum, the Director may set the procurement goal. MBE/WBE and non-MBE/WBE members shall be represented in each quorum to the extent possible. At the discretion of the Director, meetings of each Procurement Goal Committee will be conducted in person or by conference call. Conference call meetings will originate from the room where the scheduled in person meeting would have taken place.

**D.** The Director shall determine whether to appoint additional Procurement Goal Committees as appropriate to review and determine goals, if any, for specific, individual procurements.

**7.2.3.** Terms. The Director shall appoint the Procurement Goal Committee(s)

members for one (1), two (2), and three (3) year terms. The terms may be assigned or drawn by lot, as determined by the Director in his or her sole discretion. Reappointment will be at the sole discretion of the Director.

**7.2.4. Attendance.** Any Procurement Goal Committee member absent for whatever reason from three (3) meetings in any given six (6) month period will automatically be terminated from his or her Procurement Goal Committee(s).

**7.2.5. Meetings.** A representative of the DSBO will chair each Procurement Goal Committee meeting. Meetings may be held at a central location or may be conducted via conference call at the Director's discretion. Scheduled meetings will be in Conference Room 2.J.5 in the Wellington E. Webb Municipal Office Building, 201 W. Colfax Avenue, Denver, Colorado 80202. The time and location of meetings may be changed by prior posting in a hard copy format on the Procurement Bulletin Board located on the second floor of the Wellington E. Webb Municipal Office Building, 201 W. Colfax Avenue, Denver, CO 80202. All notifications or changes must also be posted on the DSBO website and emailed to interested parties known to the City. Upon appointment, the Procurement Goal Committee(s) will meet every second (2<sup>nd</sup>) Wednesday of each month at 1:30 p.m. M.T. If more than one Procurement Goal Committee(s) has been appointed, the date, time, and location of all meetings conducted by the additional committee(s) will be posted, no less than forty-eight (48) hours in advance of such meeting, on the Procurement Bulletin Board, the DSBO website and emailed to interested parties known to the City.

**7.2.6. Procurement Goal Committee(s) Operations, Procedures, and Goal Recommendation.**

**A.** The User department, as such term is defined D.R.M.C. Section 28-123(50), or Purchasing Division shall prepare and submit to the Director a written scope statement of a proposed procurement for Covered goods or Covered services subject to a procurement goal. The scope statement will contain all essential elements of the proposed procurement including without limitation, a narrative of the project/ procurement, total estimated procurement costs, the applicable North American Industry Classification System (NAICS) work code(s) for the Covered goods or Covered services, and relevant information on any similarly-scoped procurement previously submitted to a Procurement Goal Committee(s) including the goal actually recommended by the Goal Committee and set by the Director. The User department or Purchasing Division proposing the procurement will present the scope statement to the Goal Committee at the Goal Committee meeting set by the Director. The scope statement will be submitted to DSBO on a "Goal Committee Information Form." The scope statement must be delivered to the Director no later than five (5) Business Days before the assigned Goal Committee meeting. This five (5) Business Day time limit may be shortened at the sole discretion of the Director. A scope statement received after the deadline will be scheduled for the next Goal Committee meeting.

**B.** DSBO shall provide the scope statement to the Goal Committee members two (2) Business Days prior to the Goal Committee meeting (time limit

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may be shortened at the sole discretion of the Director). DSBO prepares information on the proposed procurement based on the “description of goods” or “description of services” and other appropriate factors for the Goal Committee(s) consideration.

**C.** The User department initiating or requesting the procurement of Covered goods or Covered services will be responsible for attending or participating in Goal Committee meetings and presenting procurement(s) to the Goal Committee.

**D.** DSBO staff shall notify Goal Committee members of meeting dates and cancellation of such meetings if there is no business to be conducted or if no quorum is available. The cancellation of meetings will be announced by notices posted on the Procurement Bulletin Board and the DSBO website, and will be emailed to interested persons known to the City.

**E.** In rendering advice as to a goal for each procurement for Covered goods or Covered services, the Goal Committee(s) shall consider, but shall not be limited to: data regarding availability and capacity of types of MBEs/WBEs doing business in the City with respect to each individual procurement of Covered goods or Covered services under consideration. This data will be presented in the context of a “description of work” or “description of goods” for each individual procurement under consideration. The Goal Committee(s) shall then render recommendations based on such information and their own practical awareness of MBEs/WBEs availability and capacity for such description of work for the particular purchase.

**F.** Goal set on alternates or options. If a request for bid, invitation for bid, or request for proposals issued by the City requests Vendor pricing for alternates or options, the alternates or options shall be reviewed separately for applicable goals by the Goal Committee. The Goal Committee shall make a separate recommendation for the requested alternates or options based on the information provided and their own practical awareness of MBE’s/WBE’s availability and capacity for such description of work for the particular purchase.

**G.** The Goal Committee(s), in arriving at the appropriate recommended level of goal(s) for the procurement, shall consider all relevant information, including but not limited to:

(i) The reasonably known availability and capacity of MBE/WBEs in specific goods or services areas that are associated with individual procurements, utilizing directories of certified MBEs/WBEs, the City’s Disparity Study, and the DSBO’s reports on MBEs/WBEs having contracts with the City;

(ii) The City’s Disparity Study methodology, or related methodology, for recommending individual procurement goals;

(iii) The members' practical knowledge of the industry, including but not limited to: practical awareness of MBE/WBE availability and capacity pertaining to the particular purchase; and

(iv) Other resources available to the DSBO or other studies undertaken by the City relating to MBE's/WBE's availability and capacity.

**H.** The DSBO shall maintain Goal Committee(s) records; record the meeting or conference call; prepare and provide agenda and meeting notices; schedule space for meetings; schedule conference calls; prepare and submit Goal Committee advice and recommendations to the Director.

**I.** Meetings will be conducted in accordance with Robert's Rules of Order; however, the provisions of these Rules and Regulations control over any provision contained in Robert's Rules of Order. All meetings will be open to the general public.

**J.** Each Goal Committee member who has, or anticipates having an employment, contractual, or financial interest in competing for a proposed procurement, or each Goal Committee member who has a member of his or her immediate family, a business associate (as such term is defined by D.R.M.C. Section 2-61(b), or an employer who has, or anticipates having an employment, contractual, or financial interest in competing for a proposed procurement shall disclose such interest to the Goal Committee at the Goal Committee meeting for that specific procurement.

**K.** All Goal Committee recommendations will be presented to the Director.

**L.** All actions resulting in a tie vote will be referred to the Director for final resolution.

**M.** All recommendations to the Director must indicate the Goal Committee members participating in such recommendations. DSBO will post the recommendations on the Procurement Bulletin Board and the DSBO website for a minimum of forty-eight (48) hours. Comments on proposed goals must be addressed to the Director.

**N.** After the posting of the recommended procurement goals, the Director shall determine what the final procurement goal will be. DSBO shall advise the responsible staff member from the User department or Purchasing Division of the procurement goal. The responsible staff member from the User department shall be responsible for incorporating the final procurement goal as determined by the Director in the bid or proposal solicitation, contract documents, and specifications.

**O.** The User department or Purchasing Division initiating the bid or proposal shall transmit a copy of the procurement bid solicitation or request for proposals to the DSBO when it is published or made available to the public.

