

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

DIVISION 1. DIVISION OF SMALL BUSINESS OPPORTUNITY¹

Subdivision I. [In General]

Sec. 28-31. DSBO and program objectives.

The division of small business opportunity (DSBO), under the Denver Economic Development and Opportunity (DEDO) agency, shall be responsible for the performance of the functions, powers and duties assigned to DSBO by this chapter 28 or as may be assigned by the executive director of the DEDO, which shall report to the mayor. Such duties shall include development and enforcement of programs for enhancing minority, women and small business enterprise utilization in city construction, professional design and construction services, and DEN concession contracting. DSBO shall also be responsible for promoting economic development of such minority, women and small business enterprises.

(Ord. No. 286-20, § 1, 4-13-20)

Sec. 28-32. Purpose and scope.

The purpose of article III and, in part, article V is to enable the city, through the departments and agencies of the city, including the departments of transportation and infrastructure, aviation and general services and other user departments, and the DSBO, to undertake specific activities to promote equity, maximize opportunities, and prevent discrimination and its effects against business enterprises that have been certified as MWBEs in the areas of construction, reconstruction and remodeling, and professional design and construction services, in the execution by the above departments of their duties pursuant to the Charter and ordinances of the City and County of Denver. The director and the user departments are hereby expressly delegated the necessary powers to effectuate the purpose of article III and V and to undertake such additional studies or inquiries as they may deem appropriate.

(Ord. No. 286-20, § 1, 4-13-20)

¹Editor's note(s)—Ord. No. 286-20, § 1, adopted April 13, 2020, repealed art. III, div. 1, §§ 28-31—28-36 and enacted a new div. 1 as set out herein. Former div. 1 pertained to similar subject matter and derived from Ord. No. 760-06, § 1, adopted Nov. 13, 2006; Ord. No. 85-14, § 1, adopted Feb. 18, 2014; Ord. No. 1324-17, § 1, adopted December 18, 2017; and Ord. No. 159-19, §§ 2—7, adopted March 18, 2019.

Sec. 28-33. Powers and duties.

- (a) The DSBO shall perform all duties and responsibilities established by this chapter 28 together with such other duties and responsibilities as may be assigned to the office by ordinance, executive order or which may be otherwise delegated to it by operation of federal law, including, but not limited to, administration and oversight of such federally-established disadvantaged business enterprise (DBE) or similar programs that may be made applicable to city contracting activities.
- (b) The director is hereby delegated the authority to promulgate such rules and regulations or guidelines as may be necessary to effectuate the purposes of this chapter 28 and other programs within the purview of the DSBO.

(Ord. No. 286-20, § 1, 4-13-20)

Sec. 28-34. Race- and gender-neutral measures to promote equal opportunities for all business enterprises.

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

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

(Ord. No. 286-20, § 1, 4-13-20)

Sec. 28-35. Definitions.

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

- (1) *Affiliate* means any business that is associated with an MWBE or with the owner(s) of such MWBE. Businesses are affiliates of each other when one (1) controls or has the power to control the other, or a third party or parties' controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists. The director may utilize, in the interpretation of this definition, the definition of affiliate set forth in C.F.R. § 121 or successor regulation, including related SBA guidance documents, as from time to time amended.
- (2) *Annual goal* means the targeted level for the aspirational goal established by the city for the annual aggregate participation of MWBEs in city contracts.
- (3) *Applicant business enterprise* means a business enterprise seeking to be certified as a minority and/or woman business enterprise under this article III and its divisions.

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- (4) *Bidder* means a business enterprise that submits a bid on a construction contract that is offered for competitive bidding by the city or otherwise offered by a private owner.
 - (5) *Broker* means a business enterprise that performs a commercially useful function as an intermediary, for a fee, in the acquisition of materials, supplies or equipment, regardless of whether it takes title to such materials, supplies or equipment, for the city or a private owner or its contractors, consultants or suppliers, but is not a manufacturer, manufacturer's representative or regular dealer. Only bona fide commissions earned by a broker for its activities in performing a commercially useful function on a city contract shall be counted toward the participation goal as set out in sections 28-59 and 28-63. A packager shall be considered and treated as a broker.
 - (6) *Business enterprise* means an individual, sole proprietorship, corporation, limited liability company, partnership, limited partnership, limited liability limited partnership, joint stock company, joint venture, professional association or any other legal entity operated for profit that is properly licensed or registered, as applicable, owned and controlled by person(s) who are citizens of the United States or lawful permanent residents of the United States, and otherwise authorized to do business in the State of Colorado.
 - (7) *Certification* means completion by a business enterprise of an application procedure to be developed by the DSBO, and formal authorization by the director to participate as an MWBE under this article III and its divisions. Certification neither represents nor implies that a business enterprise is qualified to perform on a contract, nor that it performs a commercially useful function.
 - (8) *City* means the City and County of Denver and its participating user departments.
 - (9) *City's marketplace* means the geographic and procurement area in which the city contracts on an ongoing basis, as established by the findings of the Denver City Council.
 - (10) *City project; city contract; city construction practices* mean any contract or project encompassed within the definition of contract in article III and its divisions, regardless of whether the project owner is the city or a private owner. All provisions of this article III and its divisions shall apply to such contracts let by private owners, provided that the city shall not dictate means and methods of construction to such private owners. Copies of all documents required to be provided by a subcontractor, subconsultant, supplier, manufacturer, manufacturer's representative or broker hereunder shall be sent to the director when the originals are sent to a private owner.
 - (11) *Commercially useful function* means an MWBE is responsible for the execution of a distinct element of the work of a contract and carries out the work by actually performing, maintaining control, managing, and supervising the work involved, or fulfilling responsibilities as a joint venturer. In determining whether an MWBE is performing or has performed a commercially useful function, the DSBO will analyze and evaluate the quantity of work subcontracted; the amount paid to the MWBE in proportion to the work actually performed; whether the MWBE is performing functions set forth in this definition and this article III and its divisions including, but not limited to, responsibility for, with respect to materials, supplies or equipment used for the contract work; negotiating price for the materials, supplies or equipment; determining quantity and quality of the materials, supplies or equipment; ordering materials, supplies or equipment; performing installation where applicable; paying for the materials, supplies or equipment; credit claimed toward participation goal achievement; and other relevant factors. Commercially useful function is measured for purposes of determining participation on a contract, not for determination of certification eligibility.
 - (12) *Competitive selection process* has the meaning ascribed to that phrase in sections 2.3.3(A) and 2.11.3(8) of the Denver City Charter, and in D.R.M.C. sections 5-19 and 20-56, as that meaning may pertain to a contract(s) at issue.

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- (13) *Conduit* means an MWBE that knowingly agrees to pass the scope of work for which it is listed for participation and is scheduled to perform or supply on a contract to a non-MWBE firm or does not carry out the responsibilities required for MWBE participation by actually performing, managing, controlling or supervising the work under a contract. In this type of relationship, the MWBE has not performed a commercially useful function and the arranged agreement between the two (2) parties is not consistent with standard industry practice. This arrangement does not meet the commercially useful function requirement, and therefore the MWBE's participation does not count toward the MWBE goal on the contract. Conduit is also referred to as a passthrough.
- (14) *Construction* means those areas of construction, reconstruction and remodeling as encompassed within the city's contracting processes authorized by the Charter and ordinances of the city, including construction management services. This definition shall encompass design-build contracts as appropriate.
- (15) *Consultant* means a business enterprise that enters into a contract with the city, in privity of contract with the city, for professional design and construction services or enters into such a contract with a private owner, in privity of contract with such private owner, for such services on a building or aviation or aeronautical facility, or improvements thereto, situated on real property owned by the city.
- (16) *Contract* means any city contract for construction or for professional design and construction services authorized by any provision of the Charter or ordinances of the city, excepting only those contracts subject to article VII of this chapter 28 or to federal DBE requirements. Contract shall include other contracts ancillary to cooperative agreements or understandings with other public and private agencies for purposes of development of public facilities, park and recreational facilities, museums, zoological and other gardens, collections of natural history, and observatories, if such contracts provide for funding in whole or in part by the city and provide for utilization of such funds for the purpose of construction or professional design and construction services for any public facility or area owned or leased by the city or situated on real property owned or leased by the city. Notwithstanding the foregoing, contract shall also include construction or professional design and construction services contracts for buildings or aviation or aeronautical facilities or improvements thereto, constructed by private owners on real property owned by the city, without regard to the utilization of city funding.
- (17) *Contractor* means a business enterprise that enters into a competitively bid or otherwise competitively selected construction contract with the city, in privity of contract with the city, or enters into such a construction contract with a private owner, whether or not bid, in privity of contract with such private owner for such work on a building or aviation or aeronautical facility, or improvements thereto, situated on real property owned by the city. Contractor includes general contractors and prime contractors.
- (18) *Day*, unless otherwise indicated, means calendar day.
- (19) *Department head* means the manager or director of the city department, user department or agency entering into contract(s) utilizing MWBE participation, or such person's designee.
- (20) *Design-build contract* means a contract for the procurement of both the design and the construction, reconstruction or remodeling of a public work in a single contract with a single design-build contractor or combination of such contractors that are capable of providing the necessary design and construction, reconstruction or remodeling services.
- (21) *Director* means the director of the division of small business opportunity or successor agency, or such director's designee.
- (22) *DSBO* or the DSBO means the division of small business opportunity.
- (23) *DSBO required forms* means the certifications, letters of intent, commitment forms and other forms and documents developed by DSBO or described in this article III and its divisions and the rules and

regulations, referenced in applicable procurement documents, and required by DSBO to confirm and evaluate a bidder's or proposer's commitment to utilization of certified firms and other DSBO program requirements. No unauthorized alteration or modification of a DSBO required form is permitted. DSBO reserves the right to reject altered or modified forms.

- (24) *Doing business* means having a physical location from which to engage in for-profit activities in the scope(s) of expertise of the business enterprise.
- (25) *Economically disadvantaged* means an individual with a personal net worth equal to or less than the permissible net worth amount determined by the U.S. Department of Transportation to be applicable to its DBE programs, or as otherwise promulgated by the director by rule and regulation.
- (26) *Expertise* means demonstrated skills, knowledge or ability to perform in the field of endeavor in which certification is sought by the business enterprise as defined by normal industry practices, including licensure or registration where required.
- (27) [Reserved]
- (28) *Good faith efforts* means substantive and meaningful good faith actions undertaken by a contractor or consultant to achieve the MWBE participation goal as defined in more detail in sections 28-60 and 28-64 of this article III and its divisions.
- (29) *Individual or person* means a natural human being, and not a legally-created or maintained entity.
- (30) *Integrated contract* means contract or contracts for construction procured and awarded for a city construction project or program, including where the awarded contractor may be authorized to conduct bidding or solicit proposal of contractors or subcontractors under city requirements, without a specific pre-determined project or scope of work. Once specific scope or scopes of work are identified, various projects, separate procurements, or individual work orders or task orders are authorized, and the contractor proceeds to complete the work under the separate contracts, projects or the individual work orders or task orders.
- (31) *Joint venture* means an association of two (2) or more business enterprises to constitute a single business enterprise to perform a city construction or professional design and construction services contract for which purpose they combine their property, capital, efforts, skills and knowledge and in which endeavor each joint venturer is responsible for a distinct, clearly defined portion of the work of the contract, performs a commercially useful function, and whose share in the capital contribution, control, management responsibilities, risks and profits of the joint venture are equal to its ownership interest. Joint ventures must have an agreement in writing specifying the terms and conditions of the relationships between the joint venturers and their relationship and responsibility to the contract. Only the portion of the total dollar value of a joint venture contract equal to the distinct, clearly defined work that the MWBE performs with its own forces as a commercially useful function will count towards MWBE participation.
- (32) *Letter of intent* means a DSBO required form that shall be a written communication from a project bidder or proposer to the city or a private owner with respect to a contract, evidencing an understanding between an MWBE and the bidder or proposer that, if the bidder or proposer is selected, then such MWBE has or will enter into a contractual relationship with the bidder or proposer on such contract or that such bidder or proposer will self-perform as an MWBE on such contract.
- (33) *Manufacturer* means a business enterprise that operates or maintains a factory or establishment that produces, or substantially alters on the premises the materials, supplies or equipment provided to contractors, consultants, subcontractors, subconsultants, suppliers, brokers or manufacturer's representatives on a contract, required under the contract and of the general character described by the contract specifications. For manufacturers, one hundred (100) percent of the value the materials, supplies or equipment provided by an MWBE under a contract shall count toward MWBE participation.

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- (34) *Manufacturer's representative* means a business enterprise that sells products for one (1) or more manufacturers. A manufacturer's representative does not take legal title to or physical possession of the products that it sells, such products generally being sent directly from the manufacturer to the contractor or subcontractor purchasing the products. Only bona fide commissions earned by a manufacturer's representative in performing a commercially useful function on a contract shall be counted toward the participation goal as set out in sections 28-59 and 28-63.
- (35) *Mentor-Protégé* means a relationship between a subcontractor certified as an MWBE (protégé) and a more experienced contractor (mentor) approved by DSBO. In a mentor-protégé relationship, the mentor provides guidance on technical, financial, bonding, equipment, and personnel assistance to the protégé. The purpose of the relationship is to increase the capacity of MWBEs to perform city contracts.
- (36) *Minority business enterprise or MBE* means a business enterprise that is certified by the director under this article III and its divisions as meeting all of the requirements for certification set forth in sections 28-53 and 28-55 as an MBE. A business enterprise owned by individuals who are both socially and economically disadvantaged minority individuals and women may be certified as both an MBE and a WBE. For purposes of this article III and its divisions, an MBE or WBE certified with DSBO in accordance with this article III and its divisions and the applicable rules and regulations shall be referred to as an MWBE.
- (37) *Minority individual* means:
- (a) An individual whose lifelong cultural and social affiliation is with one (1) of the following groups encompassed within the findings of the Denver City Council, which are rebuttably presumed to be socially disadvantaged:
 - (i) Blacks/African-Americans, which includes persons having origins in any of the black racial groups of Africa;
 - (ii) Hispanic-Americans, which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
 - (iii) Native-Americans, which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians; or
 - (iv) Asian-Americans (persons whose origins are in any of the original peoples of the far east, Southeast Asia, the islands of the Pacific or the Northern Marianas, or the Indian subcontinent); or
 - (b) Alternatively, on a case-by-case basis for the purposes of this article III and its divisions, an individual found by the city to have been subjected to individualized racial or ethnic prejudice or cultural bias within American society within the city's marketplace because of his or her identity as a member of a group other than the groups referenced in subsection (a) above, without regard to individual qualities, and therefore determined by the director to be individually socially disadvantaged under this subsection; and
 - (c) Individual social disadvantage must stem from circumstances beyond the individual's control. Evidence of individual social disadvantage must include:
 - (i) At least one (1) objective, distinguishing feature that has contributed to social disadvantage, such as disability, long-term residence in an environment isolated from the mainstream of American society within the city's marketplace or other similar barriers not common to individuals who are not socially disadvantaged.

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- (ii) Personal experiences of substantial and chronic social disadvantage in American society within the city's marketplace.
 - (iii) Negative impact on entry into or advancement in the city's marketplace and participating on city contracts because of the disadvantage, as demonstrated by the individual's education, employment and business history.
- (38) *On-call construction or design contracts or on-call projects* means contracts that are procured and awarded without a pre-determined specific project or scope of work. Once a specific scope of work is identified, individual work orders or task orders are authorized, and the contractor proceeds to complete the work under the individual work order or task order.
- (39) *Packager* means a business enterprise that performs a commercially useful function in the packaging of goods for the city or a private owner or its contractors, consultants, manufacturers, manufacturer's representatives or suppliers but is not itself a regular dealer, manufacturer, or manufacturer's representative. A packager shall be considered and treated as a broker.
- (40) *Participation goal* means the specific MWBE goal established for a particular contract, on-call contract, or city project including task orders or work orders, or at the city's option for separate procurements under an integrated contract, based upon the availability of MWBEs in the scope(s) of work of the contract.
- (41) *Personal net worth* means the net value of the assets of an individual after total liabilities are deducted. An individual's personal net worth does not include the individual's ownership interest in an applicant business enterprise or participating MWBE or the individual's equity, if any, in his or her primary place of residence. An individual's personal net worth includes only his or her share of assets held individually and jointly with the individual's spouse. For the purposes of certification as an MWBE under this article III and its divisions, an individual must have a personal net worth equal to or less than the permissible personal net worth amount determined by the U.S. Department of Transportation to be applicable to its DBE programs or as otherwise promulgated by the director by rule and regulation.
- (42) *Private owner* means a private or other non-city owner undertaking to contract for construction work or for design or construction management services on buildings or aviation or aeronautical facilities or improvements thereto, on real property owned by the city.
- (43) *Professional design and construction services* means those areas of services ancillary to construction as encompassed within the city's contracting processes authorized by the charter and ordinances of the city, including, but not limited to, engineering, architectural, testing, and planning services and all other professional services related to construction projects.
- (44) *Proposal* means an offer to perform construction or professional design and construction services pursuant to a negotiated or otherwise competitively selected city contract with either the city or a private owner, and whether in response to a request for qualifications, request for proposals or otherwise. The department head shall designate the proposal, and the date of receipt for each solicitation of proposers subject to this article III and its divisions.
- (45) *Proposer* means a business enterprise that submits a proposal on a city construction contract or professional design and construction services contract that is negotiated and not competitively bid or that utilizes a competitive selection process.
- (46) *Public-private partnership agreement (or P3 agreements)* means city contract or contracts for some combination of the following for the development, financing, design, construction, operation and maintenance of public facilities, buildings or aviation or aeronautical facilities, or improvements thereto, where such contracts provide for funding in whole or in part by the city or private funding and provide for utilization of such funds for the purpose of development, financing, construction, professional design and construction, professional services or operation and maintenance services for

public facilities or areas owned or leased by the city or situated on real property owned or leased by the city. For purposes of this article III and its divisions, such contracts shall allow the performance of design, professional services or construction, subject to city laws, rules and regulations, of a public facility by a public or private entity on city owned or leased land. Notwithstanding the foregoing, such contract or contracts shall also include development, financing, construction, professional design, professional services and construction services contracts by private owners on real property owned or leased by the city, without regard to the utilization of city funding.

- (47) *Qualified*, with respect to good faith efforts in this article III and its divisions, means that a business enterprise has the financial ability, expertise, skill, experience, and access to the necessary staff, facilities and equipment to complete contract(s) or subcontract(s) that it may undertake on projects. The city makes no representations as to the qualification of any applicant business enterprise MWBE.
- (48) *Regular dealer* means a business enterprise that owns, operates or maintains a store, warehouse or other establishment in which the materials, supplies, articles or equipment of the general character described by the contract specifications and required for the performance of the contract are bought and regularly sold or leased to the public in the usual course of business. To be a regular dealer, the business enterprise must be an established, regular business engaged in, as a substantial and material portion of its business, and in its own name, the purchase and sale or lease of the products in question. A regular dealer is presumed to keep such materials, supplies, articles or equipment in stock, but must in any event bear the risk of loss of such items. A regular dealer in such bulk items as steel, cement, gravel, stone, asphalt and petroleum products need not own, operate or maintain a place of business if it both owns and operates distribution equipment for the products. Any supplementation of a regular dealer's distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis. For regular dealers, sixty (60) percent of the value of the commercially useful function performed by the MWBE shall be counted toward the participation goal. Brokers, conduits, packagers, manufacturers and manufacturer's representatives shall not be regarded as regular dealers within the meaning of this term.
- (49) *Socially disadvantaged* means a minority individual or woman who has been subjected to racial, ethnic or gender prejudice or significant cultural bias within American society in the city's marketplace because of his or her identity as a member of a group and without regard to individual qualities. Social disadvantage must stem from circumstances beyond the individual's control. A socially disadvantaged individual must be a citizen or lawfully admitted permanent resident of the United States.
- (50) *Subcontractor or subconsultant* means a business enterprise that has entered into a contract with a general contractor or prime contractor to provide goods or services pursuant to a contract between the general contractor or prime contractor and the city. A subcontractor or subconsultant means a business enterprise that either directly contracts with a contractor or consultant or directly contracts with subcontractors or subconsultants under such contractor or consultant on a city contract, and which business enterprise will provide services or perform work under agreements with the contractor or consultant or with other subcontractors or subconsultants under such contractor or consultant.
- (51) *Supplier* means a business enterprise that either directly contracts with a contractor or consultant or directly contracts with subcontractors or subconsultants under such contractor or consultant on a city contract, and which business enterprise will provide materials, supplies or equipment under agreements with the contractor or consultant, or with other subcontractors or subconsultants under such contractor or consultant. A supplier may be a regular dealer, manufacturer, manufacturer's representative or broker. The participation goal shall be counted in accordance with the function performed by the MWBE supplier under a contract and determined on a per-contract or per-project basis.
- (52) *Teaming agreement* means an agreement between a prime or general contractor and an MWBE subcontractor or an agreement between a consultant and an MWBE subconsultant to:

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- (a) Develop the capacity of the MWBE under the bid or proposal to the city; and
 - (b) Describes how the parties are going to share work under the bid or proposal for the primary scope of work under the bid or proposal.
- (53) *Utilization plan* means a required plan, prepared by or on behalf of the bidder or proposer as required by DSBO and set forth in the applicable contract procurement documents that describes the bidder's or proposer's approach to satisfying the small, minority, and women-owned business enterprise requirements including, but not limited to, the participation goal.
- (54) *Woman* means a person of the female gender, encompassed within the findings of, the Denver City Council, who is rebuttably presumed to be socially disadvantaged.
- (55) *Woman business enterprise or WBE* means a business enterprise that is certified by the director under this article III and its divisions as meeting all of the requirements for certification set forth in sections 28-53 and 28-55 as a WBE.

For purposes of this article III and its divisions, the director shall classify business enterprises with both minority and women owners, and meeting the requirements for certification as an MWBE, as MBEs if socially and economically disadvantaged minority individual(s) own fifty-one (51) percent or more of ownership, and as WBEs if socially and economically disadvantaged women own fifty-one (51) percent or more of ownership. A business enterprise owned by individuals who are both socially and economically disadvantaged minority individuals and women may be certified as both an MBE and a WBE. For purposes of this article III and its divisions, an MBE or WBE certified with DSBO in accordance with ordinance and the applicable rules and regulations shall be referred to as an MWBE.

(Ord. No. 286-20, § 1, 4-13-20; Ord. No. 833-21, § 1, 8-23-21)

Subdivision II. Administrative Requirements for MWBE Program

Sec. 28-36. Program administration.

- (a) The DSBO shall perform additional duties in the administration of the programs established under this chapter 28 or otherwise, which duties shall include:
 - (1) Formulating, proposing and implementing rules and regulations for the development, implementation, administration, compliance and monitoring, and reporting of the various programs established through chapter 28, by other city programs or by federal law.
 - (2) Providing information, education, outreach and assistance to MWBEs, SBEs and other business enterprises relating to city contracting practices and procedures, and bid specifications, requirements and prerequisites.
 - (3) Assisting letting agencies with applicable portions of procurement documents and advertisements related to MWBE or SBE requirements.
 - (4) Assisting letting agencies with reviewing applicable portions of procurement proposal submissions to assess for responsiveness.
 - (5) Establishing uniform rules and regulations, procedures, and criteria for certification, renewal of certification, decertification and graduation, as an MWBE or SBE and appeals of and challenges to all such certification decisions and maintaining certification records and directories of such MBEs, WBEs and SBEs.

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- (6) Establishing annual and participation goals for the MWBE contracting program established in division 3 of this article III of chapter 28, and tracking progress toward the annual goal.
 - (7) Evaluating contractors' and consultants' achievement of participation goals or good faith efforts to meet participation goals.
 - (8) Working with user departments to monitor contracts to ensure prompt payments to MWBEs and SBEs, and compliance with applicable participation goals and commitments.
 - (9) Receiving, reviewing, and acting upon complaints and suggestions concerning the various programs established through chapter 28 or by federal law.
 - (10) Collecting payment, goal compliance, and other pertinent data to evaluate the programs and other city contracting initiatives.
 - (11) Developing technical assistance programs to assist MWBEs, SBEs and other businesses relating to contracting, business and professional development.
 - (12) Establishing a mentor-protégé program to encourage trade associations and individual businesses to work jointly to connect MWBE protégés with well-established mentor firms. DSBO shall in coordination and cooperation with other city agencies facilitate the implementation and coordination of this program. The program may encourage firms to mentor MWBE protégés.
 - (13) Establishing by the DSBO director advisory committee or committees to advise and recommend to the DSBO director, as appropriate, policies and initiatives to assist the city with regard to the programs under articles III, V and VII. The purpose, functions, roles and procedures of a committee will be established by the director and applicable rules and regulations promulgated by the director.
 - (14) Periodically, at the director's discretion and based on DSBO's specific needs, DSBO shall perform, or cause to have performed, an evaluation of DSBO including, but not limited to, the following:
 - a. Program goals, responsibilities, and staffing necessary to fulfill all compliance requirements and accomplish annual and aspirational goals;
 - b. Documentation on total MWBE and SBE completed work payments for each compliance program participant and its relationship to established goals;
 - c. Monitoring of SBE contractor billing and payment process procedures as well as MWBE and SBE subcontractor billing and payment process procedures as required through this chapter 28;
 - d. Number of certified MWBE and SBE firms and their participation in city contracts over a defined period to establish a relevant participation trend;
 - e. Number of MWBE and SBE educational activities and mentorships, the number of participants, and an evaluation of the educational programs, including education on how to utilize city systems for tracking activity and payments;
 - f. Compliance with section 28-58 regarding establishing participation goals.
- (b) The user departments that receive appropriate delegation for project management, contract and concession agreement management, or construction or design or professional services contract responsibility shall have the following duties and responsibilities with regard to the programs established through chapter 28, by other city programs or by federal law:
- (1) Assisting the DSBO with setting participation goals for MWBE participation on individual contracts.
 - (2) Assisting in the identification of available MWBEs and providing other assistance in meeting the annual goal and participation goals.

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- (3) Assisting in the identification of contracts and concession agreements appropriate for the utilization of the SBE defined selection pool contracting established by article VII of chapter 28.
 - (4) Assuring that MWBEs, SBEs and other business enterprises are informed of city contracting and concession opportunities.
 - (5) Performing other activities to support the various programs established through this chapter 28, by other city programs or by federal law.
 - (6) Gathering and maintaining contracting, consulting, subcontracting and subconsulting data or documents for those contracts that the user departments manage, as provided under this chapter 28.
 - (7) Submitting subcontracting and subconsulting data or documents as required to the director.
 - (8) Managing contracts and concession agreements in a consistent manner to assure contract and concession agreement compliance in utilization of MWBEs and SBEs.
- (c) Pursuant to its authority under articles I and III of chapter 28, DSBO may adopt rules and regulations, which shall be for and aid in the interpretation, administration and enforcement of this ordinance, and which shall be periodically amended and revised.

(Ord. No. 286-20, § 1, 4-13-20)

Sec. 28-37—28-40. Reserved.

DIVISION 2. EQUAL EMPLOYMENT OPPORTUNITY

Sec. 28-41. Legislative intent.

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

(Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-42. Definitions.

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

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

Director: The director of the office of contract compliance.

Manager: The manager of transportation and infrastructure.

(Ord. No. 513-90, § 2, 9-4-90; Ord. No. 39-20, § 58, 2-3-20)

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

- (a) Unless exempted from the provisions of this section by rules and regulations adopted by the manager, every covered contract regardless of how financed shall be subject to the affirmative action and equal employment opportunity requirements of this division and such rules and regulations and bidding conditions authorized thereunder that the manager shall adopt.
- (b) The bidding specifications for every covered contract shall require the bidder to commit the bidder's organization to the affirmative action and equal employment opportunity requirements set forth therein. Affirmative action and equal employment opportunity requirements similar to those in the bidding specifications shall be included in all subcontracts awarded under every covered contract regardless of tier unless exempted by the rules and regulations of the manager, and the bidding specifications shall so require. Failure to subscribe to and accept such affirmative action and equal employment opportunity requirements shall render a bidder ineligible for contract award and a subcontractor ineligible to participate in the work for which an award is made.

(Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-44. Compliance review.

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

- (1) When a compliance review by the director indicates grounds for finding that a contractor awarded any covered contract or a subcontractor awarded any subcontract thereunder is not in compliance with the affirmative action and equal employment requirements of this section or of the bidding specifications or contractual provisions relating to such requirements and the manager is so informed by the director, the manager shall give the contractor written notice to correct or to cause to be corrected the deficiencies within such reasonable period of time as the manager shall allow.
- (2) If a contractor who has received a written notice from the manager to correct such deficiencies fails to meet affirmative action and equal employment opportunity requirements within the period of time allowed by the manager, the director shall so advise the manager in writing so that a hearing before the manager may be held in order for the manager to determine whether such contractor or subcontractor has failed to comply with the affirmative action and equal employment opportunity requirements.
- (3) After giving notice and holding a hearing and upon determining that a contractor awarded any covered contract or a subcontractor awarded any subcontract thereunder has failed to comply with the affirmative action and equal employment opportunity requirements, the manager may impose such sanctions as the manager deems appropriate, including but not limited to suspending or terminating the contract involved or any portion thereof, which suspension or termination shall be considered a default under section A2.3-1(4) of the Charter, and causing to be removed from the list of eligible prequalified contractors the names of contractors and subcontractors found by the manager to be in noncompliance with the affirmative action and equal employment opportunity requirements of any such contract or subcontract awarded thereunder until such time as the manager is satisfied that such contractors or subcontractors are in compliance with the affirmative action and equal employment opportunity requirements. In making such determination, the manager of transportation and infrastructure shall be guided by those procedures and powers of C.R.S. 24-4-101 et seq. as amended

from time to time, relating only to adjudication, provided that he may by rules and regulations adopt different procedures and powers. The provisions in such article relating to rulemaking shall not apply.

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

(Ord. No. 513-90, § 2, 9-4-90; Ord. No. 39-20, § 59, 2-3-20)

Sec. 28-45. Rules and regulations.

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

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

(Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-46. Federal requirements govern.

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

(Ord. No. 513-90, § 2, 9-4-90)

Sec. 28-47. Quarterly reports.

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

(Ord. No. 513-90, § 2, 9-4-90)

Secs. 28-48—28-50. Reserved.

*DIVISION 3. NONDISCRIMINATION IN CITY CONTRACTS FOR CONSTRUCTION,
RECONSTRUCTION, AND REMODELING, AND PROFESSIONAL DESIGN AND
CONSTRUCTION SERVICES²*

**Subdivision I. MWBE Program for City Contracts For Construction, Reconstruction,
Remodeling, and Professional Design and Construction Services**

Sec. 28-51. [Reserved].

Sec. 28-52. Contracts excluded from coverage by this division 3.

- (a) Contracts and concession agreements for which bids or proposals are sought under the SBE defined selection pool contracting program established pursuant to article VII of this chapter 28 are excluded from the coverage of this division 3. In addition, in the case of a contract hereunder for which a part of the contract price is to be paid with funds from the United States Government or the State of Colorado and for which the United States Government or the State of Colorado has made applicable to such contract requirements terms or conditions which are inconsistent with the provisions of this division 3, the provisions of this division 3 shall not apply to such contract to the extent of such inconsistency.
- (b) Contracts where the director has authorized the waiver of a participation goal, or has otherwise authorized a contract to be advertised in collaboration with the user departments without participation goals to assist in the determination of ongoing MWBE utilization on city contracts in the absence of participation goals are excluded from the coverage of this division 3. However, this reference to contracts without participation

²Editor's note(s)—Ord. No. 286-20, § 2, adopted April 13, 2020, repealed art. III, div. 3, §§ 28-51—28-83 and enacted a new div. 3 as set out herein. Former div. 3 pertained to similar subject matter and derived from Ord. No. 760-06, § 2, adopted November 13, 2006; Ord. No. 85-14, § 2, adopted February 18, 2014; Ord. No. 1324-17, §§ 2—5, adopted December 18, 2017; Ord. No. 159-19, §§ 8-14, 15—47, adopted March 18, 2019; and Ord. No. 39-20, § 60, adopted February 3, 2020.

goals shall not include contracts that are advertised with a zero percent participation goal after due assessment of availability.

(Ord. No. 286-20, § 2, 4-13-20)

Sec. 28-53. MWBE certification; eligibility of applicant business enterprises.

