

**CITY AND COUNTY OF DENVER  
Denver Economic Development & Opportunity  
Division of Small Business Opportunity**

**RULES AND REGULATIONS FOR THE INTERPRETATION, ADMINISTRATION AND ENFORCEMENT OF DIVISION 1, ARTICLE III OF CHAPTER 28, D.R.M.C., DIVISION 3, ARTICLE III OF CHAPTER 28, D.R.M.C (REFERRED TO HEREIN AS THE “MWBE ORDINANCE”) AND ARTICLE VII OF CHAPTER 28, D.R.M.C. (REFERRED TO HERIN AS THE “SBE/EBE ORDINANCE”).**

**APPROVED AS TO FORM:**

City Attorney  
For the City and County of Denver

By:   
Date: December 22, 2021

**APPROVED AND ADOPTED:**

Adrina Gibson  
Director of Division of Small Business  
Opportunity

By:   
Date: December 22, 2021

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

**RULE I. SCOPE OF RULE**

- A. These Rules are promulgated for the purposes of interpretation, administration and enforcement of Division 1, Article III of Chapter 28, D.R.M.C., Division 3, Article III of Chapter 28, D.R.M.C. (referred to herein as the “MWBE Ordinance”) and Article VII of Chapter 28, D.R.M.C. (referred to herein as the “SBE/EBE Ordinance”). The rules and regulations governing Division 1 of Article III of Chapter 28, D.R.M.C., Division 3 of Article III of Chapter 28, D.R.M.C. and Article VII of Chapter 28, D.R.M.C. previously adopted by DSBO are hereby repealed and replaced by these rules and regulations.
- B. **AUTHORITY**
1. Executive Order No. 28 establishes the Denver Economic Development & Opportunity (“DEDO”) agency, formerly the Mayor’s Office of Economic Development. The applicable authority of Executive Order No. 28 is found in Section 2.2.1 and 2.2.6 of the Charter of the City and County of Denver, 2002 revised. DEDO is headed by an Executive Director, appointed by the Mayor. The Executive Director and appropriate staff supervise and administer various divisions within DEDO, including the Division of Small Business Opportunity (“DSBO”).
  2. Under Division 1 of Article III, D.R.M.C., DSBO is responsible for performing the tasks and duties related to the Minority and Women Owned Business Enterprise Program and the Small Business Enterprise Program (together, the “Programs”). In accordance with D.R.M.C. Section 28-33, the Director of DSBO is delegated the authority to promulgate rules and regulation necessary to effectuate the purposes of the DSBO Programs.

**RULE II. SCOPE OF ADMINISTRATIVE REVIEW**

- A. **ADMINISTRATIVE RECONSIDERATION (DIVISION 1, ARTICLE III OF CHAPTER 28, D.R.M.C.)**
1. **ADMINISTRATIVE DETERMINATION OF NONRESPONSIVENESS TO REQUESTS FOR BIDS OR PROPOSALS.**
    - a. When DSBO finds that a bid or proposal is nonresponsive it shall provide the User Department its reasons and the basis for the finding of nonresponsiveness in writing. The City shall also notify the proposing contractor of the nonresponsive determination.
    - b. In the event of a nonresponsive finding, the proposing contractor shall have two (2) business days from receipt of the finding within which to submit to the Director a request in writing for a reconsideration. Upon receipt of a request for reconsideration, the Director shall make the determination of reconsideration.

- c. In reaching a decision the DSBO will consider all relevant facts and documents in the record viewed as a whole and determine whether the proposing contractor has met its burden by a preponderance of the evidence.
- d. Once a reconsideration decision is made, the DSBO will send the proposing contractor a written decision, with a copy to the User Department, including the User Department's project manager. The decision shall constitute a final decision, and the proposing contractor may appeal the decision by requesting a D.R.M.C. Section 28-69 hearing. See Rule II.B., below.
- e. If the proposer is found nonresponsive after a reconsideration, the proposer may appeal the decision to the DEDO Executive Director in accordance with D.R.M.C. Section 28-69. The proposing contractor has thirty (30) days from the date of determination to file an appeal with the DEDO Executive Director. The DEDO Executive Director may hold the hearing, or, in the Executive Director's discretion, designate a DSBO officer or employee or a hearing officer to hold the hearing for a determination on the appeal. The determination shall be considered a final order of the Director upon the date the Director rules on the request for reconsideration.
- f. User Departments shall stay the effect of DSBO determinations of nonresponsiveness only until the date of DSBO's decision on reconsideration under Rule II.A.1.b.

## 2. CERIFICATION DECISIONS

- a. When the DSBO denies a request to be certified or to revoke a certification it shall provide the business enterprise a written explanation of the reasons and the basis for the denial or revocation.
- b. In the event of such a denial under this Rule II, the Business Enterprise shall have thirty (30) days from receipt of the finding to submit a request of reconsideration to the DSBO Director.
- c. The Business Enterprise must submit a formal letter (mail or email) stating why they do not agree with the determination and provide documentation that substantiates their claim. This documentation cannot be any new documentation that is dated after the original determination. The Business Enterprise seeking certification has the burden of demonstrating, by a preponderance of the evidence, that it meets the requirements of the MWBE and SBE/EBE Ordinances.
- d. DSBO will review the record as a whole and determine whether the business enterprise has met its burden by a preponderance evidence. DSBO will have 15 days to review the request.
- e. Upon completion of the administrative reconsideration, DSBO will send the business enterprise a written reconsideration decision. The decision on certification reconsideration shall constitute a final decision, and the business

entity may request a D.R.M.C. Section 28-69 hearing.

B. ADMINISTRATIVE HEARINGS FOR DISPUTES OR APPEALS OF DETERMINATIONS OF NON-RESPONSIVENESS; (DIVISION 1, ARTICLE III OF CHAPTER 28, D.R.M.C.)

1. Administrative Hearings under D.R.M.C. Section 28-69 for the dispute or appeal of a final decision will be conducted in accordance with the Public Works (now known as the Department of Transportation and Infrastructure) Rules and Regulations Governing Hearings Before The Manager of Public Works, adopted October 15, 1993 (“Public Works Hearing Rules”), except to the extent there is a conflict between these Rules and the Public Works Hearing Rules, in which case these Rules shall control.
2. The petitioning Business enterprise or contractor has the burden of showing that they meet the requirements of the MWBE or SBE/EBE Ordinances by a preponderance of the evidence.
3. The petition for appeal must be delivered to the DEDO Executive Director no later than thirty (30) days after the date of the final decision under Rule II.A., II.B., or II.C. Compliance with the provisions of D.R.M.C. Section 28-69 shall be a jurisdictional prerequisite to any action brought under the provisions of this Rule, and failure of compliance shall forever bar any such action. Nothing in these Rules, the Public Works Hearing Rules or D.R.M.C. Section 28-69 shall be construed to create a right of standing that does not otherwise exist under Colorado law. D.R.M.C. Section 28-69(a).
4. The DEDO Executive Director may hold such hearing or the Executive Director, in its sole discretion, may designate an officer or employee of the DEDO including the DSBO Director, or an independent hearing officer retained by the City, as a hearing officer with authority to hold such hearing or hearings. D.R.M.C. Section 28-69(b).
5. The petition for appeal shall be in writing, and the facts and other information shall be submitted under oath or affirmation either in writing or orally at a hearing scheduled by the DEDO 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.
6. 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, or its designee, may provide, by rule and regulation, for either review of the record or for limited de novo review of different types of questions coming before the Director. D.R.M.C. Section 28-69(c). Pending the conclusion of the D.R.M.C. Section 28-69 hearing and the hearing officer’s (the “Hearing Officer”) decision in the matter, the decision of the DSBO remains in effect. The Hearing Officer shall not stay the effect of DSBO’s previous decision while he or she is considering an appeal.
7. Upon receipt of a request for dispute or appeal, the Hearing Officer will request a copy of the DSBO’s administrative record in the matter, which must be provided by the DSBO within ten (10) business days of the Hearing Officer’s request. The Hearing Officer may

extend this time period on the basis of a showing of good cause. The record shall be well organized, indexed and paginated.

8. SCOPE OF ADMINISTRATIVE HEARING.

- a. The Hearing Officer's decision shall be made based solely on the administrative record. The Hearing Officer does not make a de novo review of the matter but may accept briefs with written arguments and allow oral argument by the parties.
- b. The Hearing Officer will affirm the decision of the DSBO unless the Hearing Officer determines, based on the entire administrative record, that the decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of the applicable ordinances or regulations of the DSBO. The Hearing Officer is not required to reverse a decision if the Hearing Officer determines that a procedural error did not result in fundamental unfairness to the appellant or substantially prejudice the opportunity of the appellant to present its case.
- c. If the Hearing Officer determines, after reviewing the entire administrative record, that the DSBO's decision was unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of applicable ordinances or regulations, the Hearing Officer may reverse the DSBO's decision and direct the DSBO to prepare conforming findings.
- d. If it appears that the record is incomplete or unclear with respect to matters likely to have a significant impact on the outcome of the case, the Hearing Officer may remand the record to the DSBO with instructions seeking clarification or augmentation of the record before making a finding. The Hearing Officer may also remand a case for further proceedings consistent with the Hearing Officer's instructions concerning the proper application of applicable ordinances or regulations.
- e. The Hearing Officer shall not uphold the DSBO's decision based on grounds not specified in the DSBO's written decision.
- f. The Hearing Officer will provide written notice of its decision to the adversely affected contractor or business enterprise requesting an administrative review hearing. The notice shall include the reasons for the Hearing Officer's decision, including specific references to the evidence in the record that supports each reason for the decision.
- g. The DSBO will take the action directed by the Hearing Officer's decision immediately upon receiving written notice of it.

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

Review of all other matters reviewed under D.R.M.C. Section 28-69 shall allow for de novo review by the Hearing Officer of the facts and circumstances upon which the DSBO's decision was based.

**RULE III. MWBE AND SBE ORDINANCE DEFINITIONS; SUPPLEMENTS TO D.R.M.C. §28-35; §28-204**

A. The terms defined in the MWBE Ordinance or the SBE Ordinance are restated here for reference only. Any term or definition here that is not found in the MWBE Ordinance or SBE Ordinance is supplemental to the Ordinances. The definitions in the MWBE Ordinance or SBE Ordinance shall take precedence over the definitions in this Rule.

(1) *Affiliate* means any business enterprise that is affiliated with an MWBE/SBE or with the owner(s) of such MWBE/SBE. Business enterprises 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, including related SBA guidance documents, as from time to time amended.

(2) *Anniversary date* means the date on which certification for an MWBE, SBE, SBEC or EBE is established by the DSBO and the business enterprise is authorized to participate as a certified business enterprise.

(3) *Annual goal* means the targeted level for the aspirational goal established by the city for the annual aggregate participation of MWBE/SBEs in city contracts.

(4) *Applicant business enterprise* means a business enterprise seeking to be certified as a MWBE, SBE, SBEC or EBE.

(5) *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.

(6) *Broker* means a business enterprise that performs a commercially useful function as an intermediary, for a fee, in the acquisition of materials, supplies or equipment, regardless of whether or not it takes title to such materials, supplies or equipment, for the city or a private owner or its contractors, consultants or suppliers, but is not a manufacturer, manufacturer's representative or regular dealer. Only bona fide commissions earned by a broker for its activities in performing a commercially useful function on a city contract shall be counted toward the MWBE participation goal as set out in sections 28-59 and 28-63, D.R.M.C., for Construction; section 28-129, D.R.M.C., for Goods and Services; or participation under section 28-212, D.R.M.C., for SBE. 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 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.

(8) *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, SBE, SBEC or EBE under Article III or Article VII. Certification neither represents nor implies that a business enterprise is qualified to perform on a 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'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.