**73.** Solicitation Documents for Procurements with Assigned Goal. Solicitation documents for which the Director has assigned a goal of 1 percent (1%) or more will inform Bidders and Proposers of the requirements for compliance with the assigned goal including without limitation provisions addressing the goal percentage and DSBO forms. User departments shall consult with DSBO and the City Attorney’s Office for standard RFP, RFB, and IFB provisions.

**74.** Compliance with Assigned Procurement Goal (D.R.M.C. § 28-127)

**7.4.1.** General. The DSBO shall (i) develop such forms, including without limitation Letter of intent (LOI) forms, affidavits, and other documentation as the Director deems appropriate for the showing by Bidders or Proposers of compliance with procurement goals or demonstration of good faith efforts; (ii) determine what information is required from the Bidder or Proposer, MBE, WBE, or others as the Director deems appropriate for such compliance with procurement goals or demonstration of good faith effort process; and (iii) determine what reviews, examinations, and assessments of information are appropriate for such compliance with procurement goals or demonstration of good faith effort process.

**7.4.2.** Joint Ventures.

**A.** Joint Venture Agreement. If two (2) or more business entities wish to form a joint venture to bid or propose on a City contract or purchase order for Covered goods or Covered services, which proposed joint venture includes one or more MBEs or WBEs, then the joint venture must submit its joint venture agreement to the Director for review by the time stated in the bid or request for proposal documents at least ten (10) Business Days prior to bid opening or proposal due date. The Director shall review the joint venture agreement to determine whether the joint venture agreement contains the following:

- (i) Provisions setting out the scope and extent of each member’s responsibility for performing the work described in the contract or purchase order;
- (ii) Provisions for the MBE/WBE member to perform a commercially useful function under the contract or purchase order;
- (iii) Each member of the joint venture’s share in the capital contribution, control, management responsibilities, risks and profits are equal to its ownership interest in the joint venture; and
- (iv) Utilization in the joint venture of joint management and full integration of work forces by the joint venturers.

**B.** Joint Venture Eligibility Form. In addition to submitting its joint venture agreement in advance of the bid opening/proposal due date, the joint venture must

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also complete and submit a joint venture eligibility form with its bid or proposal, the form of which will be included in requests for bids or proposals.

**C.** Timely Submission required. A bid or proposal submitted by a joint venture that has not timely submitted a satisfactory written joint venture agreement and a joint venture eligibility form in accordance with the requirements of this section will be deemed non-responsive.

#### **7.4.3. Compliance Plans.**

**A.** Purpose. D.R.M.C. Section 28-127(b) of the Purchasing Ordinance provides that for on-call procurement contracts and on-call Master Purchase Orders, the Purchasing Director or Department head may request the Director to allow Proposers to address the procurement goal by means of a compliance plan. Such a plan allows a Bidder or Proposer to address the procurement goal by means of commitments to utilize MBEs/WBEs for Procurement work or by the demonstration of a good faith effort at the point where the procurement is sufficiently defined and the process of procuring the subcontractors to perform the work is about to begin. The development, scope, and utilization of such compliance plans will be governed by the considerations and requirements listed in Rules 7.4.3. B-F below.

**B.** Basis for Determination. Unless otherwise authorized in writing by the Director, a Department head may only allow Proposers to address a procurement goal by means of a compliance plan under the following conditions:

(i) The procurement of Covered goods or Covered services must be issued under the authority of the charter, revised municipal code, or executive orders of the City and County of Denver;

(ii) The procurement solicitation must include the procurement of Covered goods or Covered services;

(iii) At the time of the solicitation the Scope of Work must not be complete or at a level of completeness allowing for final competitive pricing proposal; and

(iv) The procurement solicitation must not require a lump sum price proposal upon which an award of a contract or purchase order will be made.

**C.** Development of Compliance Plan. Upon a determination that a compliance plan will be permitted for a procurement, the compliance plan will be developed in accordance with the following requirements:

(i) The Director may, where appropriate, require separate goals or an aggregate goal and may require that the compliance plan address the assigned goal(s);

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(ii) The procurement goal established for each procurement of Covered goods or Covered services must be expressed as a percentage of either: 1) the total dollar value of any purchase order or contract awarded to acquire Covered goods or Covered services; or if the total dollar value is not delineated, 2) the total anticipated percentage of participation of MBEs and WBEs;

(iii) The Department head shall provide a good faith estimate of the maximum contract or purchase order amount upon which a goal is set. The compliance plan Proposer shall provide a refined estimate the maximum contract or purchase order amount at the time of the submission of a proposed compliance plan, if the amount is not reflected in an executed contract;

(iv) After consultation with the Department head or a designated representative, the Director shall establish a timetable for submittal and review of any proposed compliance plan;

(v) At the Director's sole discretion, the Director may require that submission and review of proposed compliance plans occur 1) during the solicitation process as solicitation submittal requirement; or 2) after the conclusion of the solicitation process as a component of contract negotiations and award; and

(vi) Failure to comply with any submittal timetable established by the Director may, at the sole discretion of the Director, result in no further consideration of the proposed compliance plan.

**D. Elements of Compliance Plan.** At a minimum, a proposed compliance plan must address the following elements:

(i) To the maximum extent applicable, comply with the requirements of the Purchasing Ordinance, all Rules and Regulations and be consistent with the scope and intent of the Purchasing Ordinance;

(ii) Set forth a detailed program for identifying and contacting certified MBE/WBE Vendors that is calculated to enhance participation opportunities;

(iii) Set forth a detailed program describing whether and how the Proposer will divide up the anticipated Covered goods or Covered services into economically feasible units calculated to enhance participation opportunities;

(iv) Set forth a detailed methodology by which the Proposer

shall meet the assigned goal;

(v) If appropriate, address the subcontracting of normally self-performed work to meet the assigned goal;

(vi) Set forth how the Proposer will comply with the requirements of D.R.M.C. Section 28-125 and Sections 28-127 through 28-130 including use of commitment forms, letters of intent, and joint venture forms to adequately document committed participation attained;

(vii) Contain a specific acknowledgement of the Proposer's continuing duty, pursuant to D.R.M.C. Sections 28-132, 28-133 and 28-135, to maintain, throughout the duration of any contract or purchase order for Covered goods or Covered services, compliance with the level of MBE/WBE participation committed to under any approved compliance plan, and such commitment will be the basis for award of any contract or purchase order. The plan will also detail the methodology the Proposer will employ for maintaining participation commitments for the duration of the contract or purchase order;

(viii) Set forth a detailed methodology for tabulation of participation performance and plan administration, as well as monitoring and reporting progress and participation performance to DSBO. The plan will provide for review and audit opportunities for DSBO;

(ix) Affirm that DSBO has prompt, full and complete access to all personnel, books and records of the Contractor, Consultant, or Vendor, and subcontractor personnel, books and records required to monitor and assure performance of the approved compliance plan. Additionally, the plan will acknowledge the City's right to impose monetary penalties and/or withhold payment in the event of non-compliance;

(x) Set forth a detailed methodology by which Vendor will issue notice(s) of non-compliance of participation performance by subvenders or joint venturers with the plan and a reasonable opportunity to cure; and

(xi) Set forth a detailed methodology for final reconciliation of participation performance, measured against the established goal and plan close out.

**E. Approval of Compliance Plan.**

(i) Upon receipt of a proposed compliance plan, DSBO shall review and either approve or initially reject, with comments, the proposed plan. In the event of a rejection of the proposed plan, the DSBO shall set a date for re-submission and if warranted, schedule a meeting to discuss any deficiencies that must be addressed in the re-submittal.