- (a) Procedures and methods. The director shall, by rule and regulation or policies relating solely to internal management and procedure, establish reasonable procedures and methods for the certification of applicant business enterprises as an MWBE in order to effectuate the purposes of this article III and its divisions. The director may seek input and advice from appropriate industry sources as to appropriate aspects of work performance, equipment and staffing in these industry areas in which certification is being sought.
- (b) Only applicant business enterprises that meet the criteria for certification as an MWBE may participate in the goals program established under this article III and its divisions. The applicant business enterprise has the burden of persuasion by a preponderance of the evidence. Only an applicant business enterprise owned and managed and controlled by socially and economically disadvantaged individual(s) may be certified as an MWBE, as applicable. MWBEs may be certified only for specific types of work for which they apply and in which they have had sustained business activity for a minimum of six (6) months. Certification areas shall correspond to the codes set forth in North American Industrial Classification Standard (NAICS) Codes, or successor classification system, Code of Federal Regulations § 121.201, as amended, or successor regulation.
- (c) To determine whether the requirements set forth below are met, the DSBO must consider all of the facts in the record, viewed as a whole.
 - (1) *Ownership.* In order for the socially and economically disadvantaged owner(s) to be found to own the applicant business enterprise for purposes of certification, as applicable, the applicant business enterprise or socially and economically disadvantaged owner(s) must meet the requirements set forth below.
 - a. To be an eligible MWBE, each socially and economically disadvantaged owner must:
 - (i) Own in his or her own name the legal and equitable interest in the applicant business enterprise;
 - (ii) Have acquired the interest in a verifiable and substantial arms-length transaction, utilizing verifiable, substantial, and continuing consideration; going beyond pro forma ownership of the applicant business enterprise as reflected in ownership documents;
 - (iii) Enjoy customary incidents of ownership and share in the risks and profits commensurate with their ownership interests in practice, not merely in the form of arrangements; and
 - (iv) Have acquired the interest with a contribution of his or her own capital resources, by having put his or her own financial resources at risk in the operation of the applicant business enterprise, or, subject to requirements below, with a contribution of expertise. All contributions by the socially and economically disadvantaged owner(s) to acquire the ownership interest in the applicant business enterprise must be verifiable, substantial, and continuing, which in part, requires that it be commensurate with the ownership interest acquired. All contributions to acquire an ownership interest, including any portion of it, must have been made at the time the socially and economically disadvantaged individuals acquired the interest in business enterprise.
 - (A) If expertise is relied upon as part of a socially and economically disadvantaged owner's contribution to acquire ownership, the expertise must be of the requisite quality generally recognized in a specialized field, in areas critical to

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

- (B) Examples of insufficient contributions include a promise to contribute capital, an unsecured note payable to the business enterprise or to an owner who is not socially and economically disadvantaged individual, or mere participation in the business enterprise as an employee. Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render an applicant business enterprise ineligible, even if the debtor's ownership interest is security for the loan.
- (2) *Management and control.* Only an applicant business enterprise that is managed and controlled by a socially and economically disadvantaged individual(s) may be certified as an MWBE. The socially and economically disadvantaged minority or woman owner(s) shall direct the management, policies, and day-to-day business operations of the applicant business enterprise and shall have the power to make, and shall in fact make, routine and major decisions on matters of management, policy, and operations. The socially and economically disadvantaged minority or woman owner's(s') management and control must be verifiable, substantial, and continuing and go beyond the pro forma ownership of the applicant business enterprise as reflected in its ownership documents. Ownership alone is not sufficient to establish management and control. To determine whether each socially and economically disadvantaged individual satisfies these requirements, the DSBO shall consider the criteria below:
- a. If federal or state law or city ordinance requires the owner(s) to have a particular license or other credential in order to own or control a certain type of business enterprise, then the socially and economically disadvantaged owner(s) must possess the required license or credential. If federal or state law or city ordinance does not require that the owner possess the license or other credential to own or control the business enterprise, to determine whether the socially and economically disadvantaged owner(s) manage and control the business enterprise, DSBO may consider whether the socially and economically disadvantaged owner(s) hold the license or other credential required to conduct the specific type of work in which certification is sought as a factor. If there is not a legal requirement for the owner to hold the license or other credential to own or control a certain type of business enterprise, failure of the owner to hold the license or other credential does not by itself indicate lack of management and control of a business enterprise without other factors indicating to the contrary.
 - b. The socially and economically disadvantaged minority or woman owner(s) shall have substantial experience in the trade or industry that would be necessary to make routine and major decisions for the applicant business enterprise.
 - c. The socially and economically disadvantaged minority or woman owner(s) shall regularly make decisions, hold themselves out to the public, and sign important documents and financial instruments in a manner that is indicative of primary management and control of daily business operations and responsibility for routine and major decisions.
 - d. No restriction through corporate charter provisions, by-law provisions, contracts, or any other formal or informal devices may prevent the socially and economically disadvantaged owner(s), without the cooperation or vote of any non-socially and economically disadvantaged owner, from making any business decision of the applicant business enterprise, including the making of obligations or the disbursing of funds.

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- e. The socially and economically disadvantaged owner(s) must possess the power to direct or cause the direction of the management and policies of the applicant business enterprise and to make day-to-day as well as long-term decisions on management, policy, and operations.
 - f. The socially and economically disadvantaged owner(s) may delegate various areas of the management, policymaking or daily operations of the applicant business enterprise to other participants who are not socially and economically disadvantaged owner(s). Such delegations of authority must be revocable, and the socially and economically disadvantaged owner(s) must retain the power to hire and fire any such persons. The socially and economically disadvantaged owner(s) must actually exercise control over the applicant business enterprise's operations, management, and policies.
 - g. The socially and economically disadvantaged owner(s) must have an overall understanding of, and managerial and technical competence, experience and expertise regarding, matters directly related to the type of business in which the applicant business enterprise is engaged and its operations. The socially and economically disadvantaged owner(s) is not required to have experience or expertise in every critical area of the applicant business enterprise's operations or have greater experience or expertise in a given field than managers or key employees. The socially and economically disadvantaged owner(s) must have the ability to intelligently and critically evaluate information presented by other participants in the applicant business enterprise's activities and to make independent decisions concerning the applicant business enterprise's daily operations, management, and policymaking. Generally, expertise or responsibilities primarily in office management, administration, bookkeeping, or other functions unrelated to the principal business activities of the applicant business enterprise are insufficient to demonstrate management and control.
 - h. A socially and economically disadvantaged owner(s) may not engage in outside employment or other business interests that conflict with the management of the applicant business enterprise or prevent the owner(s) from devoting sufficient time and attention to the affairs of the applicant business enterprise to manage and control its day to day activities. For example, absentee ownership of a business and part-time work in a full-time applicant business enterprise are not viewed as constituting management and control. An individual, however, could be viewed as controlling a part-time business that operates only evenings or weekends or both, provided the individual manages and controls it throughout all hours of operation.
 - i. An applicant business enterprise may be certified only for specific types of work in which the socially and economically disadvantaged owner(s) has the ability and expertise to manage and control the applicant business enterprise's operations and work. To become certified in an additional type of work, the enterprise must sufficiently demonstrate only that its socially and economically disadvantaged owners are able to control the enterprise with respect to that type of work. It is not required to be recertified, unless it is also seeking renewal, or submit a new application for certification, but DSBO must be able to verify that the socially and economically disadvantaged owner(s) manages and controls the enterprise with regard to the additional type of work.
- (3) *Independence.* Only an independent applicant business enterprise may be certified as an MWBE. An independent applicant business enterprise viability cannot depend on its relationship with another business enterprise. Recognition of an applicant business enterprise as a separate entity for tax or corporate purposes is not necessarily sufficient to demonstrate that the applicant business enterprise is independent and not an affiliate. In determining whether an applicant business enterprise is an independent business, the DSBO shall, at minimum:
- a. Examine whether there is actual or potential affiliation between the applicant business enterprise and individuals or non-certified business enterprises. To determine whether affiliation

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- exists, the DSBO considers factors such as ownership, management, previous relationships with or ties to another individual or non-certified business entity, and contractual relationships. Affiliation may be based on common management, identity of interest, the newly-organized-concern rule, joint venture, or any combination thereof;
- b. Scrutinize relationships with non-certified business enterprises in areas of personnel, finance, facilities, other resources. The DSBO may consider shared employees (including administrative staff), office space, phone numbers, and equipment and whether there is any support or sharing of bonding capacity, lines of credit, and other resources;
 - c. Consider present or recent employer/employee relationships between the socially and economically disadvantaged individuals of the applicant and non-certified business enterprises or persons associated with non-certified business enterprises;
 - d. Examine the applicant business enterprise's relationships with non-certified business enterprises to determine whether there is a pattern of exclusive or primary dealings with non-certified business enterprises; and
 - e. Consider whether relationships between the applicant business enterprise and non-certified business enterprises are consistent with normal industry practice.
- (4) *Actively in business for six (6) months.* The applicant business enterprise may not be certified until six (6) months after the satisfaction of each of the following:
- a. Formation of the applicant business enterprise;
 - b. Commencement of sustained business activity in the trade or profession described on the certification application; and
 - c. Commencement of ownership, management and control of daily business operations by the identified socially and economically disadvantaged minority or woman owner(s).
- (5) *Lawfully present in the United States.* The socially and economically disadvantaged owner(s) must be a citizen of the United States or a lawfully admitted permanent resident of the United States, and must not have the status of an unauthorized worker or otherwise be disqualified from lawfully residing in the United States, engaging in business and seeking this certification. As a condition of certification, owner(s) must comply with all reporting, submittal and other requirements that may be imposed by the city, State of Colorado or United States governments regarding such lawful presence.
- (6) *Eligibility; rebuttable presumption of social disadvantage; individualized showing of social disadvantage; evidence of discrimination.*
- a. *Rebuttably presumed social disadvantage.* A socially and economically disadvantaged minority individual or woman upon whom the certification application is based must supply credible evidence, by sworn affidavit, that such individual has suffered from past race- or gender-based (as applicable) discrimination in association with the conduct of business or the attempted conduct of business as a business enterprise, in the construction or the professional design and construction services industries in the city's marketplace; provided that, any applicant business enterprise owned and controlled by, or any socially and economically disadvantaged minority individual or woman upon whom certification of such applicant business enterprise is sought, who is a member of the racial or ethnic minority groups referenced in section 28-35(36)(a), or is a woman, is rebuttably presumed to be socially disadvantaged under the provisions of section 28-35(37) and (49) and, if such minority individual or woman further demonstrates that such minority individual or woman so conducted business or attempted to conduct business in the construction or professional design and construction services industries in the city's marketplace prior to January 1, 2006, such minority individual or woman shall in addition be rebuttably

presumed to have suffered from discrimination within the city's marketplace and to therefore be eligible to be certified as an MWBE under this article III and its divisions, subject to compliance with all other requirements of sections 28-53 and 28-55.

- b. *Individualized social disadvantage.* An individualized socially disadvantaged minority individual upon whom the certification application is based pursuant to section 28-35(37)(b) shall supply credible evidence, by sworn affidavit, (i) that such individual has suffered from past individualized discrimination in association with the conduct of business or the attempted conduct of business as a business enterprise, in the construction or the professional design and construction services industries in general; (ii) that he or she has in addition suffered from such individualized discrimination within the city's marketplace; and (iii) that he conducted business or attempted to conduct business in the city's marketplace as set out in a., above. An individual who makes such a showing shall be deemed to have suffered from individualized discrimination and social disadvantage within the city's marketplace, and therefore be deemed eligible to be certified as an MWBE under this article III and its divisions, subject to compliance with all other requirements of sections 28-53 and 28-55.
- (7) *Eligibility; showing of economic disadvantage.* A socially and economically disadvantaged minority individual or woman upon whom the certification application is based shall also supply credible evidence, by personal financial statement or as otherwise required by the director, that such individual has a personal net worth equal to or less than the permissible personal net worth amount determined by the U.S. Department of Transportation to be applicable to its DBE programs, or as otherwise determined by the director by rule and regulation as defined in section 28-35(25). An individual who makes such a showing shall be deemed to have been economically disadvantaged within the city's marketplace and to therefore be eligible to be certified as an MWBE under this article III and its divisions, subject to compliance with all other requirements of sections 28-53 and 28-55.
- (8) *Threshold size; continued eligibility and renewal of certification.* No applicant business enterprise or MWBE shall be eligible for initial certification or subsequent certification renewal if such business enterprise, MWBE or SBE combined with any affiliates meets the criteria set forth in section 28-55 for graduation from participation in the goals program established by this article III and its divisions. An MWBE will be certified for a three-year period. Following initial certification, an MWBE that desires to continue its certification shall, no later than thirty (30) days prior to each three-year anniversary of the certification, submit a certification renewal application, which shall update and reaffirm all requirements for certification. No later than thirty (30) days prior to each annual anniversary of the certification, an MWBE shall submit an affidavit certifying that there has been no change in any information affecting certification eligibility, along with other required tax or other financial information and documents. A certification may be terminated by the director upon the failure of the MWBE to satisfy any certification requirement set forth in this article III and its divisions.
- (9) *City officials, officers, and employees ineligible.* No applicant business enterprise shall be eligible to be certified as an MWBE if ownership or control of such business enterprise is held by a current official, officer or employee of the city.
- (10) *Interviews, investigation, and onsite visits.* The DSBO shall personally interview all persons upon whom eligibility for certification is based, and is empowered to interview such other persons and conduct such onsite visits and investigations as may be appropriate in its sole discretion to verify eligibility for certification. An applicant business enterprise wishing to be certified as an MWBE shall cooperate with the DSBO in supplying additional information that may be requested in order to make a determination.

(Ord. No. 286-20, § 2, 4-13-20)

Sec. 28-54. Collection of fees by DSBO to defray certification costs of chapter 28 programs.

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

(Ord. No. 286-20, § 2, 4-13-20)

Sec. 28-55. MWBE certification and size standards; renewal of certification; decertification; graduation.

- (a) The DSBO is authorized to establish the size standards for the certification of business enterprises as further provided in the applicable rules and regulations and in accordance with articles of III, V and VII of this chapter 28. No applicant business enterprise shall be certified as an MWBE, and following certification of an MWBE, no certification shall be renewed, if on the effective date of the application or renewal the applicant business enterprise or MWBE (combined with all affiliates) has achieved a size standard established by the DSBO.
- (b) No applicant business enterprise shall be certified as an MWBE, and following certification of an MWBE, no certification shall be renewed, if on the effective date of the application or renewal the socially and economically disadvantaged minority or woman upon which certification is based is not economically disadvantaged, as defined in section 28-35(25).
- (c) If an MWBE has been certified by the city in more than one (1) NAICS Code or has an affiliate that has been certified by the city in a NAICS Code other than that of the MWBE, then the annual receipt level or employee or other criterion used as the graduation criterion for such MWBE shall apply separately to each NAICS Code for which the MWBE and its affiliate have been certified. Such an MWBE and any affiliate that has exceeded the graduation criteria in one (1) NAICS Code shall be deemed to be graduated from this article III and its divisions as to that code, and, if the graduation requirements of subsections (a) or (b) above do not apply, may continue to be certified in another NAICS Code having a higher monetary or employee number graduation level but shall no longer be considered eligible to be or remain certified in the NAICS Code with the lower size standard. Such an MWBE or any affiliate that has exceeded the graduation criteria for the largest NAICS Code applicable to its activities shall be deemed to be graduated from this article III and its divisions for the duration of the period in which the MWBE exceeds the graduation criteria. Graduated MWBEs may reapply for certification if they meet the criteria for certification including the requisite size standard.
- (d) Graduation of an MWBE shall not affect the contribution made by the MWBE toward satisfaction of a participation goal if the work was bid or proposed to be performed by the MWBE prior to the date of ineligibility for certification based on achievement of the graduation criterion.
- (e) Application to affiliates. The graduation criteria set forth above shall be deemed to apply to the socially and economically disadvantaged minority individual or woman upon whom eligibility for certification is based and all affiliates of such minority individual or woman. No applicant business enterprise shall be certified based upon one (1) or more socially and economically disadvantaged minority individuals or women who owned or who was an affiliate of an MWBE that has become ineligible for renewal of certification because of the achievement of graduation criteria.
- (f) The certification status of all MWBEs shall be reviewed periodically by the DSBO. Failure of a certified and eligible MWBE to seek timely renewal of certification by filing the necessary documentation with the DSBO may result in decertification. An MWBE's certification may be suspended for failure to comply with all certification requirements set forth in this article III and its divisions and the rules and regulations.

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- (g) In accordance with the DSBO's regulations, it shall decertify an MWBE that does not continuously meet the eligibility criteria for certification.
 - (1) The MWBE shall notify the DSBO of any change in its circumstances affecting its continued eligibility for certification under this article III and its divisions within thirty (30) days of the MWBE's actual awareness of such change of circumstances. Failure to do so may result in the MWBE's decertification.
 - (2) The director may move to decertify an MWBE that repeatedly fails to respond to requests for quotations from bidders or proposers who timely solicit participation on a contract, attend relevant pre-bid or pre-proposal conferences, honor quotations in good faith, or otherwise comply with the requirements of this article III and its divisions.
 - (h) An applicant business enterprise or MWBE that has been denied certification or renewal or certification or been decertified may protest the denial of certification or decertification by the procedure set out in section 28-69. An applicant business enterprise or MWBE found to be ineligible for certification or renewal of certification may not apply for certification or renewal of certification for one (1) year after the effective date of the final decision.

(Ord. No. 286-20, § 2, 4-13-20; Ord. No. 833-21, §§ 2, 3, 8-23-21)

Sec. 28-56. Third party challenge to certification; renewal of certification; or presumption of social disadvantage of minority individual or woman.

Subject to the provisions in this section, a third party may challenge the eligibility of an applicant business enterprise for certification, the eligibility of an MWBE for renewal of certification, or the rebuttable presumption of social disadvantage of a minority individual or woman as provided in section 28-35(37)(a) and (49), respectively. The burden of demonstrating to the director's satisfaction the lack of such eligibility or the rebuttal of such presumption rests with such third party and shall be demonstrated by a preponderance of the evidence.

- (a) The eligibility of a challenged applicant business enterprise or MWBE for certification or renewal of certification, or the presumption that a minority individual or woman is socially disadvantaged, shall remain in effect unless and until the city renders a final decision otherwise.
- (b) The challenge to such certification, renewal of certification or presumption shall be made in writing to the director by the challenging third party and shall include all information relied upon by such party.
- (c) The director shall notify the challenged applicant business enterprise or MWBE or minority individual or woman, in writing, of the challenge and summarize the grounds for the challenge. The notice may also require the challenged applicant business enterprise, MWBE or minority individual or woman to provide the director, within a reasonable time, any information requested to permit the director to evaluate the eligibility of the applicant business enterprise or MWBE or the validity of the presumption of social disadvantage with respect to a minority individual or woman.
- (d) Subject to the limitation in section 28-69(e), a third party putting forth a challenge under this section, and an applicant business enterprise, MWBE or minority individual or woman that is the subject of such challenge, may seek review from a decision of the director pursuant to section 28-69.

(Ord. No. 286-20, § 2, 4-13-20)

Subdivision II. Participation Goals; Good Faith Efforts

Sec. 28-57. Annual MWBE goal.

- (a) Of the total dollars spent annually for construction and for professional design and construction services contracts, the director shall establish an aspirational annual goal, consistent with annual reporting under section 28-78 and section 28-79, for MWBE utilization based on the dollars to be spent for construction, reconstruction and remodeling contracts and such a goal for MWBE utilization based on the dollars to be spent for professional design and construction services contracts. For the purpose of setting such annual aspirational goal, construction management services contracts shall be computed in and counted toward the construction area although construction management shall be considered a professional service. The following shall count toward the goal to the extent provided in sections 28-59 and 28-63; portions of work undertaken by MWBEs as contractors, consultants, subcontractors, subconsultants, suppliers, manufacturers, manufacturer's representatives, brokers, teaming agreements or joint venturers, including appropriate portions of work undertaken by subcontractors, subconsultants, suppliers, manufacturers, manufacturer's representatives, and brokers on subsidiary tiers under MWBEs.
- (b) The director as a basis for the establishment of the aspirational annual goal shall annually during the term hereof determine the present availability of all MWBEs doing business in the city by profession and trade groupings and recommend the aspirational annual goal to the city council for its review. The director shall conduct such inquiries, studies and hearings, and utilize information and assistance from such persons, consultants, entities or organizations, within or without the city, including, but not limited to, the department heads, as the director may, in the exercise of sole discretion, deem necessary to make such annual recommendation.
- (c) The city council shall review the aspirational annual goal recommended by the director, may undertake such additional inquiries as it deems appropriate, and may approve, disapprove or modify the recommended aspirational annual goal by ordinance in each succeeding year. Until the city council approves, disapproves or modifies the aspirational annual goal in a succeeding year, the initial aspirational annual goal established in this section shall continue in effect.

(Ord. No. 286-20, § 2, 4-13-20)

Sec. 28-58. Project participation goals.

- (a) The director shall assign for each construction, reconstruction, and remodeling contract or city project as may be applicable, and for each professional design and construction services contract, a unitary contract participation goal, or rather than a unitary contract goal, a goal for each city project, task order or work order issued under a contract, or goal for a separate procurement under a contract, for MWBE utilization based upon a percentage of the dollar value of all work on such contract, project, task order, work order or separate procurement, and, as set out below, the availability of MWBEs to perform the anticipated work and the city's progress toward meeting the annual goal. The determination of whether to assign the goal to the contract, task order, work order or separate procurement under a contract shall occur in cooperation between the DSBO and the user department. If the director determines it to be in the best interests of the city, the director may in consultation with the user department waive the application of a participation goal. The goal percentage assigned by the director may vary from contract to contract, project to project, task order to task order, or work order to work order, consistent with meeting the appropriate overall annual goals, when established. The DSBO shall establish a methodology for the setting of the participation goal, including through rules and regulations. Such methodology shall consider the following factors:
 - (1) To the extent applicable, the effect on the annual goal achievement of the varying levels of availability of MWBEs among industry groupings associated with individual contracts, projects, task orders or work

orders and the effect on aspirational annual goal achievement of the participation goal compliance being achieved through good faith efforts resulting in non-utilization of MWBEs.

- (2) The reasonably known availability of MWBEs in specific industry groupings which are associated with individual contracts, projects, task orders or work orders.
 - (3) For public-private partnership agreements, integrated contracts, on-call contracts, and other contracts that may be procured and awarded without a pre-determined specific project or scope of work, the goal may be set on a per-project basis, per-task-order basis or per-work-order basis, or per separate procurement, once a specific scope of work is identified, individual projects are defined, or individual work orders or task orders are authorized, and the contractor can proceed to complete the work for the individual project, task order or work order consistent with the methodology set forth in this section 28-58 and the rules and regulations.
- (b) The following contributions shall count toward the goal set by the director as more specifically provided below: portions of work undertaken by MWBEs as contractors, consultants, subcontractors, subconsultants, suppliers, manufacturers, manufacturer's representatives, brokers, packagers, regular dealers, teaming agreements or joint venturers.
 - (c) The director, at the director's sole discretion, may cause a representative sample of city construction, reconstruction and remodeling, and professional design and construction services contracts or projects to be bid or otherwise selected without a participation goal, in order to determine MWBE utilization on such contracts or projects in the absence of such a goal. Following the first full year of operation of this article III and its divisions, the director shall analyze, based upon such representative sample and other contracts or projects that may otherwise be let with a contract or project participation goal of zero (0) percent, to what extent the originally established annual goal has been met without the imposition of contract or project participation goals. To the extent ascertainable, this information shall be utilized in the setting of the annual goal for the following year.
 - (d) If a project or contract is let with a zero (0) percent goal, whether based on the director's decision under 28-58(c), or established based on project information, and MWBE subcontractors are later added to the project or contract, then the project or contract shall be subject to the requirements of this article III and its divisions, including for violations and enforcement.

(Ord. No. 286-20, § 2, 4-13-20)

Sec. 28-59. Contracts for construction, reconstruction and remodeling—Identification of participating MWBEs.

- (a) At the time of bid opening or date established by the user department of proposal in the case of a competitive selection process, the bidder or proposer shall provide to the city or private owner DSBO required forms, which may include a letter of intent as required by the DSBO, of all MWBEs to be utilized toward the satisfaction of the participation goal whether as a self-performing bidder or proposer or as subcontractors, suppliers, manufacturers, manufacturer's representatives, brokers or members of a joint venture or teaming agreement. The DSBO required forms shall specify:
 - (1) The name and contact information for the MWBE;
 - (2) The dollar value and description of the commercially useful function to be performed by the MWBE, consistent with subsections (d) and (e). In the case of utilization of a supplier, manufacturer, manufacturer's representative, or broker, the appropriate percentage of dollar value attributable to such MWBE as a commercially useful function shall be calculated with all underlying data supplied. If the proposer provides a dollar fee value amount, then both the dollar value and percentage must be listed in the proposal;

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- (3) The designation of each participating MWBE's applicable scope of work, including the NAICS code, intended to count toward the participation goal. The MWBE firm must be certified in the applicable scope of work in order for their participation to count toward the goal;
 - (4) An adequate statement from the bidder or proposer that the dollar amount of work to be performed by such MWBE on the contract, other than that self-performed by the bidder or proposer, was furnished to the MWBE and agreed upon prior to bid opening or date of proposal in the case of a competitive selection process; and
 - (5) An adequate statement from the bidder or proposer that it understands that a letter of intent, including, but not limited to, values provided by self-performing bidders or proposers, joint venturers, teaming agreement participants, subcontractors, suppliers, manufacturers, manufacturer's representatives, and brokers, expressed in dollar values and as a percentage of the overall work, must be submitted to the director for each MWBE listed, including a self-performing bidder or proposer, at the time bids are opened by the city, or by the date of proposal in the case of a competitive selection process, or bid selection made by a private owner, or some other time specified by the DSBO and the user department.
- (b) Only that level of MWBE utilization demonstrated in accordance with this section at the time of such bid opening, date of proposal in the case of a competitive selection process or private selection, or some other time specified by the DSBO and user department may be counted in satisfaction of the participation goal, except as otherwise set out in sections 28-68 and 28-70. Bidders or proposers must submit an executed letter of intent for each MWBE listed by the bidder or proposer, including a self-performing bidder or proposer, and any other DSBO required forms at the time bids are opened, proposals are received, in the case of a competitive selection process, or bid selection is made, or some other time specified by the DSBO and the user department. The required information shall be provided in a letter of intent, along with commitment forms and any other document or form specified for the particular procurement by the user department, the DSBO and the rules and regulations. Failure to submit completed DSBO required forms, letters of intent, and other required commitment forms or any other documents or forms may render the bid or proposal nonresponsive.
 - (c) For on-call construction contracts, integrated contracts, design-build contracts, construction manager-general contractor contracts, public-private partnership agreements and other contracts that may be procured and awarded without a pre-determined specific project or scope of work, the director in consultation with the department head may require a utilization plan pursuant to section 28-62(b). In such event, the proposer may not be required to demonstrate MWBE utilization at the time of bid opening or date of proposal, but will be required to develop an approved utilization plan to demonstrate compliance with the requirements of this article III and its divisions and the rules and regulations. The utilization plan shall be required either at the time of submission of a proposal or at some other time as required by the department head and the DSBO. The DSBO in conjunction with the department head is responsible for the review and assessment of utilization plans.
 - (d) All MWBE contractors, subcontractors, joint venturers, suppliers, manufacturers, manufacturer's representatives, or brokers listed in a bid or proposal must actually perform a commercially useful function in the work of a contract within the area(s) for which they are certified, and must not function as a conduit. Consistent with industry or professional practice, and as permitted by rules and regulations adopted by the director, MWBE's may enter into subcontracts, including subcontracts with non-MWBE's. In no case, however, shall an MWBE act as a conduit, nor shall the participation of an MWBE count toward a participation goal to the extent it fails to perform a commercially useful function.
 - (e) All expenditures for materials, supplies, and equipment obtained from an MWBE manufacturer, manufacturer's representative or supplier shall count toward the appropriate participation goal as specified in section 28-35(51). Expenditures for materials, supplies, and equipment paid to MWBE's that are not manufacturers, manufacturer's representatives or suppliers may count toward an appropriate participation

goal only to the extent offers or commissions charged for providing a bona fide service, such as professional, technical, consultant, or managerial services and assistance in the procurement of essential personnel, facilities, equipment, materials, or supplies required for performance of the contract; provided that the fee or commission is determined by the DSBO to be reasonable and not excessive as compared with fees customarily allowed for similar services.

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

(Ord. No. 286-20, § 2, 4-13-20)

Sec. 28-60. Contracts for construction, reconstruction and remodeling—Good faith efforts.

- (a) If the bidder or proposer has not fully met the participation goal as provided in section 28-62, then it shall demonstrate that it has made good faith efforts to meet such goal. The bidder or proposer shall furnish to the director at the time of bid opening by the city or on or before the time of the proposal submitted to and authorized by the city pursuant to a competitive selection process, or bid selection by a private owner, or some other time specified by the DSBO and the user department a detailed statement of its good faith efforts to meet the participation goal established by the director. This statement shall address each of the items in subsection (b), below, and any additional criteria that the director may establish by rule or regulation consistent with the purposes of this article III and its divisions. Good faith efforts must be demonstrated to be meaningful and not merely for formalistic compliance with this article III and its divisions. The scope and substance of the efforts will be considered in determining whether the bidder or proposer has achieved a good faith effort.
- (b) The statement of good faith efforts shall include a specific response and verification with respect to each of the following good faith effort categories, which may be further defined by rule or regulation. A bidder or proposer may include any additional information it believes may be relevant. Failure of a bidder or proposer to show good faith efforts as to any one (1) of the following categories shall render its overall good faith effort showing insufficient and its bid or proposal nonresponsive:
 - (1) If pre-bid or pre-proposal meetings are scheduled by the city at which MWBEs may be informed of subcontracting or joint venture opportunities under a proposed negotiated construction or construction related services contract, and attendance at such pre-bid or pre-proposal meetings is not deemed mandatory, bidders or proposers are nonetheless responsible for the information provided at these meetings whether or not they attend.
 - (2) The bidder or proposer must solicit through all reasonable and available means the interest of all MWBEs certified in the scopes of work of the contract. The bidder or proposer must solicit the interest of such MWBEs within sufficient time, prior to the bid opening or date of proposal in the case of a competitive selection process, to allow such MWBEs to respond to the solicitation. The bidder or proposer must determine with certainty if the MWBEs are interested by demonstrating appropriate steps in following up on initial solicitations.
 - (3) The bidder or proposer must select portions of the work of the contract to be performed by MWBEs in order to increase the likelihood that the participation goal will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate MWBE participation as subcontractors, teaming agreement participants or joint venturers, and for bidder or proposer self-performed work, as suppliers, manufacturers, manufacturer's representatives and brokers, all reasonably consistent with industry practice, even when the bidder or proposer would otherwise prefer to perform these work items with its own forces. The bidder or proposer must identify what portions of the contract will be self-performed and what portions of the contract will be

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- opened to solicitation of bids, proposals and quotes from MWBEs. All portions of the contract not self-performed must be solicited for MWBE participation. The ability or desire of a bidder or proposer to perform the work of a contract with its own forces does not relieve the bidder or proposer of the responsibility to meet the participation goal or demonstrate good faith efforts to do so.
- (4) The bidder or proposer, consistent with industry practice, must provide MWBEs at a clearly stated location with timely, adequate access to and information about the plans, specifications, and requirements of the contract, including bonding and insurance requirements, if any, to assist them in responding to a solicitation.
 - (5) The bidder or proposer must negotiate in good faith with interested MWBEs and provide written documentation of such negotiation with each such MWBE.
 - (6) For each MWBE that contacted the bidder or proposer or that the bidder or proposer contacted or attempted to subcontract, enter into a teaming agreement or joint venture with, consistent with industry practice, the bidder or proposer must supply a statement giving the reasons why the bidder or proposer and the MWBE did not succeed in negotiating a subcontracting, supplier, manufacturer, manufacturer's representative, broker or joint venture agreement, as applicable.
 - (7) The bidder or proposer must provide verification that it rejected each non-utilized MWBE because the MWBE did not submit the lowest bid or it was not qualified. Such verification shall include a verified statement of the amounts of all bids received from potential or utilized subcontractors, suppliers, manufacturers, manufacturer's representatives, brokers or joint venturers on the contract, whether or not they are MWBEs. In determining that an MWBE is not qualified, the bidder or proposer shall be guided by the definition of qualified in section 28-35(47), but evidence of lack of qualification must be based on factors other than solely the amount of the MWBE's bid. For each MWBE found not to be qualified by the bidder or proposer, the verification shall include a statement giving the bidder's or proposer's reasons for its conclusion. A bidder's or proposer's industry standing or group memberships may not be the cause of rejection of an MWBE. A bidder or proposer may not reject an MWBE as being unqualified without sound reasons based on a reasonably thorough investigation and assessment of the MWBE's capabilities and expertise.
 - (8) If requested by a solicited MWBE, the bidder or proposer must make reasonable efforts to assist interested MWBEs in obtaining bonding, lines of credit, alternative payment or performance guarantees, or insurance as required by the city or by the bidder or proposer, provided that the bidder or proposer need not provide financial assistance toward this effort.
 - (9) If requested by a solicited MWBE, the bidder or proposer must make reasonable efforts to assist interested MWBEs in obtaining necessary and competitively priced equipment, supplies, materials, or related assistance or services for performance under the contract, provided that the bidder or proposer need not provide financial assistance toward this effort.
 - (10) The bidder or proposer must use the DSBO MWBE directories to identify, recruit, and retain MWBEs.
- (c) In determining whether a bidder or proposer has satisfied good faith efforts as to a participation goal, the success or failure of other bidders or proposers on the contract in meeting such participation goal may be considered.
 - (d) The good faith effort factors in section 28-60(b) shall also apply to conditions arising under section 28-74(c). Proposers or contractors are required to make continuous good faith efforts throughout the contract term and document these efforts. User departments will notify the DSBO of impending contract closeout to allow the DSBO to request remaining good faith efforts and other required documents from the contractor. Contractor may remain subject to the requirements including potential violations of this article III and its divisions after contract closeout.