(11) *City project; city contract; city construction practices* mean any contract or project encompassed under Articles III or VII, regardless of whether the project owner is the city or a private owner. All provisions of the MWBE or SBE ordinance 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.

(12) *Commercially useful function* means an MWBE, SBE, or EBE is responsible for the execution of a distinct element of the work of a contract and is carrying out the work by actually performing, maintaining control of, managing, and supervising the work involved, or fulfilling responsibilities as a joint venturer. In determining whether an MWBE, SBE, or EBE is performing or has performed a commercially useful function, DSBO will analyze and evaluate the amount of work subcontracted; the amount paid to the MWBE, SBE, or EBE in proportion to the work actually performed; whether the MWBE, SBE, or EBE is performing functions, including but not limited to being responsible for, with respect to materials and supplies used for the contract work; negotiating price; determining quantity and quality; ordering materials; performing installation where applicable; paying for the materials; 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.

(13) *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.

(14) *Concessionaire* means a business enterprise certified as an SBEC 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.

(15) *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.

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

(17) *Conduit* means an MWBE, SBE, SBEC, or EBE 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/SBE/SBEC/EBE firm or does not carry out the responsibilities required for MWBE/SBE/SBEC/EBE participation by actually performing, managing, controlling and supervising the work under a contract. In this type of relationship, the MWBE/SBE/SBEC/EBE 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/SBE/SBEC/EBE's participation does not count toward the MWBE/SBE/EBE goal on the contract. Conduit is also referred to as a passthrough.

(18) *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.

(19) *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.

(20) *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 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.

(21) *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.

(22) *Day*, unless otherwise indicated, means calendar day.

(23) *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.

(24) *Department head* means the manager or director of the User Department entering into contract(s) utilizing MWBE, SBE, SBEC or EBE participation, or such person's designee.

(25) *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.

(26) *Director* means the director of the division of small business opportunity or successor agency, or such director's designee.

(27) *Distributor* means an entity that buys noncompeting products or product lines, warehouses them, and resells them to retailers or direct to the end users or customers. Most distributors provide strong manpower and cash support to the supplier or manufacturer's promotional efforts. They usually also provide a range of services (such as product information, estimates, technical support, after-sales services, credit) to their customers.

(28) *DSBO* means the division of small business opportunity.

(29) *DSBO required forms* means the certifications, letters of intent, commitment forms and other forms and documents developed by DSBO 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.

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

(31) *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.

(32) *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.

(33) *Emerging business enterprise* or *EBE* means a business enterprise that is certified by the director under Article VII as meeting all of the requirements for certification set forth in sections 28-205 and 28-206, D.R.M.C.

(34) *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.

(35) *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, D.R.M.C.

(36) *Gross Receipts* means the total revenues received before deducting costs, expenses or other deductible amounts under general accounting practices.

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

(38) *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 proposals 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 may be authorized, and the contractor may proceed to complete the work under the separate contracts, projects or the individual work orders or task orders.

(39) *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 that portion of the total dollar value of a joint venture contract equal to the distinct, clearly defined work that the MWBE/SBE performs with its own forces as a commercially useful function will count towards MWBE/SBE participation.

(40) *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/SBE/EBE and the bidder or proposer that such MWBE/SBE 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/SBE/EBE on such contract.

(41) *Majority ownership* means no less than fifty-one percent (51%) ownership of a business enterprise by an individual applicant or applicants for certification.

(42) *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 percent (100%) of the value the materials, supplies or equipment provided by an MWBE/SBE under a contract shall count toward MWBE/SBE/EBE participation.

(43) *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, 28-63, 28-129, and 28-212, D.R.M.C.

(44) *Mentor-Protégé* means a relationship between a subcontractor certified as an MWBE/SBE/EBE (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 MWBE/SBE/EBEs to perform city contracts.

(45) *Minority business enterprise* or *MBE* means a business enterprise that is certified by the director under Article III and its divisions as meeting all of the requirements for certification set forth in sections 28-53 and 28-55, D.R.M.C., 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 Article III and its divisions, an MBE or WBE certified with DSBO in accordance with Article III and its divisions and the applicable rules and regulations shall be referred to as an MWBE.

(46) *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 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.

(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.

(47) *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.

(48) *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.

(49) *Participation goal* means the specific MWBE goal established for a particular contract or city project, 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.

(50) *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/SBE /EBE 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/SBE/EBE under Article III and its divisions or 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.

(51) *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.

(52) *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 applicable professional services related to construction projects.

(53) *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 Article III and its divisions or Article VII.

(54) *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.

(55) *Public-private partnership agreement (also known as 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 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 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 by the city, without regard to the utilization of city funding.

(56) *Qualified*, with respect to good faith efforts in 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/SBE/EBE.

(57) *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/SBE/EBE 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.

(58) *Revocation* means DSBO's action to decertify a business enterprise and remove the business enterprise from the DSBO program.

(59) *Size standard* means the maximum size threshold for an eligible certified business enterprise as set forth by the director and described in ordinance or rules and regulations.

(60) *Small business enterprise* or SBE means a business enterprise that is certified by the director under Article VII as meeting all of the requirements for certification set forth in sections 28-205 and 28-206, D.R.M.C.

(61) *Small business enterprise concessionaire* or SBEC means a business enterprise that is certified by the director under Article VII as meeting all of the requirements for certification set forth in sections 28-205 and 28-206, D.R.M.C. for concessions contracts.

(62) *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.

(63) *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.

(64) *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.

(65) *Teaming agreement* means an agreement between a prime or general contractor and an MWBE/SBE/EBE subcontractor or an agreement between a consultant and an MWBE/SBE/EBE subconsultant to:

- (a) Develop the capacity of the MWBE/SBE/EBE 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.

(66) *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.

(67) *Wholesaler* means a person or firm that buys large quantities of goods from various producers or vendors, warehouses them, and resells to retailers. Wholesalers who carry only non-competing goods or lines are called distributors.

(68) *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.

(69) *Woman business enterprise* or *WBE* means a business enterprise that is certified by the director under Article III and its divisions as meeting all of the requirements for certification set forth in sections 28-53 and 28-55, D.R.M.C., as a WBE.

**RULE IV. CERTIFICATION, RENEWAL OF CERTIFICATION, REVOCATION, AND GRADUATION OF MWBEs AND SBE/EBE/SBECs. (APPLICABLE TO BOTH MWBE AND SBE/EBE ORDINANCES)**

**A. CERTIFICATION, RENEWAL OF CERTIFICATION, REVOCATION, AND GRADUATION OF MWBEs**

1. A business entity seeking to be certified or recertified as an EBE/MWBE/SBE/SBEC ("Applicant Business Enterprise" or "Applicant") shall apply online on the DSBO website. The DSBO shall (i) develop such forms, affidavits, and other documentation as the Director deems appropriate for such certification procedure; (ii) determine the information that shall be required from the Applicant or others as the Director deems appropriate for such procedure; and (iii) determine the reviews, examinations, and site visits the Applicant Business Enterprise shall submit as the Director deems appropriate for such procedure.
2. The Applicant shall complete all documentation for certification developed by the DSBO, provide all information required by the DSBO, and cooperate with the DSBO in all reviews, examinations, and site visits required by the DSBO. Failure to provide all required documents and information may result in denial of certification or recertification.
3. Formation of the Applicant Business Enterprise as required for certification shall presumptively be the date filed with the Secretary of State.
4. All trade names or DBAs are required to be registered in the State of Colorado
5. An Applicant seeking certification shall provide adequate evidence, by execution of such

forms and/or affidavit(s) as may be developed and promulgated by the Director, as follows:

- a. Formation of the Applicant Business Enterprise as required for certification shall presumptively be the date filed with its local jurisdiction's Secretary of State, or similar authority, or the date the Applicant Business Enterprise is otherwise qualified to conduct business in its local jurisdiction.
- b. The Applicant must have conducted sustained business activity in the trade or profession described in the certification application within the City's Marketplace, the State of Colorado, during a minimum period of six (6) months immediately prior to the date of application submission.
- c. The Applicant Business Enterprise must be registered with the Colorado Secretary of State at time of application submission.
- d. Applicable only to MWBE certification: If the Applicant Business Enterprise is owned and controlled by person(s) rebuttably presumed to be Socially Disadvantaged under D.R.M.C. §28-53(c)(6)(a), the Applicant Business Enterprise must demonstrate by affidavit those requirements set forth in D.R.M.C. §28-53(c)(6)(a).
- e. Applicable only to MWBE certification: If the Applicant Business Enterprise is not owned, managed and controlled by person(s) rebuttably presumed to be Socially Disadvantaged under D.R.M.C. §28-53(c)(6)(a), then the individual(s) owning, managing and controlling the Applicant Business Enterprise must demonstrate past individualized discrimination in association with the conduct of business or the attempted conduct of business as a business enterprise, in the construction or the professional design and construction services industries in general and within the City's marketplace in accordance with D.R.M.C. §28-53(c)(6)(b).
- f. The Applicant Business Enterprise shall supply information in a format prescribed by the Director in order to determine the Applicant meets the requirements of D.R.M.C. §28-53(c)(6)(a) or (b).
  - i. The Applicant must demonstrate it conducted business or attempted to conduct business in the trade or profession described in the certification application within the City's Marketplace, the State of Colorado, during the period for a minimum of six (6) months immediately prior to the date of application submission.
  - ii. The Applicant must be registered with the Colorado Secretary of State at time of application submission.
  - iii. The Applicant must demonstrate it conducted sustained business activity in the trade or profession described in the certification application for a minimum of six (6) months prior to the date of application.

- g. If the Applicant Business Enterprise is owned and controlled by person(s) seeking to be certified under D.R.M.C. Section §28-53(c)(6)(a), and did not conduct business or attempt to conduct business within the City’s Marketplace, the State of Colorado, the Applicant must demonstrate by affidavit that, while owned, managed, and controlled by such minority owners:
  - i. it conducted sustained business activity in the trade or profession described in the certification application for a minimum of six (6) months prior to the date of application; and
  - ii. the individual(s) owning, managing and controlling the Applicant Business Enterprise has suffered from past individualized discrimination in association with the conduct of business or the attempted conduct of business as a business enterprise, in the construction or the professional design and construction services industries in general and within the City’s marketplace.
- 6. An individual owning and controlling an Applicant Business Enterprise shall supply information in a format prescribed by the Director in order to determine whether such individual is Economically Disadvantaged as defined in D.R.M.C. Section 28-35(25).
- 7. Applicable only to MWBE certification: If the Applicant is owned and controlled by person(s) not rebuttably presumed to be Socially Disadvantaged under D.R.M.C. Section 28-53(c)(6)(a), and seeks certification pursuant to D.R.M.C. Sections 28-54(35)(b) and 28-53(c)(6)(b), the Applicant must comply with Rule IV.3. and Rule IV.4., as well as demonstrate by affidavit individual social disadvantage as set forth in D.R.M.C. Section 28-54(37)(c). The individual(s) owning, managing and controlling the Applicant Business Enterprise must demonstrate that he or she has suffered from past individualized discrimination in association with the conduct of business or the attempted conduct of business as a business enterprise, in the construction or the professional design and construction services industries in general and within the City’s marketplace.
- 8. In accordance with D.R.M.C. Section 28-55(h), an Applicant that is denied certification may not apply for certification until one (1) year after denial.
- 9. Anyone seeking a third-party challenge pursuant to D.R.M.C. Section 28-56 shall apply to the Director in writing. The Director shall develop and promulgate forms or affidavits for the documentation and presentation of such challenges. Any such third-party challenger shall execute all documentation required by the Director.

**B. ELIGIBILITY REQUIREMENTS FOR EBE, MWBE, SBE, AND SBEC**

DSBO will use these guidelines in determining whether an applicant firm meets certification criteria.