(ii) In the event the Director formally rejects a proposed compliance plan, the Director shall notify the responsible staff member of the User Department and the Department head in writing of his or her determination and such determination will result in no further consideration of the Contractor's proposal or in termination of the contract or purchase order for cause, in the event a contract or purchase order has been awarded. In no event will an on-call contract or purchase order to acquire Covered goods or Covered services be executed or continue without a compliance plan approved by the Director.

(iii) Upon approval, the compliance plan will be incorporated and made a part of the contract or Master Purchase Order.

**F.** Sanctions. In the event that the DSBO director determines, in his or her sole discretion, that a Vendor, Contractor or Consultant has not complied with an approved compliance plan, the provisions of these Rules or the Purchasing Ordinance, including without limitation performing as or using MBEs or WBEs for a non-commercially useful function or as a conduit, failure to submit information timely, submission of false, misleading, or materially incomplete statements, documentation or records, good faith efforts, or letters of intent, or failure to cooperate in an investigation, or to otherwise be in breach of a contract it will be subject to the sanctions set forth in D.R.M.C. Section 28-137(b)-(d). 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.

**7.4.4.** Review of Bids and Proposals for compliance with Assigned Goal and Submission Deadlines - D.R.M.C. § 28-130(a)&(b). (No Good Faith).

**A.** Uniform Timelines. User departments, the Purchasing Division, and the DSBO shall comply with the following uniform timelines to facilitate the review of bids and proposals for compliance with assigned goal and submission deadlines.

(i) Communications between User Departments, the Purchasing Division, and the DSBO will be by email pursuant to Rule

1.3.6.B. Email Communications sent on or before 5:00 p.m., M.T., will be effective on that Business Day pursuant to rule 1.3.7.D.

(ii) Communications from DSBO to Bidders and Proposers will be made pursuant to Rule 1.3.6.A.

<p>Timeline for Review of bids and proposals - (Compliance with Goal/Information provided timely/ No Good Faith submission)</p>
<p>Business Day 1 – User department or Purchasing Division provides copies of bids/proposals to DSBO.</p>
<p>Business Day 2 until Business Day 8 - DSBO review process for compliance with assigned goal and submission of timely information. See, D.R.M.C. Section 28-130 (a) and (b).</p>
<p>Business Day 8 – Last Business Day for DSBO to notify User department or Purchasing Division of responsive bids or proposals due in accordance with D.R.M.C. Section 28-130(a). Last Business Day for DSBO to notify User department or Purchasing Division and the Bidder or Proposer of the Director’s final determination of non-responsive bids/proposals for failure to meet assigned goal or failure to provide timely information. See, D.R.M.C. Section 28-130(b).</p>
<p>Business Day 10 until Business Day 11 – A Bidder or Proposer (who did not submit a statement of good faith at bid opening) will have two (2) Business Days from the date of receipt or delivery, as applicable, of DSBO’s notice of non- responsiveness to submit a request to DSBO for an administrative reconsideration of that decision. See Rule 11 for reconsideration.</p>
<p>Business Day 12 until Business Day 14 – DSBO shall complete the administrative reconsideration and provide the User department or Purchasing</p>
<p>Division and the Bidder or Proposer with a written decision of reconsideration no later than two (2) Business Days. See Rule 11 for reconsideration.</p>
<p>Business Day 14– A bid or proposal deemed responsive as a result of reconsideration will be added to the review process of the User department or Purchasing Division.</p>
<p>As of Business Day 14 – The decision of nonresponsiveness on reconsideration will constitute a final decision, and the Bidder or Proposer may request a hearing under D.R.M.C. Section 28-33.</p>

**B.** DSBO Review of Bids and Proposals (D.R.M.C. §28- 130(a)&(b)). In accordance with D.R.M.C. Section 28-130(a)&(b), DSBO shall review each bid and proposal to determine if it has fully met the assigned procurement goal and has been submitted timely.

(i) Goals based on based bid or proposal amount alone. In determining whether a Bidder's committed level of participation meets or exceeds the stated MBE/WBE procurement goal, DSBO shall base its calculation of applicable amounts and percentages on the total base bid or proposal amount, not including any listed alternates, of each bid or proposal as follows:

1. The bid or proposal solicitation information provided by the User department will be used to determine the total base bid or proposal amount of each bid or proposal. Each Bidder's total base bid amount and each Proposer's total base proposal amount will be multiplied by the MBE/WBE percentage established for the procurement to determine the exact dollar amount of required MBE/WBE participation for the procurement. This amount will then be compared against the exact dollar amounts for the MBE/WBE committed for participation by the Bidder or Proposer. If the total dollar amount of participation listed meets or exceeds the established MBE/WBE dollar amount goal listed, then DSBO shall determine that the goal has been met.

2. In addition, DSBO shall determine the exact commitment percentage for each listed MBE/WBE by dividing the dollar amount listed for each MBE/WBE by the total base bid or proposal dollar amount submitted by the Bidder or Proposer. These individual percentages when totaled for all listed MBEs/WBEs will establish the total committed percentage level of MBE/WBE participation that the Bidder or Proposer will comply with during the life of the contract or purchase order. In all cases, the committed percentage level of MBE/WBE participation must equal or exceed the assigned MBE/WBE goal for the procurement.

3. In providing the exact dollar amount of participation for each listed MBE/WBE, a Bidder or Proposer will not round up the dollar amount to determine whether or not the total of these amounts meets or exceeds the established percentage goal. The procurement goal must be met or exceeded by dollar amounts and percentages in order for DSBO to determine that the Bidder or Proposer has met or exceeded the applicable MBE/WBE procurement goal.

(ii) Goal set on alternates or options. If a bid or request for proposal issued by the City requests Vendor pricing for alternates or options, those alternates or options shall be reviewed separately for applicable goals by the Goals Committee and a separate, additional goal may be set on that specific alternate or option. Should any designated

alternate or option be selected by the City for inclusion in the contract or purchase order ultimately awarded, the MBE/WBE goal percentage level submitted at bid time on the base bid or proposal will apply to the selected alternates and must be maintained for the life of the contract or purchase order. In such event, participation contained in any alternate or option will count towards satisfaction of the additional procurement goal.

(iii) The Director may prioritize review of individual bids or proposals to efficiently process review for responsiveness and non-responsiveness.

**745** Review and Clarification of Statements of Good Faith Efforts - (D.R.M.C. § 28-128 and § 28-130(c)).

**A.** Uniform Timelines. User departments, the Purchasing Division, and the DSBO shall comply with the following uniform timelines to facilitate the review of a Bidder’s or Proposer’s demonstration of good faith efforts under D.R.M.C. Section 28-128.

(i) Communications between User Departments, the Purchasing Division, and the DSBO will be by e-mail pursuant to rule 1.3.6.B. E-mail Communications will be effective on or before 5:00 p.m., M.T. on that Business Day pursuant to rule 1.3.7.D.

(ii) Communications from DSBO to Bidders and Proposers will be made pursuant to rule 1.3.6.A.

Review of Bidder’s or Proposer’s Demonstration of Good Faith Efforts
Business Day 1 –User department or Purchasing Division provides copies of bids or proposals to DSBO and statements of good faith efforts submitted with bids or proposals.
Business Day 2 until Business Day 8 - DSBO review process.
Business Day 8 – Last Business Day for DSBO to notify User department or Purchasing Division of responsive bids/proposals due to submission of an adequate demonstration of good faith efforts in accordance with D.R.M.C. Section 28- 130(a). Last Business Day for DSBO to notify Bidders or Proposers of the Director’s final determination of non-responsive bids/proposals due to an inadequate demonstration of good faith efforts or failure to provide the good faith effort timely. See, D.R.M.C. Section 28-130(b).