(Ord. No. 286-20, § 2, 4-13-20)

Sec. 28-61. Contracts for construction, reconstruction and remodeling—Responsive and nonresponsive bids or proposals.

- (a) *Responsive; compliance with requirements.* If the low monetary bid or competitive selection process proposal subject to a participation goal meets such goal or shows adequate good faith efforts as set out in sections 28-60 or 28-64, then the director shall notify the department head to regard the bid or proposal as responsive as to compliance with this article III and its divisions.
- (b) *Failure to meet requirements.* If a bid or proposal subject to a participation goal does not meet such goal or show good faith efforts as set out in sections 28-60 or 28-64, or provide timely information as set out in section 28-59, then the director shall notify the department head to regard the bid or proposal as nonresponsive, and such determination shall result in no further consideration by the city or private owner of the bid or proposal.
- (c) *Good faith efforts—Informal meeting.* If the director finds inadequacies in a bidder or proposer's demonstration of good faith efforts under section 28-60, the director will provide written notice of such inadequacies to the bidder or proposer, consistent with section 28-61 (b), above, and the appropriate department head of bid or proposal nonresponsiveness. Within two (2) business days from the date that the city notifies the bidder or proposer of the inadequacies of its demonstration of good faith efforts, the bidder or proposer may request an informal meeting with the director. Such informal meeting shall be scheduled by the director. All deficiencies in good faith efforts shall be explained to the bidder or proposer at such informal meeting. Within twenty-four (24) hours after the informal meeting, the bidder or proposer shall be allowed to submit additional information or to clarify the original good faith efforts. The director will at no time, however, allow additional subcontractors, joint venturers, suppliers, manufacturers, manufacturer's representatives or brokers that may later be added to the contract or to the original MWBE participation submitted at the time of the bid or date of proposal in the case of a competitive selection process to be counted toward meeting of the participation goal. After this informal meeting, the director will:
 - (1) Determine whether the bidder or proposal will be responsive or nonresponsive;
 - (2) Make the notification as stated in subsection (b) above, as applicable; and
 - (3) Provide written notice to the bidder or proposer of the director's final determination.

(Ord. No. 286-20, § 2, 4-13-20)

Sec. 28-62. Contracts for construction, reconstruction and remodeling—Compliance with participation goals.

- (a) The bid or competitive selection process specifications for each applicable contract shall require that all bidders or proposers seeking to contract with the city or a private owner on such project shall address the participation goal through one (1) or more of the following subsections, or by demonstrating good faith efforts as set out in section 28-60:
 - (1) If the bidder or proposer is an MWBE, the value of the commercially useful function to be self-performed by the MWBE shall count to the extent provided in section 28-59 toward satisfaction of the participation goal. If the level of self-performed work does not satisfy the goal, the MWBE bidder or proposer must utilize additional MWBE firms or submit good faith efforts.
 - (2) If the bidder or proposer utilizes MWBEs as subcontractors, suppliers, manufacturers, manufacturer's representatives or brokers, the value of the commercially useful function to be performed by such MWBEs shall count to the extent provided in section 28-59 toward satisfaction of the participation goal; or

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- (3) If the bidder or proposer submits a joint venture agreement that includes one (1) or more MWBEs, the value of the commercially useful function to be performed by the MWBEs in the joint venture as the distinct, clearly defined portion of the work of the joint venture agreement that the MWBE performs with its own forces or for which it is separately at risk shall count to the extent provided in section 28-59 toward satisfaction of the participation goal. The joint venture agreement is subject to review and approval by the director, and shall be provided to the director at least ten (10) days prior to the date of bid opening or the date of proposal, in the case of a competitive selection process unless otherwise set forth in the request for bids or proposals.
 - (4) If the bidder or proposer submits a teaming agreement that includes one (1) or more MWBEs, the value of the commercially useful function to be performed by the MWBEs in the teaming agreement as the distinct, clearly defined portion of the work of the teaming agreement that the MWBE performs with its own forces or for which it is separately at risk shall count to the extent provided in section 28-59 toward satisfaction of the participation goal. The teaming agreement is subject to review and approval by the director, and the teaming agreement shall be provided to the director at least ten (10) days prior to the date of bid opening or the date of proposal, in the case of a competitive selection process unless otherwise set forth in the request for bids or proposals. Teaming agreement participation will count toward the satisfaction of the participation goal upon confirmation by the director of the utilization in the teaming agreement arrangement and full integration of work forces by the teaming agreement parties.
 - (5) Utilization of MWBEs shall count toward a goal, if any, to the extent that an MWBE is performing a commercially useful function corresponding to a NAICS Code in which it is certified.
- (b) For contracts selected in accordance with sections 2.3.3(A) and 2.11.3(8) of the city charter, and D.R.M.C. sections 5-19 and 20-56, including design-build contracts; construction manager-general contractor contracts; on-call construction contracts; integrated contracts; or public-private partnership agreements; the director in collaboration with the department head may determine to address the participation goal by means of a utilization plan for utilization of MWBEs on such contract, which may also include setting of goals on a per-project basis consistent with section 28-58, or for alternative demonstration of good faith efforts by the proposer. In that event, the department head shall request that the director approve the utilization of such a utilization plan, consistent with the scope and intent of this article III and its divisions. The development, scope and utilization of such utilization plans shall be addressed in rules and regulations promulgated by the director.
 - (c) Notwithstanding any other provision of this article III and its divisions, in the event that a department head finds with respect to a particular contract that the best interests of the city would be served by the negotiation of a contract, including, but not limited to, a design-build or construction manager-general contractor contract, through a competitive selection process based wholly on quality, without reference to selection by low bid of the contractor or its subcontractors or suppliers, the analysis of the MWBE utilization or good faith effort by such contractor shall be determined on the basis set out in sections 28-63 through 28-66, provided that, in the event of such an analysis, all references in those sections to respectively, consultant or subconsultant, shall also be deemed to refer to, respectively, contractor or subcontractor.

(Ord. No. 286-20, § 2, 4-13-20; Ord. No. 833-21, § 4, 8-23-21)

Sec. 28-62.5. Contracts for construction, reconstruction and remodeling—Joint ventures and teaming agreements.

- (a) A proposer or bidder may opt to meet the participation goal through a joint venture or teaming agreement. Only the portion of the total dollar value of a joint venture contract equal to the distinct, clearly defined work that the MWBE performs with its own forces as a commercially useful function will count towards

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

- (b) The division of small business opportunity shall review and approve all contractual agreements regarding the terms and provisions of each joint venture relationship prior to the award of a contract, including agreements pertaining to:
- (1) The initial capital investment of each venture partner;
 - (2) The proportional allocation of profits and losses to each venture partner; no MWBE venture partner's liability should ever exceed said partners percentage of revenue earned while a participant in the joint venture;
 - (3) The sharing of the right to control the ownership and management of the joint venture;
 - (4) Actual participation of the venture partners on the project;
 - (5) The method of and responsibility for accounting;
 - (6) The method by which disputes are resolved; and
 - (7) Any additional or further information required by the division of small business opportunity as set forth in bid documents or otherwise.

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

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

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- (g) If, after the award of a contract to a joint venture or team, any member of the joint venture or team believes that the terms and conditions of the agreement as approved by the division of small business opportunity have not been complied with, then such member may seek the DSBO's and the user department's assistance with review and resolution of the issue. The request for review must be made in writing.
 - (h) [Reserved]
 - (i) [Reserved]
 - (j) If, after the award of a contract, a dispute arises between the prime contractor and a subcontractor regarding performance of work or provision of services or supplies on the eligible project, then such prime contractor or subcontractor may seek the DSBO's and the user department's assistance with review and resolution of the issue. The request for review must be made in writing.
 - (k) Within twenty (20) calendar days of receipt of a request for review, if the dispute has not been resolved informally among the parties, the DSBO will recommend and schedule an informal meeting among the parties.
 - (l) The director shall have authority to make recommendations in an attempt to resolve the dispute.
 - (m) In the event that the DSBO's informal procedures do not resolve the disputes, the DSBO shall have the option of referring the dispute to a qualified outside mediator, contingent upon the consent of the interested parties, with the costs to be borne by the disputing parties.
- (Ord. No. 286-20, § 2, 4-13-20)

Sec. 28-63. Contracts for professional design and construction services—Identification of participating MWBEs.

- (a) At the time of the proposal submission to and authorized by the city or a private owner, the proposer shall provide to the city or private owner the specified DSBO required forms of all MWBEs that are being utilized toward the satisfaction of the participation goal whether as a self-performing proposer, or as subconsultants, suppliers, manufacturers, manufacturer's representatives, brokers or members of a joint venture or teaming agreement. Unless otherwise specified in a request for qualifications, request for proposal or other proposal solicitation, in the event that a proposal is requested for the provision of professional design and construction services for a period of time, with known delineation of the dollar amount of professional design and construction services projects, the proposer need list the percentage participation and dollar amount of MWBEs. The DSBO required forms shall specify:
 - (1) The name and contact information for the MWBE;
 - (2) The dollar value and description of the commercially useful function to be performed by the MWBE consistent with subsections (d) and (e). In the case of utilization of a supplier, manufacturer, manufacturer's representative or broker, the appropriate percentage of dollar value attributable to such business enterprise as a commercially useful function shall be calculated with all underlying data supplied. If the proposer provides a dollar fee amount, then both the dollar value and percentage must be listed in the proposal;
 - (3) The designation of each participating MWBE's applicable scope of work, including the NAICS code, intended to count toward the participation goal. The MWBE firm must be certified in the applicable scope of work for their participation to count toward the goal;
 - (4) An adequate statement from the proposer that the dollar amount of work or the percentage of the work (whichever is applicable) to be performed by such MWBEs on the contract, other than that self-

performed by the proposer, was furnished to the proposer and agreed upon by the MWBE prior to the time of submission of the proposal submitted to and authorized by the city or a private owner; and

- (5) An adequate statement from the proposer that it understands that a letter of intent, including, but not limited to, values provided by self-performing proposers, joint venturers, subconsultants, suppliers, manufacturers, manufacturer's representatives and brokers, expressed in dollar values and as a percentage of the overall work, must be submitted to the director for each MWBE listed, including a self-performing proposer, at the time of submission of a proposal submitted to and authorized by the city or a private owner.
- (b) Only that level of MWBE utilization demonstrated in accordance with this section at the time of the proposal submitted to and authorized by the city or a private owner may be counted toward meeting the participation goal except as otherwise set out in sections 28-68 and 28-70. Proposers must submit such an executed letter of intent for each MWBE listed by the proposer, including a self-performing proposer, and any other DSBO required forms at the time of the submission of the proposal submitted to and authorized by the city or a private owner. Failure to timely submit the required letter of intent along with any other DSBO required forms or any other form or document as may be required in the procurement documents and the rules and regulations may render the proposal nonresponsive.
- (c) For on-call design or professional services, and other design or professional services contracts that may be procured and awarded without a pre-determined specific project or scope of work, the director in consultation with the department head may require a utilization plan for contracts that do not delineate the dollar amount of specific projects, scopes of work, and work orders or task orders pursuant to section 28-59. In such event, proposer shall not be required to demonstrate MWBE utilization at the time the proposal is submitted, but will be required to develop an approved utilization plan to demonstrate compliance with the requirements of this article III and its divisions and as set forth in the rules and regulations. The utilization plan shall be required either at the time of submission of a proposal or at some other time as required by the department head and DSBO. DSBO in conjunction with the user department is responsible for the review and assessment of utilization plans.
- (d) All MWBE consultants, subconsultants, joint venturers, suppliers, manufacturers, manufacturer's representatives or brokers listed in a proposal must actually perform a commercially useful function in the work of a contract within the area(s) for which they are certified, and must not function as a conduit. Consistent with industry or professional practice, and as permitted by rules and regulations adopted by the director, MWBEs may enter into subcontracts, including subcontracts with non-MWBEs. In no case, however, shall an MWBE act as a conduit, nor shall the participation of an MWBE count toward a participation goal to the extent it fails to perform a commercially useful function.
- (e) All expenditures for materials, supplies and equipment obtained from an MWBE manufacturer, manufacturer's representative or supplier shall count toward the participation goal as specified in section 28-35(33) and section 28-35(51).
- (f) Any agreement between a proposer and an MWBE in which the proposer requires that the MWBE not provide subconsulting quotations to other proposers is prohibited and shall render a proposer's proposal nonresponsive.

(Ord. No. 286-20, § 2, 4-13-20)

Sec. 28-64. Contracts for professional design and construction services—Good faith efforts.

- (a) If the proposer has not fully met the participation goal as provided in section 28-66, then it shall demonstrate that it has made good faith efforts to meet such goal. The proposer shall furnish to the director on or before the time of the proposal submitted to and authorized by the city or a private owner, a detailed statement of

its good faith efforts to meet the participation goal set by the director. This statement shall address each of the items in subsection (b) and any additional criteria that the director may establish by rule or regulation consistent with the purposes of this article III and its divisions. Good faith efforts must be demonstrated to be meaningful and not merely for formalistic compliance with this article III and its divisions. Substantive and meaningful efforts will be considered in determining whether the bidder or proposer has complied with the good faith effort requirements.

- (b) The statement of good faith efforts shall include a specific response and verification with respect to each of the following good faith effort categories, which may be further defined by rule or regulation. A proposer may include any additional information it believes may be relevant. Failure of a proposer to show good faith efforts as to any one (1) of the following categories shall render its overall good faith effort showing insufficient and its proposal nonresponsive:
- (1) If pre-proposal meetings are scheduled by the city at which MWBEs may be informed of subconsulting or joint venture opportunities under a proposed negotiated professional services contract, including design, and construction services contract, attendance at such pre-proposal meetings is not mandatory; however, proposers are responsible for the information provided at these meetings.
 - (2) The proposer must solicit through all reasonable and available means the interest of all MWBEs certified in the scopes of work of the contract. The proposer must solicit the interest of such MWBEs within sufficient time, prior to the date of the proposal, to allow such MWBEs to respond to the solicitation. The proposer must determine with certainty if the MWBEs are interested by demonstrating appropriate in following up initial solicitations.
 - (3) The proposer must select portions of the services of the contract to be performed by MWBEs in order to increase the likelihood that the participation goal will be achieved. This includes, where appropriate, using best efforts to break out contract service items into economically feasible units to facilitate MWBE participation as subconsultants or joint venturers, and for proposer self-performed work, as suppliers, manufacturers, manufacturer's representative and brokers, all reasonably consistent with industry and professional practice, even when the proposer would otherwise prefer to perform these services with its own staff. The proposer must identify what portions of the contract will be self-performed and what portions of the contract were selected for solicitation of statements of qualification or proposals from MWBEs. All portions of the contract not self-performed must be solicited for MWBE participation within the relevant certification and scopes of work. The ability or desire of a proposer to perform the services of a contract with its own staff does not relieve the proposer of the responsibility to meet the participation goal or demonstrate good faith efforts to do so.
 - (4) The proposer, consistent with industry and professional practice, must provide MWBEs at a clearly stated location with timely, adequate access to and information about the plans, specifications, and requirements of the contract, including insurance requirements, if any, to assist them in responding to a solicitation.
 - (5) The proposer must negotiate in good faith with interested MWBEs and provide written documentation of such negotiation with each such MWBE.
 - (6) For each MWBE that contacted the proposer or that the proposer contacted or attempted to subconsult or joint venture with, consistent with industry and professional practice, the proposer must supply a statement giving the reasons why the proposer and the MWBE did not succeed in negotiating a subconsulting, supplier, manufacturer, manufacturer's representative, broker or joint venture agreement, as applicable.
 - (7) The proposer must provide verification that it rejected each non-utilized MWBE because the MWBE was not qualified. Such verification shall include a verified statement of the proposals received from potential or utilized subconsultants, suppliers, manufacturers, manufacturer's representative or brokers on the contract, whether or not they are MWBEs. In making such a determination of not being

qualified, the proposer shall be guided by the definition of qualified in section 28-35(47). For each MWBE found not to be qualified by the proposer, the verification shall include a statement giving the proposer's reasons for its conclusion. A proposer's industry or professional standing or group memberships may not be the cause of rejection of an MWBE. A proposer may not reject an MWBE as being unqualified without sound reasons based on a reasonably thorough investigation and assessment of the MWBE's capabilities and expertise.

- (8) If requested by a solicited MWBE, the proposer must make reasonable efforts to assist interested MWBEs in obtaining alternative payment or performance guarantees or insurance as required by the city or by the proposer, provided that the proposer need not provide financial assistance toward this effort.
- (9) If requested by a solicited MWBE, the proposer must make reasonable efforts to assist interested MWBEs in obtaining necessary and competitively priced equipment, supplies, materials, or related assistance or services for performance under the contract, provided that the proposer need not provide financial assistance toward this effort.
- (10) The proposer must use the DSBO MWBE directories to identify, recruit and place MWBEs.
- (c) In determining whether a proposer has satisfied good faith efforts as to a participation goal, the success or failure of other proposers on the contract in meeting such participation goal may be considered.
- (d) These factors shall also apply to instances where the participation goal may not be met. Proposers or contractors are required to make continuous good faith efforts throughout the contract term, and document these efforts. User departments will notify the DSBO of impending contract closeout to allow the DSBO to request remaining good faith efforts and other required documents from the contractor. Contractor may remain subject to the requirements including potential violations of this article III and its divisions after contract closeout.

(Ord. No. 286-20, § 2, 4-13-20)

Sec. 28-65. Contracts for professional design and construction services—Responsive and nonresponsive proposals.

- (a) *Responsive; compliance with requirements.* If the proposal submitted to and authorized by the city or a private owner subject to a participation goal meets such goal or shows adequate good faith efforts as set out in sections 28-64 or 28-66, then the director shall notify the department head that the proposal is responsive as to compliance with this division 3.
- (b) *Failure to meet requirements.* If such a proposal subject to a participation goal does not meet such goal or show good faith efforts as set out in sections 28-64 or 28-66, or provide timely information as set out in section 28-63, then the director shall notify the department head that the proposal is nonresponsive, and such determination shall result in no further consideration by the city or private owner of the proposal.
- (c) *Good faith efforts—Informal meeting.* In the event the director finds inadequacies in a bidder or proposer's demonstration of good faith efforts under section 28-64, the director will provide written notice of such inadequacies to the bidder or proposer prior to notifying the appropriate department head of bid or proposal responsiveness. Within two (2) business days from the date that the city notifies the bidder or proposer of the inadequacies of its demonstration of good faith efforts, the bidder or proposer may request an informal meeting with the director. Such informal meeting shall be scheduled by the director. All deficiencies in good faith efforts shall be explained to the bidder or proposer at such informal meeting. Within twenty-four (24) hours after the informal meeting, the bidder or proposer shall be allowed to submit additional information or to clarify the original good faith efforts. The director will at no time, however, allow additional subconsultants, joint venturers, suppliers, manufacturers, manufacturer's representatives or

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(Supp. No. 142, Update 8)

brokers that may later be added to the contract or to the original participation goal participation submitted at the time of the submission of the proposal submitted to and authorized by the city or a private owner to be counted toward meeting of the participation goal. After this informal meeting, the director will:

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

(Ord. No. 286-20, § 2, 4-13-20)

Sec. 28-66. Contracts for professional design and construction services—Compliance with participation goals.

- (a) The proposal specifications for each professional design and construction services contract shall require that all proposers seeking to contract with the city or a private owner on such project shall address the participation goal through one (1) or more of the following subsections, or by demonstrating good faith efforts as set out in section 28-64:
 - (1) If the proposer is an MWBE, the value of the commercially useful function to be self-performed by the MWBE, shall count to the extent provided in section 28-63 toward satisfaction of the participation goal. If the level of self-performed work does not satisfy the requirements to meet the goal, the MWBE proposer must utilize additional MWBE firms or submit good faith efforts substantiating why they could not meet the goal.
 - (2) If the bidder or proposer utilizes MWBEs as subconsultants, suppliers, manufacturers, manufacturer's representatives or brokers, the value of the commercially useful function to be performed by such MWBEs, shall count to the extent provided in section 28-63 toward satisfaction of the participation goal.
 - (3) If the proposer submits a joint venture agreement that includes one (1) or more MWBEs, the value of the commercially useful function to be performed by the MWBEs in the joint venture as the distinct, clearly defined portion of the work of the joint venture agreement that the MWBE performs with its own forces or for which it is separately at risk shall count to the extent provided in section 28-63 toward meeting the participation goal. The joint venture is subject to review and approval by the director, and the joint venture agreement shall be provided to the director within a time period consistent with section 28-66.5. Joint venturer participation will count toward the satisfaction of the participation goal upon confirmation by the director of the utilization in the joint venture of joint management and full integration of work forces by the joint venturers; or
 - (4) If the proposer utilizes MWBEs as subconsultants, suppliers, manufacturers, manufacturer's representatives or brokers, the value of the commercially useful function to be performed by such MWBEs shall count to the extent provided in section 28-63 toward satisfaction of the participation goal.
 - (5) Utilization of MWBEs shall count toward a goal, if any, to the extent that an MWBE is performing a commercially useful function corresponding to a NAICS Code in which it is certified.

(Ord. No. 286-20, § 2, 4-13-20; Ord. No. 833-21, § 5, 8-23-21)

Sec. 28-66.5. Contracts for professional design and construction services—Joint ventures and teaming agreements.

- (a) A proposer may opt to meet the goal through a joint venture or teaming agreement. As to each joint venture under this section, a written joint venture agreement must be completed by all parties to the joint venture and executed, which clearly delineates the rights and responsibilities of each member or partner, complies with any requirements of the division of small business opportunity as set forth in bid documents or otherwise, and provides that the joint venture shall continue for, at a minimum, the duration of the project.
- (b) The division of small business opportunity shall review and approve all contractual agreements regarding the terms and provisions of each joint venture relationship to the award of a contract subject to this division, including agreements pertaining to:
 - (1) The initial capital investment of each venture partner;
 - (2) The proportional allocation of profits and losses to each venture partner; no MWBE venture partner's liability should ever exceed said partners percentage of revenue earned while a participant in the joint venture;
 - (3) The sharing of the right to control the ownership and management of the joint venture;
 - (4) Actual participation of the venture partners on the project;
 - (5) The method of and responsibility for accounting;
 - (6) The method by which disputes are resolved; and
 - (7) Any additional or further information required by the division of small business opportunity as set forth in bid documents or otherwise.

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

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

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- (f) The joint venture, each member of the joint venture, or the teaming parties shall provide the division of small business opportunity access to review all records pertaining to joint venture agreements or teaming agreements before and after the award of a contract in order to reasonably assess compliance with this section.
 - (g) If, after the award of a contract to a joint venture or team, any member of the joint venture or team believes that the terms and conditions of the agreement as approved by the division of small business opportunity have not been complied with, then such member may seek the DSBO's and the user department's assistance with review and resolution of the issue. The request for review must be made in writing. If, after the award of a contract, a dispute arises between the prime contractor and a subcontractor regarding performance of work or provision of services or supplies on the eligible project, then such prime contractor or subcontractor may seek the DSBO's and the user department's assistance with review and resolution of the issue. The request for review must be made in writing.
 - (h) Within twenty (20) calendar days of receipt of a request for review, if the dispute has not been resolved informally among the parties, the DSBO will recommend and schedule an informal meeting among the parties.
 - (i) The director shall have authority to make recommendations in an attempt to resolve the dispute.
 - (j) In the event that the DSBO's informal procedures do not resolve the disputes, the DSBO shall have the option of referring the dispute to a qualified outside mediator, contingent upon the consent of the interested parties, with the costs to be borne by the disputing parties.

(Ord. No. 286-20, § 2, 4-13-20)

Sec. 28-67. Time periods for DSBO required MWBE forms and documentation submitted to the city.

For construction, design, or professional services related to construction, documentation of good faith efforts and all DSBO required forms including letters of intent of a bidder or proposer, and as applicable, its subcontractors, subconsultants, joint venturers, suppliers, manufacturers, manufacturer's representatives or brokers shall be submitted to the director at the time of bid opening, date of proposal in the case of a competitive selection process or private owner selection for a construction contract, or at the time of submission of the proposal submitted to and authorized by the city or a private owner for a professional design and construction services contract, or at some other time that may be required by the DSBO and the user department. During contract performance, the prime contractor is responsible for updating or providing new DSBO required forms as applicable any time a new MWBE is added to a contract or project. The prime contractor must also provide copies of the MWBE certification letters to the DSBO for new MWBEs added to the contract or project.

(Ord. No. 286-20, § 2, 4-13-20)

Sec. 28-68. Compliance with participation goal during contract performance.

- (a) Upon award of a contract by the city that includes a participation goal, the goal becomes a covenant of performance by the contractor or consultant in favor of the city.
- (b) All contracts subject to this article III and its divisions shall be reviewed by the DSBO for compliance with the provisions hereof. This review shall examine, but is not be limited to, whether the MWBE participation dollar amounts and percentages and achieved participation goal levels upon which the contract was awarded are maintained over the term or duration of the contract.

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- (c) For any contract for which the director has set a participation goal, it shall be an ongoing, affirmative obligation of the contractor or consultant on such contract to maintain compliance with all applicable provisions of this article III and its divisions to include, at a minimum, compliance with the originally achieved level of MWBE participation upon which the contract was awarded, for the duration of the contract, unless the city initiates a material alteration to the scope of work affecting MWBEs performing on the contract through change order, contract amendment, force account or as otherwise described in section 28-70. Graduation of an MWBE shall not affect the contribution made by the MWBE toward satisfaction of a participation goal if the work was bid or proposed to be performed by the MWBE prior to the date of ineligibility for certification based on achievement of the graduation criteria.
- (d) The DSBO shall evaluate the utilization of MWBEs to determine whether such MWBEs are performing a commercially useful function. The evaluation shall examine the amount of work subcontracted, industry practice and other relevant factors. The amount of MWBE participation credited toward a participation goal shall be based upon an analysis of the specific duties performed by the MWBE, and the extent to which such duties constitute a commercially useful function. The director may undertake such inquiries or studies, engage such employees or retain such consultants to assist the director in rendering these determinations. In order for the DSBO to accurately track utilization of MWBEs, the MWBEs shall submit regularly the information described in subsections below to DSBO in a method prescribed by the DSBO. The submitted information may include but is not limited to:
- (1) Prime contractor information (name, address, contact person, telephone and email address);
 - (2) MWBE subcontractor information for all tiers (name, address, contact person, telephone, email address, and certification number);
 - (3) Contract information and city contract control number (report for month of, contract name and date executed, original dollar amount, current dollar amount if changed, and all change orders);
 - (4) Subcontract agreement information (copy of the document, original amount, current amount if changed, scope of work, and change orders);
 - (5) Payment received in current month;
 - (6) Total payments received;
 - (7) Percent of work completed;
 - (8) Billing request rejection date and reason for rejection; and
 - (9) Past due invoices (invoice date, reference number, number of days past due, and amount outstanding).
- (e) The work performed by an MWBE not providing a commercially useful function, or functioning as a conduit, shall not count toward meeting the participation goal.

(Ord. No. 286-20, § 2, 4-13-20; Ord. No. 833-21, § 6, 8-23-21)

Subdivision III. Compliance and Enforcement

Sec. 28-69. Administrative review and court proceedings.

- (a) Any person who disputes any determination made by or on behalf of the city pursuant to the authority of the director, which determination adversely affects such person, may petition the executive director for a hearing concerning such determination no later than thirty (30) days after the date of the determination. Compliance with the provisions of this section shall be a jurisdictional prerequisite to any action brought

under the provisions of this section, and failure of compliance shall forever bar any such action. This section shall not be construed to create a right of standing that does not otherwise exist under Colorado law.

- (b) The executive director may hold such hearing or in the executive director's sole discretion may designate and request an officer or employee of the DSBO, or an independent hearing officer retained by the city, as a hearing officer with authority to hold such hearing or hearings.
- (c) Such petition shall be in writing, and the facts and figures submitted shall be submitted under oath or affirmation either in writing or orally at a hearing scheduled by the executive director or the hearing officer. The hearing, if any, shall take place in the city, and notice thereof and the proceedings shall otherwise be in accordance with rules and regulations issued by the director. The petitioner shall bear the burden of persuasion and the burden of going forward, and the standard of proof shall conform to that in civil, non-jury cases in state district court, provided that the executive 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 executive director.
- (d) Thereupon, the executive director or designee shall make a final determination. Such final determination shall be considered a final order of the executive director and may be reviewed under Rule 106(a)(4) of the state rules of civil procedure by the petitioner or by the city. A request for reconsideration of the final determination may be made if filed with the executive director within fifteen (15) days from the date of determination, in which case the executive director shall review the record if the proceedings were conducted by a designated hearing officer, and the determination shall be considered a final order of the director upon the date the director rules on the request for reconsideration.
- (e) Pursuant to Rule 106(a)(4) of the state rules of civil procedure, the district court of the second judicial district of the state shall have original jurisdiction in proceedings to review the final order.

(Ord. No. 286-20, § 2, 4-13-20)

Sec. 28-70. Project change orders, amendments and modifications.

- (a) Contractors and consultants on contracts hereunder shall have a continuing obligation to immediately inform the DSBO in writing of any agreed-upon and user department approved increase or decrease in the scope of work of such contract, upon any of the bases discussed in this section 28-70, regardless of whether such increase or decrease in scope of work has been reduced to writing at the time of notification.
- (b) Any increase in the scope of work of a contract for construction, reconstruction, or remodeling, whether by amendment, change order, force account or otherwise, or any increase in the scope of services of a contract for professional design or construction services, whether by amendment or any other addition of special, additional or other services to the contract, which increases the dollar value of the contract, whether or not such change is within the scope of work designated for performance by a MWBE at the time of contract award, shall be immediately submitted to the DSBO. The contractor is responsible for obtaining user department approval of any such change. Those amendments, change orders, force accounts or other contract modifications that involve a changed scope of work that cannot be performed by existing project subcontractors, subconsultants, joint venturers, suppliers, manufacturer, manufacturer's representatives or brokers, or by the contractor or consultant, shall be subject to a goal for MWBEs equal to the original participation goal on the contract that was included in the bid or proposal requirements. The contractor or consultant shall satisfy such goal as respects such changed scope of work by soliciting new MWBEs in accordance with section 28-62 or 28-66 as applicable, or the contractor or consultant must show each element of good faith efforts and other applicable requirements set out in sections 28-60, 28-64, 28-73, or section 28-74(c) hereof. The original participation goal percentage shall be applied to the new, increased dollar amount of the contract. The contractor or consultant shall supply to the director and user department

the documentation described in sections 28-60, 28-64, 28-73, or 28-74(c) with respect to the increased dollar value of the contract.

(Ord. No. 286-20, § 2, 4-13-20)

Sec. 28-71. Payments to MWBE subcontractors, subconsultants, joint venturers, suppliers, manufacturers, manufacturer's representatives and brokers.

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

(Ord. No. 286-20, § 2, 4-13-20)

Sec. 28-72 Contractor prompt payment; MWBE subcontractors.