**1. OWNERSHIP.**

- a. The ownership by Applicant Business Enterprise must be real, substantial and

continuing beyond the pro-forma ownership of the business as reflected in its ownership documents.

- b. The applicant must share in all risk and profits commensurate with their ownership interest as demonstrated by a detailed examination of the substance of their business arrangements with others.
- c. All securities that constitute ownership of a firm shall be held directly by applicant owner(s), who are not minors, or held in a trust that is one of the types of trusts described in Rule IV.B.1.e.v., below.
- d. Contribution of Capital or Expertise:
  - i. Contribution of capital and/or expertise by Applicant Business Enterprise to acquire their ownership interest shall be real and substantial and be in proportion to the interest(s) acquired.
  - ii. If expertise is relied upon as part of an Applicant Business Enterprise'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.
  - iii. Insufficient contributions shall include but shall not be limited to promises to contribute capital or expertise in the future, a note payable to the business or its owners who are not otherwise an owner(s) eligible for certification, or the mere participation as an employee.
- e. Corporate and Ownership Structure. Legal corporate entities must be formed in and have their principal place of business in the United States. (D.R.M.C. 28-53 (c)(5))
  - i. Sole Proprietor. In a sole proprietorship, the owner must own one hundred percent (100%) of the company assets.
  - ii. Corporations.
    - (A) MWBE Only: In a corporation form of organization, applicant principal(s) must own at least fifty-one percent (51%) of each class of voting stock outstanding and fifty-one percent (51%) of the aggregate of all stock outstanding.
    - (B) Any voting agreements among the shareholders must not dilute the beneficial ownership, the rights, or the influence of the applicant owners of the stock or classes of stock of the corporation.

- (C) Applicant owner(s) shall possess the right to all customary incidents of ownership (e.g., ability to transfer stock, title possession, enter binding agreements, etc.).
- (D) Nonprofit corporations do not meet this requirement and are therefore not eligible for certification.

iii. Partnerships.

- (A) MWBE Only: General Partnership. In a general partnership, applicant owners must own at least fifty-one percent (51%) of the partnership interests.
- (B) Limited Partnership.
  - (1) MWBE Only: In a limited partnership, the applicant general partners must own at least fifty-one percent (51%) of the general partnership interest and exert at least fifty-one percent (51%) of the control among all general partners. The applicant general partners must receive at least fifty-one percent (51%) of the profits and benefits, including tax credits, deductions and postponements distributed or allocable to all of the general partners.
  - (2) MWBE Only: In addition, the applicant limited partners must own at least fifty-one percent (51%) of the limited partnership interests and receive at least fifty-one percent (51%) of the profits and benefits, including tax credits, deductions and postponements distributed or allocable to all of the limited partners.

iv. Limited Liability Companies.

- (A) MWBE Only: In a Limited Liability Company, applicant principal(s) must own at least fifty-one percent (51%) of membership interests, and at least fifty-one percent (51%) of the management and control among all of the members.
- (B) The applicant principal(s) must also participate in all risks and profits of the organization at a rate commensurate with their membership interests.

v. Trusts. In order to be counted as owned by an eligible individual(s), ownership held in a trust must meet the following requirements, as applicable:

- (A) *Irrevocable trusts.* If the trust is an irrevocable trust, ownership held for the benefit of a socially or economically disadvantaged

individual who is not a minor and who is a beneficiary with a present interest in the trust may be counted as owned by socially or economically disadvantaged individual.

- (B) *Revocable trusts.* If the trust is a revocable trust, all the grantors must be socially or economically disadvantaged, and ownership held for the benefit of a socially and economically disadvantaged individual(s) who is not a minor and who is a beneficiary with a present interest in the trust may be counted as owned by socially or economically disadvantaged individuals.
- (C) *Employee Stock Ownership Plans (ESOPs).* Ownership by socially and/or economically disadvantaged individual(s) who are participants in an employee stock ownership plan qualified under Section 401 of the Internal Revenue Code, 1986, as amended, may be counted as owned by a socially or economically disadvantaged individual(s).
- (D) *Trustees.* In all cases, all the trustees must be a socially or economically disadvantaged business, provided that a financial institution may act as trustee.
- (E) *Determination of present interest in the trust.* A beneficiary has a present interest in a trust if he/she is currently eligible to receive distributions of income or principal from the trust. If more than one beneficiary has a present interest in the trust, each beneficiary shall be deemed to have an equal interest unless the instrument that creates the trust provides otherwise.
- (F) *Other requirements.* Businesses whose ownership, in whole or part, is held in a trust are not thereby exempt from the other requirements of this Rule.

2. CONTROL. The applicant must show evidence that the Applicant Business Enterprise has control of the business. "Control" means the primary power to direct the management of a business enterprise as evidenced through the governance documents and actual day-to-day operation. The following factors will be examined in determining who controls an enterprise.

a. Governance.

- i. The organizational and signed governing documents, with amendments, of an applicant (e.g., Limited Liability Company Operating Agreements, Partnership Agreements, or Articles of Incorporation and By-laws) must not contain any provision, which restricts the ability of the minority/women business owner(s) from exercising Managerial Control (defined below) and Operational Authority (defined below) of the

business.

- ii. In reviewing governance documents and issues, special attention shall be given to:
  - (A) The composition of the business's governing body (e.g., board of directors or management committee);
  - (B) The functioning of the governing body;
  - (C) The content of shareholder's agreements, bylaws, operating agreements, partnership agreements or state incorporation statutes, and the extent to which such agreements, bylaw(s), or statutes affect the ability of the Applicant Business Enterprise to direct the management and policy of the business;
  - (D) An eligible applicant must hold the highest defined officer position in the company (e.g. President, Chief Executive Officer, Managing Member or Managing Partner), in each case by whatever title and based on the company's governing documents.

b. Operation and Management.

- i. The applicant business enterprise must possess the power to direct or cause the direction of the management and policies of the business and to make the day-to-day as well as major decisions on matters of management, policy and operations. The business must not be subject to any formal or informal restrictions that limit the customary discretion of the owner(s).
- ii. A previous or continuing employer-employee relationship between or among present owners is carefully reviewed to ensure that the employee-owner has management responsibilities and capabilities.
- iii. An Applicant Business Enterprise 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.
- iv. In the event that the actual management of the business is contracted or carried out by individuals other than the owner(s), those persons who have the ultimate power and expertise to hire and fire the managers can, for this purpose, be considered as controlling the business.

- v. The applicants must show evidence that the owner(s) have operational authority and managerial control of the applicant. In evaluating this evidence, the following factors will be considered:
- (A) Operational Authority. “Operational Authority” means the extent to which the owner(s) actually operate the day-to-day business. Assessments of operational control will rest upon the peculiarities of the industry of which the business is a part. In order to ascertain the level of operational control of the owner(s), the following will be considered:
    - (1) Experience. The owner(s) shall have education, demonstrable working knowledge and/or experience in the area of specialty or industry claimed in the certification application.
    - (2) Responsibility for Decision-Making. The owner(s) shall be able to demonstrate her role in making basic decisions pertaining to the daily operation of the business.
    - (3) Technical Competence. The owner(s) shall have technical competence in the industry or specialty of the applicant business and/or a working knowledge of the technical requirements of the business sufficient enough to critically evaluate the work of subordinates.
    - (4) Licenses. 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, 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) Managerial Control. “Managerial Control” is the demonstrated ability to make independent and unilateral business decisions

necessary to guide the future and destiny of the business. Managerial control may be demonstrated in a number of ways. For an Applicant Business Enterprise to demonstrate Managerial Control, DSBO will consider the following (not intended to be all inclusive) areas of routine business activity:

- (1) The owner(s) must produce documents that clearly indicate their control of basic business functions, *e.g.*, authority to sign payroll checks and letters of credit, signature responsibility for insurance and/or bonds, authority to negotiate contracts and financial services.
- (2) Agreements for support services that do not impair the owner(s)'s control of the company are permitted as long as the owner's power to manage the company is not restricted or impaired as determined by DSBO in its sole administrative discretion.

- c. Independence. An independent applicant business enterprise is one whose viability does not depend on its relationship with another business enterprise.
- i. The owner(s) shall have the ability to perform in its area of specialty/expertise without substantial reliance upon finances and resources (*e.g.*, equipment, automobiles, facilities, etc.) from an outside firm/source.
  - ii. Test of Independence. Recognition of the applicant as a separate and distinct entity by governmental taxing authorities shall not be a sole determinant of any applicant's assertions of independence. Test criteria include, but are not limited to the following:
    - (A) Applicant's relationship with another firm that involves any long-term contract or lease agreements.
    - (B) Applicant's status as a party to any contract or lease agreement on terms inconsistent with industry standards or prudent business practices.
    - (C) Relationships between or among other firms which may affect ownership of the applicant.
    - (D) Common directors, officers, or members between the applicant and another firm.
    - (E) Applicant's use of employees, equipment, expertise, facilities, etc., "shared" with or obtained from another firm.
    - (F) The receipt by another firm of financial benefits (*i.e.* profits,

wages, etc.) shall be commensurate with the duties performed.

- (G) An applicant's business that cannot operate without licenses, permits or insurance held by another business is not independent. The business must possess all legal requirements necessary to legally conduct business.

### 3. SIZE STANDARDS.

- a. Business size standard is based on annual receipts averaged over the five (5) preceding consecutive fiscal years, or the average number of employees over twelve (12) months; whether the applicant business has otherwise achieved a size standard based upon its number of employees; or other criteria, applicable to any of the work activities for which the applicant business enterprise seeks certification or is certified, the gross annual receipts averaged over 5 years or the average of employees over 12 months based on the SBA standards for that specific NAICS code.
- b. Procedure for Modifying Applicable Size Standards. The director may from time to time and in the director's discretion modify the size standards utilized for business enterprise eligibility and certification. The factors that may be considered in modifying size standards include but are not limited to local or regional economic conditions; changes in local, federal or state law; programmatic changes regarding DSBO; disparity study or other professional or industry recommendations or input; or other relevant industry or economic data or information affecting business enterprises under the DSBO program. The director may also consider factors utilized in other similar local or federal programs.
- c. Upon the director's determination that modification of size standards may be appropriate, the director shall initiate a public and stakeholder outreach and comment process, including development of a review and comment schedule. If modification of size standards result in revision of the rules and regulations, the public outreach and comment for size standards shall be in addition to the public process required for promulgation of rules and regulations.
  - i. Emerging Business Enterprise (EBE)
    - (A) Based on the foregoing, the size standard for EBEs certified to perform construction work shall not exceed three million dollars (\$3,000,000.00).
    - (B) Based on the foregoing, the size standard for EBEs certified to perform professional services shall not exceed one million dollars (\$1,000,000.00).
  - ii. Minority or Woman Business Enterprise (MWBE). The applicable size standard for MWBEs shall be one hundred percent (100%) of the SBA

size standards in accordance with 13 CFR Part 121.2 guidelines. If SBA size standards are modified, then DSBO size standards are considered also modified without further action from DSBO.

- iii. Small Business Enterprise (SBE). The applicable size standard for SBEs shall be one hundred percent (100%) of the SBA size standards in accordance with 13 CFR Part 121.2 guidelines.
  - iv. Small Business Enterprise Concessionaire (SBEC). The applicable size standard for SBECs shall be one hundred percent (100%) of the SBA size standards for food, beverage, and retail.
  - v. Personal Net Worth (for all certifications). Each individual owner of a business enterprise whose ownership and control is relied upon for certification must be equal to or less than the permissible personal net worth amount determined by the U.S. Department of Transportation, excluding equity in primary residence and ownership interest in applicant's business enterprise.
4. **LAWFUL PRESENCE 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.