Business Day 10 until Business Day 11–Bidders or Proposers will have two (2) Business Days from the date of receipt or delivery, as applicable, of DSBO’s notice of inadequate demonstration of good faith efforts to request an informal meeting with DSBO. D.R.M.C. Section 28-130(c).

Business Day 12 until Business Day 14– DSBO will schedule the informal meeting no later than two (2) Business Days from the date the informal meeting is requested. The Bidder or Proposer will have twenty-four (24) hours from the date and time the informal meeting is complete to submit additional information or to clarify the original good faith efforts in accordance with D.R.M.C. Section 28- 130(c).

DSBO will have two (2) Business Days from the date of the informal meeting to provide written notice to the Bidder or Proposer and the User department or Purchasing Division whether the bid or proposal is responsive or nonresponsive in accordance with D.R.M.C. Section 28-130(c).

A bid or proposal deemed responsive as a result of the informal meeting will be added to the review process of the User department or Purchasing Division.

A Bidder or Proposer will have two (2) Business Days from the date of receipt or delivery, as applicable, of DSBO’s notice of non-responsiveness to submit a request to DSBO for an administrative reconsideration of that decision. See Rule 11 for reconsideration.

DSBO shall complete the administrative reconsideration and provide the User department or Purchasing Division and the Bidder or Proposer with a written decision of reconsideration no later than two (2) Business Days. See Rule 11.

A bid or proposal deemed responsive as a result of the reconsideration will be added to the review process of the User department or Purchasing Division.

The decision of nonresponsiveness on reconsideration will constitute a final decision, and the Bidder or Proposer may request a hearing under D.R.M.C. Section 28-33.

**B. Clarifications of Requirements Concerning Good Faith Efforts. In**

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accordance with D.R.M.C. Section 28-128 and Section 28-130, DSBO shall review a Bidder or Proposer’s demonstration of good faith efforts to determine if it is adequate. D.R.M.C. Section 28-123(26) states that “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 set forth in more detail in D.R.M.C. Section 28-128. This Rule 7.4.5.B. clarifies certain requirements in D.R.M.C. Section 28-128 and Section 28-131 concerning the demonstration of good faith efforts to be provided by Bidders and Proposers.

**(i) Clarification of MBE/WBE Solicitation Requirements in D.R.M.C. §28-128(b)(1).**

**1.** With respect to the requirement to “solicit through all reasonable and available means”, acceptable contact modes for solicitation shall be letters, facsimile transmissions, telephone Communication, and email.

**2.** With respect to the requirement to solicit “within sufficient time” the solicitation must be made at least ten (10) Business Days before the bid date or the date of proposal submission.

**3.** With respect to the requirement to demonstrate “appropriate steps to follow up initial solicitations” appropriate steps may be demonstrated by second contact attempts by letter, facsimile transmission, telephone Communication, or e-mail, if the Bidder/Proposer failed to make contact on its first attempt.

**(ii) Clarification of Providing Opportunities to MBE/WBEs in D.R.M.C. §28-128(b)(2).**

**1.** The requirement in D.R.M.C. Section 28-128(b)(2) to break out work into economically feasible units means that the Bidder or Proposer shall make an effort to break up procurements into smaller units that could be bid on or proposed by MBEs/WBEs.

**2.** The language concerning “reasonably consistent with industry practice” in D.R.M.C. Section 28-128(b)(2) means that the Bidder or Proposer shall make a moderate and reasonable adjustment to the normal and practiced industry standard and demonstrates a reasonable willingness to divide up procurements to provide more opportunities for MBEs/WBEs to submit bids or proposals.

**(iii) Clarification of Access to Information in D.R.M.C. §28-128(b)(3).** The requirement “to provide MBEs and WBEs” “timely, adequate access to and information about” in D.R.M.C. Section 28- 128(b)(3) means

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that such access will be provided at least ten (10) Business Days before the bid date or the date of proposal submission.

**(iv)** Clarification of Good Faith Negotiation in D.R.M.C. §28-128(b)(4). The requirement “to negotiate in good faith” in D.R.M.C. Section 28-128(b)(4) means scheduling and having meaningful discussions that demonstrably seek to find reasonable ways to increase utilization of MBEs/WBEs on the contract or purchase order without preconceptions or assumptions that tend to discourage or defeat potential MBE/WBE utilization.

**(v)** Clarification of Communication Standards D.R.M.C. §28-128(b)(5). The requirement that Communications with MBEs/WBEs be consistent with industry practice in D.R.M.C. Section 28-128(b)(5) means that Communications with MBEs and WBEs will be in accordance with normal and practiced standards in the industry or the profession for Communication between Bidders or Proposers and prospective subcontractors, subconsultants, suppliers, manufacturers, manufacturer’s representatives, brokers, distributors, packagers, or joint venturers, as applicable.

**(vi)** Clarification of Verification Requirements in D.R.M.C. §28-128(b)(6). The requirement to “provide verification” and a “verified statement” in D.R.M.C. Section 28-128(b)(6) means an attested transmittal of copies of actual bids or quotes received by the Bidder or Proposer that evidences the MBE/WBE bids/quotes received were not the lowest competitive monetary bids/quotes in the commodity or service area that the MBEs/WBEs were competing for will be supplied to the DSBO.

**(vii)** Clarification of Assistance to MBEs/WBEs in D.R.M.C. §28-128(b)(7). The requirement of “reasonable efforts to assist interested MBEs and WBEs” in D.R.M.C. Section 28-128(b)(7) means that there will be practical and rational attempts to refer MBEs/WBEs to companies or organizations that provide direct services related to insurance and financial institutions that assist small growing business, consistent with the Proposer’s industry and professional knowledge, experience, and contacts.

**(viii)** Clarification to Inform Bidders and Proposers of Deadline to Submit Documentation in D.R.M.C. §28-131. All Invitations to Bid, Requests for Bid, and Requests for Proposals, as such terms are defined in D.R.M.C. Sections 28-123(28) and (43), respectively, will expressly require Bidders and Proposers to submit documentation of the Bidder’s or Proposer’s good faith efforts, and as applicable, the good faith efforts of the Bidder’s or Proposer’s subcontractors, subconsultants, subvendors, joint venturers, suppliers, manufacturers, manufacturer’s representatives, brokers, packagers, or distributors, or of letters of intent to perform, to the DSBO director at the time of submission of the bid or proposal to the User

department or Purchasing Division.

**RULE 8.** SBE DEFINED PROCUREMENT POOL – (Contracts/Purchase Orders less than fifty thousand dollars (\$50,000)).

**8.1** Purpose and Scope. D.R.M.C. Section 28-138 establishes a Defined Procurement Pool to award certain contracts and purchase orders for Covered goods and Covered services to SBEs who are not brokers, manufacturer's representatives, or packagers (as such terms are defined in D.R.M.C. Sections 28-123(7), (32), and (36), respectively. Procurement opportunities offered through the Defined Procurement Pool will be those contracts and purchase orders for Covered goods or Covered services for which the estimated cost is less than fifty thousand dollars (\$50,000) unless exempted by the Purchasing Ordinance or these Rules.