- (a) Each contractor on a city contract with certified MWBEs as subcontractors shall pay the respective subcontractors any invoiced and undisputed amounts for accepted and completed work within thirty-five (35) days of the contractor's receipt of the subcontractor's invoice. Payment to the subcontractor shall be timely made as required under this section regardless of whether the contractor has been paid for the same work or payment period. For the purposes of the section 28-72, any subcontractor, regardless of whether that subcontractor holds a city contract, may be required to make payments to MWBEs as set forth in this section.
- (b) Contractor is required to provide written notice to its subcontractor of either approval or rejection of the subcontractor's invoice within ten (10) days of receipt. If the invoice is rejected, the written notice to the subcontractor shall include the deficiencies or disputes regarding the invoice.
- (c) Failure to comply with the payment requirements in this section may be grounds for withholding of payment by the city to the contractor, and may be grounds for breach of the city contract.
- (d) The payment requirements under this section shall apply to MWBE subcontractors regardless of tier.
- (e) This section 28-72 shall apply only to city contracts in the amount of one million dollars (\$1,000,000.00) or more based on the original contract amount before amendments or changes.

(Ord. No. 286-20, § 2, 4-13-20)

Sec. 28-73. Participation modification; substitution; termination of MWBE subcontractors.

- (a) A contractor that has been awarded a contract based upon a given level of MWBE participation, or has duly added an additional or substitute MWBE subcontractor to the contract in accordance with this division 3, but intends to substitute or terminate an MWBE subcontractor must comply with this section 28-73, as directed by the DSBO and the user department, regarding the intended substitution or termination. This includes, but is not limited to, instances in which a contractor seeks to perform work with its own forces or those of an affiliate, a non-MWBE firm, or with another MWBE as a substitution for an originally designated for an MWBE subcontractor.
- (b) In the event that a contractor or consultant intends to substitute or terminate an MWBE subcontractor, subconsultant, joint venturer, supplier, manufacturer, manufacturer's representative or broker, or otherwise modify or eliminate all or a portion of work attributable to an MWBE, except in cases where directed by the city, the following must be completed:
- (1) The contractor must provide notice in writing to the MWBE subcontractor, with a copy to the DSBO and user department, of its intent to request to terminate or substitute, and the reason for the request.
 - (2) The contractor must give the MWBE subcontractor at least five (5) business days to respond to the contractor's notice.
 - (3) The DSBO, in conjunction with the user department, must provide concurrence and the reasons therefor stated in a written notification that the prime contractor has good cause to substitute or terminate the firm.
 - (4) In determining good cause to substitute or terminate the DSBO will consider all circumstances as a whole based on the following factors:
 - (i) The MWBE subcontractor fails or refuses to execute a written contract;
 - (ii) The MWBE subcontractor fails or refuses to perform the work consistent with normal industry standards; provided, however, that good cause does not exist if the failure or refusal of the MWBE subcontractor to perform its work results from the bad faith or discriminatory action of the contractor;
 - (iii) The MWBE subcontractor fails or refuses to meet the contractor's reasonable, nondiscriminatory bond requirements or insurance requirements;
 - (iv) The MWBE subcontractor becomes bankrupt, insolvent, or exhibits credit unworthiness;
 - (v) The MWBE subcontractor is or has become ineligible to work on city projects because of suspension or debarment;
 - (vi) The non-city owner or contractor has determined that the MWBE subcontractor is not a responsible contractor;
 - (vii) The MWBE subcontractor voluntarily withdraws from the project and provides written notice of its withdrawal;
 - (viii) The MWBE's work cannot be counted toward participation in accordance with this article III and its divisions;
 - (ix) An MWBE owner dies or becomes disabled resulting in the MWBE's inability to perform or complete its work on the contract; or
 - (x) Other documented good cause that the user department or DSBO determines requires termination of the MWBE subcontractor.

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- (5) The MWBE subcontractor shall be provided the opportunity to advise the DSBO, user department and the contractor of the reasons, if any, why it objects to the proposed termination, and why the DSBO should not concur with the contractor's action. If required in a particular case as a matter of public necessity (*e.g.*, safety), the DSBO may provide a response period shorter than five (5) business days.
 - (6) In addition to substitutions or terminations occurring during contract performance, the provisions of this section may apply to reductions in scope of work or substitutions of MWBE firms by bidders or proposer prior to contract execution.
- (c) If the DSBO and the user department concurs with the contractor's request to substitute, terminate or reduce the scope of work of the MWBE subcontractor, the contractor must comply with good faith efforts requirements to replace the terminated MWBE subcontractor with another MWBE firm certified to perform the scope of work.
- (d) If a contractor substitutes or terminates the MWBE subcontractor, or reduces the scope of work of the MWBE subcontractor, without first complying with this section 28-73, the DSBO may find the contractor in violation of this division and the contractor may be subject to enforcement and sanctions.
- (Ord. No. 286-20, § 2, 4-13-20)

Sec. 28-74. Potential violations during contract performance.

- (a) A contractor or consultant that has been awarded a contract based upon a given level of MWBE participation shall not, at any time before or during the performance of such contract:
- (1) Fail to in fact utilize an MWBE that was originally listed at bid opening or proposal submission in order to satisfy the participation goal, and that submitted a timely letter of intent, without substituting with another MWBE performing the same commercially useful function and dollar amount, or demonstrating each element of good faith efforts, as defined in subsection (c) hereof, to substitute an MWBE; or
 - (2) Fail to allow an MWBE functioning as a subcontractor, subconsultant, joint venturer, supplier, manufacturer, manufacturer's representative, or broker to perform the commercially useful function, the value of which was originally counted for that MWBE in awarding the contract; or
 - (3) Modify or eliminate all or a portion of the scope of work attributable to an MWBE upon which the contract was awarded without first complying with section 28-73, unless directed by the city; or
 - (4) Terminate an MWBE originally utilized as a subcontractor, subconsultant, joint venturer, supplier, manufacturer, manufacturer's representative or broker in order to be awarded the contract without complying with section 28-73; or
 - (5) Retaliate against any MWBE that reports issues to the DSBO or user departments; or
 - (6) Participate in a conduit relationship with an MWBE scheduled to perform work on the contract; or
 - (7) Otherwise fail to meet the participation goal without complying with good faith efforts requirements; or
 - (8) Commit any other violation of this article III and its divisions, or rules and regulations promulgated thereunder, which constitutes a material breach of the contract, not mentioned above.
- (b) Any action by a contractor or consultant in violation of subsections (a)(1) through (8) hereof, shall constitute a material breach of the contract that shall entitle the city or private owner to exercise all of its rights at law or equity for such material breach, in addition to exercising any of the other sanctions set out in section 28-76. If, following contract award, an MWBE has its certification terminated for reasons other than expiration of certification, or graduation from certification under section 28-55, or an MWBE fails to perform a

commercially useful function, the value of which was originally counted for that MWBE, as applicable, in awarding the contract, or an MWBE voluntarily withdraws its MWBE participation on the contract and the contractor or consultant can demonstrate that such termination or failure did not result from any action or inaction, whether direct or indirect, of or by the contractor or consultant, such termination of certification or failure to perform a commercially useful function shall not be deemed a breach of the contract; provided, however, that the requirements of section 28-73 are satisfied.

- (c) In the event that a contractor or consultant must add or replace an MWBE subcontractor, subconsultant, joint venturer, supplier, manufacturer, manufacturer's representative or broker or in the event that a new scope of work is added to the ongoing contract, and the contractor or consultant in such event is in noncompliance with maintenance of the original participation goal upon which the contract was awarded, due to failure to utilize additional MWBEs, the contractor or consultant shall be required to demonstrate good faith efforts in compliance with section 28-60, section 28-64, or section 28-73 as applicable. Failure of a contractor or consultant to show good faith efforts shall render its contract performance in noncompliance with this article III and its divisions.

(Ord. No. 286-20, § 2, 4-13-20)

Sec. 28-75. Burden of proof; investigations of compliance.

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

(Ord. No. 286-20, § 2, 4-13-20)

Sec. 28-76. Contract sanctions for failure to comply with requirements.

- (a) If a contractor or consultant is found to be in violation of the provisions of article III, to otherwise be in breach of a contract, to perform as or to utilize MWBEs for a non-commercially useful function or as a conduit, to fail to submit information required in section 28-67, to submit false, misleading or materially incomplete statements, documentation or records, including, but not limited to, good faith efforts or letters of intent, or to fail to cooperate in an investigation, it shall be subject to sanctions. The city may exercise any or all of its rights contained in the contract terms and conditions, including, but not limited to, withholding funds including retainage, imposition of monetary penalty, or suspension or termination of the pertinent contract. If the contract is suspended or terminated, the city reserves all its rights at law or equity, with such suspension or termination being deemed a response to a contractor or consultant default, as appropriate, by applicable law.
- (b) In the event that the director determines, in his or her sole discretion, that a contractor or consultant is in noncompliance with article III or its divisions, the contractor or consultant may be assessed a civil, remedial penalty, of not more than one hundred fifty (150) percent of the value of MWBE underutilization demonstrated for each MWBE involved. In assessing such civil penalty:
- (1) The director shall calculate the applicable amount of civil penalty, and may reduce or waive all or part of such penalty, in his or her sole discretion, in consideration of the following factors:

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- a. The length of the period of noncompliance;
 - b. The history of previous noncompliance with any provision of this article III and its divisions;
 - c. The monetary impact of the civil penalty on the contractor or consultant in correcting such noncompliance; or
 - d. The other facts and circumstances relevant to the noncompliance of the contractor or consultant.
- (2) The director shall collect assessed and unpaid civil penalties under this subsection by action initiated in state district court for collection of such penalty. A stay of any order of the director pending judicial review shall not relieve any contractor or consultant from any civil penalty obligation imposed under this section.
 - (3) Any such assessed civil penalties may also be offset against any amount, including, but not limited to, contract retainage, otherwise due and owing to the contractor or consultant on the contract.
 - (4) The contract may be suspended or terminated with the city reserving all its rights at law or equity, with such suspension or termination being deemed a response to a contractor or consultant default, as appropriate, by applicable law.
 - (5) The debarment board established under Denver Revised Municipal Code Section 20-77, upon request of the director, may suspend or debar the contractor or consultant from participation in city or private contracting covered hereunder for a period as may be determined by the debarment board, in its sole discretion, based upon the grounds of violating this article III and its divisions, pursuant to such suspension and debarment procedures as may be established by the city, as set forth in Denver Revised Municipal Code Section 20-77. The director in that event shall regard as nonresponsive any bid, proposal or competitive selection process proposal received during this time period that includes the contractor or consultant as a contractor, consultant, subcontractor, subconsultant, joint venturer, supplier, manufacturer, manufacturer's representative, or broker.
 - (6) If a contractor or consultant or other business enterprise knowingly receives new or additional work on a contract as a result of actions set out in this section, then the penalties in this section may be applied to such business enterprise.
 - (7) The DSBO may suspend or revoke an offending MWBE's eligibility for certification, may suspend its participation from counting toward a participation goal, and, subject to other city law, may suspend or debar it from participating in future city contracts, based upon such MWBE's acting as a conduit, failing to comply with the provisions of article III and its divisions, failing to perform a commercially useful function on a contract, failing to submit information as required by section 28-67, submitting false, misleading or materially incomplete statements, documentation or records, or failing to cooperate in investigations.
- (c) The director may, in his or her sole discretion, impose any one (1) or more of the sanctions set out in this section against any contractor, consultant, subcontractor, subconsultant, joint venturer, supplier, manufacturer, manufacturer's representative, or broker determined to be in violation of the section, provided that the director shall first advise the affected department head of the proposed sanction in writing. If the department head advises the director in writing that the department head believes that imposition of such sanction would not be in the best interests of the city, the director shall consult with the department head prior to making a final decision as to whether to impose such sanctions.
 - (d) Consistent with article III and its divisions and the rules and regulations, the DSBO may prescribe corrective actions in the case of potential violations or in lieu of potential enforcement.
 - (e) Suspected criminal violations shall be referred to the proper authorities for prosecution. If a conviction or a guilty plea is obtained pursuant to such prosecution, the perpetrator may be barred from contracting with the city to the extent authorized by law.

(Ord. No. 286-20, § 2, 4-13-20)

Sec. 28-77. State or federal law and other guidelines.

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

(Ord. No. 286-20, § 2, 4-13-20)

Sec. 28-78. Reporting.

The director shall prepare written reports no less than two (2) times each year which shall describe progress in meeting the annual goal set out in section 28-57. Copies of such reports shall be provided to the affected department heads, city council and the mayor.

In addition, the report shall encompass the implementation of this article III and its divisions and discussion of setting and justification of participation goals and achievements, including, but not limited to, contract change orders, amendments and modifications.

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

(Ord. No. 286-20, § 2, 4-13-20)

Sec. 28-79. Annual report; explanation of failure to achieve annual goal.

If the annual goal in section 28-57 is not met in any year, then by March 1 of the following year, the director shall submit to the mayor and city council a report comparing MWBE utilization achieved in the year to the aspirational annual goal, stating the reasons why the goal was not met, and advising and making recommendations as to continuing or further efforts that the city will take in eliminating identified discrimination in city construction, reconstruction and remodeling, and professional services, including design, and construction services contracting, and recommending actions to assist in meeting such goal in the future. This annual report shall be considered one (1) of the two (2) required reports under section 28-78.

(Ord. No. 286-20, § 2, 4-13-20)

Sec. 28-80. Severability.

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

(Ord. No. 286-20, § 2, 4-13-20)

Sec. 28-81. Effective date of division.

This division 3 shall become effective on May 2, 2020 and shall apply to all contracts within the scope of the division for which bids or proposals are publicly advertised on or after May 2, 2020.

(Ord. No. 286-20, § 2, 4-13-20)

Sec. 28-82. Review and sunset.

- (a) This division 3 shall be reviewed by the mayor, director and department heads on the third anniversary of its enactment, in order to determine whether adjustments or revisions to division 3 or additional studies or inquiries in furtherance of division 3 are deemed appropriate and should be undertaken or recommended, in order to further and maintain the purpose and intent of division 3.
- (b) This division 3 shall be repealed effective April 30, 2025.

(Ord. No. 286-20, § 2, 4-13-20)

Secs. 28-83—28-90. Reserved.

**ARTICLE V. NONDISCRIMINATION IN CITY CONTRACTS AND PURCHASE ORDERS
FOR GOODS AND SERVICES AND OPPORTUNITIES FOR MINORITY AND WOMAN-
OWNED BUSINESSES AND SMALL BUSINESS ENTERPRISES IN PROCUREMENTS
FOR GOODS AND SERVICES¹**

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

- (a) The purpose of this article V is to enable the city, through the department of general services, user departments, and the DSBO, to undertake specific activities to prevent discrimination and its effects against business enterprises that have been certified as MWBEs and SBEs in the award of city contracts and purchase orders for goods and services and to increase opportunities for all MWBEs and SBEs as awarded by the department of general services or user departments pursuant to the provisions of the Charter, ordinances, and executive orders of the City and County of Denver. The director of the division of small business opportunity and city department heads are hereby expressly delegated the necessary powers to effectuate the purpose of this article V and to undertake such additional studies or inquiries as they deem appropriate.
- (b) The scope of this article V will encompass an MWBE goal program, an SBE defined procurement pool program, and other outreach and education programs.
- (c) The city, through the DSBO in conjunction with the purchasing division and user departments, is authorized to develop and utilize programs and activities to provide outreach to and to facilitate the participation of all business enterprises in the city's purchasing activities, including, but not limited to, MWBEs and SBEs. These programs and activities include, but are not limited to:
 - (1) Commencement of collection and analysis, for informational purposes only, of data and information from each bidder or proposer on a city procurement contract or purchase order regarding the ongoing availability and utilization of minority and women-owned business enterprises, including MWBEs, on such bidder's or proposer's private contracts in the goods and services industries in the city's market area.
 - (2) Development of such other programs or activities as the DSBO director in conjunction with the purchasing director, manager of the department of general services or department heads may from time to time recommend.

(Ord. No. 286-20, § 3, 4-13-20)

¹Editor's note(s)—Ord. No. 286-20, § 3, adopted April 13, 2020, repealed art. V, §§ 28-117—28-158 and enacted a new art. V. as herein set out. Former art. V pertained to a similar subject matter, and derived from Ord. No. 86-14, § 1, adopted February 18, 2014.

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

Article V excludes from coverage the following purchases:

- (a) Contracts and purchase orders for which bids or proposals are sought under the minority and women business enterprise ordinance for construction, reconstruction, and remodeling, and professional design and construction services set forth in article III of this chapter 28 and under the small business enterprise ordinance set forth in article VII of this chapter 28.
- (b) Contracts and purchase orders paid with funds from the United States Government or the State of Colorado and for which the United States Government or the State of Colorado have made applicable contract requirements, terms or conditions that are inconsistent with the terms of this article V in which event the provisions of this article V shall not apply to such contract or purchase order to the extent of the inconsistency.
- (c) Contracts and purchase orders excluded by the purchasing division from procurement bidding procedures as identified in section 20-64 of this Code, and other sole source purchases authorized by city rules, regulations, ordinances or executive order.
- (d) Contracts and purchase orders made pursuant to section 20-64.5 of this Code concerning cooperative purchases under purchase contracts of the United States Government, State of Colorado, or other governmental jurisdictions.
- (e) Purchases made through the city's non-purchase order voucher or supplier invoice request procedures as identified in City Fiscal Rule 8.1.
- (f) Contracts and purchase orders for the following: (1) Real estate transactions, including purchase and sale agreements, leases and licenses; (2) intergovernmental agreements; (3) agreements with colleges and universities; (4) revenue agreements (except for golf and other concessions); (5) legal services and related expert and consulting services in aid of legal services; (6) utilities; (7) broadcasting; (8) regulated industries including railroads; (9) contracts and purchase orders procured from national markets.
- (g) The DSBO director in consultation with the purchasing division or user department is authorized to exclude contracts or purchase orders for goods or services in the best interest of the city.

(Ord. No. 286-20, § 3, 4-13-20)

Sec. 28-119. Procurement advisory committee.

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

(Ord. No. 286-20, § 3, 4-13-20)

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

All disputes concerning any determination made by or on behalf of the city pursuant to the authority of the DSBO director as set forth in this article V will be governed by administrative review and court proceedings provision contained in section 28-69 of this Code.

(Ord. No. 286-20, § 3, 4-13-20)

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

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

(Ord. No. 286-20, § 3, 4-13-20)

Sec. 28-122. EBE, MWBE, SBE and SBEC certification eligibility; renewal of certification; decertification; graduation; graduation size standards.

- (a) *Procedures and methods.* The DSBO director shall, by rule and regulation or guidelines relating solely to internal management and procedure, establish reasonable procedures and methods for the certification of applicant business enterprises as EBEs, MWBEs, SBEs and SBECs in order to effectuate the purposes of this article V. The DSBO director may seek input and advice from appropriate industry sources as to appropriate aspects of work performance, equipment and staffing in these industry areas in which certification is being sought.
- (b) *Eligibility and application procedures.* Only applicant business enterprises who meet the applicable certification criteria may participate as EBEs, MWBEs, SBEs and SBECs in the programs established under this article V. The certification criteria, requirements, and application procedures contained in sections 28-35 and 28-53 through 28-56 of this Code will apply to the certification, renewal of certification, decertification, and graduation of MWBEs under this article V. The certification criteria, requirements, and application procedures contained in sections 28-205 and 28-206 of this Code will apply to the certification, renewal of certification, decertification, and graduation of EBEs, SBEs and SBECs under this article V.
- (c) No applicant business enterprise shall be certified as EBEs, MWBEs, SBEs and SBECs, and following certification of EBEs, MWBEs, SBEs and SBECs, no certification shall be renewed if on the effective date of the application or renewal the applicant business enterprise, the EBEs, MWBEs, SBEs and SBECs (combined with all affiliates) has achieved a size standard established by the DSBO in accordance with section 28-55 of article III or section 28-206 of article VII.

(Ord. No. 286-20, § 3, 4-13-20; Ord. No. 833-21, § 7, 8-23-21)

Sec. 28-123. Definitions.

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

- (1) *Affiliate*, for purposes of this article V, will have the meaning set forth in section 28-35(1) and the meaning set forth in section 28-204(1), as applicable.

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- (2) *Annual goal* means the targeted level for the aspirational goal established by the city for the annual aggregate participation of MWBEs in city contracts and city purchase orders.
 - (3) *Applicant business enterprise* means a business enterprise seeking to be certified as a minority, woman, or small business enterprise, as appropriate, to provide goods or services under this article V.
 - (4) *Bid* means an offer to provide goods or perform services for a price under a city contract or purchase order with the city in response to a bidding procedure.
 - (5) *Bidder* means a business enterprise that submits a bid on a city contract or purchase order that is offered for bidding by the city to acquire goods or services.
 - (6) *Broker* means a business enterprise that performs a commercially useful function as an intermediary, for a fee, in the acquisition of goods regardless of whether it takes title to such goods for the city or its vendors, contractors, consultants, or suppliers, but is not a manufacturer, manufacturer's representative, supplier, or distributor. Acting as a broker as required and sought by the city or as is normal industry practice for a specific purchase of goods is considered a commercially useful function. A packager shall be considered and treated as a broker.
 - (7) *Business enterprise* means an individual, sole proprietorship, corporation, limited liability company, partnership, limited partnership, limited liability limited partnership, joint stock company, joint venture, professional association or any other legal entity operated for profit that is properly licensed or registered, as applicable, owned, and controlled by persons who are citizens of the United States or lawful permanent residents of the United States, and otherwise authorized to do business in the State of Colorado.
 - (8) *Certification* means completion by a business enterprise of an application procedure to be developed by the DSBO, and formal authorization by the DSBO director to participate as an MWBE, EBE, or SBE under this article V. Certification neither represents nor implies that a business enterprise is qualified to perform on a city procurement contract, nor that it performs a commercially useful function.
 - (9) *City* means the City and County of Denver and its participating user departments.
 - (10) *City contract or city purchase order* means any city contract, purchase order, or master purchase order for the acquisition of goods or services authorized by the Charter, Municipal Code, and executive orders of the city, including, but not limited to, contracts and purchase orders awarded by a formal or informal bidding procedure or competitive selection process, but will not include a contract or purchase order excluded under section 28-118 of this Code or a contract or purchase order for professional services that are not services. City contract or city purchase order shall include the acquisition of goods or services by the city through other contracts and purchase orders ancillary to cooperative agreements or understandings with other public and private agencies for the maintenance, repair, management, or operation of public facilities, park and recreational facilities, museums, zoological and other gardens, collections of natural history, and observatories or for the provision of public services, programs, or activities by public or private agencies at public facilities, park and recreational facilities, museums, zoological and other gardens, collections of natural history, and observatories.
 - (11) *Commercially useful function* means responsibility for the provision of goods or a distinct element of services under a contract or purchase order that is carried out by a business enterprise actually performing, maintaining control, managing, and supervising the goods or services provided. In determining whether a firm is performing or has performed a commercially useful function, the DSBO will analyze whether the firm is performing functions set forth in this definition and this ordinance including, but not limited to, responsibility for, with respect to materials and supplies used for the contract work; negotiating price; determining quantity and quality; ordering materials, supplies or equipment; performing installation where applicable; and paying for materials, supplies or equipment.

To determine whether a firm is performing a commercially useful function, the DSBO will evaluate the amount of work contracted, industry practices, the amount paid to the firm in proportion to the work actually performed, credit claimed toward goal achievement (if applicable), and other relevant factors. Commercially useful function is assessed for purposes of determining participation on a contract, not for determination of certification eligibility.

- (12) *Conduit* means an MWBE or SBE that knowingly agrees to pass all or part of the goods or services for which it is listed for participation, and is scheduled to perform or supply on a city contract or purchase order to a business entity that is not an MWBE or SBE, or does not carry out the responsibilities required for MWBE or SBE participation by actually performing, managing, controlling and supervising the work involved. In this type of relationship, the MWBE or SBE has not performed a commercially useful function and the arranged agreement between the two (2) parties is not consistent with standard industry practice. This arrangement does not meet the commercially useful function requirement, and therefore the participation of the MWBE or SBE does not count toward the participation goal or annual goal, as appropriate. Conduit may also be referred to as a passthrough.
- (13) *Contractor, consultant or vendor* means a business enterprise that enters into a city contract or purchase order for acquisition of goods or performance of services pursuant to the Charter, Municipal Code, and executive orders of the city. The terms contractor, consultant or vendor include prime contractors and general contractors.
- (14) *Day*, unless otherwise indicated, means calendar day.
- (15) *Defined procurement pool* means city bid opportunities for goods or services for which the estimated cost exceeds fifty thousand dollars (\$50,000.00) but does not exceed nine hundred ninety-nine thousand nine hundred ninety-nine dollars and ninety-nine cents (\$999,999.99).
- (16) *Department head* means the manager or director of the city department, user department or agency or the elected official initiating or requesting the city enter into contract(s) for goods or services utilizing MWBE or SBE participation, or such person's designee.
- (17) *Distributor* has the same definition as the term "supplier" as set forth in section 28-123(46) below.
- (18) *DSBO or the DSBO* means the division of small business opportunity.
- (19) *DSBO director* means the director of the division of small business opportunity or successor agency, or such director's designee.
- (20) *DSBO required forms* means the certifications, letters of intent, commitment forms and other forms and documents defined by ordinance and the rules and regulations, referenced in the applicable procurement documents, and required by the DSBO to confirm and evaluate a bidder's or proposer's commitment to utilization of certified firms and other DSBO program requirements. No authorized alteration or modification of a DSBO required form is permitted. The DSBO reserves the right to reject altered or modified forms.
- (21) *Doing business* means having a physical location from which to engage in for-profit activities in the scope(s) of expertise of the business enterprise.
- (22) *Expertise* means demonstrated skills, knowledge, or ability to perform in the field of endeavor in which certification is sought by the business enterprise as defined by normal industry practices, including licensure or registration where required.
- (23) [Reserved]
- (24) *Good faith efforts* means substantive and meaningful good faith actions undertaken by a contractor, consultant, or vendor to achieve the MWBE participation goal as defined in more detail in section 28-128 of this article V.

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- (25) *Goods* means tangible, physical items that may or may not be fungible and that are not a service. The term "goods" includes "supplies" as such term is set forth in subsection 20-61(i) of the Denver Revised Municipal. Goods shall not include those good expressly excluded under section 28-118. The DSBO will establish, in consultation with the purchasing division or user departments, subcategories of goods corresponding to the codes set forth in the North American Industrial Classification Standard (NAICS) codes system, or successor classification system.
- (26) *Invitation for bid or request for bid* means a written invitation or request to prospective vendors, contractors, or consultants to submit a bid to provide goods or perform services for a price in response to bidding procedures conducted by user departments as authorized by the charter, ordinances, or executive orders of the city.
- (27) *Joint venture* means an association of two (2) business enterprises to constitute a single business enterprise to perform a city contract or purchase order for goods or services for which purpose they combine their property, capital, efforts, skills, and knowledge, and in which venture each joint venturer is responsible for a distinct, clearly defined portion of the work of the contract or purchase order, performs a commercially useful function, and whose share in the capital contribution, control, management responsibilities, risks, and profits of the joint venture are equal to its ownership interest. Joint ventures must have an agreement in writing specifying the terms and conditions of the relationships between the joint venturers and their relationship and responsibility to the contract or purchase order.
- (28) *Letter of intent* means a DSBO required form which shall be a written communication from a bidder or proposer to the city with respect to a contract or purchase order evidencing an understanding between an MWBE and the bidder or proposer that, if the bidder or proposer is selected, then such MWBE has or will enter into a contractual relationship with the bidder or proposer on such contract or purchase order or that such bidder or proposer will self-perform as an MWBE on such contract or purchase order.
- (29) *Manufacturer* means a business enterprise that operates or maintains a factory or establishment that produces or substantially alters on the premises the materials, supplies equipment, or goods provided to a vendor, contractor, or consultant, or to subcontractors, subconsultants, subvendors, suppliers, brokers, manufacturer's representatives, or distributors on a city contract or purchase order in connection with a city contract or purchase order. For manufacturers, one hundred (100) percent of the value the materials, supplies or equipment provided by an MWBE under a contract or purchase order shall count toward MWBE participation
- (30) *Manufacturer's representative* means a business enterprise that sells products for one (1) or more manufacturers. A manufacturer's representative does not take legal title to or physical possession of the products that it sells, such products generally being sent directly from the manufacturer to the vendor, contractor, consultant or subcontractor purchasing such products. Acting as a manufacturer's representative, as is required and sought by the city or as is normal industry practice for a specific purchase of goods is considered a commercially useful function.
- (31) *Manager* means the manager of the department of general services, or such manager's designee.
- (32) *Minority business enterprise or MBE* for purposes of this article V will have the meaning set forth in section 28-35(36) of this Code. An MBE or WBE certified with the DSBO in accordance with ordinance and the applicable rules and regulations shall be referred to as an "MWBE."
- (33) *On-call procurement contracts* means contracts for goods or services that are awarded in accordance with section 20-68 of this Code or that are procured and awarded without a pre-determined specific quantity in the case of goods or scope of work in the case of services. Once a specific quantity or scope of work is identified, individual work orders or task orders are authorized, and the contractor,

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- consultant, or vendor proceeds to provide the goods or services under the individual work order or task order.
- (34) *Packager* means a business enterprise that performs a commercially useful function in the packaging of goods used in or delivered under a city contract regardless of whether it takes title to such goods for the city or their vendors, contractors, or consultants, but is not itself a manufacturer, manufacturer's representative, supplier, or distributor. Acting as a packager, as is required and sought by the city or as is normal industry practice for a specific purchase of goods, is considered a commercially useful function. A packager shall be considered and treated as a broker.
- (35) *Participation goal* means the specific MWBE goal established for a particular city contract or purchase order for services based upon the availability of MWBEs in the statement of work to be provided in the contract.
- (36) *Proposal* means an offer to provide goods or perform services under a city contract or purchase order with the city in response a competitive selection process.
- (37) *Proposer* means a business enterprise that submits a proposal on a city contract or purchase order for goods or services that utilizes a competitive selection process.
- (38) *Purchasing director* means the director of the division of purchasing of the department of general services or successor agency, or such director's designee.
- (39) *Purchase order or supplier contract* means an approved document to a bidder or proposer formalizing all the terms and conditions of a proposed transaction, such as a description of the requested items, delivery schedule, terms of payment, and transportation.
- (40) *Qualified*, with respect to good faith efforts in this article V, means that a business enterprise has the financial ability, expertise, skill, experience, and access to the necessary staff, facilities and equipment to complete contract(s) or subcontract(s) that it may undertake on projects. The city makes no representations as to the qualifications of any applicant business enterprise, MWBE or SBE.
- (41) *Request for proposal* means a written request to prospective vendors, contractors, or consultants to submit a proposal to provide goods or perform services where an award is made in consideration of best value and not necessarily lowest price in response to a selection procedure conducted by user departments as authorized by the Charter, ordinances, or executive orders of the city.
- (42) *Services* means all work offered for public or private use that are purchased by user departments under authority of the Charter, Municipal Code, and executive orders of the city and that does not consist primarily of goods. This definition does not include services expressly excluded under section 28-118. Services may also include work that includes goods but is primarily for services or professional or technical services that are not covered services. The DSBO will establish, in consultation with the purchasing division or user departments, subcategories of services corresponding to the codes set forth in the North American Industrial Classification Standard (NAICS) codes system, or successor classification system.
- (43) *Small business enterprise or SBE* will have the meaning set forth in subsection 28-204(33) of this Code.
- (44) *Solicitation* means a written bid or selection procedure to procure goods or services.
- (45) *Subcontractor, subconsultant, or subvendor* means a business enterprise that either:
- (a) Directly contracts with a contractor, consultant, or vendor to provide goods pursuant to a city contract or purchase order; or
 - (b) Directly contracts with subcontractors, subconsultants, or subvendors under such contractors, consultants, or vendors on a city contract or purchase order, and which business enterprise will provide goods or services under agreements with the vendor,

contractor, or consultant, or with other subcontractors, subconsultants, or subvendors under such contractor, consultant, or vendor.