#### C. CERTIFICATION PROCEDURES

The following are details of the certification process for all applicants seeking certification by DSBO. Information will be reviewed and analyzed as it exists on the date the application is submitted. Organizational changes subsequent to the application submittal date will not be considered during the eligibility review process. The DSBO will request any and all documentation deemed necessary to establish a business' ownership and control. The decision to certify or deny an application will be based on the Eligibility Standards for each certification in effect at the time the application is evaluated.

1. Applications that are open but not completed will be purged from the system after ninety (90) days. The firm will be required to start a new application and pay the non-refundable application fee.
2. Once an applicant has submitted their application, the Intake officer will review. If the application is incomplete the application will be returned and will require resubmission, which may delay the process. If there is no response or resubmission, the application will be purged after 90 days. The firm will be required to start a new application and pay the non-refundable application fee.
3. If an applicant fails to respond to requests for documents or information from DSBO

within the review and analysis period, the applicant will be notified that the application will not be reviewed further. The application will be deemed incomplete and purged from the system. The firm will be required to start a new application and pay the non-refundable application fee.

4. Once an applicant submits a complete application and appropriate supporting documentation, the following procedures will apply (complete application means all the required documents have been submitted and approved and the non-refundable fee has been paid):
  - a. The DSBO will inform the applicant that its application is complete, which shall start the 90-day process.
    - i. The DSBO will evaluate the application and documentation for completeness and accuracy.
    - ii. All supporting documents must be submitted in their entirety prior to DSBO scheduling an on-site visit.
    - iii. Files must remain in the custody and control of the DSBO staff at all times. The certification committee review and will be maintained as part of the permanent file.
    - iv. As provided in the Eligibility Requirements above, DSBO will conduct a document review and an on-site review.
  - b. Document Review. At any time during the review process, DSBO may request additional documents in existence at the time of application, but not requested or provided at the time of application, necessary to substantiate eligibility.
  - c. On-Site Review. Once the Document Review is completed an on-site visit at the principal place of business with the majority Owners or Executive Management will be conducted on all applicants to ensure that the findings of the Document Review are substantiated in the actual operation of the business.
  - d. If the On-Site Review corroborates the Document Review, a final recommendation is made at the certification committee review. If there is any conflicting information or observation uncovered during the course of the On-Site Review, the information will be thoroughly documented and reviewed in the Certification Committee meeting. The DSBO site visitor may request that an applicant submit to a financial review of its accounting records and books. The applicant will be advised of the DSBO's request for the financial review. An applicant's failure to permit a financial review may result in denial of certification.

- e. If certification is granted, the business enterprise will be notified in writing (via email) of the local certifications granted. A “Notice of Certification Letter” is emailed and placed in the applicants file in the Small Business Certification and Contract Management System, which will list the certifications the applicant has received and business enterprise’s anniversary date. The Applicant Business Enterprise will also be listed in the Small Business Certification and Contract Management System for the duration of the certification period.
  - f. If certification is denied, the applicant will be notified in writing (via email) of the reasons for denial based on the Eligibility Requirements. Any business that disagrees with the denial may file an appeal in accordance with Rule II.A. and Rule II.B.
  - g. Where appropriate as determined by the Director, DBSO may adjust the Anniversary date to align with the federal DBE anniversary date.
  - h. Extensions of certification dates will not be granted. It is the firm’s responsibility to maintain their certification.
5. Certification issued by DSBO is valid for a period of three (3) years, so long as a No-Change affidavit and business taxes are submitted to maintain eligibility.
- a. During the first and second year after the certification the business enterprise is required to complete a No-Change Affidavit and submit business taxes for renewal based on its applicable Anniversary date.
  - b. During the third year of certification the business enterprise is required to submit by no later than its Anniversary date: (i) a No-Change affidavit; (ii) copies of its business taxes; (iii) copies of the owner’s(s’) personal taxes; (iii) verification of the owner’s(s’) personal net worth; (iv) a renewal application affidavit; and (v) completion of an on-site review.
  - c. The DSBO, through its Small Business Certification and Contract Management System, will transmit renewal notifications to the applicants four (4) times: at one hundred twenty (120) days; ninety (90) days; sixty (60) days; and thirty (30) days prior to the certification expiration date. However, it is the applicant’s responsibility to maintain current certifications. The completed Renewal Applications will be reviewed in order of receipt.
6. Documentation of any change in ownership or control must have been timely submitted in accordance with Rule V.C.10. to be eligible for renewal of certification.
7. If a Business Enterprise fails to submit all appropriate information or documentation for renewal within sixty (60) days of its Anniversary date, its certification will be considered expired and its name will be removed from the Small Business Certification and Contract

Management System. The applicant will be notified in writing (via email) of expiration. The business enterprise will receive two notifications that its certification is expired and will be notified of the steps required to complete the renewal process.

8. Once an application is deemed expired, the applicant or business enterprise will have sixty (60) days before receiving a revocation letter and the business will be removed from the online public vendor directory.
9. The expired applications and other documents may be purged in accordance with DEDO policy.
10. Applicants are required to notify DSBO within thirty (30) days of any substantive change in ownership or control of their business or the applicant's certification may be revoked.
11. An applicant may request that DSBO withdraw its application without cause and without prejudice prior to the on-site review. Application fees will not be refunded. Documents submitted as a part of a withdrawn application will be purged. Applicants that withdraw their application must start a new application to be considered for certification.

#### D. THIRD-PARTY CHALLENGE PROCEDURES

Any third party may challenge the status of an applicant's certification. Confidentiality of challenging party's identity is to be protected. The challenge must be made in writing (email or formal letter) to the Director or Assistant Director of DSBO. Within its letter, the challenging party must include evidence disputing the eligibility of the certified company based on eligibility requirements. Within ten (10) business days, the Director or the Assistant Director will determine, on the basis of the information provided by the challenging party whether there is reason to evaluate the challenge. DSBO will make all reasonable efforts to keep the identity of the third party anonymous.

1. If the Director or Assistant Director determines that DSBO will not investigate the challenge, the challenged party will be informed in writing and the investigation will be closed. The decision to close the investigation shall be a final determination and the third party may appeal in accordance with D.R.M.C. 28-69 and Rule II.A. and Rule II.B.
2. If the Director or Assistant Director finds reason to investigate the challenge, the following steps will be taken:
  - a. The certified business will be notified in writing of a third-party challenge. This notice will identify and summarize the grounds for the challenge. This notice will require the certified firm to provide the Director or Assistant Director with information or documentation refuting the challenge within the time specified by the Director or Assistant Director.
  - b. The DSBO analyst who processed the challenged business enterprise's initial certification shall not be assigned review of the third-party challenge. If needed the Director or Assistant Director can require an on-site review.

- c. If DSBO determines to revoke the challenged business enterprise, the business enterprise will receive a letter confirming the determination. The challenged enterprise may appeal any determination in accordance with D.R.M.C. 28-69 and Rule II.A. and II.B.
- d. A business enterprise's certification shall remain in effect during the challenge procedure.

E. REVOCATION

Reasons for revocation include graduation, lack of response, third party challenge, expiration, voluntary withdrawal, and change in circumstance. DSBO will indicate in writing why the firm's certification is being revoked.

1. DSBO may revoke a business enterprise's certification for any of the following reasons:
  - a. DSBO shall immediately revoke a certification when an individual owner whose ownership and control of the firm are necessary to the firm's certification dies or is incarcerated;
  - b. Upon the sale or transfer of the business enterprise to a new owner(s);
  - c. If the business entity's ownership or control by a minority or woman owner has changed to the extent that the business is no longer eligible for certification as an MWBE;
  - d. If a business enterprise no longer meets the minimum size standards under Rule IV;
  - e. If due to a third-party challenge, investigation or other DSBO review, including compliance reviews, a business entity is found to be no longer eligible for certification;
  - f. Voluntary withdrawal; or
  - g. Certified firms that are no longer active business entities and applicants that do not respond to requests for updated or new certification information or documentation will be removed from the Small Business Certification and Contract Management System. Reinstatement will require completion of the full certification process.
2. The Business Enterprise will receive a letter of revocation from the Director or Assistant Director with the decision and the reasons for the decision. Any business enterprise that believes that it has been wrongly revoked may submit an appeal as set forth in Rule II.A. and Rule II.B.
3. If a firm's certification is revoked due to a change in ownership or has expired, the firm may reapply for certification at any time by submitting a new application.

4. If a firm is denied certification, they must wait one (1) year before reapplying.

**RULE V. ESTABLISHMENT OF PARTICIPATION GOALS (DSBO ORDINANCE).**

**A. PARTICIPATION GOALS**

The Director in accordance with D.R.M.C. Section 28-58, in collaboration with the User Department, shall assign for each construction, reconstruction and remodeling contract or project, and for each professional design services or construction services contract a participation goal. The Director may also assign goals on individual task orders or work orders issued under a contract. The Director shall consider all relevant and material information provided to the DSBO to set the participation goals, consistent with the methodology set out in D.R.M.C. Section 28-58(a) and (b).

The firms identified to count toward DSBO's established participation goal must be certified by the DSBO in that specified program, and certified in the applicable NAICS code(s) to count toward participation goal. For example, if the project has a x% MWBE Participation goal, the work must be met with certified MWBE firms in order to count towards the goal and commitment.

**B. GOALS PROCEDURES**

The purpose of the following subsections of Rule V is to establish procedures and guidelines for goal-setting and the methodologies established under D.R.M.C. Section 28-58.

**1. GOAL SETTING PROCEDURES.**

- a. User Departments or third-parties required to obtain a goal for a project shall prepare a scope of work and cost estimate and complete a goal request form for submission to the DSBO for a goal assessment. "Third-parties" may include City partners, private entities or owners, or any non-City entity performing construction or other applicable work on a public facility owned or leased by the City. A project presentation by the User Department or third-party proposing the project may be required. The goal request or project presentation may include information on any similarly-scoped project previously submitted to DSBO, as well as the Participation Goal, if any, set by the Director.
- b. Once DSBO receives complete scope of work and cost estimate information it will send the User Department or third-party a written acknowledgement and provide an estimated time for goal determination. Any amounts for force accounts established by the User Department shall not be included in the goal assessment and calculation. The estimated time will be contingent on project type and other factors. DSBO may meet with User Department as part of the assessment during the specified time for determination.
- c. In arriving at the appropriate goal(s) for the project DSBO shall consider all relevant information, including but not limited to the following:

- i. The reasonably known availability and capacity of MWBEs in the specific industries or subindustries associated with proposed projects utilizing directories of certified MWBEs prepared in compliance with law, and the DSBO's information regarding MWBEs that are performing or have performed City work;
  - ii. The City's most current and applicable Disparity Study methodology, or related methodology;
  - iii. Other resources available to the DSBO or other studies undertaken by the City relating to certified MWBE availability and capacity; or
  - iv. Any other project considerations as determined by the Director.
  - v. 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 Section 28-58 of the ordinance.
- d. After DSBO completes its goal review and analysis it shall make a determination and generate a Project Determination Memo for the Director's signature, which will include back-up documentation.
  - e. The DSBO will maintain records and documentation of goal determinations, goal setting procedures, meetings or presentations, if any.
  - f. DSBO will advise the User Department or third-party of the participation goal and distribute the Project Determination Memo to the User Department Executive Director, Contract Administrator and Project Manager.
  - g. The Project Determination Memo is effective for a period of twelve (12) months from the date of the Memo. If the Project Determination Memo expires or if there is a material change in project scope or cost prior to the project advertisement date, then the project shall be resubmitted to DSBO for reassessment prior to advertisement.
  - h. The User Department or third-party is responsible for incorporating the participation goal in the bid or proposal, contract documents, and specifications as applicable.
  - i. The User Department shall include DSBO in the review process of the project bid solicitation or request for proposals prior to publication.