**8.2** Determination of SBE availability for Defined Procurement Pool.

**8.2.1.** D.R.M.C. Section 28-139(a) requires the Purchasing Division or User department to notify the DSBO of a proposed procurement to be made through the Defined Procurement Pool.

**8.2.2.** SBEs competing for contracts and purchase orders through the Defined Procurement Pool must be certified by the DSBO in the specific NAICS work code category that corresponds to the solicitation for Covered goods or Covered services. Certification by DSBO as an SBE in the proper work code classification will be made a condition of responsiveness to any such a bid or proposal.

**8.2.3.** Upon transmission of the notice of proposed procurement from a User department, DSBO shall timely 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 under the Defined Procurement Pool. DSBO shall notify the User department or Purchasing Division of that determination no later than three (3) Business Days from the date the DSBO director completes his or her review of the SBE directory.

**8.2.4.** The DSBO director may delegate the review and determination of SBE availability to the Purchasing Director for bids or proposals solicited by the Purchasing Division.

**8.2.5.** If there are not three (3) or more available SBEs, who 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 percent (75%) of the total amount of the contract or purchase order with its own forces, the Purchasing Division or User department shall obtain the Covered goods or Covered services through an Independent Partnership. D.R.M.C. Section 28-139(c).

**8.2.6.** If there are three (3) or more SBEs, who are not brokers, packagers, or manufacturer's representatives, on the most current DSBO certification list, the Purchasing Division or User department shall provide the procurement opportunity to those identified

SBEs only through bidding or selection procedures and methods required or authorized by the Charter, Municipal Code, or executive orders for that specific contract or purchase order.

**83.** Prebid/Preproposal Meetings. User departments and the Purchasing Division shall notify DSBO in advance of any pre-bid or pre-proposal conferences for a procurement subject to the Defined Procurement Pool and all pre-bid or pre-proposal information of the procurement made available publicly to interested Bidders and Proposers.

**84.** Commercially Useful Function.

**8.4.1.** An SBE awarded a contract or purchase order through the Defined Procurement Pool must perform a commercially useful function on the contract or purchase order in the area for which it is certified and must not function as a conduit. See, D.R.M.C. Sections 28-139(b) and (c); 28-140(a). In particular, an SBE who has been awarded a contract or purchase order through the Defined Procurement Pool must self perform no less than seventy-five percent (75%) of the total amount of the contract or purchase order with its own forces. This means that an SBE awarded a contract or purchase order for Covered goods through the Defined Procurement Pool must self-perform no less than seventy-five percent (75%) of the total amount of the contract or purchase order and, if the contract or purchase order is for Covered services, the SBE must use its own forces to perform the work.

**8.4.2.** All Solicitations, as such term is defined at D.R.M.C. Section 28-143(46), for Covered services undertaken under Executive Order 8B, will include notice to Bidders and Proposers that they must complete and return the most current version of the DSBO Letter of intent form for SBE self-performance with or at the time of bid or proposal submission to the Purchasing Division or User department in order to be eligible to participate in the Defined Procurement Pool. For written solicitations, the Purchasing Division and User departments shall include the most current version of the DSBO SBE [Letter of intent form](#) with Bid or Proposal Instructions. For procurements of Covered services by an informal selection process under Executive Order 8B, User departments shall provide the SBE Letter of intent form to Proposers at the time it requests proposals for Covered services.

**8.4.3.** At the time a bid or proposal is submitted, the Bidder or Proposer shall provide to the User department or Purchasing Division, as appropriate, a fully completed DSBO SBE Letter of intent form demonstrating the Bidder or Proposer will perform a commercially useful function on the contract or purchase order in the area for which it is certified and will self perform no less than seventy-five percent (75%) of the total amount of the contract or purchase order with its own forces.

**8.4.4.** The Purchasing Division or User department shall provide a copy of all DSBO bids, proposals, and SBE Letters of intent forms to DSBO no later than two (2) Business Days from the date of submission.

**8.4.5.** The User department or Purchasing Division will not be required to stay or delay the evaluation process pending the DSBO's final review of Letter of intent forms.

**85.** DSBO Review/Informal Meeting.

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**8.5.1.** DSBO will have no more than seven (7) Business Days from the date of receipt to review bids, proposals, and SBE Letters of intent to determine if the Bidder or Proposer has demonstrated it will perform a commercially useful function on the Defined Procurement Pool contract or purchase order and to provide notices of responsiveness or nonresponsiveness. DSBO shall notify the User department or Purchasing Division of responsive bids or proposals. See, D.R.M.C. Section 28-141(a).

**8.5.2.** DSBO shall notify the User department or Purchasing Division and the Bidder or Proposer of the Director’s final determination of non-responsive bids or proposals for failure to establish the Bidder or Proposer will perform a commercially useful function. See, D.R.M.C. Section 28-141(b).

**8.5.3.** Bidders or Proposers will have two (2) Business Days from the date of receipt or delivery, as applicable, of DSBO’s notice of non-responsiveness to request an informal meeting with DSBO. D.R.M.C. Section 28-141(c).

**8.5.4.** DSBO shall schedule the informal meeting no later than two (2) Business Days from the date the informal meeting is requested. The Bidder or Proposer will have twenty-four (24) hours from the date and time the informal meeting is completed to submit additional information or to clarify its performance of a commercially useful function in accordance with D.R.M.C. Section 28-141(c).

**8.5.5.** DSBO will have two (2) Business Days from the date of the informal meeting to provide written notice to the Bidder or Proposer and the User department or Purchasing Division whether the bid or proposal is responsive or nonresponsive in accordance with D.R.M.C. Section 28-141(c).

**8.5.6.** A bid or proposal deemed responsive as a result of the informal meeting will be added to the review process of the User department or Purchasing Division.

**86.** Reconsideration by DSBO/Request for Hearing. A Bidder or Proposer may seek an administrative reconsideration in accordance with Rule 11.

**RULE 9.** SBE BID PREFERENCE - (Contracts/Purchase Orders fifty thousand dollars (\$50,000) to two hundred fifty thousand dollars (\$250,000)).

**91.** Purpose and Scope. D.R.M.C. Section 28-142 establishes a bid preference for SBEs, who are not brokers, packagers, or manufacturer’s representatives, seeking procurement opportunities for Covered goods and Covered services for which the estimated cost is from fifty thousand dollars (\$50,000) to two hundred fifty thousand dollars (\$250,000). Preference points are for requests or invitations for bids only. The preference will not be given for Requests for Proposals.

**92.** Preference Points for Requests/Invitations for Bids only.

**921.** D.R.M.C. Section 28-143(a) allows the Purchasing Division or User department to give an SBE, whose bid is otherwise responsive and responsible, a bid

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preference on bids equal to ten percent (10%) of the total bid price. The bid preference will be used only to evaluate the bid or bids and will not affect the contract price.

**922.** Although the procurement will be available to all interested Bidders, only SBEs certified by the DSBO in the specific NAICS work code category that corresponds to the Covered goods or Covered services sought by the Purchasing Division or User department will be given the preference points. SBEs competing for contracts and purchase orders with a bid preference must be certified by the DSBO in the specific NAICS work code category that corresponds to the solicitation for Covered goods or Covered services. Certification by DSBO as an SBE in the proper work code classification will be made a condition of responsiveness to any such a bid or proposal.