- (46) *Supplier* means a business enterprise that will provide goods, supplies or equipment on a city contract or purchase order under agreements with a vendor, contractor, or consultant, or with subcontractors, subconsultants, or subvendors under such a vendor, contractor, or consultant. Participation goal shall be counted in accordance with the function performed by the MWBE supplier under a contract and determined on a per-contract or per-project basis.
- (47) *Woman business enterprise* or *WBE* for purposes of this article V will have the meaning set forth in subsection 28-35(55) of this Code. An MBE or WBE certified with the DSBO in accordance with ordinance and the applicable rules and regulations shall be referred to as an MWBE.
- (48) *User department* means the city department, agency, board, commission, authority, officer, or elected official, excluding the board of water commissioners but including without limitation the county courts, library commission, civil service commission, career service authority (office of human resources), auditor, city council, and clerk and recorder, initiating or requesting a city contract or city purchase order for the acquisition of goods or services, utilizing MWBE or SBE participation, under authority of the Charter, Municipal Code, or executive orders of the city.
- (49) *Utilization plan* means a required plan, prepared by or on behalf of the bidder or proposer as required by the DSBO and set forth in the applicable contract procurement documents that describes the bidder's or proposer's approach to satisfying the small, minority, and women-owned business enterprise requirements including, but not limited to, the participation goal.

(Ord. No. 286-20, § 3, 4-13-20)

Sec. 28-124. Annual goal.

- (a) Of the total dollars spent annually for goods and services, the DSBO director, in consultation with the purchasing director and user departments shall establish an aspirational annual goal for MWBE utilization based on the dollars to be spent for goods and services. The DSBO will establish, in consultation with the purchasing division and user departments, subcategories of goods and services corresponding to the codes set forth in the North American Industrial Classification Standard (NAICS) codes system, or successor classification system. The DSBO director may also consult with user departments in establishing the annual goal.
- (b) The DSBO director, in consultation with the purchasing director and user departments, as a basis for the establishment of the annual goal shall annually determine the present availability of all MWBEs providing goods or performing services in the relevant market area and recommend the annual goal to the city council for its review. The DSBO shall conduct such inquiries, studies and hearings, and utilize such information and assistance from such persons, consultants, entities or organizations, within or without the city, including the purchasing director and city department heads as the DSBO director at his or her sole discretion deems necessary to make such annual recommendation.
- (c) The city council shall review the annual goal recommended by the DSBO director, may undertake such additional inquiries as it deems appropriate, and may approve, disapprove or modify the recommended annual goal by ordinance in each succeeding year. Until the city council approves, disapproves or modifies the annual goal in a succeeding year, the prior annual goal established in this section shall continue in effect.
- (d) Participation shall count toward the annual goal, to the extent provided in section 28-129, concerning individual participation goals; and section 28-140 concerning defined procurement pool.

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- (e) The DSBO director, in the best interests of the city, may waive a representative sample of city contracts or purchase orders for goods or services to be bid or otherwise selected without a goal, in order to determine MWBE utilization on such contracts in the absence of such a goal. A written justification for such a waiver will be included in the DSBO's annual report. The DSBO director shall analyze, based upon such representative sample and other contracts that may otherwise be let with a participation goal of zero percent, to what extent the originally established annual goal has been met without the imposition of participation goals. To the extent ascertainable, this information shall be utilized in the setting of the annual goal.

(Ord. No. 286-20, § 3, 4-13-20)

Sec. 28-125. [Reserved].

Sec. 28-126. City participation goals—Contracts or purchase orders of \$250,000.00 or more for services.

- (a) The DSBO director, in consultation with the purchasing director or department head, as appropriate, shall assign for each purchase of services with an estimated cost of two hundred fifty thousand dollars (\$250,000.00) or more a unitary participation goal for MWBE utilization based upon a percentage of the dollar value of all services to be provided on such contract and, as set out below, the availability of MWBEs to perform the anticipated work and the city's progress toward meeting the annual goal; provided that, the DSBO director may in consultation with the purchasing division or user department waive the application of a participation goal for a given contract or purchase order. The DSBO director will provide a written justification to the purchasing director or department head, as appropriate, for each waiver granted. The goal percentage assigned by the DSBO director to each such contract or purchase order may vary from contract to contract consistent with meeting the appropriate overall annual goals, when established. The DSBO shall establish a methodology for the setting of the participation goal through rules and regulations. Such methodology shall consider the following factors:
- (1) To the extent applicable, the effect on annual goal achievement of the varying levels of availability of MWBEs among services industry groupings associated with individual procurements and the effect on annual goal achievement of the participation goal compliance being achieved through good faith efforts resulting in non-utilization of MWBEs.
 - (2) The reasonably known availability of MWBEs in specific industry groupings that are associated with individual procurements.
 - (3) For on-call contracts, and other contracts that may be procured and awarded without a pre-determined specific project or scope of work, the goal may be set on a per-project basis, per-task-order basis or per-work-order basis once a specific scope of work is identified, individual projects are defined, or individual work orders or task orders are authorized, and the contractor can proceed to complete the work for the individual project, task order or work order consistent with the methodology set forth in this section 28-126 and the rules and regulations. The determination of whether the goal is set on the contract, task order or work order shall be made in cooperation between the DSBO and the purchasing director or user department
 - (4) The DSBO and the purchasing department, or the DSBO and the user department, will assess, in the best interest of the city, whether the service may be subject to an MWBE goal under this section 28-126, or the SBE defined pool under section 28-141.
 - (5) Utilization of MWBEs shall count toward a goal, if any, to the extent that an MWBE is performing a commercially useful function corresponding to a NAICS Code in which it is certified.

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

(Ord. No. 286-20, § 3, 4-13-20; Ord. No. 833-21, § 8, 8-23-21)

Sec. 28-127. Participation goals—Compliance with assigned goal—Contracts or purchase orders for services.

- (a) The bidding or competitive selection instructions for each procurement of services shall require that all bidders or proposers seeking to contract with the city shall address the participation goal through one (1) or more of the following subsections, or by demonstrating good faith efforts as set out in section 28-128:
- (1) If the bidder or proposer is an MWBE, the value of the commercially useful function to be self-performed by the MWBE shall count to the extent provided in section 28-129 toward satisfaction of the goal as assigned, provided that the goal to the extent not met by bidder or proposer self-performance shall be addressed as otherwise set out in this section;
 - (2) If the bidder or proposer utilizes MWBEs as subcontractors, suppliers, manufacturers, manufacturer's representatives, brokers, distributors, or packagers, the value of the commercially useful function to be performed by such MWBEs, shall count to the extent provided in section 28-129 toward satisfaction of the participation goal; or
 - (3) If the bidder or proposer submits a joint venture agreement that includes one (1) or more MWBEs, the value of the commercially useful function to be performed by the MWBEs in the joint venture as the distinct, clearly defined portion of the work of the joint venture agreement that the MWBE performs with its own forces or for which it is separately at risk shall count to the extent provided in section 28-129 toward satisfaction of the participation goal. The joint venture is subject to review and approval by the DSBO director and the user department. The joint venture agreement shall be provided to the DSBO director at least ten (10) days prior to the date of bid or proposal opening or as set forth in the bidding or selection instructions. Joint venturer participation will count toward the satisfaction of the participation goal upon confirmation by the DSBO director of the utilization in the joint venture of joint management and full integration of work forces by the joint venturers.
- (b) For on-call contracts and purchase orders or other contracts or purchase orders that may be procured and awarded without a pre-determined specific project or scope of work awarded in accordance with section 20-68 of this Code, and for any other on-call procurement contracts procured by user departments, the director in consultation with the purchasing director or department head may determine to address the participation goal by means of a utilization plan for utilization of MWBEs on such contract or purchase order, or for alternative demonstration of good faith efforts by the bidder or proposer. In that event, the purchasing director or department head shall request the DSBO director to approve the utilization of such a utilization plan, consistent with the scope and intent of this article V. The development, scope and utilization of such utilization plans shall be addressed in rules and regulations promulgated by the DSBO director.

(Ord. No. 286-20, § 3, 4-13-20)

Sec. 28-128. Participation goals—Good faith efforts—Contracts or purchase orders for services.

- (a) If the bidder or proposer has not fully met the participation goal as provided in section 28-127, then it shall demonstrate that it has made good faith efforts to meet such goal. The bidder or proposer shall submit with

its bid or proposal a detailed statement of its good faith efforts to meet the participation goal set by the DSBO director. This statement shall address each of the items in subsection (b) and any additional criteria that the DSBO director may establish by rule or regulation consistent with the purposes of this article V. Good faith efforts must be demonstrated to be meaningful and not merely for formalistic compliance with this article V. The scope and substance of the efforts will be considered in determining whether the bidder or proposer has achieved a good faith effort.

- (b) The statement of good faith efforts shall include a specific response and verification with respect to each of the following good faith effort categories, which may be further defined by rule or regulation. A bidder or proposer may include any additional information it believes may be relevant. Failure of a bidder or proposer to show good faith efforts as to any one (1) of the following categories shall render its overall good faith showing insufficient and its bid or proposal nonresponsive.
- (1) The bidder or proposer must solicit through all reasonable and available means the interest of all MWBE certified in the services category set forth in the bid or proposal instructions. The bidder or proposer must solicit the interest of such MWBEs within sufficient time, prior to the date bids or proposals are submitted to the purchasing division or user department, to allow such MWBEs to respond to the solicitation. The bidder or proposer must determine with certainty if the MWBEs are interested by demonstrating appropriate steps to follow up initial solicitations.
 - (2) The bidder or proposer must select portions of the services to be performed by MWBEs in order to increase the likelihood that the participation goal will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate MWBE participation as subcontractors or joint venturers, and for bidder or proposer self-performed work, as suppliers, manufacturers, manufacturer's representatives, brokers, distributors, or packagers, all reasonably consistent with industry practice, even when the bidder or proposer would otherwise prefer to perform these work items with its own forces. The bidder or proposer must identify what portions of the contract will be self-performed and what portions of the contract will be opened to solicitation of bids, proposals and quotes from MWBEs. All portions of the contract not self-performed must be solicited for MWBEs participation. The ability or desire of a bidder or proposer to perform the work of a contract with its own forces does not relieve the bidder or proposer of the responsibility to meet the participation goal or demonstrate good faith efforts to do so.
 - (3) The bidder or proposer, consistent with industry practice, must provide MWBEs at a clearly stated location, with timely, adequate access to and information about the plans, documents, specifications, and requirements of the contract or purchase order, including bonding and insurance requirements, if any, to assist them in responding to a solicitation.
 - (4) The bidder or proposer must negotiate in good faith with interested MWBEs and provide written documentation of such negotiation with each such MWBE.
 - (5) For each MWBE that contacted the bidder or proposer or that the bidder or proposer contacted or attempted to subcontract or joint venture with, consistent with industry practice, the bidder or proposer must supply a statement giving the reasons why the bidder or proposer and the MWBE did not succeed in negotiating a subcontracting, supplier, manufacturer, manufacturer's representative, broker, distributor, packager, or joint venture agreement, as applicable.
 - (6) The bidder or proposer must provide verification that it rejected each non-utilized MWBE because the MWBE did not submit the lowest bid or it was not qualified. Such verification shall include a verified statement of the amounts of all bids received from potential or utilized subcontractors, suppliers, manufacturers, manufacturer's representatives, brokers, distributors, packagers, or joint venturers on the contract, whether or not they are MWBEs. In making such a determination of not being qualified, the bidder or proposer shall be guided by the definition of qualified in subsection 28-123(40). For each MWBE found not to be qualified by the bidder or proposer, the verification shall include a statement

giving the bidder's or proposer's reasons for its conclusion. A bidder's or proposer's industry standing or group memberships may not be the cause of rejection of an MWBE. A bidder or proposer may not reject an MWBE as being unqualified without sound reasons based on a reasonably thorough investigation and assessment of the MWBEs capabilities and expertise.

- (7) If requested by a solicited MWBE, the bidder or proposer must make reasonable efforts to assist, consistent with commercially useful function requirements, interested MWBEs in obtaining bonding, lines of credit, alternative payment or performance guarantees, or insurance as required by the city or by the bidder or proposer, provided that the bidder or proposer need not provide financial assistance toward this effort.
- (8) If requested by a solicited MWBE, the bidder or proposer must make reasonable efforts, consistent with commercially useful function requirements, to assist interested MWBEs in obtaining necessary and competitively priced equipment, supplies, materials, or related assistance or services for performance under the contract or purchase order, provided that the bidder or proposer need not provide financial assistance toward this effort.
- (9) The bidder or proposer must use the DSBO MWBE directories to identify, recruit, and place MWBEs.
- (c) In determining whether a bidder or proposer has satisfied good faith efforts as to a participation goal, the success or failure of other bidders or proposers on the contract or purchase order in meeting such participation goal may be considered.
- (d) These factors shall also apply to determination of good faith efforts and any instance where the participation goal is otherwise not met. Proposers or contractors are required to make continuous good faith efforts throughout the contract term and document these efforts. Purchasing division or user departments will notify the DSBO of impending contract closeout to allow the DSBO to request remaining good faith efforts and other required documents from the contractor. Contractor may remain subject to the requirements including potential violations of this article III and its divisions after contract closeout.

(Ord. No. 286-20, § 3, 4-13-20)

Sec. 28-129. Participation goals—Identification of participating MWBEs—Contracts or purchase orders for services.

- (a) At the time a bid or proposal is submitted to the city, the bidder or proposer shall provide to the city a DSBO required forms, which may include a letter of intent as prescribed by the DSBO, of all MWBEs that are being utilized toward the satisfaction of the participation goal whether as a self-performing bidder or proposer or as a subcontractor, supplier, manufacturer, manufacturer's representative, broker, distributor, packager, or member of a joint venture. The DSBO required forms shall specify:
 - (1) The name and contact information for the MWBE;
 - (2) The dollar value and description of the commercially useful function to be performed by the MWBE, consistent with subsection (d). In the case of utilization of a supplier, manufacturer, manufacturer's representative, broker, distributor, or packager, the appropriate percentage of dollar value attributable to such MWBE as a commercially useful function shall be calculated with all underlying data supplied. If the bidder or proposer provides a dollar value amount, then both the dollar value and percentage must be listed in the bid or proposal;
 - (3) The designation of each participating MWBE's applicable scope of work intended to count toward the participation goal. The MWBE firm must be certified in the applicable scope of work in order for their participation to count toward the goal;

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- (4) An adequate statement from the bidder or proposer that the dollar amount of services to be performed or provided by such MWBEs on the contract or purchase order, other than that self-performed by the bidder or proposer, was furnished to the bidder or proposer and agreed upon prior to bid or proposal opening; and
 - (5) An adequate statement from the bidder or proposer that it understands that a letter of intent, including, but not limited to, values provided by self-performing bidders or proposers, joint venturers, teaming agreement participants, subcontractors, suppliers, manufacturers, manufacturer's representatives, and brokers, expressed in dollar values and as a percentage of the overall work, must be submitted to the director for each MWBE listed, including a self-performing bidder or proposer, at the time bids are opened by the city or by the date of proposal in the case of a competitive selection process, or bid selection made by a private owner.
- (b) Only that level of MWBE utilization demonstrated in accordance with this section at the time of bid or proposal submission may be counted in satisfaction of the participation goal, except as otherwise set out in sections 28-132 and 28-133. Bidders or proposers must submit an executed letter of intent for each MWBE listed by the bidder or proposer, including a self-performing bidder or proposer, with its bid or proposal. Failure to do so will render the bid or proposal nonresponsive.
 - (c) For on-call procurement contracts, and other contracts that may be procured and awarded without a pre-determined specific project or scope of work, the director in consultation with the purchasing director or department head may determine to use a utilization plan, pursuant to section 28-127(b). In such event, the bidder or proposer shall not be required to demonstrate MWBE utilization at the time of bid opening, but will be required to develop an approved utilization plan to demonstrate compliance with the requirements of this article V. For on-call procurement contracts that are not determined to use a utilization plan and that do not delineate the dollar amount of specific on-call projects, the bidder or proposer need list only the anticipated percentage of participation of MWBEs rather than specific dollar amounts, as required in subsection (a)(2), above.
 - (d) All MWBE vendors, contractors, consultants, subcontractors, subconsultants, joint venturers, manufacturers, manufacturer's representatives, suppliers, brokers, distributors, or packagers listed in a bid or proposal must actually perform a commercially useful function in the work of a contract within the area(s) for which they are certified, and must not function as a conduit. Consistent with industry or professional practice, and as permitted by rules and regulations adopted by the DSBO director, MWBEs may enter into subcontracts, including subcontracts with non-MWBEs. In no case, however, shall an MWBE act as a conduit, nor shall the participation of an MWBE count toward a participation goal to the extent it fails to perform a commercially useful function.
 - (e) Any agreement between a bidder or proposer and an MWBE in which the bidder or proposer requires that the MWBE not provide subcontracting quotations to other bidders or proposers is prohibited and shall render a bidder's or proposer's bid or proposal nonresponsive.

(Ord. No. 286-20, § 3, 4-13-20)

Sec. 28-130. Participation goals—Responsive and nonresponsive bids—Contracts or purchase orders for services.

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

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- (b) *Failure to meet requirements.* If a bid or proposal subject to a participation goal does not meet such goal, as set out in section 28-127, or show good faith, as set out in section 28-128, or if a bidder or proposer fails to provide timely information, as set out in section 28-129, then the DSBO director shall notify the purchasing director or department head to regard the bid or proposal as nonresponsive, and such determination shall result in no further consideration by the city of the bid or proposal.
- (c) *Statement of good faith efforts—Informal meeting.* If the DSBO director finds inadequacies in a bidder or proposer's demonstration of good faith efforts, as such good faith efforts are described in section 28-128, the DSBO director will provide written notice of such inadequacies to the bidder or proposer prior to notifying the purchasing director or department head of bid or proposal responsiveness. Within two (2) business days from the date that the city notifies the bidder or proposer of the inadequacies of its demonstration of good faith efforts, the bidder or proposer may request an informal meeting with the DSBO director. Such informal meeting shall be scheduled by the DSBO director. All deficiencies in good faith efforts shall be explained to the bidder or proposer at such informal meeting. Within twenty-four (24) hours after the informal meeting, the bidder or proposer shall be allowed to submit additional information or to clarify the original good faith efforts. The DSBO director will at no time, however, allow additional subcontractors, joint venturers, suppliers, manufacturers, manufacturer's representatives, brokers, packagers, or distributors that may later be added to the contract or to the original MWBE participation submitted in the bid or proposal to be counted toward meeting of the participation goal. After this informal meeting, the DSBO director will:
- (1) Determine whether the bidder or proposal will be responsive or nonresponsive;
 - (2) Make the notification as stated in subsection (b) above, as applicable; and
 - (3) Provide written notice to the bidder or proposer of the DSBO director's final determination.

(Ord. No. 286-20, § 3, 4-13-20)

**Sec. 28-131. Participation goals—Time periods for documentation submitted to the city—
Contracts or purchase orders for services.**

The documentation of good faith efforts and all DSBO required forms applicable to a project including letters of intent of a bidder or proposer and, as applicable, its subcontractors, subconsultants, subvendors, joint venturers, suppliers, manufacturers, manufacturer's representatives, brokers, packagers, or distributors, of letters of intent to perform, shall be submitted to the DSBO director at the time of submission of the bid or proposal. During the term of a contract for services, the prime contractor is responsible for updating, or providing new, DSBO required forms as applicable any time a new MWBE or SBE subcontractor is added to a contract or project. The prime contractor must also provide copies of the MWBE or SBE certification letters to the DSBO for new MWBEs or SBE subcontractors added to the contract or project.

(Ord. No. 286-20, § 3, 4-13-20)

**Sec. 28-132. Participation goals—Compliance with participation goal during performance on
contracts or purchase orders for services.**

- (a) Upon award of a city contract or purchase order for services that includes a participation goal, the participation goal becomes a covenant of performance by the vendor, contractor or consultant in favor of the city.
- (b) All contracts or purchase orders subject to this article V shall be reviewed by the DSBO for compliance with the provisions hereof. This review shall examine, but not be limited to, whether the MWBE participation

dollar amounts and percentages and achieved participation goal levels upon which the contract or purchase order was awarded are maintained over the term or duration of the contract or purchase order.

- (c) For any contract or purchase order for which the DSBO director has set a participation goal, it shall be an ongoing, affirmative obligation of the vendor, contractor or consultant on such contract to maintain, at a minimum, compliance with provisions of this article V as well as the originally achieved level of MWBE participation upon which the contract or purchase order was awarded, for the duration of the contract or purchase order, unless the city initiates a material alteration to the services affecting MWBEs performing on the contract or purchase order through a contract amendment, or as otherwise described in section 28-133. Graduation of an MWBE shall not affect the contribution made by the MWBE toward satisfaction of a participation goal if the work was bid or proposed to be performed by the MWBE prior to the date of ineligibility for certification based on achievement of the graduation criteria.
- (d) The DSBO shall evaluate the utilization of MWBEs to determine whether such MWBEs are performing a commercially useful function. The evaluation shall examine the amount of work subcontracted, industry practice and other relevant factors. The amount of MWBE participation credited toward a participation goal shall be based upon an analysis of the specific duties performed by the MWBE, and the extent to which such duties constitute a commercially useful function. The DSBO director may undertake such inquiries or studies, engage such employees or retain such consultants as may be necessary to assist the director in rendering these determinations. In order for the DSBO to accurately track utilization of MWBEs, MWBEs shall submit regularly the following information in a method prescribed by the DSBO. The submitted information may include but is not limited to:
 - (1) Prime contractor information (name, address, contact person, telephone and email address);
 - (2) MBWBE subcontractor information for any tiers (name, address, contact person, telephone, email address, and certification number);
 - (3) Contract information and city contract control number (report for month of, contract name and date executed, original dollar amount, current dollar amount if changed, and all change orders);
 - (4) Subcontract agreement or purchase order information (copy of the document, original amount, current amount if changed, scope of work, and change orders);
 - (5) Payment received in current month;
 - (6) Total payments received;
 - (7) Percent of work completed;
 - (8) Billing request rejection date and reason for rejection; and
 - (9) Past due invoices (invoice date, reference number, number of days past due, and amount outstanding).
- (e) The work performed by an MWBE not providing a commercially useful function, or functioning as a conduit, shall not count toward meeting the participation goal.

(Ord. No. 286-20, § 3, 4-13-20; Ord. No. 833-21, § 9, 8-23-21)

Sec. 28-133. Participation goals—Amendments and modifications to contracts for services and purchase orders.

- (a) Vendors, contractors, and consultants on contracts and purchase orders for services shall have a continuing obligation to immediately inform the DSBO in writing of any agreed upon increase or decrease in services, as approved by the purchasing division or user department, to be provided under such contract or purchase

order, upon any of the bases discussed in this section 28-133, regardless of whether such increase or decrease in services has been reduced to writing at the time of notification.

- (b) Any increase in the services to be provided under a contract or purchase order for services, whether by amendment or otherwise, which increases the dollar value of the contract or purchase order, whether or not such change, is within the scope of services designated to be provided by an MWBE at the time of contract award, shall be immediately submitted to the DSBO. The contractor is responsible for obtaining purchasing division or user department approval of any such change. Those amendments or other contract modifications that involve a change in services that cannot be performed by existing subcontractors, subconsultants, subvendors, joint venturers, suppliers, manufacturer, manufacturer's representative, brokers, distributors, or packagers or by the vendor, contractor, or consultant, shall be subject to a goal for MWBEs equal to the original goal on the contract which were included in the bid or proposal requirements. The original participation goal percentage shall be applied to the new, increased dollar amount of the contract. The vendor, contractor or consultant shall satisfy such goal as respects such changed services by soliciting new MWBEs in accordance with section 28-127 as applicable, or the vendor, contractor or consultant must good faith efforts set out in sections 28-128, 28-136, or 28-137. The vendor, contractor, or consultant shall supply to the DSBO director and the purchasing division or user department the documentation described in sections 28-128, 28-136 or 28-137 with respect to the increased dollar value of the contract or purchase order.

(Ord. No. 286-20, § 3, 4-13-20)

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

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

(Ord. No. 286-20, § 3, 4-13-20)

Sec. 28-135 Participation goals—Contractor prompt payment—Contracts for services.

- (a) Each contractor on a city contract with certified MWBEs as subcontractors shall pay the respective subcontractors any invoiced and undisputed amounts for accepted and completed work within thirty-five (35) days of the contractor's receipt of the subcontractor's invoice. Payment to the subcontractor shall be timely made as required under this section regardless of whether the contractor has been paid for the same work or payment period. For the purposes of the section 28-135, any subcontractor, regardless of whether that subcontractor holds a city contract, may be required to make payments to MWBEs as set forth in this section.
- (b) Contractor is required to provide written notice to its subcontractor of either approval or rejection of the subcontractor's invoice within ten (10) days of receipt. If the invoice is rejected, the written notice to the subcontractor shall include the deficiencies or disputes regarding the invoice.
- (c) Failure to comply with the payment requirements in this section may be grounds for withholding of payment by the city to the contractor, and may be grounds for breach of the city contract.
- (d) The payment requirements under this section shall apply to MWBEs utilized for satisfaction of the goal regardless of tier.

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- (e) This section 28-135 shall apply only to contracts in the amount of one million dollars (\$1,000,000.00) or more based on the original contract amount before amendments or changes.

(Ord. No. 286-20, § 3, 4-13-20)

Sec. 28-136. Participation goals—Participation modification; substitution; termination of MWBE subcontractors—Contracts for services.

- (a) A contractor that has been awarded a contract based upon a given level of MWBE participation or has duly added an additional or substitute MWBE subcontractor to the contract in accordance with this division, may not substitute or terminate an MWBE subcontractor without the DSBO's and purchasing division's or user department's prior written concurrence as set forth herein. This includes, but is not limited to, instances in which a contractor seeks to perform work with its own forces or those of an affiliate, a non-MWBE firm, or with another MWBE as a substitute for an originally designated for an MWBE subcontractor.
- (b) In the event that a contractor or consultant must substitute or terminate an MWBE subcontractor, subconsultant, joint venturer, supplier, manufacturer, manufacturer's representative or broker, except in cases where directed by the city, the following must be completed:
- (1) The contractor must provide notice in writing to the MWBE subcontractor, with a copy to the DSBO and the purchasing division or user department, of its intent to request to terminate or substitute, and the reason for the request.
 - (2) The contractor must give the MWBE subcontractor at least five (5) business days to respond to the contractor's notice.
 - (3) The DSBO in conjunction with the purchasing division or user department must provide concurrence and the reasons therefor stated in a written notification that the prime contractor has good cause to substitute or terminate the firm.
 - (4) In determining good cause to substitute or terminate the DSBO will consider all circumstances as a whole based on the following factors:
 - (i) The MWBE subcontractor fails or refuses to execute a written contract;
 - (ii) The MWBE subcontractor fails or refuses to perform the work consistent with normal industry standards; provided, however, that good cause does not exist where the failure or refusal of the MWBE subcontractor to perform its work results from the bad faith or discriminatory action of the contractor;
 - (iii) The MWBE subcontractor fails or refuses to meet the contractor's reasonable, nondiscriminatory bond requirements or insurance requirements;
 - (iv) The MWBE subcontractor becomes bankrupt, insolvent, or exhibits credit unworthiness;
 - (v) The MWBE subcontractor is or becomes ineligible to work on city projects because of suspension and debarment;
 - (vi) The non-city owner or contractor has determined that the MWBE subcontractor is not a responsible contractor;
 - (vii) The MWBE subcontractor voluntarily withdraws from the project and provides written notice of its withdrawal;
 - (viii) The MWBE's work cannot be counted toward participation in accordance with applicable requirements;

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- (ix) An MWBE owner dies or becomes disabled resulting in inability of the MWBE to perform or complete its work on the contract; or
 - (x) Other documented good cause that DSBO determines requires termination of the MWBE subcontractor.
- (5) The MWBE subcontractor shall be provided the opportunity to advise the DSBO, purchasing division, user department and the contractor of the reasons, if any, why it objects to the proposed termination, and why the DSBO should not concur with the contractor's action. If required in a particular case as a matter of public necessity (e.g., safety), the DSBO may provide a response period shorter than five (5) business days.
- (6) In addition to substitutions or terminations occurring during contract performance, the provisions of this section may apply to reductions in scope of work or substitutions of MWBE firms by bidders or proposer prior to contract execution.
- (c) If the DSBO and the purchasing division or user department concurs with the contractor's request to substitute, terminate or reduce the scope of work of the MWBE subcontractor, the contractor must comply with good faith efforts requirements to replace the terminated SBE subcontractor with another MWBE firm certified to perform the same scope of work.
- (d) If a contractor substitutes or terminates the MWBE subcontractor or reduces the scope of work of the MWBE subcontractor, without first complying with this section 28-136, the DSBO may find the contractor in violation of this ordinance and the contractor may be subject to enforcement and sanctions.

(Ord. No. 286-20, § 3, 4-13-20)

Sec. 28-137. Participation goals—Potential violations—Contracts for services.

- (a) A vendor, contractor or consultant that has been awarded a city contract or purchase order based upon a given level of MWBE participation shall not, at any time before or during the performance of such contract or purchase order:
- (1) Fail to in fact utilize an MWBE that was originally listed at bid or proposal opening in order to satisfy the participation goal, and that submitted a timely letter of intent, without substituting another MWBE performing the same commercially useful function and dollar amount, or demonstrating good faith efforts, as defined in subsection (d) hereof, to substitute another MWBE; or
 - (2) Fail to allow an MWBE functioning as a subcontractor, subconsultant, joint venturer, supplier, manufacturer, manufacturer's representative, or broker to perform the commercially useful function, the value of which was originally counted for that MWBE in awarding the contract or purchase order; or
 - (3) Modify or eliminate all or a portion of the services attributable to an MWBE upon which the contract was awarded, unless directed by the city; or
 - (4) Terminate an MWBE originally utilized as a subcontractor, subconsultant, joint venturer, supplier, manufacturer, manufacturer's representative or broker in order to be awarded the contract without replacing such MWBE with another MWBE, performing the same commercially useful function and dollar amount, or demonstrating good faith efforts, as defined in subsection (c) hereof, to substitute another MWBE; all subject to DSBO approval;
 - (5) Retaliate against any MWBE that reports issues to the DSBO or purchasing division or user department;
 - (6) Participate in a conduit relationship with an MWBE scheduled to perform work on the contract or purchase order;

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- (7) Otherwise fail to meet the participation goal without complying with good faith efforts or other requirements; or
 - (8) Commit any other violation of this article V, or rules and regulations promulgated hereunder, which constitutes a material breach of the contract, not mentioned above.
- (b) Any action by a vendor, contractor or consultant in violation of subsections (a)(1) through (8) hereof, shall constitute a material breach of the city contract or purchase order that shall entitle the city to exercise all of its rights at law or equity for such material breach, in addition to exercising any of the other sanctions set out in subsection 28-139(c).
- (c) If, following award of a contract or purchase order, an MWBE has its certification terminated for reasons other than:
- (1) Expiration from certification;
 - (2) Graduation from certification;
 - (3) Nonperformance of a commercially useful function, the value of which was originally counted for that MWBE, as applicable, when the contract or purchase order was awarded; or
 - (4) The voluntary withdrawal of MWBE participation on the contract or purchase order, such termination of certification or failure to perform a commercially useful function shall not be deemed to affect compliance with the participation goal, and shall not be deemed a breach of the contract or purchase order as long as the vendor, contractor or consultant can demonstrate that such termination or failure did not result from any action or inaction, whether direct or indirect, of or by the vendor, contractor or consultant. In such event, the vendor, contractor, or consultant will substitute another MWBE, performing the same commercially useful function and dollar amount, or will demonstrate good faith efforts to substitute another MWBE, as defined in subsection (d) below.
- (d) In the event that a vendor, contractor or consultant must add or replace an MWBE subcontractor, subconsultant, joint venturer, supplier, manufacturer, manufacturer's representative, broker or distributor or in the event that a new services are added to the ongoing contract or purchase order, and the vendor, contractor or consultant in such event is in noncompliance with maintenance of the original participation goal upon which the contract or purchase order was awarded, due to failure to utilize additional MWBEs, the vendor, contractor or consultant shall be required to demonstrate good faith efforts in compliance with section 28-128 or 28-136 as applicable. Failure of a vendor, contractor or consultant to show good faith efforts shall render its contract performance in noncompliance with this article V.

(Ord. No. 286-20, § 3, 4-13-20)

Sec. 28-138. Participation goals—Burden of proof; investigations of compliance.

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

(Ord. No. 286-20, § 3, 4-13-20)

Sec. 28-139. Participation goals—Sanctions for failure to comply with article V requirements.