- j. The User Department will notify DSBO of pre-bid or pre-proposal meetings and send DSBO all final solicitation documents. DSBO will be added to any meeting agendas and allotted time to present at the meetings.
2. **FEDERAL REQUIREMENTS.** In addition, the Director shall also set goals for, including but not limited to, Disadvantaged Business Enterprise (“DBE”) goals for federally-funded Denver International Airport (“DEN”) projects as approved by the Federal Aviation Administration (“FAA”). ACDBE goals set for projects as approved by the FAA are set by DEN Commerce Hub and The Federal Highway Administration (“FHWA”) or the Federal Transit Administration (“FTA”) participation goals are set by CDOT and/or the RTD, on the basis of United States Government mandated statutory and/or regulatory authority applicable to those City contracts utilizing in whole or in part funding by the United States Government, including but not limited to the provisions of Title 49, Code of Federal Regulations (“C.F.R.”), Part 23 and 13 C.F.R. Part 1. For the purposes of this Rule, the provisions of Article III, Divisions 1 and 3 of Chapter 28, D.R.M.C. of said federal law, these rules and regulations shall be interpreted consistently so far as possible. But in the event of any contradiction or inconsistency between City and federal legislation or regulation, the federal statute and/or regulation shall control.

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

**A. DEFINED POOL**

- 1. In consultation with the Department Heads of the User Department, the Director shall develop guidelines and criteria for the determination of which contracts shall be included in the SBE Defined Pool Program.
  - a. User Department contacts DSBO for assessment of SBE program.
  - b. In developing a defined selection pool DSBO and the User Department shall consider all relevant information, including but not limited to the following:
    - i. DSBO will assess the reasonably known availability and capacity of SBEs in specific industries or subindustries associated with the proposed projects utilizing directories of certified SBEs prepared in compliance with law and the DSBO’s reports on SBEs having contracts with the City.
    - ii. Other resources available to the DSBO or other studies undertaken by the City relating to certified SBE availability and capacity.
    - iii. Any other project conditions as determined by the Director.
  - c. The certified SBE firm must self-perform no less than thirty (30) percent of the scope of work.
  - d. DSBO may assign an additional SBE utilization requirement, in which case, the certified SBE firm will be required to utilize other certified SBEs as

subcontractors. The certified SBE prime contractor cannot count its own participation towards the additional SBE utilization requirement.

- e. If an additional SBE utilization requirement is assigned, the User Department will be responsible for incorporating the requirement, including any percentage utilization, in the bid or proposal, contract documents, and specifications as applicable.
- f. DSBO will generate a Project Determination Memo, with backup documentation, for the Director's signature.
- g. Once DSBO completes its review and analysis it will distribute a Project Determination Memo to the User Department Executive Director, Contract Administrator and Project Manager.
- h. The Project Determination Memo is effective for a period of twelve (12) months from the date of the Memo. If the Project Determination Memo expires prior to project advertisement date or if there is a material change in project scope or cost prior to the advertisement date, then the project shall be resubmitted to DSBO for reassessment.
- i. The User Department shall include DSBO in the review process of the project bid solicitation or request for proposals prior to publication.
- j. User Department will notify DSBO of pre-bid or pre-proposal meetings and send DSBO all solicitation documents. DSBO will be added to meeting agenda and allotted time to present at the meetings.
- k. Bidders or proposers seeking to submit bids or proposals on such contracts that have been advertised as being within the Defined Selection Pool shall submit such information documenting their certification as an SBE or EBE, as applicable, at the time of bid opening, bid date, or proposal in the case of a competitive selection process, as the Director may require. If SBE submittals are received, the User Department will provide DSBO with the bid or proposal documents for evaluation. DSBO will review bids or proposals to determine whether the bidder or proposer is responsive with regard to SBE requirements. DSBO shall notify the User Department of a responsive or nonresponsive determination and include a formal evaluation summary. Non-responsive bidders or proposers may appeal the Director's determination under Rule II.A., Rule II.B., and D.R.M.C. Section 28-69.
- l. If no SBE submittals are received at the bid or proposal due date, or if the User Department determines the procurement was not competitive, the User Department will notify DSBO in writing. The User Department will determine if the project will be resolicited to the open market.

2. Contracts determined to be within the EBE Defined Selection Pool Program, for which responsive bids or proposals will be accepted only from EBEs, shall generally be contracts with an estimated value of \$100,000 or less.

**B. JOINT VENTURES AND TEAMING AGREEMENTS**

1. If two or more business entities wish to form a joint venture or teaming agreement to bid or propose on a city construction contract, or professional services contract, which proposed joint venture or teaming agreement includes one or more SBEs, then the joint venture or team must submit its joint venture or teaming agreement, signed and executed by all members, to DSBO for review within the time stated in the bid or proposal documents, or if none stated, no later than ten (10) business days prior to bid opening or due date of a proposal. A bid or proposal from a joint venture or proposed team that is not timely submitted or is not satisfactory to DSBO and in compliance with the D.R.M.C. and this Rule shall be deemed non-responsive.
2. The DSBO shall review and approve all contractual agreements regarding the terms and provisions of each joint venture or teaming agreement, including:
  - a. Whether the joint venture or teaming agreement includes provisions adequately detailing the member's respective scopes and extent of each member's responsibility for performing the work described in the agreement;
  - b. Whether the agreement clearly delineates the rights and responsibilities of each member or partner;
  - c. Whether the joint venture or teaming agreement includes an SBE certified firm and provisions for the SBE member to perform a commercially useful function under the contract;
  - d. The proportional allocation of profits and losses to each venture or team partner; no SBE venture partner's liability should ever exceed said partners percentage of revenue earned while a participant in the joint venture or team;
  - e. The method of and responsibility for accounting;
  - f. The method by which disputes are resolved;
  - g. Whether each member's or partner's share in the capital contribution, control, management responsibilities, risks and profits are equal to its ownership interest in the joint venture or team;
  - h. Whether the agreement includes joint management and full integration of work forces by the joint venturers or team members;
  - i. That the joint venture or teaming agreement shall continue for, at a minimum, the duration of the project; or

- j. Any additional or further information required by the Director as set forth in the bid documents or otherwise.
- 3. The joint venture or teaming agreement and each member of the joint venture or team shall provide the DSBO access to all records pertaining to joint venture or teaming agreements before and after the award of a contract in order to reasonably assess compliance with the D.R.M.C. and these Rules. Each member of the joint venture or team must comply with all requests for documentation including but not limited to organization charts, invoices, payment information, business check registers and all other documentation as requested.
- 4. If, after the award of a City 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 DSBO have not been complied with, then such member may seek DSBO's assistance with review and mediation of the issue. The request for review must be made in writing.
- 5. If, after the award of a contract, a dispute arises between members of the joint venture or team regarding performance of work or provision of services or supplies on the eligible project, then such member may seek DSBO's assistance with review and mediation of the issue. The request for review must be made in writing.
- 6. Within twenty (20) calendar days of receipt of a request for review, if the dispute has not been resolved informally among the parties, DSBO will recommend and schedule an informal meeting among the parties.
- 7. DSBO shall have the authority to make other recommendations in an attempt to resolve the dispute.
- 8. In the event that DSBO's informal procedures do not resolve the disputes, the DSBO shall refer the dispute to a qualified outside mediator, contingent upon the consent of the disputing parties, with the costs to be borne by the disputing parties.

C. COMPLIANCE PLANS AND UTILIZATION PLANS

- 1. D.R.M.C. Section 28-211 of the SBE/EBE Ordinance provides that for contracts secured through a competitive selection process rather than a competitive bid process, the Director in collaboration with the User Department may require proposers to address the minimum participation by means of a Utilization Plan. Such a plan allows a contract to address SBE/EBE participation by means of commitments to utilize SBE/EBEs for Project work at the point where the project is sufficiently defined and the process of procuring the subcontractors to perform the work is about to begin. The development, scope, and utilization of such plans will be governed by the D.R.M.C., these rules and the following considerations and requirements.
- 2. Basis for Determination and Development of Utilization Plan. Unless otherwise authorized in writing by the Director, a User Department may only allow proposers to address a participation goal by means of a utilization plan under one or more of the following conditions which include but are not limited to:

- a. The project solicitation must be issued under the authority of either Section 2.3.3 (A) or 2.11.3 (B) of the City Charter, or under other City authority;
  - b. The procurement method or contract type, wherein the project scope may not be complete or sufficiently complete allowing for final competitive pricing proposal; or
  - c. The project solicitation must not require a price proposal for the completion of work upon which a contract award will be made.
3. The Director, in collaboration with the User Department, may require separate minimum utilization in a single project for professional services and construction, or may require a unitary, aggregate minimum utilization, and may further require that the utilization plan address both the professional service and construction minimum utilization, only the construction minimum utilization, only the professional service minimum utilization, or any unitary minimum utilization.
4. Solicitation Process. The Director, in collaboration with the User Department, may require that submission and review of proposed utilization plans occur (i) at the time of proposal submission; (ii) after the conclusion of the solicitation process as a component of contract negotiations and award; or (iii) at some other time as required by the Director and User Department. The submittal timing requirements for the proposed Utilization Plan will be defined in the procurement documents. Failure to comply with any deadlines established by the Director regarding the Utilization Plan may, at the sole discretion of the Director, result in no further consideration of the proposed Utilization Plan during the selection process.
5. Elements of a Utilization Plan. A proposed Utilization Plan may address the following elements as may be further defined in the solicitation documents:
- a. Identify key personnel (name, title, email, and phone number) and their duties as it relates to the execution to the components of the Utilization Plan, specifically:
    - B2GNow (Small Business Certification and Contract Management System) User;
    - Project Manager(s);
    - Controller;
    - Superintendent (if applicable); and
    - Outreach/Community Engagement Coordinator (if applicable).
  - b. Provide creative strategies to incorporate new SBE/EBE partners inclusive of but not limited to: provide an ongoing list of certified firms that provide capability statements and which of those certified firms were contacted regarding solicitations related to this project;
  - c. Provide details of small business initiatives, technical assistance and support services; such as, bonding assistance, mentoring programs, joint ventures, etc. that may be utilized on the project;

- d. Define how SBE/EBE participation will be solicited, the subcontracting process, program and incorporated into the Proposer's overall procurement process and retain documentation of such solicitation efforts such as distribution lists for invitation to bids, list of bidders, and awardees; how bid selections are made and keeping a record of each
  - e. Outline the debriefing process; how unsuccessful bidders are notified; and documentation of reasoning is retained
  - f. Outline the communication process and involvement efforts of the SBE/EBE subcontractors to ensure alignment of scheduling, safety requirements, owner direction, and performance expectations. Please include the mediation processes should performance issues or prompt payment disputes arise.
  - g. Provide examples of up to a maximum of 5 projects where the Proposer has been successful in promoting the participation of small, minority and women-owned businesses. Please include what the contract participation goal was and if you met and/or exceeded that goal. Also, provide a list of certified firms that were utilized and any supportive services/technical assistance, i.e. bonding assistance, mentor-protégé programs, that were provided to small businesses to assist with meeting the goal.
6. Approval of Utilization Plan.
- a. Upon receipt of a proposed Utilization Plan, DSBO, as part of its review of project proposals, will review and assess the proposed plan and may provide comments, which the selected proposer will be required to address. The selected proposer shall coordinate comment resolution with DSBO and re-submit a revised Utilization Plan for DSBO's review and approval prior to contract execution. Once the DSBO has approved the Utilization Plan, the DSBO will issue written notification to the User Department and its Project Manager that the Utilization Plan has been approved. In no event shall a contract be executed or continue without a Utilization Plan approved by DSBO.
  - b. If a Utilization Plan is required only after contract award and the Director formally rejects a proposed Utilization Plan, the Director shall notify the Department head in writing of its determination and such determination shall result in no further consideration of the contractor's proposal, or result in termination of the contract for cause, in the event a contract has been awarded. In no event shall a contract be executed or continue without a Utilization Plan approved by the Director.
7. Sanctions. The Contractor may be subject to sanctions in accordance with D.R.M.C. Section 28-227 for failure to comply with any material term or condition of an approved Utilization Plan or applicable provision of the SBE Ordinance or any Rules and Regulations promulgated pursuant to the SBE Ordinance, including failure to

satisfactorily address the minimum utilization, maintain participation commitments or otherwise comply with any applicable requirements.