**93.** Public Bid Opening. A public bid opening will be conducted for bid preference procurements. D.R.M.C. Section 28-143(b) requires the Purchasing Division or User department managing the bidding procedure to reduce, at bid opening, the bids of SBEs by the ten percent (10%) bid preference in order to establish the apparent low Bidder.

**94.** Prebid meetings. User departments and the Purchasing Division shall notify DSBO in advance of pre-bid conferences for a procurement subject to a bid preference and all pre-bid information of the procurement made available publicly to interested Bidders.

**95.** Commercially Use Function.

**95.1.** All SBEs awarded a contract or purchase order with a bid preference must perform a commercially useful function on the contract or purchase order in the area for which they are certified and must not function as a conduit. See, D.R.M.C. Sections 28- 142; 28-144(a); 28-148(a)(1); and 28-148(c). In particular, an SBE who has been awarded a contract or purchase order with a bid preference must self perform no less than seventy-five percent (75%) of the total amount of the contract or purchase order with its own forces. This means that an SBE awarded a contract or purchase order for Covered goods with a bid preference must self-perform no less than seventy-five percent (75%) of the total amount of the contract or purchase order and, if the contract or purchase order is for Covered services, then the SBE must use its own forces to perform the work.

**95.2.** All bid solicitations, including without limitation, Requests for Bids and Invitations to Bid, and all informal selection procedures for covered services undertaken under Executive Order 8B where the lowest price is the sole deciding factor will include notice to Bidders that they must complete and return the most current version of the DSBO Letter of intent form for SBE self-performance with or at the time of bid submission to the Purchasing Division or User department in order to be eligible for the bid preference. For written solicitations, the Purchasing Division and User departments will include the most current version of the DSBO SBE [Letter of intent form](#) with Bid Instructions. For procurements of Covered services by an informal bid selection process under Executive Order 8B, User departments shall provide the SBE Letter of intent form to Proposers at the time it requests bids for Covered services.

**95.3.** At the time a bid is submitted, the Bidder shall provide to the User department or Purchasing Division, as appropriate, a fully completed DSBO SBE Letter of

intent form demonstrating the Bidder will perform a commercially useful function on the contract or purchase order in the area for which it is certified and will self perform no less than seventy-five percent (75%) of the total amount of the contract or purchase order with its own forces.

**9.6** Initial Bid Tabulation

**9.6.1.** At the bid opening, the Purchasing Division or the User department shall apply bid preferences based on the information set forth in submitted Letters of intent and determine the apparent low Bidder. All currently certified SBE vendors who: (i) meet the 75% self-performance requirement; (ii) are otherwise deemed to be responsible and responsive to the requirements and specifications of the bid; and (iii) who are qualified (DRMC 28- 123(42)) to provide the requested goods and services, will receive a ten percent (10%) pricing preference that will be discounted from the total price of the actual bid submitted.

Bid Preference Methodology: Example A

Non-Certified Proposer	Certified SBE Proposer A	Certified SBE Proposer B
\$98,000	\$105,000	\$107,500
X 1	X .90 (10% PREFERENCE)	X .90 (10% PREFERENCE)
\$98,000	\$ 94,500 (Apparent low)	\$ 96,750

Except as expressly authorized in Section 9.6.2 below concerning partial awards, the adjusted bid prices of SBE bids will, at bid opening, then be used to determine the rank order of lowest, responsive, qualified Bidders as follows: The total adjusted bid price offered by the SBE will be compared against the lowest total bid amount, if such bid is submitted by a non-certified firm. If the adjusted bid price of the SBE is lower than the lowest bid offered by a non-certified firm, the SBE will be awarded the bid at its actual quoted and unadjusted price. The Purchasing Division or User department shall inform Bidders that final award of the contract or purchase order will be made after the Purchasing Division or User department and the DSBO have determined the bids are otherwise responsive and the Bidder is otherwise responsible.

**9.6.2.** The Purchasing Division or User department may make a partial award for a specific group or groups of Covered goods or Covered services only to the extent expressly

shown on the request or invitation for bids. The request or invitation must inform Bidders that they must provide separate bid prices for each specific Covered good or Covered service. The bid adjustment and tabulation procedures set forth in Section 9.6.1 shall apply to determine the rank order of lowest, responsive, qualified Bidders except that instead of comparing overall “total” bid prices, the Purchasing Division or User department will instead compare the total prices submitted for each specific Covered goods or Covered services in each instance. If the adjusted SBE bid price for a specific Covered good or Covered service is lower than the lowest bid price offered by a non-certified firm for that same Covered good or Covered service, the SBE will be awarded the partial bid at its actual quoted and unadjusted price for the Covered good or Covered service, in each instance. The Purchasing Division or User department shall inform Bidders that final partial award of the contract or purchase order will be made after the Purchasing Division or User department and the DSBO have determined the bids are otherwise responsive and the Bidder is otherwise responsible.

9.6.3. The Purchasing Division or User department shall provide a copy of all bids and SBE Letters of intent forms to the DSBO no later than two (2) Business Days from the date of bid opening.

9.6.4. The User department or Purchasing Division will not be required to stay or delay the evaluation process pending the DSBO’s final review of bids and Letter of intent forms.

## **9.7. DSBO Review/Delegation/Informal meeting**

**9.7.1.** DSBO will complete its review of bids, SBE letters of intent and provide notices of responsiveness or nonresponsiveness no later than seven (7) Business Days from the date of receipt.

**9.7.2.** In accordance with D.R.M.C. Section 28-145(a), the DSBO director delegates this review to the purchasing director for bids solicited by the purchasing division. The Purchasing Division shall notify the DSBO of the results of its review and any recommendations of responsiveness or nonresponsiveness and the DSBO director will make the final decision of responsiveness or nonresponsiveness.

**9.7.3.** DSBO shall notify the User department or Purchasing Division of responsive bids in accordance with D.R.M.C. Section 28-145(a).

**9.7.4.** DSBO shall notify the User department or Purchasing Division and the Bidder of the Director’s final determination of a non-responsive bid for failure to establish the Bidder will perform a commercially useful function. See, D.R.M.C. Section 28-145(b).

**9.7.5.** Bidders will have two (2) Business Days from the date of receipt or delivery, as applicable, of DSBO’s notice of non-responsiveness to request an informal meeting with DSBO. D.R.M.C. Section 28-145(c).

**9.7.6.** DSBO shall schedule the informal meeting no later than two (2) Business Days from the date the informal meeting is requested. The Bidder will have twenty-four (24) hours from the date and time the informal meeting is completed to submit additional

information or to clarify its performance of a commercially useful function in accordance with D.R.M.C. Section 28-145(c).

**9.7.7.** DSBO will have two (2) Business Days from the date of the informal meeting to provide written notice to the Bidder and the User department or Purchasing Division whether the bid is responsive or nonresponsive in accordance with D.R.M.C. Section 28-145(c).

**9.7.8.** A bid deemed responsive as a result of the informal meeting will be added to the review process of the User department or Purchasing Division.

**9.8.** Reconsideration by DSBO / Request for Hearing. A Bidder may seek an administrative reconsideration in accordance with Rule 11.