- (a) If a vendor, contractor or consultant is found to be in violation of the provisions of article V, to otherwise be in breach of a contract, to perform as or to, utilize MWBEs for a non-commercially useful function or as a conduit, to fail to submit information required in section 28-131, to submit false, misleading, or materially incomplete statements, documentation or records, including, but not limited to, good faith efforts or letters of intent, or to fail to cooperate in an investigation, it shall be subject to sanctions. The city may exercise any or all of its rights contained in the terms and conditions of the contract or purchase order, including, but not limited to, withholding funds, imposition of monetary penalty, suspension or termination. If the contract or purchase order is suspended or terminated, the city reserves all its rights at law or equity.
- (b) In the event that the DSBO director determines, in his or her sole discretion, that a vendor, contractor or consultant is in noncompliance with article V, the vendor, contractor or consultant may be assessed a civil, remedial penalty of not more than one hundred fifty (150) percent of the value of MWBE underutilization demonstrated each MWBE involved. In assessing such civil penalty:
 - (1) The DSBO director shall calculate the applicable amount of civil penalty, and may reduce or waive all or part of such penalty, in his or her sole discretion, in consideration of the following factors:
 - a. The length of the period of noncompliance;
 - b. The history of previous noncompliance with any provision of this article V;
 - c. The monetary impact of the civil penalty on the vendor, contractor or consultant in correcting such noncompliance; or
 - d. The other facts and circumstances relevant to the noncompliance of the vendor, contractor or consultant.
 - (2) The DSBO director shall collect assessed and unpaid civil penalties under this subsection by action initiated in state district court for collection of such penalty. A stay of any order of the DSBO director pending judicial review shall not relieve any vendor, contractor or consultant from any civil penalty obligation imposed under this section.
 - (3) Any such assessed civil penalties may also be offset against any amount otherwise due and owing to the vendor, contractor or consultant on the contract or purchase order.
 - (4) The city contract or purchase order may be suspended or terminated with the city reserving all its rights at law or equity.
 - (5) The debarment board, established under section 20-77 of this Code, upon request of the DSBO director, may suspend or debar the vendor, contractor or consultant from participation in city or private contracting covered hereunder for a period as may be determined by the debarment board, in its sole discretion, based upon the grounds of violating this article V, pursuant to such suspension and debarment procedures as may be established by the city, as set forth in section 20-77. The DSBO director in that event shall regard as nonresponsive any bid or proposal received during this time period that includes the vendor, contractor or consultant as a vendor, contractor, consultant, subcontractor, subconsultant, joint venturer, supplier, manufacturer, manufacturer's representative, broker or distributor.
 - (6) If a vendor, contractor or consultant or other business enterprise knowingly receives new or additional work on a contract or purchase order as a result of actions set out in this section, then the penalties in this section may be applied to such business enterprise.
 - (7) The DSBO may either suspend or revoke an offending MWBE's eligibility for certification as an MWBE or may suspend its participation from counting toward a participation goal, and, the city subject to

other city law, may suspend or debar MWBEs from participating in future city contracts, based upon such MWBE's acting as a conduit, failing to comply with the provisions of article V, failing to perform a commercially useful function on a contract or purchase order, failing to submit information as required by section 28-131, submitting false, misleading or materially incomplete statements, documentation or records, or failing to cooperate in investigations.

- (c) The DSBO director may, in his or her sole discretion, impose any one (1) or more of the sanctions set out in this section against any vendor, contractor, consultant, subcontractor, subconsultant, joint venturer, supplier, manufacturer, manufacturer's representative, broker, or distributor determined to be in violation of the section, provided that the DSBO director shall first advise the manager and purchasing director or department head, as appropriate, of the proposed sanction in writing. If the manager, purchasing director, or department head advises the DSBO director in writing that the imposition of such sanction would not be in the best interests of the city, the DSBO director shall consult with the appropriate official to make a final decision as to whether to impose such sanctions.
- (d) Consistent with article V and the rules and regulations, the DSBO may prescribe corrective actions in the case of potential violations or in lieu of potential enforcement.
- (e) Suspected criminal violations shall be referred to the proper authorities for prosecution. If a conviction or a guilty plea is obtained pursuant to such prosecution, the perpetrator may be barred from contracting with the city to the extent authorized by law.

(Ord. No. 286-20, § 3, 4-13-20)

Sec. 28-140. SBE defined procurement pool for contracts or purchase orders for services or goods between \$50,000.00 and \$999,999.99.

The purpose of the defined procurement pool is to enable the city, through the DSBO, the purchasing division of the department of general services, and other user departments to undertake specific activities to promote the use of SBEs, that are not brokers, packagers, or manufacturer's representatives, in contracts and purchase orders for goods and services awarded by the purchasing division and user departments pursuant to the Charter, revised Municipal Code, and executive orders of the City and County of Denver. The scope of the procurement pool will be limited to procurement opportunities for goods or services for which the estimated cost is at least fifty thousand dollars (\$50,000.00) but not more than nine hundred ninety-nine thousand nine hundred ninety-nine dollars and ninety-nine cents (\$999,999.99).

(Ord. No. 286-20, § 3, 4-13-20)

Sec. 28-141. Defined procurement pool—Administration of defined pool.

- (a) When the purchasing division or user department seeks to acquire services or to acquire goods with an estimated cost of at least fifty thousand dollars (\$50,000.00) but no more than nine hundred ninety-nine thousand nine hundred ninety-nine dollars and ninety-nine cents (\$999,999.99) pursuant to the Charter, revised Municipal Code, and executive orders of the City and County of Denver, it will notify the DSBO of the proposed procurement. The DSBO director will determine if there is a requisite number of SBEs in accordance with section 28-141(b), below, that are not brokers, packagers, or manufacturer's representatives, listed in the most current DSBO certification directory for the goods or services to be acquired. The DSBO director in consultation with the purchasing division and user departments will adopt rules and regulations or informal guidelines to timely notify the purchasing director or department head of such determinations. For services under this section 28-141, DSBO and the purchasing division or user

department will assess in the best interest of the project and the city whether to apply a participation goal in accordance with section 28-126 or to follow the procedures under this section 28-141.

- (b) For procurements under sections 28-140 and 28-141, the defined pool shall require at least six (6) SBE certified companies. If there is the required number of SBEs in accordance with this section 28-141(b), that are not brokers, packagers, or manufacturer's representatives, on the most current DSBO certification list, the purchasing division or user department will provide the procurement opportunity to such SBEs through bidding or selection procedures authorized by the charter, municipal code, or executive orders for that specific contract or purchase order. The bidding or proposal instructions will require that such SBEs self-perform no less than thirty (30) percent of the total amount of the contract or purchase order with their own forces.
- (c) If there is not the required number of SBE certified companies, that are not brokers, packagers, or manufacturer's representatives, on the most current DSBO certification list, or if the purchasing division or user department does not receive a bid or proposal from such an SBE offering to self-perform no less than thirty (30) percent of the total amount of the contract or purchase order with its own forces, the purchasing division or user department will obtain the goods or services through procurement methods required or authorized by the Charter, Municipal Code, or executive orders for that specific contract or purchase order.
- (d) Certification by the DSBO as an SBE shall thereupon be established as a condition of responsiveness to a bid or proposal on such selected contracts and purchase orders. Defined procurement pool contracts and purchase orders shall be evaluated and awarded in accordance with sections 28-142 and 28-143 below and any other procedure and method required or authorized by the Charter, Municipal Code, or executive orders for that specific contract or purchase order.
- (e) User departments will not split, combine, revise, restructure, or modify purchases of goods or services with other goods or one (1) or more other services to avoid the dollar thresholds for inclusion in the defined procurement pool or perform other actions with the intent of avoiding the requirements of this article V.

(Ord. No. 286-20, § 3, 4-13-20)

Sec. 28-142. Defined procurement pool—Commercially useful function.

- (a) An SBE awarded a contract or purchase order through the defined procurement pool will self-perform no less than thirty (30) percent of the total amount of the contract or purchase order with its own forces. All SBE contractors, consultants, or vendors listed in a bid or proposal; must actually perform a commercially useful function on a defined procurement pool contract or purchase order within the area(s) for which they are certified, and must not function as a conduit. The bidding or proposal instructions for each defined procurement pool contract or purchase order shall require that all bidders and proposers seeking to provide goods or services under a city contract or purchase order shall provide a commercially useful function on such contract or purchase order.
- (b) All expenditures for goods or services obtained from such an SBE who is also an MWBE manufacturer, supplier, or distributor will be counted toward the annual goal set forth in section 28-124 based upon an analysis by the DSBO of the specific duties performed by the MWBE and the extent to which such duties constitute a commercially useful function for each defined procurement pool contract or purchase order. All expenditures for goods or services obtained from an SBE who is not an MWBE manufacturer, supplier, or distributor will be calculated separately by the DSBO based upon an analysis of the specific duties performed by the SBE and the extent to which such duties constitute a commercially useful function for each defined procurement pool contract or purchase order.

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

(Ord. No. 286-20, § 3, 4-13-20)

Sec. 28-143. Defined procurement pool—Review of bid or proposal responses.

- (a) *Review of bids or proposals; compliance with requirements.* The DSBO director shall review bid or proposals submitted for defined procurement pool opportunities and will notify the purchasing director or department head to regard the submission as responsive to the requirements of this article V if such bid or proposal establishes that the bidder or proposer will perform a commercially useful function on the defined procurement pool contract or purchase order.
- (b) *Failure to meet requirements.* The DSBO director shall notify the purchasing director or department head to regard the submission as nonresponsive to the requirements of this article V if such bid does not establish that the bidder or proposer will perform a commercially useful function on the defined procurement pool contract or purchase order. Such determination that the bid as submitted is nonresponsive shall result in no further consideration by the city of the bid.
- (c) *Commercially useful function—Informal meeting.* In the event the DSBO director finds inadequacies in a bidder's or proposer's demonstration of commercially useful function under section 28-142, the DSBO director will provide written notice of such inadequacies to the bidder or proposer. Within two (2) business days from the date that the city notifies the bidder or proposer of such inadequacies, the bidder or proposer may request an informal meeting with the DSBO director. Such informal meeting shall be scheduled by the DSBO director or the director's designee. All deficiencies shall be explained to the bidder or proposer at such informal meeting. Within twenty-four (24) hours after the informal meeting, the bidder or proposer shall be allowed to submit additional information or to clarify its performance of a commercially useful function. After this informal meeting, the DSBO director will:
 - (1) Determine whether the bid will be responsive or nonresponsive;
 - (2) Make the notification as stated in subsection (b) above, as applicable; and
 - (3) Provide written notice to the bidder or proposer of the DSBO director's final determination.

(Ord. No. 286-20, § 3, 4-13-20)

Secs. 28-144, 28-145. [Reserved].

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

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

made by the SBE toward participation if the work was bid or proposed to be performed by the SBE prior to the date of ineligibility for certification based on achievement of the graduation criteria.

- (b) The DSBO shall review all contracts and purchase orders to determine compliance by SBEs with the provisions contained in sections 28-140 through 28-150. The review shall include, but not be limited to:
 - (1) An examination of the goods provided, work performed, industry practice, and other relevant factors to determine whether the commercially useful function on the contract or purchase order was has been maintained over the term or duration of the contract or purchase order; and
 - (2) A determination of whether the SBE has performed its other contract performance obligations over the term or duration of the contract or purchase order.

The purchasing division or user department, as appropriate, will provide bid documentation for each specific procurement opportunity to the DSBO director at the time of bid opening.

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

(Ord. No. 286-20, § 3, 4-13-20; Ord. No. 833-21, § 10, 8-23-21)

Sec. 28-147. Defined procurement pool—Amendments and modifications.

- (a) Contractors shall have a continuing obligation to immediately inform the DSBO in writing of any agreed upon increase or decrease to the dollar value of a contract or purchase order, as appropriate, whether by amendment or any other modification to the contract or purchase order regardless of whether such increase or decrease concerning the goods or services to be provided has been reduced to writing at the time of notification.
- (b) The SBE shall provide a commercially useful function as respects the changed goods or services by providing such goods or services itself, by retaining additional SBEs listed in the most current DSBO certification list for the additional goods or services to be acquired, or showing each element of good faith efforts set out in subsection 28-148(c). The SBE shall supply to the DSBO director all documentation establishing the revised dollar value of the contract or purchase order as well as the SBE's maintenance of the commercially useful function requirement.

(Ord. No. 286-20, § 3, 4-13-20)

Sec. 28-148. Defined procurement pool—Potential violations during contract performance.

- (a) An SBE that has been awarded a city contract or purchase order through the defined procurement pool shall not, at any time before or during the performance of such contract or purchase order:
 - (1) Fail to in fact self-perform, as a certified vendor, contractor, or consultant, no less than thirty (30) percent of the total amount of the contract or purchase order for goods or services with its own forces as originally listed at bid or proposal opening, as appropriate; or

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- (2) Modify or eliminate all or a portion of the goods or services to be provided and attributable to the certified vendor, contractor, or consultant, unless directed by the city in writing.
- (b) Any action by an SBE in violation of subsections (a)(1) or (2) hereof, shall constitute a material breach of the contract or purchase order that shall entitle the city to exercise all of its rights at law or equity for such material breach, in addition to exercising any of the other sanctions set out in section 28-150 below. If, following award of a contract or purchase order, an SBE has its certification terminated for reasons other than expiration or graduation from certification, such termination of certification shall not be deemed to affect compliance with the contract or purchase order and shall not be deemed a breach of the contract or purchase order as long as the vendor, contractor or consultant can demonstrate that such termination or failure did not result from any action or inaction, whether direct or indirect, of or by the vendor, contractor or consultant.
- (c) The following good faith requirements shall apply to sections 28-146 and 28-147. In the event that additional goods or services are added to an on-going contract or purchase order and the SBE in such event is in noncompliance with either the requirement to self-perform no less than thirty (30) percent of the total amount of the contract or purchase order with its own forces or to perform a commercially useful function for the provision of the additional goods or services, the following good faith efforts must be completed. Failure of a vendor, contractor or consultant to show good faith efforts as to any one (1) of the following categories shall render its overall good faith efforts showing insufficient; and its contract performance in noncompliance with this article V:
- (1) Verification that the vendor, contractor or consultant used the most current SBE directory from the DSBO in order to contact SBEs that are certified in the identified goods at the time of the modified good faith effort.
 - (2) Verification of efforts to contact appropriate SBEs within the same identified goods must be documented. The DSBO director may verify such contacts as he or she deems appropriate.
 - (3) Documentation of the good faith efforts must be submitted to the DSBO prior to the payment to the vendor, contractor or consultant of the next progress or other partial payment or fund release under the contract or purchase order.

(Ord. No. 286-20, § 3, 4-13-20)

Sec. 28-149. Defined procurement pool—Burden of proof; investigations of compliance.

Any business enterprise affected by the operation of sections 28-140 through 28-150, shall have the burden of proving its compliance with the requirements and obligations herein. The DSBO is empowered to receive and investigate complaints and allegations by SBEs, third parties, or city personnel, or to initiate its own investigations regarding compliance with the requirements and obligations of this article V. If the DSBO determines in its sole discretion that an investigation is warranted, upon written notice of such investigation the affected party shall be obligated to cooperate fully with the investigation and shall have a continuing burden of providing complete, truthful information to the DSBO director and of otherwise proving compliance with the requirements and obligations of this article V.

(Ord. No. 286-20, § 3, 4-13-20)

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

- (a) If a vendor, contractor, or consultant is found to be in violation of the provisions of article V, to otherwise be in breach of a contract or purchase order, to perform a non-commercially useful function or act as a conduit, to fail to submit information required under this article V, to submit false, misleading, or materially

incomplete statements, documentation, or records, or to fail to cooperate in an investigation, it shall be subject to sanctions. The city may exercise any or all of its rights, including withholding funds, imposition of monetary penalty, suspension, or termination, contained in the contract or purchase order terms and conditions. If the contract or purchase order is suspended or terminated, the city reserves all its rights at law or equity.

- (b) If the DSBO director determines, in his or her sole discretion, that an SBE is in noncompliance with the defined procurement pool requirements contained in sections 28-140 through 28-150, the SBE may be assessed a civil, remedial penalty of not more than one hundred fifty (150) percent of the value of underutilization of the minimum participation required. In assessing such civil penalty:
- (1) The DSBO director shall calculate the applicable amount of civil penalty and may reduce or waive all or part of such penalty, in his or her sole discretion, in consideration of the following factors:
 - a. The length of the period of noncompliance;
 - b. The history of previous noncompliance with this article V;
 - c. The monetary impact of the civil penalty on the SBE vendor, contractor, or consultant in correcting such noncompliance; or
 - d. The other facts and circumstances relevant to the noncompliance of the SBE vendor, contractor, or consultant.
 - (2) The DSBO director shall collect assessed and unpaid civil penalties under this subsection by action initiated in the state district court for collection of such penalty. A stay of any order of the DSBO director pending judicial review shall not relieve any SBE vendor, contractor, or consultant from any civil penalty obligation imposed under this subsection.
 - (3) Any such assessed civil penalties may also be offset against any amount otherwise due and owing to the SBE vendor, contractor, or consultant on the contract or purchase order.
 - (4) The contract or purchase order may be suspended or terminated with the city reserving all its rights at law or equity.
 - (5) The debarment board established under section 20-77 of this Code, upon request of the DSBO director, may suspend or debar the vendor, contractor, or consultant from participation in city contracting covered hereunder for a period as may be determined by the debarment board, in its sole discretion, based upon the grounds of violating this article V, pursuant to such suspension and debarment procedures as may be established by the city, as set forth in section 20-77. The DSBO director, in that event, shall regard as nonresponsive any bid or proposal received during this time period that includes the vendor, contractor, or consultant as a vendor, contractor, consultant, subcontractor, subconsultant, supplier, manufacturer, or distributor.
 - (6) If a vendor, contractor, consultant, or other business enterprise knowingly receives new or additional work as a result of actions set out in this section, then the penalties in this section may be applied to such business enterprise.
 - (7) The DSBO may suspend or revoke an offending SBE's eligibility for certification, as an SBE, may suspend its participation in a city contract or purchase order from the calculation of annual goals, and, subject to other city law, may suspend or debar the SBE from participating in future city contract's, based upon the SBEs acting as a conduit, failing to comply with the provisions of article V, failing to perform a commercially useful function on a contract or purchase order, failing to submit information as required by section 28-147, or submitting false, misleading, or materially incomplete statements, documentation, or records, or failing to cooperate in investigations.

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- (c) The DSBO director may, in his or her sole discretion, impose any one (1) or more of the sanctions set out in this section against any vendor, contractor, or consultant determined to be in violation of the section, provided that the director shall first advise the affected department head of the proposed sanction in writing. If the department head advises the DSBO director in writing that the department head believes that imposition of such sanction would not be in the best interests of the city, the DSBO director shall consult with the department head prior to making a final decision as to whether to impose such sanctions.
 - (d) Consistent with article V and the rules and regulations, the DSBO is authorized to prescribe corrective actions in the case of potential violations or in lieu of potential enforcement.
 - (e) Suspected criminal violations shall be referred to the proper authorities for prosecution. If a conviction or a guilty plea is obtained pursuant to such prosecution, the perpetrator may be barred from contracting with the city to the extent authorized by law.

(Ord. No. 286-20, § 3, 4-13-20)

Sec. 28-151. [Reserved].

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

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

(Ord. No. 286-20, § 3, 4-13-20)

Sec. 28-153. Reporting.

The DSBO director shall prepare written reports no less than two (2) times each year which shall describe progress in meeting the annual goals set out in section 28-124, as well as progress under defined procurement pool as applied to city contracts and purchase orders for goods and services under this article V. Copies of quarterly reports shall be provided to the manager, purchasing director, affected department heads, city council, and the mayor.

In addition, the reports shall describe the implementation of this article V and provide an evaluation of individual contracts and purchase orders, including all change orders, amendments, and modifications awarded for goods and services through the participation goal and defined procurement pool provisions of this article V.

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

(Ord. No. 286-20, § 3, 4-13-20)

Sec. 28-154. Annual report.

- (a) *MWBE utilization.* If the annual goal in section 28-124 is not met in any year, then by March 1 of the following year, the DSBO director shall submit to the mayor, city council, manager, purchasing director, and affected department heads a report comparing MWBE utilization achieved in the year to the aspirational annual goal through the participation goals and defined procurement pool stating the reasons why the goal was not met, substantiating any waivers for participation goals granted under section 28-124, and advising and making recommendations as to continuing or further efforts that the city should make in remedying discrimination and its effects in contracting for goods and services, and recommending what should be done to assist in meeting such goal in the future.
- (b) *SBE utilization.* The DSBO director will include in the report under Section 28-154 the following:
 - (1) Description of utilization levels achieved for SBEs in the preceding year through the defined procurement pool;
 - (2) Recommendations as to further efforts that the city should make to assist in the development and utilization of such firms in the acquisition of goods and services; and
 - (3) Recommendation regarding assistance in achieving such participation by SBEs in the future.
- (c) This annual report under section 28-154 shall be considered one (1) of the two (2) required reports under section 28-153.

(Ord. No. 286-20, § 3, 4-13-20)

Sec. 28-155. Rules and regulations.

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

(Ord. No. 286-20, § 3, 4-13-20)

Sec. 28-156. Severability.

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

(Ord. No. 286-20, § 3, 4-13-20)

Sec. 28-157. Effective date of article.

This article V shall become effective on May 2, 2020 and shall apply to all contracts and purchase orders within the scope of the article for which bids or proposals are made available for bidding or competitive selection on or after May 2, 2020.

(Ord. No. 286-20, § 3, 4-13-20)

Sec. 28-158. Review and sunset.

- (a) This article V shall be reviewed by the mayor, manager, department heads and the DSBO director on the third anniversary of its enactment, in order to determine whether adjustments or revisions to article V or additional studies or inquiries in furtherance of article V are deemed appropriate and should be undertaken or recommended to further and maintain the purpose and intent of article V.
- (b) This article V shall be repealed effective April 30, 2025.

(Ord. No. 286-20, § 3, 4-13-20)

Secs. 28-159—28-199. Reserved.

ARTICLE VII. OPPORTUNITIES FOR SMALL BUSINESS ENTERPRISES AND EMERGING BUSINESS ENTERPRISES IN CITY CONTRACTS FOR CONSTRUCTION, RECONSTRUCTION, AND REMODELING, AND PROFESSIONAL DESIGN AND CONSTRUCTION SERVICES, AND FOR SMALL BUSINESS ENTERPRISE CONCESSIONAIRES IN CONCESSION AGREEMENTS, THROUGH DEFINED SELECTION POOL CONTRACTS AND CONCESSION AGREEMENTS

ARTICLE VII. OPPORTUNITIES FOR SMALL BUSINESS ENTERPRISES AND EMERGING BUSINESS ENTERPRISES IN CITY CONTRACTS FOR CONSTRUCTION, RECONSTRUCTION, AND REMODELING, AND PROFESSIONAL DESIGN AND CONSTRUCTION SERVICES, AND FOR SMALL BUSINESS ENTERPRISE CONCESSIONAIRES IN CONCESSION AGREEMENTS, THROUGH DEFINED SELECTION POOL CONTRACTS AND CONCESSION AGREEMENTS¹

Sec. 28-201. Reserved.

Sec. 28-202. Purpose and scope.

The purpose of this article VII is to enable the city, through the department of transportation and infrastructure, department of aviation, general services and other user departments, and the division of small business opportunity ("DSBO"), to undertake specific activities to promote use of small business enterprises ("SBEs"), small business enterprise concessionaires ("SBEcs"), and emerging business enterprises ("EBEs"), in construction and professional design and construction services contracts and in concession agreements, in the execution by the above user departments of their duties pursuant to the Charter of the City and County of Denver. The director of the DSBO and the department heads of the user departments are expressly delegated the necessary powers and rule-making authority to effectuate the purpose of this article VII, and to undertake such additional studies or inquiries as they may deem appropriate.

(Ord. No. 286-20, § 4, 4-13-20; Ord. No. 833-21, § 13, 8-23-21)

Sec. 28-203. Contracts excluded from this article VII.

Contracts for which bids or proposals are sought under the minority and women business enterprise (MWBE) ordinance established pursuant to article III of this chapter 28, and its divisions, are excluded from the coverage of this article VII. In addition, in the case of a contract for which a part of the contract price is to be paid with funds from the United States Government or the State of Colorado and for which the United States Government or the State of Colorado have made applicable to such contract requirements, terms or conditions that are inconsistent with the terms of this article VII, the provisions of this article VII shall not apply to such contract to the extent of such inconsistency.

¹Editor's note(s)—Ord. No. 286-20, § 4, adopted April 13, 2020, repealed art. VII, §§ 28-201—28-234 and enacted a new art. VII as set out herein. Former art. VII pertained to similar subject matter and derived from Ord. No. 85-14, § 3, adopted February 18, 2014; Ord. No. 1324-17, § 6, adopted December 18, 2017; Ord. No. 159-19, §§ 61—65, adopted March 18, 2019; Ord. No. 1289-19, § 3, adopted December 23, 2019.

Sec. 28-204. Definitions.

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

- (1) *Affiliate* means any business that is associated with an SBE, SBEC or EBE or with the owner(s) of such SBE, SBEC or EBE. Businesses are affiliates of each other when one controls or has the power to control the other, or a third party or parties' controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists. The director may utilize, in the interpretation of this definition, the definition of affiliate set forth in C.F.R. § 121 or successor regulation, as from time to time amended.
- (2) *Applicant business enterprise* means a business enterprise seeking to be certified as a small business enterprise under this article VII.
- (3) *Bidder* means a business enterprise that submits a bid on a construction contract that is offered for competitive bidding by the city or otherwise offered by a private owner.
- (4) *Broker* means a business enterprise that performs a commercially useful function as an intermediary, for a fee, in the acquisition of materials, supplies or equipment, regardless of whether or not it takes title to such materials, supplies or equipment, for the city or a private owner or its contractors, consultants or suppliers, but is not a manufacturer, manufacturer's representative or regular dealer. Only bona fide commissions earned by a broker for its activities in performing a commercially useful function on a city contract shall be counted toward legitimate participation by an SBE on such contract as set out in this article VII. A packager shall be considered and treated as a broker.
- (5) *Business enterprise* means an individual, sole proprietorship, corporation, limited liability company, partnership, limited partnership, limited liability limited partnership, joint stock company, joint venture, professional association or any other legal entity operated for profit that is properly licensed or registered, as applicable, owned, and controlled by persons who are citizens of the United States or lawful permanent residents of the United States, and otherwise authorized to do business in the State of Colorado.
- (6) *Certification* means completion by a business enterprise of an application procedure to be developed by the DSBO, and formal authorization by the director to participate as an SBE or SBEC under this article VII. Certification neither represents nor implies that a business enterprise is qualified to perform on a contract or concession agreement, nor that it performs a commercially useful function.
- (7) *City* means the City and County of Denver and its participating user departments.
- (8) *City project; city contract; city construction practices* mean any contract or project encompassed within the definition of contract in this article VII, regardless of whether the project owner is the city or a private owner. All provisions of this article VII shall apply to such contracts let by private owners, provided that the city shall not dictate means and methods of construction to such private owners. Copies of all documents required to be provided by a subcontractor, subconsultant, supplier, manufacturer, manufacturer's representative or broker hereunder shall be sent to the director when the originals are sent to a private owner.
- (9) *Commercially useful function* means an EBE, SBE, or SBEC is responsible for the execution of a distinct element of the work of a contract or concession agreement and is carrying out the work by actually performing, maintaining control, managing, and supervising the work involved, or fulfilling responsibilities as a joint venturer. In determining whether an EBE, SBE, or SBEC is performing or has

performed a commercially useful function, the DSBO will analyze whether the SBE is performing functions set forth in this definition and this division including, but not limited to, being responsible for, with respect to materials, supplies or equipment used for the contract work, negotiating price, determining quantity and quality of the materials, supplies or equipment, ordering the materials, supplies or equipment, performing installation where applicable, and paying for the materials, supplies or equipment. To determine whether an EBE, SBE, or SBEC is performing a commercially useful function, the DSBO will evaluate the amount of work contracted or subcontracted, industry practices, amounts paid to the EBE, SBE, or SBEC in proportion to the work actually performed, progress toward compliance with this article, and other relevant factors. Commercially useful function is measured for purposes of determining participation on a contract or concession agreement, not for determination of certification eligibility.

- (10) *Competitive selection process* has the meaning ascribed to that phrase in sections 2.3.(A) and 2.11.3(B) of the Denver City Charter, and in D.R.M.C. sections 5-19 and 20-56, as that meaning may pertain to a contract(s) at issue.
- (11) *Concessionaire or small business enterprise concessionaire or SBEC* means a business enterprise that enters into a competitively selected or negotiated concession agreement with the city, in privity of contract with the city, for the operation of a retail, food service or other concession in a building, or aviation or aeronautical facility, or improvements thereto, situated on real property owned or operated by the city. A certified SBE may be included as a concessionaire or SBEC under this article VII.
- (12) *Concession agreement* means any city agreement for the operation of a retail, food service or other concession authorized by any provision of the Charter or ordinances of the city, including, but not limited to, agreements awarded by competitive selection procedures or negotiated contracts, in a building, or aviation or aeronautical facility, or improvements thereto, situated on real property owned or operated by the city.
- (13) *Conduit* means an EBE, SBE, or SBEC that knowingly agrees to pass the scope of work for which it is listed for participation and is scheduled to perform or supply on a contract or concession agreement, to a non-EBE, non-SBE, or non-SBEC, or does not carry out the responsibilities required by actually performing, managing, controlling and supervising the work involved. In this type of relationship, the EBE, SBE, or SBEC has not performed a commercially useful function and the arranged agreement between the two (2) parties is not consistent with standard industry practice. This arrangement does not meet the commercially useful function requirement, and therefore the EBE's, SBE's, or SBEC's participation is not considered to be a legitimate portion of the work on the contract or concession agreement. Conduit is also referred to as a passthrough.
- (14) *Construction* means those areas of construction, reconstruction and remodeling as encompassed within the city's contracting processes authorized by the Charter and ordinances of the city. This definition shall encompass design-build contracts as appropriate.
- (15) *Consultant* means a business enterprise that enters into a negotiated contract with the city, in privity of contract with the city, for professional design and construction services or enters into such a contract with a private owner, in privity of contract with such private owner, for such services on a building or aviation or aeronautical facility, or improvements thereto, situated on real property owned by the city.
- (16) *Contract* means any city contract for construction or for professional design and construction services authorized by any provision of the Charter or ordinances of the city, excepting only those contracts subject to division of article III of this chapter 28, or to federal requirements or city concession contracts. Contract shall also include other contracts ancillary to cooperative agreements or understandings with other public and private agencies for purposes including the development of public facilities, park and recreational facilities, museums, zoological and other gardens, collections of natural history, and observatories, if such contracts provide for funding in whole or in part by the city

and provide for utilization of such funds for the purpose of construction or professional design and construction services for any public facility or area owned or leased by the city or situated on real property owned or leased by the city. Notwithstanding the foregoing, contract shall also include construction or professional design and construction services for buildings or aviation or aeronautical facilities or improvements thereto, constructed by private owners on real property owned by the city, without regard to the utilization of city funding.

- (17) *Contractor* means a business enterprise that enters into a competitively bid, otherwise competitively selected or negotiated construction contract with the city, in privity of contract with the city, or enters into such a construction contract with a private owner, whether or not bid, in privity of contract with such private owner for such work on a building or aviation or aeronautical facility, or improvements thereto, situated on real property owned by the city. Contractor includes general contractors and prime contractors.
- (18) *Day*, unless otherwise indicated, means calendar day.
- (19) *Defined selection pool contract or concession agreement* means a contract or concession agreement which is determined by the director to be appropriate for restriction of the selection of the contractor, consultant or concessionaire and, as applicable, subcontractors, subconsultants and suppliers on such contract or concession agreement to the pool of certified SBEs, SBECs, or EBEs, as determined by the director.
- (20) *Department head* means the manager or director of the city department entering into contract(s) or concession agreement(s) with SBE(s) or SBECs, or such person's designee.
- (21) *Design-build contract* means a contract for the procurement of both the design and the construction, reconstruction or remodeling of a public work in a single contract with a single design-build contractor or combination of such contractors that are capable of providing the necessary design and construction, reconstruction or remodeling services.
- (22) *Director* means the director of the division of small business opportunity or successor agency, or such director's designee.
- (23) *DSBO* or the DSBO means the division of small business opportunity.
- (24) *DSBO required forms* means the certifications, letters of intent, commitment forms and other forms and documents developed by the DSBO or described in this article VII and the rules and regulations, referenced in the applicable procurement documents, and required by the DSBO to confirm and evaluate a bidder's or proposer's commitment to utilization of certified firms and other DSBO program requirements. No authorized alteration or modification of a DSBO required form is permitted. The DSBO reserves the right to reject altered or modified forms.
- (25) *Emerging business enterprise* or *EBE* means a business enterprise that is certified by the director under this article VII as meeting all of the requirements for certification set forth in sections 28-205 and 28-206.
- (26) *Expertise* means demonstrated skills, knowledge or ability to perform in the field of endeavor in which certification is sought by the business enterprise as defined by normal industry practices, including licensure or registration where required.
- (27) *Joint venture* means an association of two (2) or more business enterprises to constitute a single business enterprise to perform a city construction or professional design or construction services contract, or concession agreement for which purpose they combine their property, capital, efforts, skills and knowledge and in which venture each joint venturer is responsible for a distinct, clearly defined portion of the work of the contract or concession agreement, performs a commercially useful function, and whose share in the capital contribution, control, management responsibilities, risks and

profits of the joint venture are equal to its ownership interest. Joint ventures must have an agreement in writing specifying the terms and conditions of the relationships between the joint venturers and their relationship and responsibility to the contract or concession agreement.