D. EVALUATION OF SBE PARTICIPATION - RESPONSIVENESS

1. In accordance with the provisions of the SBE Ordinance, DSBO will evaluate each bid or proposal to determine responsiveness related to SBE Ordinance requirements. In determining whether a bidder's committed level of participation meets the stated SBE minimum utilization, DSBO shall base its calculation on the total base bid amount, not including any listed alternates, of each bid as follows:
  - a. The bidder's total base bid amount will be multiplied by the SBE percentage established for the project to determine the exact dollar amount of required SBE minimum utilization for the Project. This amount will then be compared against the exact dollar amounts for the SBE commitment for participation by the bidder. If the total dollar amount of the minimum utilization listed meets or exceeds the established SBE dollar amount minimum utilization, then DSBO will determine that the minimum utilization has been met, and the proposed commitment will be incorporated into the contract.
  - b. In addition, DSBO will determine the exact commitment percentage by dividing the dollar amount listed for each additional SBE by the total base bid dollar amount submitted by the bidder. The individual percentages when totaled for all listed SBEs will establish the total committed percentage level of SBE utilization that the bidder must comply with throughout the term of the contract including amendments. In all cases, the committed percentage level of SBE participation must equal or exceed the assigned SBE minimum utilization for the Project. If the committed percentage does not meet the required SBE minimum utilization for the project, then DSBO may find the proposer nonresponsive in accordance with D.R.M.C. Section 28-213, Section 28-219 and Section 28-229.
  - c. In providing the exact dollar amount of participation for each listed SBE, a bidder should take care never to round up in determining whether or not the total of these amounts meets or exceeds the established utilization. The utilization must be met or exceeded by dollar amounts and percentages in order for DSBO to determine that the bidder has met or exceeded the applicable SBE utilization.
  - d. Responsiveness with the SBE minimum utilization at bid opening will be determined on the base bid alone. If a bid contains alternates, minimum utilizations contained in any alternate will not count towards satisfaction of the minimum utilization. However, should any designated alternate be selected by the City for inclusion in the contract ultimately awarded, the SBE minimum utilization committed at bid time on the base bid will also apply to the selected alternates and must be maintained throughout the term of the contract on the total contract amount, including any alternate work, change orders, change directives, amendments or other modifications to the contract value. Although such participation will not be considered in evaluating bids, bidders are urged to

consider participation in preparing bids for designated alternates.

- e. For guidance regarding participation for regular dealers, brokers, manufacturers see Rule VI.F.2.

E. EVALUATION OF SBE REQUIREMENTS

1. The User Department issuing a solicitation will develop and establish submission deadlines, evaluation criteria and assessment criteria in consultation with DSBO associated with SBE utilization, which will be included in the solicitation documents.
2. Subject to User Department authority, DSBO will evaluate a proposer's submission based on criteria outlined in the procurement documents. If the required documentation is not submitted, the proposal may be found non-responsive.

F. SBE PARTICIPATION

1. For all contracts, except if otherwise stated in the solicitation documents, if an SBE does not perform a commercial useful function for at least 30% of the total value of its contract with its own work force, or the SBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, it is presumed that it is not performing a commercially useful function. When an SBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward additional SBE participation only if the SBE's subcontractor is itself an SBE. Work that an SBE subcontracts to a non-SBE firm does not count toward SBE participation. DSBO may perform site reviews to verify SBEs are performing a commercially useful function at DSBO's discretion. SBEs shall comply with all requests for related documentation associated with such site visit.
2. Contracts with SBE minimum utilization for materials or supplies shall count as follows:
  - a. If the materials or supplies are obtained from an SBE manufacturer the utilization may count one-hundred (100) percent of the cost of the materials or supplies toward the SBE minimum utilization. A manufacturer is a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.
  - b. If the materials or supplies are purchased from an SBE regular dealer the utilization may count no more than sixty (60) percent of the cost of the materials or supplies toward the SBE minimum utilization. A regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business.

- i. To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question.
  - ii. A firm may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis.
  - iii. Packagers, brokers, manufacturers' representatives, or other firms that arrange or expedite transactions are not regular dealers.
3. With respect to materials or supplies purchased from an SBE, which is neither a manufacturer nor a regular dealer, utilization shall count as the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site toward SBE minimum utilization provided that the fees are reasonable and not excessive as compared with fees customarily allowed for similar services. No portion of the cost of the materials and supplies themselves shall count toward SBE minimum utilization.
4. The minimum utilization credited for the provisions of materials and supplies (e.g., whether a firm is acting as a regular dealer or a transaction expediter) is determined on a contract-by-contract basis.

G. SANCTIONS

The Contractor may be subject to sanctions in accordance with D.R.M.C. Section 28-227 and Section 28-229 for failure to satisfactorily address the minimum utilization requirements, maintain participation commitments or otherwise comply with any applicable requirements; or for failure to comply with any material term or condition of an approved Utilization Plan or other applicable provision of the SBE/EBE Ordinance or any Rules and Regulations promulgated pursuant to the SBE/EBE Ordinance.

**RULE VII. COMPLIANCE WITH PARTICIPATION GOALS OR DEMONSTRATION OF GOOD FAITH EFFORTS (MWBE ORDINANCE)**

The DSBO shall (i) develop such forms, affidavits, and other documentation as the Director deems appropriate for use by bidders or proposers regarding compliance with participation goals or demonstration of good faith efforts; (ii) determine the information required from the bidder or proposer, MWBE, or others as the Director deems appropriate for such compliance with participation goals or demonstration of good faith efforts; and (iii) determine the reviews, examinations, and assessments appropriate for such compliance with participation goals or demonstration of good faith efforts.

A. JOINT VENTURES AND TEAMING AGREEMENTS

1. If two or more business entities wish to form a joint venture or enter into a teaming agreement to bid or propose on a city construction contract, or professional services contract, which proposed joint venture or teaming agreement includes one or more MWBEs, then the joint venture or team must submit its (i) joint venture or teaming agreement signed and executed by all members; (ii) joint venture affidavit or teaming agreement affidavit; and (iii) joint venture eligibility form or teaming agreement eligibility form, as applicable, to DSBO for review within the time stated in the bid or proposal documents, or if none stated, no later than ten (10) business days prior to bid opening or due date of proposal. A bid or proposal from a joint venture or proposed team that is not timely submitted or not satisfactory to DSBO and in compliance with the D.R.M.C. and this Rule shall be deemed non-responsive.
2. The DSBO shall review and approve all contractual agreements regarding the terms and provisions of each joint venture or teaming agreement, including:
  - a. Whether the joint venture or teaming agreement includes provisions adequately detailing the member's respective scopes and extent of each member's responsibility for performing the work described in the agreement;
  - b. Whether the agreement clearly delineates the rights and responsibilities of each member or partner.
  - c. Whether the joint venture or teaming agreement includes an MWBE certified firm and provisions for the MWBE member to perform a commercially useful function under the contract;
  - d. The proportional allocation of profits and losses to each venture or team partner; no MWBE member's or partner's liability should ever exceed said partners percentage of revenue earned while a participant in the joint venture or team;
  - e. The method of and responsibility for accounting;
  - f. The method by which disputes are resolved;
  - g. Whether each member's or partner's share in the capital contribution, control, management responsibilities, risks and profits are equal to its ownership interest in the joint venture or team;
  - h. Whether the agreement includes joint management and full integration of work forces by the joint venturers or team members;
  - i. That the joint venture or teaming agreement shall continue for, at a minimum, the duration of the project; or
  - j. Any additional or further information required by the Director as set forth in the bid documents or otherwise.
3. The joint venture or team and each member of the joint venture or team shall provide the

DSBO access to review all records pertaining to joint venture or teaming agreements before and after the award of a contract in order to reasonably assess compliance with the D.R.M.C. and these Rules. Each member of the joint venture or team must comply with all requests for documentation including but not limited to organization charts, invoices, payment information, business check registers and all other documentation as requested.

4. If, after the award of a City 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 DSBO have not been complied with, then such member may seek DSBO's assistance with review and mediation of the issue. The request for review must be made in writing.
5. If, after the award of a contract, a dispute arises between members of the joint venture regarding performance of work or provision of services or supplies on the eligible project, then such member may seek review and mediation of the issue before the DSBO. The request for review must be made in writing.
6. Within twenty (20) calendar days of receipt of a request for review, if the dispute has not been resolved informally among the parties, DSBO will recommend and schedule an informal meeting among the parties.
7. DSBO shall have authority to make recommendations in an attempt to resolve the dispute.
8. In the event that DSBO's informal procedures do not resolve the disputes, the DSBO shall refer the dispute to a qualified outside mediator, contingent upon the consent of the interested parties, the costs to be borne by the interested parties.

**B. COMPLIANCE PLANS AND UTILIZATION PLANS**

1. D.R.M.C. Section 28-62(b) of the MWBE Ordinance provides that for contracts secured through a competitive selection process rather than a competitive bid process, the Director in collaboration with the User Department, may require proposers to address the participation goal by means of a Utilization Plan. Such a plan allows a contract to address the participation goal by means of commitments to utilize MWBEs for Project work or by the demonstration of a good faith effort at the point where the project is sufficiently defined and the process of procuring the subcontractors to perform the work is about to begin. The development, scope, and utilization of such plans will be governed by the D.R.M.C., these Rules, and the following considerations and requirements.
2. Basis for Determination and Development of Utilization Plan. Unless otherwise authorized in writing by the Director, a User Department may only allow proposers to address a participation goal by means of a Utilization Plan under one or more of the following conditions which include but are not limited to:
  - a. The project solicitation must be issued under the authority of either Section 2.3.3 (A) or 2.11.3 (B) of the City Charter, or under other City authority;
  - b. The procurement method or contract type, wherein the project scope may not be complete or sufficiently complete allowing for final competitive pricing proposal;

or

- c. The project solicitation must not require a price proposal for the completion of work upon which a contract award will be made.
3. The Director, in collaboration with the User Department, may require separate goals in a single project for professional services and construction, or may require a unitary, aggregate goal, and may further require that the Utilization Plan address both the professional service and construction goals, only the construction goal, only the professional service goal, or any unitary goal.
  4. Solicitation Process. The Director, in collaboration with the User Department, may require that submission and review of proposed Utilization Plans occur (i) at the time of proposal submission; (ii) after the conclusion of the solicitation process as a component of contract negotiations and award; or (iii) at some other time as required by the Director and the User Department. The submittal timing requirements for the proposed Utilization Plan will be defined in the procurement documents. Failure to comply with any submittal deadlines established by the Director regarding Utilization Plans may, at the sole discretion of the Director, result in no further consideration of the proposed utilization plan during the selection process.
  5. Elements of a Utilization Plan. A proposed Utilization Plan may address the following elements as may be further defined in the solicitation documents:
    - a. Identify key personnel (name, title, email, and phone number) and their duties as it relates to the execution to the components of the Utilization Plan, specifically:
      - B2GNow (Small Business Certification and Contract Management System) User,
      - Project Manager(s),
      - Controller,
      - Superintendent (if applicable), and
      - Outreach/Community Engagement Coordinator (if applicable).
    - b. Provide creative strategies to incorporate new MWBE partners inclusive of but not limited to: provide an ongoing list of certified firms that provide capability statements and which of those certified firms were contacted regarding solicitations related to this project;
    - c. Provide details of small business initiatives, technical assistance and support services; such as, bonding assistance, mentoring programs, joint ventures, etc. that may be utilized on the project;
    - d. Define how MWBE participation will be solicited, the subcontracting process, program and incorporated into the Proposer's overall procurement process and retain documentation of such solicitation efforts such as distribution lists for invitation to bids, list of bidders, and awardees; how bid selections are made and keeping a record of each

- e. Outline the debriefing process; how unsuccessful bidders are notified; and documentation of reasoning is retained
- f. Outline the communication process and involvement efforts of the MWBE subcontractors to ensure alignment of scheduling, safety requirements, owner direction, and performance expectations. Please include the mediation processes should performance issues or prompt payment disputes arise.
- g. Provide examples of up to a maximum of 5 projects where the Proposer has been successful in promoting the participation of small, minority and women-owned businesses. Please include what the contract participation goal was and if you met and/or exceeded that goal. Also, provide a list of certified firms that were utilized and any supportive services/technical assistance, i.e. bonding assistance, mentor-protégé programs, that were provided to small businesses to assist with meeting the goal.