**9.9.** Bid Preference Methodology: Example A (re-tabulated) Upon final decision by DSBO (after informal meeting and after reconsideration, if requested by the Bidder) of the nonresponsiveness of the apparent low SBE Bidder, the User department or Purchasing Division shall re-tabulate the bid amount and bid preference for the second lowest SBE Bidder who is otherwise responsive and responsible in all respects, as follows:

Non-Certified Proposer	Certified SBE Proposer A	Certified SBE Proposer B
\$98,000	\$105,000	\$107,500
X 1	X .90 (10% PREFERENCE)	X .90 (10% PREFERENCE)
\$98,000	\$ 94,500 ( <del>Apparent original low</del> )  LOI found non-compliant by DSBO- Vendor A will now be considered as non-certified- Preference Points Retracted: \$105,000	\$ 96,750  LOI found compliant by DSBO  The \$ 96,750 stands and the Proposer is Awarded at \$107,500

**RULE 10. INDEPENDENT PARTNERSHIPS** - Contracts/Purchase Orders for Covered goods or Covered services independent from the Goal, Defined Procurement Pool or Bid Preference programs.

**10.1.** Purpose and Scope. D.R.M.C. Section 28-151 establishes procurement opportunities for MBEs/WBEs, SBEs, and other business enterprises, to participate in contracts or purchase orders for Covered goods or Covered services that are not included in the goal, bid preference, or Defined Procurement Pool programs. Procurement opportunities will encourage participation by such business entities, but selection of such entities will not be required or compelled. User departments and the Purchasing Division shall not mandate

a specific outcome in favor of an MBE/WBE or SBE. Accordingly, User departments and the Purchasing Division will not score, rank or otherwise evaluate a response or lack of a response for independent partnerships for contract or purchase order award purposes.

**102. Prebid/Preproposal Meetings.** User departments and the Purchasing Division shall notify DSBO in advance of any pre-bid or pre-proposal conferences for a procurement awarded under an Independent Partnership and all pre-bid or pre-proposal information of the procurement made available publicly to interested Bidders and Proposers.

**103. Solicitation Documents.** All Solicitations, as such term is defined at D.R.M.C. Section 28-143(46), including without limitation, Requests for Proposals, Requests for Bids, and Invitations to Bid, for Covered goods or Covered services, and all informal selection procedures for Covered services undertaken under Executive Order 8B that are subject to the requirements for Independent Partnerships in D.R.M.C. Section 28-151, will contain a provision encouraging, but not requiring, participation by an independent partnership with MBEs/WBEs and SBEs. User departments and the Purchasing Division shall confirm with the City Attorney's Office that they

are using the most current version of the independent partnerships provision. In addition, for written Solicitations, User departments and the Purchasing Division shall provide the most current version of the DSBO SBE [Letter of intent form](#) with Bid or Proposal Instructions. For procurements of Covered services by an informal selection process under Executive Order 8B, User departments shall provide the DSBO SBE Letter of intent form to Proposers at the time it requests proposals for Covered services.

**104. Voluntary Disclosure of Participation by MBEs, WBEs, or SBEs.** User departments and the Purchasing Division shall provide information to Bidders or Proposers to complete and return the DSBO SBE Letter of intent form at the time a bid or proposal is submitted if the Bidder or Proposer intends to voluntarily include MBEs/WBEs or SBEs on the contract or purchase order as a subcontractor, subconsultant, subvendor, supplier, manufacturer, manufacturer's representative, broker, distributor, or joint venture. In such event, the Bidder or Proposer shall identify, on the form, the level of participation by MBEs/WBEs or SBEs for the duration of the contract or purchase order.

**105. DSBO Review.** Upon award of a City contract or purchase order, the Purchasing Division or User department shall provide a copy of all DSBO SBE Letters of intent forms to DSBO timely. DSBO shall review the forms to determine if there will be participation by an MBE/WBE or SBE. If the disclosure reveals that performance will be provided by an SBE who is also an MBE or WBE, then such participation or performance will be monitored by DSBO and credited toward the annual goal based upon an analysis of the specific duties actually 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 disclosure reveals performance will be provided 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 actually performed by the SBE and the extent to which such duties constitute a commercially useful function for each contract or purchase order. D.R.M.C. Section 28-151(b).

**106.** Compliance a Condition of the Contract.

**1061.** Upon award of a City contract or purchase order that includes participation by an MBE/WBE or SBE pursuant to D.R.M.C. Section 28-151, the MBE's/WBE's or SBE's participation becomes a covenant of performance by the Vendor, Contractor or Consultant in favor of the City.

**1062.** All contracts or purchase orders demonstrating voluntarily inclusion of MBEs/WBEs or SBEs under independent partnerships shall be reviewed periodically by the DSBO to determine whether the MBE/WBE or SBE participation dollar amounts and percentages originally disclosed are maintained over the term or duration of the contract or purchase order; and are performing a commercially useful function. The review will examine the nature and amount of participation provided, industry practice, and other relevant factors. The amount of MBE and WBE participation credited toward the MBE/WBE annual goal will 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 work performed by an MBE/WBE or SBE not providing a commercially useful function, or functioning as a conduit will not be counted.

**1063.** Vendors, Contractors, and Consultants, User departments, and the Purchasing Division shall timely notify DSBO of any agreed upon increase or decrease in the Covered goods or Covered services to be provided under a contract or purchase order containing independent partnerships regardless of whether such increase or decrease in Covered goods or Covered services has been reduced to writing at the time of notification.

**1064.** For any contract or purchase for which a Vendor, Contractor, or Consultant has voluntarily disclosed and agreed that it will have participation by an MBE/WBE or SBE under independent partnerships, the covenant of performance will be an on-going, affirmative obligation of the Vendor, Contractor, or Consultant on such contract or purchase order to maintain the level of participation disclosed with its bid or proposal and contained in its contract or purchase order for the duration of the contract or purchase order to the extent the participation by the MBE/WBE or SBE constitutes a commercially useful function, except to the extent such noncompliance is addressed in Sections 10.6.5 and 10.6.6 below.

**1065.** The Vendor, Contractor or Consultant shall have the opportunity to demonstrate its good faith efforts, in the event the DSBO determines a Vendor, Contractor or Consultant has failed to maintain the original participation level disclosed on the contract or purchase order due to:

**A.** A material alteration, initiated by the City through a contract or purchase order amendment, to the Covered goods or Covered services,

such as an increase to the existing Covered goods or Covered services or the addition of new Covered goods or Covered services, adversely affecting original participation level of MBEs/WBEs or SBEs from performing on the contract or purchase order; or

**B.** A determination by the Vendor, Contractor or Consultant that it must add or replace an MBE/WBE or SBE originally listed to perform on the contract or purchase order

**1066.** Documentation of good faith efforts to maintain independent partnerships must be submitted to the DSBO prior to the next payment to the Vendor, Contractor or Consultant under the contract or purchase order. The good faith efforts will contain the following information:

**A.** Verification of the Vendor's, Contractor's or Consultant's intention to terminate or replace an MBE/WBE or SBE 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.

**B.** Verification that the Vendor, Contractor or Consultant used the most current DSBO MBE/WBE or SBE directory in order to contact business entities that are certified in the applicable category of goods or services at the time of the good faith effort.

**C.** Verification of efforts to contact appropriate MBEs/WBEs and SBEs within the same category of Covered goods or Covered services. The DSBO director may verify such contacts as he or she deems appropriate.