- (28) *Manufacturer* means a business enterprise that operates or maintains a factory or establishment that produces, or substantially alters on the premises the materials, supplies or equipment provided to contractors, consultants, subcontractors, subconsultants, suppliers, brokers or manufacturer's representatives on a contract, required under the contract and of the general character described by the contract specifications. For manufacturers, one hundred (100) percent of the value the materials, supplies or equipment provided by an SBE or EBE under a contract shall count toward SBE participation.
- (29) *Manufacturer's representative* means a business enterprise that sells products for one (1) or more manufacturers. A manufacturer's representative does not take legal title to or physical possession of the products that it sells, such products generally being sent directly from the manufacturer to the contractor or subcontractor purchasing such products. Only bona fide commissions earned by a manufacturer's representative in performing a commercially useful function on a contract shall be counted toward legitimate participation by an SBE or EBE on such contract as set out in this article VII.
- (30) *Packager* means a business enterprise that performs a commercially useful function in the packaging of goods for the city or a private owner or its contractors, consultants, manufacturers, manufacturer's representatives or suppliers but is not itself a regular dealer or a manufacturer or manufacturer's representative. A packager shall be considered as, and treated as, a broker. A packager shall be considered and treated as a broker.
- (31) *Personal net worth* means the net value of the assets of an individual after total liabilities are deducted. An individual's personal net worth does not include the individual's ownership interest in an applicant business enterprise or participating EBE, SBE, or SBEC or the individual's equity, if any, in his or her primary place of residence. An individual's personal net worth includes only his or her share of assets held individually and jointly with the individual's spouse. For the purposes of certification as an SBE, SBEC, or an EBE under this article VII, an individual must have a personal net worth equal to or less than the permissible personal net worth amount determined by the U.S. Department of Transportation to be applicable to its DBE programs, or as otherwise promulgated by the director by rule and regulation.
- (32) *Private owner* means a private or other non-city owner undertaking to contract for construction work or for professional design and construction services on buildings or aviation or aeronautical facilities or improvements thereto, on real property owned by the city.
- (33) *Professional design and construction services* means those areas of services ancillary to construction as encompassed within the city's contracting processes authorized by the Charter and ordinances of the city, including engineering, architectural, testing, construction management services and planning services related to a construction project.
- (34) *Proposal* means an offer to perform construction or professional design and construction services or to operate a concession pursuant to a negotiated or otherwise competitively selected city contract or concession agreement with either the city or a private owner, and whether in response to a request for qualifications, request for proposals or otherwise. The department head shall designate the proposal, and the date of receipt for each solicitation of proposers subject to this article VII.
- (35) *Proposer* means a business enterprise that submits a proposal on a city construction contract or professional services, including design and construction services contract, or for a concession agreement, that is negotiated and not competitively bid or that utilizes a competitive selection process.

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- (36) *Regular dealer* means a business enterprise that owns, operates or maintains a store, warehouse or other establishment in which the materials, supplies, articles or equipment of the general character described by the contract specifications and required for the performance of the contract are bought and regularly sold or leased to the public in the usual course of business. To be a regular dealer, the business enterprise must be an established, regular business engaged in, as a substantial and material portion of its business, and in its own name, the purchase and sale or lease of the products in question. A regular dealer is presumed to keep such materials, supplies, articles or equipment in stock, but must in any event bear the risk of loss of such items. A regular dealer in such bulk items as steel, cement, gravel, stone, asphalt and petroleum products need not own, operate or maintain a place of business if it both owns and operates distribution equipment for the products. Any supplementation of a regular dealer's distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis. For regular dealers, sixty (60) percent of the value of the commercially useful function performed by the SBE shall be counted toward the participation goal. Brokers, conduits, packagers, manufacturers and manufacturer's representatives shall not be regarded as regular dealers within the meaning of this term.
- (37) *Small business enterprise* or *SBE* means a business enterprise, including an SBEC, that is certified by the director under this article VII as meeting all of the requirements for certification set forth in sections 28-205 and 28-206.
- (38) *Subcontractor* or *subconsultant* means a business enterprise that either directly contracts with a contractor or consultant or directly contracts with subcontractors or subconsultants under such contractor or consultant on a city contract or concession agreement, and which business enterprise will provide services or perform work under agreements with the contractor or consultant or with other subcontractors or subconsultants under such contractor or consultant.
- (39) *Supplier* means a business enterprise that either directly contracts with a contractor or consultant or directly contracts with subcontractors or subconsultants under such contractor or consultant on a city contract, and which business enterprise will provide materials, supplies or equipment under agreements with the contractor or consultant, or with other subcontractors or subconsultants under such contractor or consultant. A supplier may be a regular dealer, manufacturer, manufacturer's representative or broker. Participation goal shall be counted in accordance with the function performed by the SBE supplier under a contract and determined on a per-contract or per-project basis.

(Ord. No. 286-20, § 4, 4-13-20; Ord. No. 833-21, § 14, 8-23-21)

Sec. 28-205. SBE, SBEC, and EBE certification; eligibility of applicant business enterprises.

- (a) *Procedures and methods.* The director shall, by rule and regulation or informal guidelines relating solely to internal management and procedure, establish reasonable procedures and methods for the certification of applicant business enterprises as SBEs, SBECs, and EBEs in order to effectuate the purposes of this article VII. The director may seek input and advice from appropriate industry sources as to appropriate aspects of work performance, equipment and staffing in these industry areas in which certification is being sought.
- (b) Only applicant business enterprises that meet the criteria for certification as an SBE, SBEC, and EBE may participate in the program established under this article VII. The SBEs, SBECs, and EBEs applicant business enterprise has the burden of persuasion by a preponderance of the evidence. SBEs, SBECs, and EBEs shall be certified only for the certification area(s) for which they apply and in which they have had sustained business activity for a minimum of six (6) months. Certification areas shall correspond to the codes set forth in North American Industrial Classification Standard (NAICS) Codes, or successor classification system, Code of Federal Regulations § 121.201, as amended, or successor regulation.

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- (c) To determine whether the requirements set forth below are met, the division must consider all of the facts in the record, viewed as a whole.
- (1) *Ownership.* In order for the owner(s) to be found to own the applicant business enterprise for purposes of certification, as applicable, the applicant business enterprise or owner(s) must meet the requirements set forth below.
- a. Own in his or her own name the legal and equitable interest in the applicant business enterprise;
 - b. Have acquired the interest in a verifiable and substantial arms-length transaction utilizing verifiable, substantial, and continuing consideration, going beyond pro forma ownership of the applicant business enterprise as reflected in ownership documents;
 - c. Enjoy customary incidents of ownership and share in the risks and profits commensurate with his or her ownership interest in practice, not merely in the form of arrangements; and
 - d. Have acquired the interest with a contribution of his or her own capital resources, by having put his or her own financial resources at risk in the operation of the applicant business enterprise, or subject to requirements below, with a contribution of expertise. All contributions by the owner(s) to acquire the ownership interest in the applicant business enterprise must be verifiable, substantial, and continuing, which in part, means that it be commensurate with the ownership interest acquired.
 - (A) If expertise is relied upon as part of an owner's contribution to acquire ownership, the expertise must be of the requisite quality generally recognized in a specialized field, in areas critical to the operations of the applicant business enterprise, indispensable to the applicant business enterprise's potential success, specific to the type of work the applicant business enterprise performs and documented in the applicant business enterprise's records. These records must clearly show the contribution of expertise, including its equivalent monetary value. The individual(s) whose expertise is relied upon must have a commensurate capital investment in the applicant business enterprise.
- (2) *Management and control.* The owner(s) shall manage and control the daily business operations of the applicant business enterprise. The owner(s) management and control must be verifiable, substantial, and continuing and go beyond the pro forma ownership of the applicant business enterprise as reflected in its ownership documents. Ownership alone is not sufficient to establish management and control. To determine whether the owner(s) satisfy these requirements, the DSBO shall consider the criteria below.
- (3) *Management and control.* The owner(s) shall manage and control the daily business operations of the applicant business enterprise. The owner's(s') management and control must be real, substantial, and continuing and go beyond the pro forma ownership of the applicant business enterprise as reflected in its ownership documents. Ownership alone is not sufficient to establish management and control. To determine whether the owner(s) satisfy these requirements, the DSBO shall consider the criteria below.
- a. If federal or state law or city ordinance requires the owner(s) to have a particular license or other credential to own or control a certain type of business enterprise, then the owner(s) must possess the required license or other credential. If federal or state law or city ordinance does not require that the owner possess the license or other credential to own or control the business enterprise, including control, direction, or supervision of the work performed under the license, to determine whether the owner(s) manage and control the business enterprise, the DSBO may consider whether the owner(s) holds the license or other credential as a factor. If there is not a legal requirement for the owner to hold the license or other credential to own or control a certain type of business enterprise, failure of the owner to hold the license or other credential

does not by itself indicate lack of management and control of a business enterprise without other factors indicating to the contrary.

- b. An owner(s) shall have substantial experience in the trade or industry that would be necessary to make routine and major decisions for the applicant business enterprise.
 - c. An owner(s) shall regularly make decisions, hold himself or herself out to the public, and sign important documents and financial instruments in a manner that is indicative of primary management and control of daily business operations and responsibility for routine and major decisions.
 - d. There may not be any restriction through corporate charter provisions, by law provisions, contracts or any other formal or informal devices that prevent the owner(s), without the cooperation or vote of any other individual, from making any business decision of the applicant business enterprise, including the making of obligations or the dispersing of funds.
 - e. The owner(s) must possess the power to direct or cause the direction of the management and policies of the applicant business enterprise and to make day-to-day as well as long-term decisions on management, policy, and operations.
 - f. The owner(s) may delegate various areas of the management, policymaking, or daily operations of the applicant business enterprise to another participant or other participant(s) who are not owner(s). Such delegations of authority must be revocable, and the owner(s) must retain the power to hire and fire any such person. The owner(s) must actually exercise control over the applicant business enterprise's operations, management, and policies.
 - g. The owner(s) must have an overall understanding of, and managerial and technical competence, experience and expertise, directly related to the type of business in which the applicant business enterprise is engaged and its operations. The owner(s) is not required to have experience or expertise in every critical area of the applicant business enterprise's operations or have greater experience or expertise in a given field than managers or key employees. The owner(s) must have the ability to intelligently and critically evaluate information presented by other participants in the applicant business enterprise's activities and to make independent decisions concerning the applicant business enterprise's daily operations, management, and policymaking. Generally, expertise or responsibilities primarily in office management, administration, bookkeeping, or other functions unrelated to the principal business activities of the applicant business enterprise are insufficient to demonstrate management and control.
 - h. An owner(s) may not engage in outside employment or other business interests that conflict with the management of the applicant business enterprise or prevent the owner(s) from devoting sufficient time and attention to the affairs of the applicant business enterprise to manage and control its day to day activities. For example, absentee ownership of a business and part-time work in a full-time applicant business enterprise are not viewed as constituting management and control. An individual, however, could be viewed as controlling a part-time business that operates only evenings or weekends or both, provided the individual manages and controls it throughout all hours of operation.
- (4) *Independence.* Only an independent applicant business enterprise may be certified as an SBE, SBEC or an EBE. An independent applicant business enterprise is one whose viability does not depend on its relationship with another business enterprise. Recognition of an applicant business enterprise as a separate entity for tax or corporate purposes is not necessarily sufficient to demonstrate that the applicant business enterprise is independent and not an affiliate. In determining whether an applicant business enterprise is an independent business, the director shall:

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- a. Examine whether there is actual or potential affiliation between the applicant business enterprise and individuals or non-certified business enterprises. To determine whether affiliation exists, the division considers factors such as ownership, management, previous relationships with or ties to another individual or non-certified business entity, and contractual relationships. Affiliation may be based on common management, identity of interest, newly organized concern rule, joint venture, or any combination thereof.
 - b. Scrutinize relationships with non-certified business enterprises in areas of personnel, finance, facilities, equipment, and other resources. The division may consider shared employees (including administrative staff), office space, phone numbers, and equipment and whether there is any support or sharing of bonding capacity, lines of credit, and other resources.
 - c. Consider present or recent employer/employee relationships between the owner(s) of the applicant and non-owner individuals, non-certified business enterprises, and persons associated with non-certified business enterprises.
 - d. Examine the applicant business enterprise's relationships with non-certified business enterprises to determine whether there is a pattern of exclusive or primary dealings with non-certified business enterprises.
 - e. Consider whether relationships between the applicant business enterprise and other non-certified persons and business enterprises is consistent with normal industry practice.
- (5) *Other ownership criteria.* The director may establish by rule and regulation other appropriate criteria of ownership, including, but not limited to, conditions of personal net worth of SBEs owners, other than those certified solely as concessionaires. Personal net worth shall be the amount of personal net worth described in subsection 28-204(31).
- (6) *Actively in business for six (6) months.* The applicant business enterprise may not be certified until six (6) months after the satisfaction of each of the following:
- a. Formation of the applicant business enterprise;
 - b. Commencement of sustained business activity in the trade or profession described on the certification application; and
 - c. Commencement of ownership, management and control of daily business operations by the identified owner(s).
- (7) *Lawfully present in the United States.* The owner(s) must be a citizen of the United States or a lawfully admitted permanent resident of the United States, and must not have the status of an unauthorized worker or otherwise be disqualified from lawfully residing in the United States, engaging in business and seeking this certification. As a condition of certification, owner(s) must comply with all reporting, submittal and other requirements that may be imposed by the city, State of Colorado or United States governments regarding such lawful presence.
- (8) *Threshold size; continued eligibility and renewal of certification.* No applicant business enterprise or SBE or EBE shall be eligible for initial or subsequent renewal of certification if such applicant business enterprise or SBE or EBE combined with any affiliates meets the criteria set forth in section 28-206 for graduation from this article VII. An SBE, SBEC or an EBE will be certified for a three-year period. Following initial certification, an SBE, SBEC or an EBE that desires to continue its certification shall, no later than thirty (30) days prior to each three-year anniversary of the certification, submit a certification renewal application that shall update and reaffirm all requirements for certification. No later than thirty (30) days prior to each annual anniversary of the certification, an SBE, SBEC or an EBE shall submit an affidavit certifying that there has been no change in any information affecting certification eligibility, and other required tax or other financial information and documents. A

certification may be terminated by the director upon the failure of the SBE, SBEC or an EBE to satisfy any certification requirement set forth in this article VII.

- (9) *City officials, officers and employees ineligible.* No applicant business enterprise shall be eligible to be certified as an EBE, SBE, SBEC if ownership or control of such business enterprise is held by a current official, officer or employee of the city.
 - (10) *Interviews, investigation and onsite visits.* The DSBO shall personally interview all persons upon whom eligibility for certification is based, and is empowered to interview such other persons and conduct such onsite visits and investigations as may be appropriate in its sole discretion to verify eligibility for certification. An applicant business enterprise wishing to be certified as an SBE, SBEC or an EBE shall cooperate with the DSBO in supplying additional information that may be requested in order to make a determination.
- (d) An applicant business enterprise shall be certified only for specific types of work in which the owner(s) has the ability and expertise to manage and control the applicant business enterprise's operations and work.
 - (e) In lieu of conducting its own certifications, the DSBO may accept formal certifications by other governmental entities as meeting the requirements of this article VII provided that the director determines that the certification standards and safeguards of such entities are substantially equivalent to those of the city.
- (Ord. No. 286-20, § 4, 4-13-20; Ord. No. 833-21, § 15, 8-23-21)

Sec. 28-206. SBE, SBEC, and EBE certification and graduation size standards; renewal of certification; decertification; graduation.

- (a) The DSBO is authorized to establish the size standards for the certification of business enterprises as further provided in the applicable rules and regulations and in accordance with articles of III, V and VII of this chapter 28. No applicant business enterprise shall be certified as an SBE, SBEC or EBE, and following certification of an SBE, SBEC or EBE, no certification shall be renewed if on the effective date of the application or renewal the applicant business enterprise, SBE, SBEC or EBE (combined with all affiliates) has achieved a size standard established by the DSBO:
- (b) If an SBE, SBEC, or EBE has been certified by the city in more than one (1) NAICS Code or has an affiliate that has been certified by the city in a NAICS Code other than that of the SBE, SBEC or EBE, then the annual receipt level or employee or other criterion used as the graduation criterion for such SBE, SBEC, or EBE shall apply separately to each NAICS Code for which the SBE or EBE and its affiliate have been certified. Such an SBE, SBEC, or EBE and any affiliate that has exceeded the graduation criteria in one (1) NAICS Code shall be deemed to be graduated from this article VII as to that Code, and if the graduation requirements of subsection (a) above do not apply, may continue to be certified in another NAICS Code having a higher monetary or employee number graduation level but shall no longer be considered eligible to be or remain certified in the NAICS Code with the lower size standard. Such an SBE, SBEC, or EBE, or any affiliate thereof that has exceeded the graduation criteria for the largest NAICS Code applicable to its activities shall be deemed to be graduated from this article VII criteria. Graduated SBEs, SBECs, or EBEs may reapply for certification if they meet the criteria for certification. Utilization of SBE or SBEC contractors, consultants and concessionaires shall be counted under defined selection pool contracts to the extent that an SBE is performing a commercially useful function corresponding to a NAICS Code in which it is certified.
- (c) Application to affiliates. The graduation criteria set forth above shall be deemed to apply to the owner(s) upon whom eligibility for certification is based and all affiliates of such owner(s). No applicant business enterprise shall be certified based upon one (1) or more owner(s) who owned or who was an affiliate of an SBE, SBEC, or EBE that has become ineligible for renewal of certification because of the achievement of graduation criteria.

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- (d) The certification status of all SBEs, SBECs, or EBEs shall be reviewed periodically by the DSBO. Failure of a certified and eligible SBE, SBEC, or EBE to seek timely renewal of certification by filing the necessary documentation with the DSBO may result in decertification.
 - (e) The DSBO shall decertify an SBE, SBEC, or EBE that does not continuously meet the eligibility criteria for certification.
 - (1) The SBE shall notify the DSBO of any change in its circumstances affecting its continued eligibility for certification under this article VII within thirty (30) days of the SBE's, SBEC's or EBE's actual awareness of such change of circumstances. Failure to do so may result in the SBE's, SBEC's, or EBE's decertification.
 - (2) The director may move to decertify an SBE, SBEC, or EBE that repeatedly fails to submit bids or proposals on city contracts, attend relevant pre-bid or pre-proposal conferences, or otherwise comply with the requirements of this article VII.
 - (f) An applicant business enterprise or SBE, SBEC, or EBE that has been denied certification or renewal of certification or decertified may protest the denial of certification or decertification by the procedure set out in section 28-69. An applicant business enterprise or SBE, SBEC, or EBE found to be ineligible for certification or renewal of certification may not apply for certification or recertification for one (1) year after the effective date of the final decision.

(Ord. No. 286-20, § 4, 4-13-20; Ord. No. 833-21, § 16, 8-23-21)

Sec. 28-207. Identification of defined selection pool contracts and concession agreements; determination of defined selection pool requirements.

The director, in collaboration with the department heads, may on the basis of contract or concession agreement categories, types, size standards or other consistent criteria for selection, identify and determine those contracts and concession agreements proposed to be restricted by the director for award to SBEs, SBECs, or EBEs under this article VII. The stated selection criteria may differ among agencies of the city. Certification as an SBE, SBEC, or EBE shall thereupon be established as a condition of responsiveness to a bid or proposal on such selected contracts and concession agreements. Such selected contracts and concession agreements, referred to as defined selection pool contracts and concession agreements, shall be awarded only to responsive low-bidder SBE, SBEC, or EBE (as applicable) bidders on bid contracts and to responsive SBE, SBEC, or EBE proposers (as applicable) on non-bid contracts and concession agreements. Such bidders and proposers may also function as brokers, joint venturers, manufacturers, manufacturer's representatives, packagers, regular dealers or suppliers, to the extent consistent with the definitions of those terms contained in section 28-204, so long as the SBE, SBEC, or EBE bidder or proposer, also performs a commercially useful function as a contractor, consultant, or concessionaire, as applicable, on the contract or concession agreement, and does not function as a conduit.

(Ord. No. 286-20, § 4, 4-13-20; Ord. No. 833-21, § 17, 8-23-21)

Sec. 28-208. Contracts for construction, reconstruction and remodeling—Defined selection pool contracts—Compliance with defined selection pool requirements.

- (a) The bid or competitive selection process specifications for each defined selection pool construction contract shall require that all bidders or proposers seeking to contract with the city or a private owner on such project shall address the project defined selection pool requirements through one (1) or both of the following subsections:

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- (1) The value of the commercially useful function to be self-performed by the SBE or EBE bidder or proposer shall count to the extent provided in section 28-212 toward satisfaction of the SBE or EBE defined selection pool performance requirements; or
 - (2) If the bidder or proposer submits a joint venture agreement that includes one (1) or more SBEs or EBEs, the value of the commercially useful function to be performed by the SBE or EBE in the joint venture shall count to the extent provided in section 28-212 toward satisfaction of the SBE or EBE defined selection pool requirements. The joint venture is subject to the review and approval by the director and the joint venture agreement shall be provided to the director within a time period before the date of bid opening or the date of proposal in the case of a competitive selection process defined by the director. Joint venturer participation will count toward the satisfaction of the SBE or EBE defined selection pool requirements upon confirmation by the director of the utilization in the joint venture of joint management and full integration of work forces by the joint venturers.
- (b) Notwithstanding any other provision of this article VII, if a department head finds, with respect to a particular contract, that the best interests of the city would be served by the negotiation of a contract, including, but not limited to, a design-build or construction manager-general contractor contract, through a competitive selection process based wholly on quality, without reference to selection by low bid of the contractor or its subcontractors or suppliers, the analysis of the SBE or EBE defined selection pool requirements by such contractor shall be determined on the basis set out in sections 28-214 through 28-218, provided that, in the event of such an analysis, all references in those sections to consultant shall also be deemed to refer to contractor.
 - (c) Graduation of an SBE, SBEC, or EBE shall not affect the contribution made by the SBE, SBEC, or EBE toward its performance under defined selection pool requirements if the work was bid or proposed to be performed by the SBE, SBEC, or EBE prior to the date of ineligibility for certification based on achievement of the graduation criteria.

(Ord. No. 286-20, § 4, 4-13-20; Ord. No. 833-21, § 18, 8-23-21)

Sec. 28-209. Contracts for construction, reconstruction and remodeling—Defined selection pool contracts—SBE subcontractor and supplier minimum utilization requirements.

- (a) In addition to determining that a contract should be subject to the defined selection pool requirements set out in section 28-207, the director may, in collaboration with the department heads, also add a requirement to the bid or competitive selection process instructions for each defined selection pool construction contract assigning a minimum utilization requirement on such contract for SBE utilization as subcontractors or suppliers, based upon a percentage of the dollar value of all work on such contract; provided that, if the director determines it to be in the best interests of the city, the director may in consultation with the user department waive the application of minimum SBE subcontractor or supplier utilization for a given contract. The minimum utilization requirement assigned by the director to each such contract may vary from contract to contract consistent with the availability of SBEs with respect to such contract. Such minimum utilization requirement, if established, is not a goal, but a mandatory requirement of the contract. The DSBO shall establish a methodology for the establishment of minimum utilization requirements through rules and regulations. Such methodology shall consider the reasonably known availability of SBEs in specific industry groupings that are associated with individual projects.
- (b) The following factors shall count toward SBE utilization requirements as more specifically provided below: portions of work undertaken by SBEs as subcontractors, suppliers, manufacturers, manufacturer's representatives or brokers.

(Ord. No. 286-20, § 4, 4-13-20)

Sec. 28-210. [Reserved].

Sec. 28-211. Defined selection pool contracts for construction, reconstruction and remodeling—Compliance with SBE minimum utilization.

- (a) The bid or competitive selection process specifications for each defined selection pool construction contract shall require that all bidders or proposers seeking to contract with the city on such project shall address any project SBE minimum utilization requirements as follows. If the bidder or proposer utilizes SBEs as subcontractors, suppliers, manufacturers, manufacturer's representatives or brokers, the value of the commercially useful function to be performed by such SBEs, including the cost of supplies and materials obtained by the SBE for the work of the contract, and supplies purchased or equipment leased by the SBE, except supplies and equipment the SBE purchases or leases from the bidder or proposer or its affiliate, shall count to the extent provided in section 28-212 toward satisfaction of the SBE minimum utilization requirements.
- (b) In order for its bid or proposal to be deemed responsive, a bidder or proposer must meet the minimum utilization requirements for SBEs on a particular contract as well as the bidder's or proposer's self-performance or joint venture obligations set out in section 28-208 above. Graduation of an SBE, SBEC, or EBE shall not affect the contribution made by the SBE, SBEC or EBE toward its performance under defined selection pool requirements if the work was bid or proposed to be performed by the SBE, SBEC or EBE prior to the date of ineligibility for certification based on achievement of the graduation criterion.
- (c) For contracts selected in accordance with sections 2.3.3(A) and 2.11.3(B) of the Denver City Charter, and D.R.M.C. Sections 5-19 and 20-56, including on call construction contracts, the department head may determine to address the minimum utilization requirements by means of a small business utilization plan for utilization of SBEs on such contract. In that event, the department head shall request the director to approve the utilization of such a utilization plan, consistent with the scope and intent of this article VII. The development, scope and utilization of such utilization plans shall be addressed in rules and regulations promulgated by the director.

(Ord. No. 286-20, § 4, 4-13-20; Ord. No. 833-21, § 19, 8-23-21)

Sec. 28-212. Defined selection pool contracts for construction, reconstruction and remodeling—Identification of work scope of performing SBE and of other participating SBEs.

- (a) At the time of bid opening, or date of proposal in the case of a competitive selection process, the bidder or proposer shall provide to the city or private owner a list of all SBEs that are being utilized on the contract whether as a self-performing bidder or proposer or as subcontractors, suppliers, manufacturers, manufacturer's representatives, brokers or members of a joint venture. The list shall specify:
 - (1) The name and contact name for each SBE;
 - (2) The dollar value and description of the commercially useful function to be performed by the SBE, consistent with subsections (c) and (d). In the case of utilization of a supplier, manufacturer, manufacturer's representative, or broker, the appropriate percentage of dollar value attributable to such SBE as a commercially useful function shall be calculated with all underlying data supplied;
 - (3) The percentage of the value of the commercially useful function to be performed by the SBE, consistent with subsections (c) and (d), as compared to the total contract amount;

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- (4) An adequate statement from the bidder or proposer that the dollar amount of work to be performed by such SBE on the contract, other than that self-performed by the bidder or proposer, was furnished to the bidder or proposer and agreed upon prior to bid opening or date of proposal in the case of a competitive selection process; and
 - (5) An adequate statement from the bidder or proposer that it understands that a letter of intent, including, but not limited to, values provided by self-performing bidders or proposers, joint venturers, subcontractors, suppliers, manufacturers, manufacturer's representatives and brokers, expressed in dollar values and as a percentage of the overall work, must be submitted to the user department or director for each SBE listed, including a self-performing bidder or proposer, at the time bids are opened by the city or by the date of proposal in the case of a competitive selection process, or bid selection made by a private owner.
- (b) Only that level of SBE utilization demonstrated in accordance with this section at the time of such bid opening, date of proposal in the case of a competitive selection process or private selection may be counted in satisfaction of the requirements of this article VII. Bidders or proposers must submit an executed letter of intent for each SBE listed by the bidder or proposer, including a self-performing bidder or proposer, at the time bids are opened, proposals are received, in the case of a competitive selection process, or bid selection is made. Failure to do so will render the bid or proposal nonresponsive.
 - (c) All SBE contractors, subcontractors, joint venturers, suppliers, manufacturers, manufacturer's representatives or brokers listed in a bid or proposal must actually perform a commercially useful function in the work of a contract within the area(s) for which they are certified, and must not function as a conduit. Consistent with industry or professional practice, and as permitted by rules and regulations adopted by the director, SBEs may enter into subcontracts, including subcontracts with non-SBEs. In no case, however, shall an SBE act as a conduit, nor shall the participation of an SBE count toward satisfaction of the requirements of this article VII to the extent it fails to perform a commercially useful function.
 - (d) All expenditures for materials, supplies and equipment obtained from an SBE manufacturer, manufacturer's representative or supplier shall count toward SBE self-performance or utilization as specified in subsection 28-204(39). Expenditures for materials, supplies and equipment paid to SBEs that are not manufacturers, manufacturer's representatives or suppliers may count toward compliance with the requirements of this article VII only to the extent of fees or commissions charged for providing a bona fide service, such as professional, technical, consultant or managerial services and assistance in the procurement of essential personnel, facilities, equipment, materials or supplies required for performance of the contract, provided that the fee or commission is determined by the director to be reasonable and not excessive as compared with fees customarily allowed for similar services.
 - (e) Any agreement between a bidder or proposer and an SBE in which the bidder or proposer requires that the SBE not provide subcontracting quotations to other bidders or proposers is prohibited and shall render a bidder's bid or proposer's proposal nonresponsive.

(Ord. No. 286-20, § 4, 4-13-20)

Sec. 28-213. Defined selection pool contracts for construction, reconstruction and remodeling—Responsive and nonresponsive bids or proposals.

- (a) *Responsive; compliance with requirements.* If the low monetary bid or competitive selection process proposal subject to the defined selection pool requirements indicates that the SBE or EBE bidder or proposer is appropriately performing a commercially useful function on the contract, and is otherwise responsive to the requirements of the contract and this article VII, then the director shall notify the department head to regard the bid or proposal as responsive to this article VII.

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- (b) *Failure to meet requirements.* If a bid or proposal subject to the defined selection pool requirements does not demonstrate performance by the SBE or EBE bidder or proposer of a commercially useful function, as set out in section 28-208, minimum utilization of SBE subcontractors or suppliers as set out in section 28-211 or provide timely information as set out in section 28-212, then the director shall notify the department head to regard the bid or proposal as nonresponsive, and such determination shall result in no further consideration by the city or private owner of the bid or proposal.
- (c) *Commercially useful function or minimum utilization of SBE subcontractors—Informal meeting.* In the event the director finds inadequacies in a bidder or proposer's demonstration of commercially useful function under section 28-208 or minimum utilization of SBE subcontractors or suppliers under section 28-211, the director will provide written notice of such inadequacies to the bidder or proposer prior to notifying the appropriate department head of bid or proposal responsiveness. Within two (2) business days from the date that the city notifies the bidder or proposer of such inadequacies, the bidder or proposer may request an informal meeting with the director. Such informal meeting shall be scheduled by the director. All deficiencies shall be explained to the bidder or proposer at such informal meeting. Within twenty-four (24) hours after the informal meeting, the bidder or proposer shall be allowed to submit additional information or to clarify its performance of a commercially useful function. At no time, however, will the director count toward the minimum utilization the addition of subconsultants, joint venturers, suppliers, manufacturers, manufacturer's representatives, or brokers that may later be added to the contract or to the original SBE participation submitted at either the time of the bid or the date of proposal, in the case of a competitive selection process. After this informal meeting, the director will:
- (1) Determine whether the bid or proposal will be responsive or nonresponsive;
 - (2) Make the notification as stated in subsection (b) above, as applicable; and
 - (3) Provide written notice to the bidder or proposer of the director's final determination.

(Ord. No. 286-20, § 4, 4-13-20)

Sec. 28-214. Contracts for professional design and construction services and concession agreements—Compliance with defined selection pool requirements.