6. Approval of Utilization Plan.

- a. Upon receipt of a proposed Utilization Plan, DSBO, as part of its review of project proposals, will review and assess the proposed plan and may provide comments, which the selected proposer will be required to address. The selected proposer shall coordinate comment resolution with DSBO and re-submit a revised Utilization Plan for DSBO's review and approval prior to contract execution. Once the DSBO has approved the Utilization Plan, the DSBO will issue written notification to the User Department and its Project Manager that the Utilization Plan has been approved. In no event shall a contract be executed or continue without a Utilization Plan approved by DSBO.
- b. If a utilization plan is required only after contract award and the Director formally rejects a proposed utilization plan, the Director shall notify the Department head in writing of its determination and such determination shall result in no further consideration of the contractor's proposal, or result in termination of the contract for cause, in the event a contract has been awarded. In no event shall a contract be executed or continue without a utilization plan approved by the Director.

7. Sanctions. The Contractor may be subject to sanctions in accordance with D.R.M.C. Section 28-74, for failure to comply with any material term or condition of an approved utilization plan or applicable provision of the MWBE Ordinance or any Rules and Regulations promulgated pursuant to the MWBE Ordinance, including failure to satisfactorily address the participation goal, maintain participation commitments or otherwise comply with any applicable requirements.

C. SPECIFIC REQUIREMENTS FOR COMPLIANCE WITH GOOD FAITH EFFORTS FOR CONTRACTS FOR PROFESSIONAL SERVICES, CONSTRUCTION, RECONSTRUCTION, AND REMODELING

1. If the bidder or proposer has not fully committed to the participation goal 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, 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 Rule VII.C.1.a. and any additional criteria that the Director may establish by Rule and Regulation or Ordinance. Good faith efforts must be demonstrated to be substantive and not merely for formalistic compliance with the Ordinance and the Rules. The scope and adequacy of the efforts will be considered in determining whether the bidder or proposer has achieved a good faith effort.
  - a. The statement of good faith efforts shall include a specific response and verification with respect to each of the following good faith effort categories. 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:
    - i. If 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-proposal meetings is not designated as mandatory, proposers are responsible for the information provided at these meetings whether or not they attend.
    - ii. 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 the 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 to follow up initial solicitations.
    - iii. 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 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.

- iv. 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.
- v. The bidder or proposer must negotiate in good faith with interested MWBEs and provide written documentation of such negotiation with each such MWBE.
- vi. 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.
- vii. 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, manufacturers' representatives, brokers 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 D.M.R.C. 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.
- viii. 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.

- ix. 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.
  - x. The bidder or proposer must use the DSBO MWBE directories to identify, recruit, and place MWBEs.
- b. 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.
  - c. The good faith effort factors in D.R.M.C. Section 28-60(b) shall also apply to conditions arising under D.R.M.C. 28-74(c).
2. Proposers or contractors are required to make continuous good faith efforts throughout the contract term and document these efforts. Good faith efforts and supporting documents will be reviewed prior to contract closeout.
  3. The contractor is responsible for its good faith efforts as well as managing MWBE participation towards meeting the MWBE goal commitment. The contractor is responsible for submitting a formal response to their good faith efforts and provide documentation for DSBO review and approval.
  4. The contractor must cooperate and provide all necessary documentation as requested by DSBO. DSBO may require meetings with the contractor regarding good faith effort requirements.
  5. DSBO will provide the contractor its decision in a formal correspondence to the contractor, with a copy to the User Department, after a review of the contractor's good faith effort response and supporting documentation. If DSBO finds inadequacies in a demonstration of good faith efforts, the contractor is entitled to an informal meeting with DSBO in accordance with D.R.M.C. Section 28-61 or Section 28-65.
  6. If during contract performance a good faith effort is rejected, the contractor may be found in violation of the MWBE Ordinance and sanctions may apply at Director's discretion and in consultation with the User Department. D.R.M.C. Section 28-74.

**D. EVALUATION OF MWBE PARTICIPATION – RESPONSIVENESS**

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

as follows:

- a. The bidder's total base bid amount will be multiplied by the MWBE goal percentage established for the project to determine the exact dollar amount of required participation for the Project. This amount will then be compared against the exact dollar amounts for the MWBE commitment for participation by the bidder. If the total dollar amount of participation listed meets or exceeds the established MWBE participation goal dollar amount listed, then DSBO will determine that the goal has been met, and the proposed commitment will be incorporated into the contract.
- b. In addition, DSBO will determine the exact commitment percentage for each listed MWBE by dividing the dollar amount listed for each MWBE by the total base bid dollar amount submitted by the bidder. The individual percentages when totaled for all listed MWBEs will establish the total committed percentage level of MWBE participation that the bidder must comply with throughout the term of the contract, including amendments. In all cases, the committed percentage level of MWBE participation must equal or exceed the assigned MWBE goal for the Project, unless a good faith effort is approved. If the committed percentage does not meet the required MWBE goal for the project, then good faith efforts will apply, D.R.M.C. Section 28-58.
- c. In providing the exact dollar amount of participation for each listed MWBE, a bidder should take care never to round up in determining whether or not the total of these amounts meets or exceeds the established percentage goal. The goal must be met or exceeded by dollar amounts and percentages in order for DSBO to determine that the bidder has met or exceeded the applicable MWBE goal and is therefore responsive.
- d. Responsiveness with the MWBE goal at bid opening or proposal submission will be determined on the base bid alone. If a bid contains alternates, participation contained in any alternate will not count towards satisfaction of the participation goal. However, should any designated alternate be selected by the City for inclusion in the contract ultimately awarded, the MWBE goal percentage level committed at the time of bid on the base bid amount will also apply to the selected alternates and must be maintained for the entire term of the contract on the total contract amount, including any alternate work, change orders, change directives, amendments or other modifications to the contract value. Although such participation will not be considered in evaluating bids, bidders are urged to consider participation in preparing bids for designated alternates.
- e. For guidance on counting participation for suppliers, brokers, manufacturers see Rule VII.F.2., MWBE Participation below.

E. EVALUATION OF CERTAIN MWBE REQUIREMENTS.

1. For selected procurements the User Department may establish, in coordination with DSBO, submission deadlines, evaluation criteria and assessment criteria associated with

certain MWBE program requirements as may be applicable, separate from and in addition to participation goals. The MWBE program requirements will be included in the solicitation documents. DSBO will evaluate MWBE requirements based on criteria outlined in the solicitation documents. If the proposer fails to meet MWBE program requirements, the proposal may be found non-responsive.

2. If an evaluation panel is utilized by the procuring User Department, DSBO may, subject to applicable User Department authority, participate on the panel in reviewing and assessing compliance with MWBE program requirements separate from participation goals.
3. Subject to User Department authority and procedures, DSBO will provide an evaluation summary or scoring justification to the procuring User Department for solicitations on which DSBO participates, and retain copies of such.
4. The procuring User Department will provide DSBO copies of any award notifications.

F. COUNTING MWBE PARTICIPATION.

1. When an MWBE participates in a contract, DSBO will count only the value of the work actually performed by the MWBE toward MWBE goals.
  - a. Count the entire amount of that portion of a contract that is performed by the MWBE's own forces. Include the cost of supplies and materials obtained by the MWBE for the work of the contract, including supplies purchased or equipment leased by the MWBE (except supplies and equipment the MWBE subcontractor purchases or leases from the prime contractor or its affiliate).
  - b. Count the entire amount of fees or commissions charged by an MWBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a contract, toward MWBE goals, provided DSBO determines the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.
  - c. When an MWBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward MWBE participation only if the MWBE's subcontractor is itself a MWBE. Work that a MWBE subcontracts to a non-MWBE firm does not count toward MWBE participation.
  - d. When an MWBE performs as a participant in a joint venture, count a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the MWBE performs with its own forces toward MWBE participation.
  - e. Count expenditures to a DBE contractor toward DBE goals only if the DBE is performing a commercially useful function on that contract.

2. For all contracts, except CM/GC, if an MWBE does not perform a commercially useful function for at least 30% of the total value of its contract with its own work force, or the MWBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, it is presumed that it is not performing a commercially useful function. When an MWBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward MWBE goals only if the MWBE's subcontractor is itself an MWBE. Work that an MWBE subcontracts to a non-MWBE firm does not count toward MWBE goals. DSBO may perform site reviews to verify MWBEs are performing a commercially useful function at DSBO's discretion. The contractors and its MWBE subcontractors shall comply with all requests for related documentation associated with such site visit.
3. Utilization of MWBEs for materials or supplies toward the MWBE goal shall be counted as follows:
  - a. If the materials or supplies are obtained from an MWBE manufacturer, then one-hundred (100) percent of the cost of the materials or supplies count toward an MWBE goal. A manufacturer is a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.
  - b. If the materials or supplies are purchased from an MWBE regular dealer, then sixty (60) percent of the cost of the materials or supplies count toward an MWBE goal.
    - i. A regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business.
    - ii. To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question.
    - iii. A person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis.
    - iv. Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers.

- c. With respect to materials or supplies purchased from an MWBE, which is neither a manufacturer nor a regular dealer, the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site, shall count toward MWBE goals, provided that the fees are determined to be reasonable and not excessive as compared with fees customarily allowed for similar services. No portion of the cost of the materials and supplies themselves shall be counted toward MWBE goals, however.
  - d. The utilization credited toward the provisions of materials and supplies (e.g., whether a firm is acting as a regular dealer or a transaction expediter) must be determined on a contract-by-contract basis.
4. When a firm's certification is revoked in accordance with Rule IV.E., or for other reasons determined by the Director, thereby rendering it an otherwise ineligible MWBE/SBE/EBE firm on a city contract, its continued performance counts toward MWBE/SBE/EBE participation as follows:
- a. When a prime contractor has made a commitment to utilizing the ineligible firm, or the City has made a commitment to utilizing a MWBE prime contractor, but an agreement has not been executed and submitted to DSBO prior to the date DSBO issued the certification-revocation letter, the ineligible firm will not count toward the contract participation commitment. The prime contractor or City must meet its contract participation commitment with an eligible certified MWBE firm or demonstrate it has made a good faith effort to do so.
  - b. When a prime contractor has executed and submitted a letter of intent with the ineligible firm prior to the date DSBO issued the certification-revocation letter, the prime contractor may continue to use the firm on the contract and may continue to receive credit toward its contract participation commitment for the firm's work.
  - c. In the case where the City has executed a prime contract to a MWBE firm that was later ruled ineligible, the portion of the ineligible firm's performance of the contract remaining after the date DSBO has issued the revocation letter shall not count toward the participation commitment. The prime contractor must meet its contract participation commitment with an eligible MWBE firm on the remaining contract value or demonstrate good faith efforts.
    - i. In the case where the City has executed a prime on-call contract to a MWBE firm that was later ruled ineligible, if a task order or work order is executed prior to the date DSBO issued the revocation letter, then the work performed by the ineligible firm will continue to count toward meeting its participation commitment for the duration of the executed task order or work order. Conversely, if a task order or work order is executed after the date DSBO issued the revocation letter, then work performed by

the ineligible firm shall not count towards the participation commitment for the task order or work order.