**107.** Noncompliance with originally disclosed participation levels on contract or purchase order. Absent an adequate demonstration of good faith efforts, it will be a material breach of the contract or purchase order for a Vendor, Contractor, or Consultant to have utilized MBEs/WBEs or SBEs for a non-commercially useful function or as a conduit, failed to submit information required to confirm participation by MBEs/WBEs or SBEs, submitted false, inaccurate, or materially incomplete statements, documentation or records, including but not limited to Letters of intent, or to fail to cooperate in a review or investigation concerning the participation of MBEs/WBEs or SBEs through independent partnerships. The Purchasing Division or User department shall consult with DSBO to make a final decision of breach of contract or purchase order. If a Vendor, Contractor, or Consultant is found to be in breach of contract for the foregoing reasons or otherwise, the City may exercise any or all of its rights, specified in the contract or purchase order.

**108.** Records. The Vendor, Contractor, or Consultant, shall establish and maintain records and report on-going participation by MBEs/WBEs or SBEs and provide any other information reasonably requested by DSBO in such format as designated by DSBO.

**RULE 11. REVIEW OF DSBO DETERMINATIONS.**

**11.1. Administrative Reconsideration.**

**11.1.1.** In the event the DSBO finds that a bid or proposal is not responsive, it shall provide the business enterprise a written explanation of the reasons and the basis for the finding of non-responsiveness.

**11.1.2.** For goal procurements, in the event of a non-responsive finding based on the failure to demonstrate compliance with the assigned goal, failure to submit information timely, or inadequacies in a demonstration of good faith efforts, the business enterprise may request in writing an administrative reconsideration no later than two (2) Business Days from the date of receipt or delivery, as applicable, of the DSBO finding.

**11.1.3.** For SBE Defined Procurement Pool and bid preference procurements, when the finding is based on an inadequate demonstration of a commercially useful function, the business enterprise may request in writing an administrative reconsideration no later than two (2) Business Days from the date of receipt or delivery, as applicable, the DSBO notice.

**11.1.4.** At the administrative reconsideration, the business enterprise may provide written documentation or oral argument in support of its reconsideration request. The business enterprise seeking reconsideration has the burden of demonstrating, by a preponderance of the evidence, that it has met all applicable requirements of Denver's Purchasing Ordinance. The DSBO will consider all of the facts in the record viewed as a whole and determine whether the business enterprise has met its burden by a preponderance of the evidence.

**11.1.5.** Upon completion of the administrative reconsideration, the DSBO shall provide the business enterprise with a written reconsideration decision. The decision on reconsideration will constitute a final decision, and the business entity may petition the Director for a hearing under D.R.M.C. Section 28-33.

**11.1.6.** The User department or Purchasing Division shall stay the effect of DSBO decision of nonresponsiveness only until the date of DSBO's final decision on reconsideration.

**11.2. Administrative Hearing of Determinations of Nonresponsiveness- D.R.M.C § 28-33.**

**11.2.1.** Administrative Hearings under D.R.M.C. Section 28-33 will be conducted in accordance with the Rules and Regulations Governing Hearings Before the Director of the Mayor's Office of Contract Compliance (promulgated on October 21, 1993), except to the extent there is a conflict between these Rules and the 1993

Rules in which case these Rules shall control.

**11.2.2.** The petition for appeal must be delivered to the Director no later than thirty (30) after the date of the determination of nonresponsiveness. Compliance with the provisions of D.R.M.C. Section 28-33 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. Nothing in these Rules, the 1993 Rules or D.R.M.C. Section 28-33 shall be construed to create a right of standing that does not otherwise exist under Colorado law. D.R.M.C. Section 28-33(a).

**11.2.3.** 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. D.R.M.C. Section 28-33(b).

**11.2.4.** The petition for appeal 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.

**11.2.5** 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.R.M.C. Section 28-33(c).

**1126.** No Stay of DSBO Decision. Pending the conclusion of the D.R.M.C. Section 28-33 hearing and the hearing officer's (the "Hearing Officer") decision in the matter, the decision of the DSBO remains in effect. The Hearing Officer shall not stay the effect of the decision while he or she is considering an appeal.

**1127.** Record on Appeal. Upon receipt of an appeal, the Hearing Officer will request a copy of the DSBO's administrative record in the matter, which must be provided by the DSBO within ten (10) Business Days of the Hearing Officer's request. The Hearing Officer may extend this time period on the basis of a showing of good cause. The record shall be well organized, indexed and paginated.

**1128.** Scope of Administrative Hearing.

**A.** The Hearing Officer's decision shall be made based solely on the administrative record. The Hearing Officer does not make a de novo review of the matter but may accept briefs with written arguments and allow oral argument by the parties.

**B.** The Hearing Officer will affirm the decision of the DSBO unless the Hearing Officer determines, based on the entire administrative record, that the decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of the applicable ordinances or regulations of the DSBO. The Hearing Officer is not required to reverse a decision if the Hearing Officer determines that a procedural error did not result in fundamental unfairness to the appellant or substantially prejudice the opportunity of the appellant to present its case.

**C.** If the Hearing Officer determines, after reviewing the entire administrative record, that the DSBO's decision was unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of applicable ordinances or regulations, the Hearing Officer may reverse the DSBO's decision and direct the DSBO to find the bid or proposal responsive.

**D.** If it appears that the record is incomplete or unclear with respect to matters likely to have a significant impact on the outcome of the case, the Hearing Officer may remand the record to the DSBO with instructions seeking clarification or augmentation of the record before making a finding. The Hearing Officer may also remand a case for further proceedings consistent with the Hearing Officer's instructions concerning the proper application of applicable ordinances or regulations.

**E.** The Hearing Officer shall not uphold the DSBO's decision based on grounds not specified in the DSBO's written decision.

**F.** The Hearing Officer will provide written notice of its decision to the business enterprise requesting an administrative review hearing. The notice shall include the reasons for the Hearing Officer's decision, including specific references to the evidence in the record that supports each reason for the decision.

**G.** The DSBO will take the action directed by the Hearing Officer's decision immediately upon receiving written notice of it.

**H.** The DSBO's policy is that the Hearing Officer shall make his or her decision within sixty (60) calendar days of receiving the complete administrative record. If the Hearing Officer does not make a decision within this period, the Hearing Officer shall provide written notice to concerned parties, including a statement of the reason for the delay and a date by which the appeal decision will be made.

**11.3.** Administrative Hearing of All Other Decisions of the DSBO Under the Purchasing Ordinance - D.R.M.C. Section 28-33. Review of all other matters reviewed under D.R.M.C. §28-33 shall allow for de novo review by the Hearing Officer of the facts and circumstances

upon which the DSBO's decision was based.

**RULE 12. MEDIATION OF DISPUTES IN THE EVENT OF FAILURE TO UTILIZE A MBE/WBE OR SBE ORIGINALLY IDENTIFIED FOR PARTICIPATION ON A PROCUREMENT (POST AWARD).**

12.1. DSBO May Order Mediation. In the event a Vendor, Contractor, or Consultant intends to modify or eliminate all or a portion of the Covered goods or Covered services attributable to a MBE/WBE or SBE upon which a contract or purchase order has been awarded, or intends to terminate a MBE/WBE or SBE originally utilized as a subcontractor, subconsultant, subvendor, supplier, manufacturer, manufacturer's representative, broker, distributor, or joint venture, in order to be awarded the contract or purchase order, as set forth in D.R.M.C. Section 28-135(a) (3) and (4), and such proposed modification or elimination of work or proposed termination is related to or results in a dispute ("Dispute") between the Vendor, Contractor, or Consultant and the MBE/WBE or SBE (the "Parties"), then the Director may order the Parties to submit such Dispute to mediation prior to modifying or eliminating such work or terminating its agreement with the MBE/WBE or SBE.