The proposal specifications for each defined selection pool professional design and construction services contract and concession agreement shall require that all proposers seeking to contract with the city or a private owner on such contract or concession agreement shall address the SBE, SBEC or EBE defined selection pool requirements through one (1) or both of the following subsections:

- (1) The value of the commercially useful function to be self-performed by the SBE, SBEC or EBE (as applicable) proposer shall count to the extent provided in section 28-218 toward satisfaction of the SBE, SBEC or EBE defined selection pool requirements; or
- (2) If the proposer submits a joint venture agreement that includes one (1) or more SBEs, SBECs or EBEs, the value of the commercially useful function to be performed by the SBEs, SBECs or EBEs (as applicable) in the joint venture shall count to the extent provided in section 28-218 toward satisfaction of the SBE, SBEC or EBE defined selection pool requirements. The joint venture is subject to the review and approval by the director and the joint venture agreement shall be provided to the director within a time period before the date of proposal defined by the director. Joint venturer participation will count toward the satisfaction of the SBE, SBEC or EBE defined selection pool requirements upon confirmation by the director of the utilization in the joint venture of joint management and full integration of work forces by the joint venturers. Graduation of an SBE, SBEC, or EBE shall not affect the contribution made by the SBE, SBEC or EBE toward its performance under defined selection pool requirements if the work

was bid or proposed to be performed by the SBE, SBEC or EBE prior to the date of ineligibility for certification based on achievement of the graduation criteria.

(Ord. No. 286-20, § 4, 4-13-20; Ord. No. 833-21, § 20, 8-23-21)

Sec. 28-215. Contracts for professional design and construction services and concession agreements—SBE or EBE subconsultant and supplier minimum utilization requirements.

- (a) In addition to determining that a contract should be subject to the defined selection pool requirements set out in section 28-214, the director may, in collaboration with the department heads, also add a requirement to the proposal instructions for each defined selection pool professional design and construction services contract assigning a minimum utilization requirement on such contract for SBE or EBE utilization as subconsultants and/or suppliers, based upon a percentage of the dollar value of all work on such contract; provided that, if the director determines it to be in the best interests of the city, the director may in consultation with the user department waive the application of minimum SBE or EBE subconsultant or supplier utilization for a given contract. The minimum utilization requirement assigned by the director to each such contract may vary from contract to contract consistent with the availability of SBEs or EBEs with respect to such contract. Such minimum utilization requirement, if established, is not a goal, but a mandatory requirement of the contract. The DSBO shall establish a methodology for the establishment of minimum utilization requirements through rules and regulations. Such methodology shall consider the reasonably known availability of SBEs in specific industry groupings that are associated with individual projects.
- (b) The following factors shall count toward SBE or EBE utilization requirements as more specifically provided below: portions of work undertaken by SBEs or EBEs as subconsultants, suppliers, manufacturers, manufacturer's representatives or brokers.
- (c) The SBE or EBE minimum utilization requirements shall not be applied to concession agreements under this article VII.

(Ord. No. 833-21, § 20, 8-23-21)

Sec. 28-216. [Reserved].

(Ord. No. 286-20, § 4, 4-13-20)

Sec. 28-217. Defined selection pool contracts for professional design and construction services—Compliance with SBE or EBE minimum utilization.

- (a) The competitive selection process specifications for each defined selection pool professional design and construction services contract shall require that all proposers seeking to contract with the city on such project shall address any project SBE or EBE minimum utilization requirements as follows. If the proposer utilizes SBEs or EBEs as subconsultants, suppliers, manufacturers, manufacturer's representatives or brokers, the value of the commercially useful function to be performed by such SBEs or EBEs, including the cost of supplies and materials obtained by the SBE for the work of the contract, and supplies purchased or equipment leased by the SBE, except supplies and equipment the SBE purchases or leases from the proposer or its affiliate, shall count to the extent provided in section 28-218 toward satisfaction of the SBE or EBE minimum utilization requirements. Graduation of an SBE or EBE shall not affect the contribution made by the SBE toward its performance under defined selection pool requirements if the work was bid or proposed to

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be performed by the SBE prior to the date of ineligibility for certification based on achievement of the graduation criterion.

- (b) In order for its proposal to be deemed responsive, a proposer must meet the minimum utilization requirements for SBEs or EBEs on a particular contract as well as the proposer's self-performance or joint venture obligations set out in Section 28-214 above.

(Ord. No. 286-20, § 4, 4-13-20; Ord. No. 833-21, § 20, 8-23-21)

Sec. 28-218. Defined selection pool contracts for professional design and construction services—Identification of work scope of performing SBE or EBE and of other participating SBEs or EBEs.

- (a) At the time of the proposal submitted to and authorized by the city or a private owner the proposer shall provide to the city or private owner a list of all SBEs or EBEs that are being utilized on the contract or concession agreement whether as a self-performing proposer or as subconsultants, suppliers, manufacturers, manufacturer's representatives, brokers or members of a joint venture. Unless otherwise specified in a request for qualifications, request for proposal or other proposal solicitation, in the event that a proposal is requested for the provision of on-call services for a period of time, with no delineation of the dollar amount of specific on-call projects, the proposer need list only the anticipated percentage participation of SBEs or EBEs rather than specific dollar amounts. The list shall specify:
- (1) The name and contact information for each SBE or EBE;
 - (2) The description and percentage of the value of the commercially useful function to be performed by the SBE or EBE or the percentage of the revenues expected to be generated by the concession agreement, consistent with subsections (b) and (c), as compared to the total contract amount or the total revenues expected to be generated by the concession agreement. In the case of utilization of a supplier, manufacturer, manufacturer's representative, or broker, the appropriate percentage of dollar value attributable to such SBE or EBE as a commercially useful function shall be calculated with all underlying data supplied. If the proposer provides a dollar fee amount, then both the dollar value and percentage must be listed in the proposal.
 - (3) The percentage of the value of the commercially useful function to be performed by the SBE or EBE, consistent with subsections (c) and (d), as compared to the total contract or concession agreement amount;
 - (4) An adequate statement from the proposer that the dollar amount of work and/or the percentage of the work to be performed by such SBE or EBE on the contract or concession agreement, other than that self-performed by the proposer, was furnished to the proposer and agreed upon prior to the time of submission of the proposal submitted to and authorized by the city or a private owner; and
 - (5) An adequate statement from the proposer that it understands that a letter of intent, including, but not limited to, values provided by self-performing proposers, joint venturers, subconsultants, suppliers, manufacturers, manufacturer's representatives and brokers, expressed in dollar values and as a percentage of the overall work, must be submitted to the director for each SBE or EBE listed, including a self-performing proposer, at the time of submission of the proposal submitted to and authorized by the city or a private owner.
- (b) Only that level of SBE or EBE utilization demonstrated in accordance with this section at the time of such date of proposal submitted and authorized by the city or a private owner may be counted in satisfaction of the requirements of this article VII. Proposers must submit an executed letter of intent for each SBE or EBE listed by the proposer, including a self-performing proposer, at the time of submission of the proposal

submitted to and authorized by the city or a private owner. Failure to do so will render the proposal nonresponsive.

- (c) All SBE or EBE consultants, subconsultants, joint venturers, suppliers, manufacturers, manufacturer's representatives or brokers listed in a proposal must actually perform a commercially useful function in the work of a contract or the operation of a concession agreement within the area(s) for which they are certified, and must not function as a conduit. Consistent with industry or professional practice, and as permitted by rules and regulations adopted by the director, SBEs and EBEs may enter into subcontracts, including subcontracts with non-SBEs or non-EBEs. In no case, however, shall an SBE or EBE act as a conduit, nor shall the participation of an SBE or EBE count toward satisfaction of the requirements of this article VII to the extent it fails to perform a commercially useful function.
- (d) All expenditures for materials, supplies and equipment obtained from an SBE or EBE manufacturer, manufacturer's representative or supplier shall count toward SBE self-performance or utilization as specified in subsection 28-204(39). Expenditures for materials, supplies and equipment paid to SBEs or EBEs that are not manufacturers, manufacturer's representatives or suppliers may count toward compliance with the requirements of this article VII only to the extent of fees or commissions charged for providing a bona fide service, such as professional, technical, consultant or managerial services and assistance in the procurement of essential personnel, facilities, equipment, materials or supplies required for performance of the contract or concession agreement, provided that the fee or commission is determined by the director to be reasonable and not excessive as compared with fees customarily allowed for similar services.
- (e) Any agreement between a proposer and an SBE or EBE in which the proposer requires that the SBE not provide subconsulting quotations to other proposers is prohibited and shall render a proposer's proposal nonresponsive.

(Ord. No. 286-20, § 4, 4-13-20; Ord. No. 833-21, § 20, 8-23-21)

Sec. 28-219. Defined selection pool contracts for professional design and construction services—Responsive and nonresponsive proposals.

- (a) *Responsive; compliance with requirements.* The director shall notify the department head to regard the proposal as responsive if such proposal submitted to and authorized by the city or a private owner subject to the defined selection pool requirements indicates that the SBE or EBE proposer is appropriately performing a commercially useful function on the contract or concession agreement, and is otherwise responsive to the requirements of the contract or concession agreement and this article VII.
- (b) *Failure to meet requirements.* The director shall notify the department head to regard the proposal as nonresponsive if such proposal subject to the defined selection pool requirements does not demonstrate performance by the SBE or EBE proposer of a commercially useful function, as set out in section 28-214, minimum utilization of SBE or EBE subconsultants and suppliers as set out in section 28-217, as applicable, or provide timely information as set out in section 28-218. Such determination that the proposal is nonresponsive shall result in no further consideration by the city or private owner of the proposal.
- (c) *Commercially useful function or minimum utilization of SBE or EBE subcontractors or suppliers—Informal meeting.* In the event the director finds inadequacies in a bidder or proposer's demonstration of commercially useful function under section 28-214 or minimum utilization of SBE or EBE subcontractors or suppliers under section 28-217, the director will provide written notice of such inadequacies to the bidder or proposer prior to notifying the appropriate department head of bid or proposal responsiveness. Within two (2) business days from the date that the city notifies the bidder or proposer of such inadequacies, the bidder or proposer may request an informal meeting with the director. Such informal meeting shall be scheduled by the director. All deficiencies shall be explained to the bidder or proposer at such informal meeting. Within twenty-four (24) hours after the informal meeting, the bidder or proposer shall be allowed to submit

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additional information or to clarify its performance of a commercially useful function. At no time, however, will the director count toward the minimum utilization the addition of subconsultants, joint venturers, suppliers, manufacturers, manufacturer's representatives, or brokers that may later be added to the contract or to the original SBE participation submitted at either the time of the bid or the date of proposal, in the case of a competitive selection process. After this informal meeting, the director will:

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

(Ord. No. 286-20, § 4, 4-13-20; Ord. No. 833-21, § 20, 8-23-21)

Sec. 28-220. Time periods for documentation submitted to the city.

The documentation of achievement of defined selection pool and minimum SBE or EBE utilization performance requirements of a bidder or proposer, as applicable, shall be submitted to the director at the time of the bid opening date or proposal in the case of a competitive selection process or private owner selection for a construction contract, or at the time of submission of the proposal submitted to and authorized by the city or a private owner for a professional design and construction services contract or a concession agreement.

(Ord. No. 286-20, § 4, 4-13-20; Ord. No. 833-21, § 20, 8-23-21)

Sec. 28-221. [Reserved].

Sec. 28-222. Compliance with committed SBE, SBEC, or EBE contractor, consultant or concessionaire performance and minimum SBE, SBEC, or EBE subcontractor utilization required throughout performance of contract or concession agreement.

- (a) Upon award of a defined selection pool contract or concession agreement by the city, including those containing a minimum SBE, SBEC, or EBE utilization requirement, compliance with the performance and utilization requirements set out in this article VII by the bidder or proposer becomes a covenant of performance by the contractor or consultant in favor of the city.
- (b) All contracts and concession agreements subject to this article VII shall be reviewed by the DSBO for compliance with the provisions hereof. This review shall examine, but not be limited to, whether the SBE, SBEC, or EBE contractor, consultant or concessionaire performance dollar amounts and percentages and achievement of defined selection pool requirements and minimum utilization of SBE, SBEC, or EBE subcontractors, subconsultants and suppliers upon which the contract or concession agreement was awarded are maintained over the term or duration of the contract or concession agreement.
- (c) For any defined selection pool contract or concession agreement, it shall be an ongoing, affirmative obligation of the contractor, consultant or concessionaire on such contract or concession agreement to maintain, at a minimum, compliance with such defined selection pool requirements and with the minimum utilization, if applicable, of SBE, SBEC, or EBE subcontractors, subconsultants and suppliers upon which the contract or concession agreement was awarded, for the duration of the contract or concession agreement, unless the city initiates a material alteration to the scope of work affecting SBE, SBEC, or EBE performance of a commercially useful function on the contract or concession agreement through change order, contract or concession agreement amendment, force account or as otherwise described in section 28-223. SBE, SBEC, or EBE performance of such material alteration of the contract or concession agreement scope shall be documented in writing to the director by the SBE, SBEC, or EBE.

(d) The DSBO shall evaluate the performance of the SBE, SBEC, or EBE contractor, consultant or concessionaire to determine whether such contractor, consultant or concessionaire, and any utilized SBE, SBEC, or EBE subcontractor, subconsultant or supplier, is performing a commercially useful function on the contract or concession agreement. The evaluation shall examine the amount of work subcontracted, industry practice and other relevant factors. The amount of SBE, SBEC or EBE participation credited toward defined selection pool requirements and minimum SBE, SBEC, or EBE utilization requirements shall be based upon an analysis of the specific duties performed by the SBE, SBEC, or EBE contractor, consultant or concessionaire, and any utilized SBE, SBEC, or EBE subcontractor, subconsultant or supplier, and the extent to which such duties constitute a commercially useful function. The director may undertake such inquiries or studies, engage such employees or retain such consultants as may be necessary to assist the director in rendering these determinations. In order for the DSBO to accurately track the amount of SBE, SBEC, or EBE participation credited toward defined selection pool requirements and minimum SBE, SBEC, or EBE utilization requirements, SBE, SBEC, or EBE contractors, consultants and concessionaires, as well as any utilized SBE, SBEC, or EBE subcontractors, subconsultants or suppliers, shall submit regularly the following information on a form prescribed by the DSBO:

- (1) Prime contractor information (name, address, contact person, telephone, and email address);
- (2) SBE, SBEC, or EBE subcontractor information (name, address, contact person, telephone, email address, and certification number);
- (3) Contract information and city contract control number (report for month of, contract name, date executed, original dollar amount, current dollar amount if changed, and all change orders);
- (4) Subcontract information (original amount, current amount if changed, scope of work, and change orders);
- (5) Payment received in current month;
- (6) Total payments received;
- (7) Percent of work completed;
- (8) Billing request rejection date and reason for rejection; and
- (9) Past due invoices (invoice date, reference number, number of days past due, and amount outstanding).

(e) Work performed by an SBE, SBEC, or EBE contractor, consultant or concessionaire, or utilized SBE, SBEC, or EBE subcontractor, subconsultant or supplier not providing a commercially useful function, or functioning as a conduit, shall not count toward achieving ongoing defined selection pool and, if applicable, minimum SBE utilization requirements on contracts and concession agreements under this article VII. Graduation of an SBE, SBEC, or EBE shall not affect the contribution made by the SBE toward its performance under defined selection pool requirements if the work was bid or proposed to be performed by the SBE prior to the date of ineligibility for certification based on achievement of the graduation criterion.

(Ord. No. 286-20, § 4, 4-13-20; Ord. No. 833-21, § 20, 8-23-21)

Sec. 28-223. Project change orders, amendments and modifications.

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

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- (b) Any increase in the scope of work of a contract for construction, reconstruction, or remodeling, whether by amendment, change order, force account or otherwise, or any increase in the scope of services of a contract for professional design or construction services or of a concession agreement, whether by amendment or any other addition of special, additional or other services to the contract or concession agreement, which increases the dollar value of the contract or concession agreement, if such change is within the scope of work designated for performance by the SBE or EBE or any utilized SBE or EBE subcontractor, subconsultant or supplier at the time of contract or concession agreement award, shall be immediately submitted to the DSBO. The contractor is responsible for obtaining user department approval of any such change. The contractor, consultant or concessionaire shall achieve defined selection pool requirements and, if applicable, minimum SBE subcontractor, subconsultant and supplier utilization requirements as respects such changed scope of work by performing such work or by retaining additional SBE or EBE subcontractor(s), subconsultant(s) or supplier(s).

(Ord. No. 286-20, § 4, 4-13-20; Ord. No. 833-21, § 20, 8-23-21)

Sec. 28-224. Payments to SBE, SBEC, or EBE subcontractors, subconsultants, joint venturers, suppliers, manufacturers, manufacturer's representatives and brokers.

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

(Ord. No. 286-20, § 4, 4-13-20; Ord. No. 833-21, § 20, 8-23-21)

Sec. 28-225. Prompt payment to SBE, SBEC, or EBE subcontractors.

- (a) Each contractor on a city contract with certified SBEs, SBECs, or EBEs as subcontractors shall pay the respective subcontractors any invoiced and undisputed amounts for accepted and completed work within thirty-five (35) days of the contractor's receipt of the subcontractor's invoice. Payment to the subcontractor shall be timely made as required under this section regardless of whether the contractor has been paid for the same work or payment period. For the purposes of the section 28-225, any subcontractor, regardless of whether that subcontractor holds a city contract, may be required to make payments to SBEs, SBECs, or EBEs as set forth in this section.
- (b) Contractor is required to provide written notice of either approval or rejection of the subcontractor's invoice within ten (10) days of receipt. If the invoice is rejected, the written notice to the subcontractor shall include the objections, discrepancies or disputes regarding the invoice.
- (c) Failure to comply with the payment requirements in this section may be grounds for withholding of payment by the city to the contractor, and may be grounds for breach of the city contract.

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- (d) The payment requirements under this section shall apply to SBE, SBEC, or EBE subcontractors utilized for satisfaction of the minimum utilization regardless of tier.
 - (e) SBEs performing as prime contractors shall be subject to the requirements under this section 28-225 regarding payment to SBE, SBEC, or EBE subcontractors.
 - (f) This section 28-225 shall apply only to contracts in the amount of one million dollars (\$1,000,000.00) or more based on the original contract amount before amendments or changes.
- (Ord. No. 286-20, § 4, 4-13-20; Ord. No. 833-21, § 20, 8-23-21)

Sec. 28-226. Participation modification; substitution; termination of SBE, SBEC, or EBE subcontractors.

- (a) A contractor that has been awarded a contract which includes SBE, SBEC, or EBE participation, or has duly added an additional or substitute SBE, SBEC, or EBE subcontractor to the contract in accordance with this division, may not substitute or terminate an SBE, SBEC, or EBE subcontractor without the DSBO's and user department's prior written concurrence as set forth herein. This includes, but is not limited to, instances in which a contractor seeks to perform work with its own forces or those of an affiliate, a non-SBE, non-SBEC, or non-EBE firm, or with another SBE, SBEC, or EBE firm that was originally designated for an SBE, SBEC, or EBE subcontractor.
- (b) In the event that a contractor or consultant must substitute or terminate an SBE, SBEC, or EBE subcontractor, subconsultant, joint venturer, supplier, manufacturer, manufacturer's representative or broker, except in cases where directed by the city, the following must be completed:
 - (1) The contractor must provide notice in writing to the SBE, SBEC, or EBE subcontractor, with a copy to DSBO and the user department, of its intent to request to terminate or substitute, and the reason for the request.
 - (2) The contractor must give the SBE, SBEC, or EBE subcontractor at least five (5) business days to respond to the contractor's notice.
 - (3) The DSBO in conjunction with the user department must provide concurrence and the reasons therefor stated in a written notification that the prime contractor has good cause to substitute or terminate the firm.
 - (4) In determining good cause to substitute or terminate the DSBO will consider all circumstances as a whole based on the following factors:
 - (i) The SBE, SBEC, or EBE subcontractor fails or refuses to execute a written contract;
 - (ii) The SBE, SBEC, or EBE subcontractor fails or refuses to perform the work consistent with normal industry standards; provided, however, that good cause does not exist if the failure or refusal of the SBE, SBEC, or EBE subcontractor to perform its work results from the bad faith or discriminatory action of the contractor;
 - (iii) The SBE, SBEC, or EBE subcontractor fails or refuses to meet the contractor's reasonable, nondiscriminatory bond requirements or insurance requirements;
 - (iv) The SBE, SBEC, or EBE subcontractor becomes bankrupt, insolvent, or exhibits credit unworthiness;
 - (v) The SBE, SBEC, or EBE subcontractor is or becomes ineligible to work on city projects because of suspension and debarment;

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- (vi) The non-city owner or contractor has determined that the SBE, SBEC, or EBE subcontractor is not a responsible contractor;
 - (vii) The SBE, SBEC, or EBE subcontractor voluntarily withdraws from the project and provides to you written notice of its withdrawal;
 - (viii) The SBE, SBEC, or EBE subcontractor's participation cannot be counted toward the minimum participation requirement;
 - (ix) A SBE, SBEC, or EBE subcontractor owner dies or becomes disabled resulting in the SBE subcontractor's inability to perform or complete its work on the contract; or
 - (x) Other documented good cause that the DSBO determines requires termination of the SBE subcontractor.
- (5) The SBE, SBEC, or EBE subcontractor shall be provided the opportunity to advise the DSBO, user department and the contractor of the reasons, if any, why it objects to the proposed termination, and why the DSBO should not concur with the contractor's action. If required in a particular case as a matter of public necessity (*e.g.*, safety), DSBO may provide a response period shorter than five (5) business days.
- (6) In addition to post-award substitutions or terminations, the provisions of this section apply to reductions in scope of work and pre-award deletions of or substitutions of SBE, SBEC, or EBE firms by bidders or proposers prior to execution of a contract.
- (c) If the DSBO and the user department concurs with the contractor's request to substitute, terminate or reduce the scope of work of the SBE subcontractor, the contractor must replace the terminated SBE, SBEC, or EBE subcontractor with another SBE, SBEC, or EBE firm certified to perform the same scope of work unless the contractor can demonstrate that it cannot replace the subcontractor to the DSBO's satisfaction.
- (d) If a contractor substitutes or terminates the SBE subcontractor, or reduces the scope of work of the SBE, SBEC, or EBE subcontractor, without first complying with this section 28-226, the DSBO may find the contractor in violation of this ordinance and the contractor may be subject to enforcement and sanctions.
- (Ord. No. 286-20, § 4, 4-13-20; Ord. No. 833-21, § 20, 8-23-21)

Sec. 28-227. Potential violations during contract or concession agreement performance.

- (a) A contractor, consultant or concessionaire that has been awarded a contract or concession agreement based upon a given level of SBE, SBEC, or EBE participation shall not, at any time before or during the performance of such contract or concession agreement:
- (1) Fail to in fact perform as an SBE, SBEC, or EBE, as applicable, to achieve the work scope that was originally listed at bid opening or proposal submission in order to achieve defined selection pool requirements; or
 - (2) Fail to in fact utilize SBE, SBEC, or EBE subcontractor(s), subconsultant(s) or supplier(s) to achieve the work scope that was originally listed at bid opening or proposal submission in order to achieve required minimum utilization of SBE, SBEC, or EBE subcontractors, subconsultants and suppliers, if applicable; or
 - (3) Modify or eliminate all or a portion of the scope of work attributable to the SBE or EBE upon which the contract or concession agreement was awarded, unless directed by the city; or
 - (4) Terminate an SBE, SBEC, or EBE originally utilized as a subcontractor, subconsultant, joint venturer, supplier, manufacturer, manufacturer's representative or broker in order to be awarded the contract without replacing such SBE, SBEC, or EBE subcontractor with another SBE, SBEC, or EBE subcontractor,

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- performing the same commercially useful function and dollar amount, to substitute another SBE subcontractor; all subject to the DSBO's approval;
- (5) Retaliate against any SBE, SBEC, or EBE subcontractor that reports issues to the DSBO or user department;
 - (6) Participate in a conduit relationship with an SBE, SBEC, or EBE subcontractor scheduled to perform work on the contract;
 - (7) Otherwise fail to meet the minimum utilization requirements; or
 - (8) Commit any other violation of this article VII, or rules and regulations promulgated hereunder, which constitutes a material breach of the contract, not mentioned above.
- (b) Any action by a contractor, consultant or concessionaire in violation of subsections (a)(1) through (8) hereof, shall constitute a material breach of the contract or concession agreement that shall entitle the city or private owner to exercise all of its rights at law or equity for such material breach, in addition to exercising any of the other sanctions set out in section 28-229. If, following contract or concession agreement award, an SBE, SBEC, or EBE has its certification terminated for reasons other than expiration of certification, or graduation from certification under section 28-206, or an SBE, SBEC, or EBE fails to perform a commercially useful function, the participation of which was originally counted for that SBE, SBEC, or EBE in awarding the contract or concession agreement, or an SBE, SBEC, or EBE voluntarily withdraws its participation on the contract or concession agreement and the contractor, consultant or concessionaire can demonstrate that such termination or failure did not result from any action or inaction, whether direct or indirect, of or by the contractor, consultant or concessionaire, such termination of certification or failure to perform a commercially useful function shall not be deemed to affect compliance with the contract or concession agreement defined selection pool requirements or minimum SBE, SBEC, or EBE utilization requirements, and shall not be deemed a breach of the contract or concession agreement.

(Ord. No. 286-20, § 4, 4-13-20; Ord. No. 833-21, § 20, 8-23-21)

Sec. 28-228. Burden of proof; investigations of compliance.

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

(Ord. No. 286-20, § 4, 4-13-20; Ord. No. 833-21, § 20, 8-23-21)

Sec. 28-229. Sanctions for failure to comply with article VII requirements.

- (a) If a contractor, consultant or concessionaire is found to be in violation of the provisions of article VII, to otherwise be in breach of a contract or concession agreement, to perform as an SBE, SBEC, or EBE for a non-commercially useful function or as a conduit, to fail to achieve required minimum SBE subcontractor, subconsultant and/or supplier utilization, if applicable, to fail to submit information required in section 28-220, to submit false, misleading or materially incomplete statements, documentation or records, or to fail to cooperate in an investigation, it shall be subject to sanctions. The city may exercise any or all of its rights, including, but not limited to, withholding funds including retentions, imposition of monetary penalty,

suspension or termination, contained in the contract or concession agreement terms and conditions. If the contract or concession agreement is suspended or terminated, the city reserves all its rights at law or equity, with such suspension or termination being deemed a response to a contractor, consultant or concessionaire default, as appropriate, by applicable law.

- (b) If the director determines, in his or her sole discretion, that a contractor, consultant or concessionaire is in noncompliance with article VII, the contractor, consultant or concessionaire may be assessed a civil, remedial penalty of not more than one hundred fifty (150) percent of the value of the minimum SBE, SBEC, or EBE participation underutilization, or in the case of a concession agreement, of not more than the revenues accruing to the concessionaire from its concession operations over the past three-month period. In assessing such civil penalty:
- (1) The director shall calculate the applicable amount of civil penalty, and may reduce or waive all or part of such penalty, in his or her sole discretion, in consideration of the following factors:
 - a. The length of the period of noncompliance;
 - b. The history of previous noncompliance with this article VII;
 - c. The monetary impact of the civil penalty on the contractor, consultant or concessionaire in correcting such noncompliance; or
 - d. The other facts and circumstances relevant to the noncompliance of the contractor, consultant or concessionaire.
 - (2) The director shall collect assessed and unpaid civil penalties under this subsection by action initiated in the state district court for collection of such penalty. A stay of any order of the director pending judicial review shall not relieve any contractor, consultant or concessionaire from any civil penalty obligation imposed under this subsection.
 - (3) Any such assessed civil penalties may also be offset against any amount, including, but not limited to, contract retainage, otherwise due and owing to the contractor, consultant or concessionaire on the contract or concession agreement.
 - (4) The contract or concession agreement may be suspended or terminated with the city reserving all its rights at law or equity, with such suspension or termination being deemed a response to a contractor, consultant or concessionaire default, as appropriate, by applicable law.
 - (5) The debarment board established under Denver Revised Municipal Code Section 20-77, upon request of the director, may suspend or debar the contractor, consultant or concessionaire from participation in city or private contracting covered hereunder for a period as may be determined by the debarment board, in its sole discretion, based upon the grounds of violating this article VII, pursuant to such suspension and debarment procedures as may be established by the city, as set forth in Denver Revised Municipal Code Section 20-77. The director in that event shall regard as nonresponsive any bid, proposal or competitive selection process proposal received during this time period that includes the contractor, consultant or concessionaire as a contractor, consultant, concessionaire, subcontractor, subconsultant, joint venturer, supplier, manufacturer, manufacturer's representative, or broker.
 - (6) If a contractor, consultant, concessionaire or other business enterprise knowingly receives new or additional work on a contract or concession agreement as a result of actions set out in this section, then the penalties in this section may be applied to such business enterprise.
 - (7) The DSBO may suspend or revoke an offending SBE's, SBEC's, or EBE's eligibility for certification, may suspend its participation from counting toward achieving defined selection pool and/or SBE minimum utilization requirements if applicable, and, subject to other city law, may refer to the debarment board to suspend or debar it from participating in future city contracts or concession agreements, based upon such SBE's, SBEC's or EBE's acting as a conduit, failing to comply with the provisions of article VII, failing

to perform a commercially useful function on a project, failing to achieve required SBE minimum subcontractor, subconsultant and/or supplier utilization if applicable, failing to submit information as required by section 28-220, submitting false, misleading or materially incomplete statements, documentation or records, or failing to cooperate in investigations.

- (c) The director may, in his or her sole discretion, impose any one (1) or more of the sanctions set out in this section against any contractor, consultant, concessionaire or joint venturer determined to be in violation of the section, provided that the director shall first advise the affected department head of the proposed sanction in writing. If the department head advises the director in writing that the department head believes that imposition of such sanction would not be in the best interests of the city, the director shall consult with the department head prior to making a final decision as to whether to impose such sanctions.
- (d) Consistent with article VII and the rules and regulations, the DSBO may prescribe corrective actions in the case of potential violations or in lieu of potential enforcement.
- (e) Suspected criminal violations shall be referred to the proper authorities for prosecution. If a conviction or a guilty plea is obtained pursuant to such prosecution, the perpetrator may be barred from contracting with the city to the extent authorized by law.

(Ord. No. 286-20, § 4, 4-13-20; Ord. No. 833-21, § 20, 8-23-21)

Sec. 28-230. State or federal law and other guidelines.

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

(Ord. No. 286-20, § 4, 4-13-20)

Sec. 28-231. Reporting.

The director shall prepare written reports two (2) times each year that this article VII is in effect that shall describe defined selection pool requirements applied to contracts and concession agreements under this article VII. Copies of such reports shall be provided to the affected department heads, city council and the mayor according to the following schedule:

In addition, the report shall encompass the implementation of this article VII as well as a report and justification of SBE, SBEC, or EBE defined selection pool requirements and minimum SBE utilization requirements by contract or concession agreement including all change orders, amendments and modifications.

In calculating SBE, SBEC, or EBE participation, all funds paid to SBEs, SBECs, and EBEs on city defined selection pool contracts and all revenues received by SBEs or from city concession agreements by SBECs during the year shall be counted whether or not such funds were used to compensate SBEs, SBECs, and EBEs or such concession revenues were received by SBEs or SBECs for the performance of a commercially useful function.

(Ord. No. 286-20, § 4, 4-13-20; Ord. No. 833-21, § 20, 8-23-21)

Sec. 28-232. Annual report.

For each year that this article VII is in effect, by March 1 of the following year, the director shall submit to the mayor and council a report describing SBE, SBEC, or EBE defined selection pool levels achieved in the preceding year and making recommendations as to continuing or further efforts that the city should make in efforts to assist in the development and utilization of SBEs in city construction and professional design and construction services contracting, and utilization of SBECs in city concession opportunities, and recommending what should be done to assist in achieving such SBE, SBEC, or EBE participation in the future. The annual report shall be regarded as one of the reports required under section 28-231.

(Ord. No. 286-20, § 4, 4-13-20; Ord. No. 833-21, § 20, 8-23-21)

Sec. 28-233. Rules and regulations; guidelines.

The director shall have the power and authority to adopt rules and regulations or guidelines to effectuate the purpose, procedures and operations of this article VII.

(Ord. No. 286-20, § 4, 4-13-20)

Sec. 28-234. Severability.

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

(Ord. No. 286-20, § 4, 4-13-20)

Sec. 28-235. Effective date of ordinance.

This article VII shall become effective on May 2, 2020 and shall apply to all contracts and concession agreements within the scope of the article for which bids or proposals are publicly advertised on or after May 2, 2020.

(Ord. No. 286-20, § 4, 4-13-20)

Sec. 28-236. Review and sunset.

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

(b) This article VII shall be repealed effective April 30, 2025.

(Ord. No. 286-20, § 4, 4-13-20)

Secs. 28-237—28-249. Reserved.