- d. *Exception:* If the MWBE ineligibility is caused solely by the firm's having exceeded the size standard ("graduated") during the performance of the contract, whether as prime contractor or subcontractor, its post-revocation participation on that contract will continue to count toward participation commitment if the work to be performed by the MWBE was bid or proposed to the City prior to the date DSBO issued the certification-revocation letter.
- e. In the case of SBE Defined Pool contracts, if the SBE firm becomes ineligible during the performance of the contract, its post-revocation participation on that contract will continue to count toward its self-performance commitment if the work to be performed by the SBE was bid or proposed to the City prior to the date DSBO issued the certification-revocation letter.

#### G. SANCTIONS

The Contractor may be subject to sanctions in accordance with D.R.M.C. Section 28-74 and Section 28-76 for failure to satisfactorily address the participation goal, maintain participation commitments or otherwise comply with any applicable requirements; or for failure comply with any material term or condition of an approved Utilization Plan, or applicable provision of the MWBE Ordinance or any Rules and Regulations promulgated pursuant to the MWBE Ordinance.

#### **RULE VIII. TERMINATION, SUBSTITUTION, OR REDUCTION IN SCOPE OF MWBEs, SBEs, or EBEs**

- A. A contractor that has been awarded a contract based upon a given level of MWBE, SBE, or EBE participation, or has duly added an additional MWBE, SBE, or EBE subcontractor to the contract, but intends to substitute or terminate an MWBE or SBE subcontractor must comply with D.R.M.C. Section 28-73 under MWBE Ordinance, or D.R.M.C. Section 28-226 under the SBE Ordinance, and this Rule regarding the intended substitution or termination. This includes, but is not limited to, instances in which a contractor seeks to perform work originally designated for an MWBE, SBE, or EBE subcontractor with its own forces or those of an affiliate, with a non-MWBE, non-SBE, or non-EBE firm, or with another MWBE, SBE, or EBE firm. At all times DSBO and the User Department will use best efforts or keep the other fully informed of the circumstances of any proposed termination or substitution.
- B. In the event that a contractor or consultant intends to substitute or terminate an MWBE, SBE, or EBE firm, or otherwise modifies or eliminates all or a portion of work attributable to an MWBE, SBE, or EBE, except in cases where directed by the City, the following must be completed:
  - 1. The contractor must provide notice in writing to the MWBE, SBE, or EBE subcontractor, copying DSBO and the User Department including the project manager, of its intent to request to terminate or substitute, and the reason for the request.

2. The contractor must give the MWBE, SBE, or EBE subcontractor at least five (5) business days to respond to the contractor's notice.
3. The DSBO must provide concurrence and the reasons therefore stated in a written notification with a copy to the User Department including the project manager 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 on a whole based on the following factors:
  - a. The MWBE, SBE, or EBE subcontractor fails or refuses to execute a written contract;
  - b. The MWBE, SBE, 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 MWBE or SBE subcontractor to perform its work results from the bad faith or discriminatory action of the contractor;
  - c. The MWBE, SBE, or EBE subcontractor fails or refuses to meet the contractor's reasonable, nondiscriminatory bond requirements or insurance requirements;
  - d. The MWBE, SBE, or EBE subcontractor becomes bankrupt, insolvent, or exhibits credit unworthiness;
  - e. The MWBE, SBE, or EBE subcontractor is ineligible to work on City projects because of suspension or debarment;
  - f. The non-City owner or contractor has determined that the MWBE, SBE, or EBE subcontractor is not a responsible contractor;
  - g. The MWBE, SBE, or EBE subcontractor voluntarily withdraws from the project and provides written notice of its withdrawal;
  - h. The MWBE's, SBE's, or EBE's work cannot be counted toward participation in accordance with these Rules and the MWBE Ordinance or the SBE Ordinance;
  - i. An MWBE, SBE, or EBE owner dies or becomes disabled resulting in the MWBE's, SBE's, or EBE's inability to perform or complete its work on the contract; or
  - j. Other documented good cause that the DSBO in coordination with User Department determines compels the termination of the MWBE, SBE, or EBE subcontractor.
5. The MWBE, SBE, or EBE subcontractor shall be provided the opportunity to advise DSBO, the User Department and the contractor of the reasons, if any, why it objects to

the proposed termination, and why 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 no longer than five (5) business days.

6. In addition to post-award substitutions or terminations, the provisions of this Rule may apply to reductions in scope of work and pre-award deletions of or substitutions affecting MWBE, SBE, or EBE firms by bidders or proposers prior to contract execution.
- C. If DSBO concurs with the contractor's request to substitute, terminate or reduce the scope of work of the MWBE, SBE, or EBE subcontractor, the contractor must comply with the good faith efforts requirements to replace the terminated MWBE, SBE, or EBE subcontractor with another MWBE, SBE, or EBE firm certified to perform the scope of work.
- D. If a contractor substitutes or terminates the MWBE, SBE, or EBE subcontractor or reduces the scope of work of the MWBE, SBE, or EBE subcontractor, without first complying with this section, DSBO may find the contractor in violation of D.R.M.C. Section 28-73 and this Rule, and the contractor may be subject to enforcement and sanctions.

#### **RULE IX. SPECIFIC REQUIREMENTS FOR COMPLIANCE WITH CONTRACTOR PROMPT PAYMENT**

All contractors and consultants shall promptly render payment to all MWBE, SBE, or EBE subcontractors, subconsultants, joint venturers, suppliers, manufacturers, manufacturer's representatives and brokers regardless of tier on a contract as required under this section as follows:

- A. The contractor or consultant and all obligated contractors shall have thirty-five (35) days to pay its respective MWBE, SBE, or EBE subcontractors following receipt of a responsive payment application or invoice for completed and accepted work. The MWBE, SBE, or EBE subcontractor will submit invoice for payment to the contractor with all submittal requirements as required by the contractor. Receipt of the MWBE, SBE, or EBE invoice, acceptance of the invoice by the contractor, and acceptance of all required work shall begin the 35-day deadline
- B. The contractor will have ten (10) days, or a reasonable time agreed upon between the contractor and subcontractor, from receipt of the MWBE, SBE, or EBE payment application or invoice to approve or reject the application or invoice.
  1. If the contractor rejects the MWBE, SBE, or EBE application or invoice, the contractor must notify the MWBE, SBE, or EBE of the deficiency or dispute in writing, including the specific bases for rejection and supporting documentation, if any, and with sufficient information to clarify and resolve the dispute or deficiency, within 10 days, or some other reasonable agreed upon time, from receipt of the MWBE, SBE, or EBE invoice.
  2. If the contractor fails to notify the MWBE, SBE, or EBE of the dispute or deficiency within 10 days, or some other reasonable agreed upon time, of receipt of the application or invoice, the contractor is required to pay the MWBE, SBE, or EBE invoice within thirty-five (35) days of the date of receipt of the application or invoice.

3. If the contractor notifies the MWBE, SBE, or EBE of the dispute or deficiency within 10 days, or some other reasonable agreed upon time, of receipt of the application or invoice, the 35-day deadline begins once the deficiency or discrepancy is resolved.
- C. If there is no dispute or deficiency regarding the application or invoice and the invoice is approved by the contractor, and all MWBE, SBE, or EBE work has been accepted, then the contractor has 35 days from the date of the invoice to pay invoice, less any retainage owed, if applicable. Payment to the MWBE, SBE, or EBE subcontractor is required regardless of whether the contractor has been paid by the City or other private owner.
- D. The contractor must report payments made to the MWBE, SBE, or EBE subcontractors to DSBO on a monthly basis by no later than the 15<sup>th</sup> of the month.
- E. MWBE, SBE, or EBE subcontractors must confirm payments for work that was accepted and approved by the contractor on a monthly basis, or report any issues or disputes, including but not limited unpaid invoices, by no later than the 20<sup>th</sup> of the month.
- F. The contractor is required to respond to disputes or issues within three (3) business days. If disputes or issues are not resolved after 3 business days, DSBO may assist with resolution under Rule XI.
- G. Failure to comply with the above may constitute cause to withhold payment from the contractor until payment to the MWBE, SBE, or EBE is satisfied.
- H. The contractor shall ensure that tiered subcontractors comply with the Prompt Payment requirements and this Rule.

## **RULE X. MEDIATION**

In the event a dispute arises between a Contractor or Consultant and an MWBE, SBE, or EBE utilized as a subcontractor, subconsultant, subvendor, supplier, manufacturer, manufacturer's representative, broker, distributor, or joint venture, then the DSBO Director may recommend the Parties submit to informal dispute resolution with DSBO prior to the Contractor or Consultant taking further action adversely affecting the MWBE, SBE, or EBE. If the dispute is not resolved, then DSBO may assist in referring the dispute to mediation proceedings with a qualified outside mediator, contingent upon the consent of the interested parties, with the costs to be borne by the parties to the dispute.

## **RULE XI. CLOSEOUT PROCEDURES**

- A. As soon as the User Department reasonably knows it can begin its closeout procedures, the User Department will send DSBO written notification that the contract is closing.
- B. DSBO will review the contract and determine whether DSBO compliance requirements have been met to date.
- C. If all compliance requirements have been met, DSBO will formally notify the Contractor, with a copy to the User Department, that all DSBO requirements have been met and that DSBO is

closing its file with regard to the contract.

- D. If the Contractor has not met all DSBO requirements, or additional reporting is required from the Contractor to DSBO or the User Department, DSBO will send written notification to the Contractor, with a copy to the User Department, regarding the remaining non-compliance issues.

## **RULE XII. RECORD RETENTION**

All contractors and consultants performing City contracts with DSBO requirements must retain all pertinent records regarding contractor or consultant performance, and related MWBE, SBE, EBE or SBEC performance and participation for at least five (5) years after completion of the project work. Contractors and consultants shall also require their subcontractor and subconsultants of all tiers to comply with this Rule XII, and shall make this requirement a specific condition their applicable subcontracts.

## **RULE XIII. ADVISORY COMMITTEES (DSBO ORDINANCE)**

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

- A. ESTABLISHMENT. An Advisory Committee may have the following functions:
1. Advise the Director of issues pertaining to MWBEs, SBEs, or EBEs, and other business enterprises seeking procurement opportunities;
  2. Review and recommend necessary policies, procedures, programs, or other actions to promote procurement opportunities for MWBEs, SBEs, EBEs and other business enterprises under the MWBE or SBE/EBE Ordinance; and
  3. Provide comment to the Director and User Department managers or directors, as appropriate, concerning procurement policies, procedures, programs, or other actions managed by the User Departments.
- B. NO COMPENSATION. The members of the Advisory Committee shall serve without compensation, except that members may be reimbursed for reasonable expenses incurred in performance of their duties pursuant to the rules and regulations of the City for such reimbursement and as approved by the Director.
- C. MEETINGS. The Director in coordination with the Advisory Committee shall establish a schedule of regular meetings that occur, at a minimum, on a quarterly basis.