

ADOPTED BY THE  
MAYOR AND COUNCIL

February 10, 2009

ORDINANCE NO. 10634

RELATING TO PROCUREMENT; PROVIDING FOR THE AWARD OF CONTRACTS IN PROFESSIONAL DESIGN, CONSTRUCTION AND CONSTRUCTION SERVICES, AND GOODS AND SERVICES, TO CERTIFIED SMALL BUSINESS ENTERPRISES AND SIGNIFICANTLY UNDERUTILIZED MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISES BY REPEALING CHAPTER 28, ARTICLE XIII, MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISE PROGRAM, AND ADOPTING A NEW CHAPTER 28, ARTICLE XIII, SMALL, MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISE PROGRAM; AND DECLARING AN EMERGENCY.

WHEREAS, on August 5, 1996, Mayor and Council, in Ordinance No. 8741, adopted the first generation minority and women-owned business enterprise (MWBE) program, a narrowly tailored program, developed to address/correct the disparity which was reported within the 1994 disparity study;

WHEREAS, on December 16, 2002, Mayor and Council, in Ordinance No. 9801, adopted the second generation MWBE program, a narrowly tailored program, developed to address/correct the disparity which was reported within the 2002 disparity study;

WHEREAS, in October 2007, in conjunction with Pima County, the City Of Tucson (City) commissioned D. Wilson Consulting Group, LLC., to conduct the third-generation disparity study to determine whether there is justification for the continuation of a race and gender conscious MWBE program;

WHEREAS, based on the totality of statistical, anecdotal, and marketplace evidence presented in the third generation disparity study, a firm evidentiary basis exists that there is identified disparity for certain MWBE's in the relevant marketplace as follows:

	<b>Construction</b>	<b>Professional Services</b>	<b>General Procurement</b>
<b>Asians</b>	Significantly Underutilized	Over utilized	Significantly Underutilized
<b>Blacks</b>	Significantly Underutilized	Significantly Underutilized	Significantly Underutilized
<b>Hispanics</b>	Over utilized	Significantly Underutilized	Over utilized
<b>Native Americans</b>	Underutilized	Significantly Underutilized	Over utilized
<b>Women</b>	Underutilized	Significantly Underutilized	Over utilized

SOURCE: CITY OF TUCSON COMPREHENSIVE DISPARITY STUDY JANUARY 1, 2002 THROUGH DECEMBER 31, 2006.

WHEREAS, on December 9, 2008, the Mayor and Council accepted the factual predicate established by the third-generation disparity study;

WHEREAS, it is in the best interests of the City to promote the equitable utilization of MWBE's in City procurement and contracting in order to prevent the City's spending decisions from contributing to existing identified disparities;

WHEREAS, findings in the City's third generation disparity study suggest, and Mayor and Council agree, that there is still a need for an MWBE program but it must be narrowly tailored to the MWBE groups that have been significantly underutilized or become significantly underutilized as determined by continuous monitoring of availability and utilization of MWBE firms; and

WHEREAS, based on recommendations in the third generation disparity study the Mayor and Council have decided to create a race and gender neutral Small Business Enterprises Program to encourage contracting with all small businesses, including MWBE businesses.

NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND COUNCIL OF THE CITY OF TUCSON, ARIZONA, AS FOLLOWS:

SECTION 1. Article XIII of Chapter 28 of the Tucson Code, Minority and Women-Owned Business Enterprise Program, is repealed.

SECTION 2. Article XIII of Chapter 28 of the Tucson Code, Small, Minority and Women-Owned Business Enterprise Program, is adopted as follows:

**“Article XIII. SMALL, MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISE PROGRAM.**

**Sec. 28-147. Definitions.**

This Article incorporates all definitions and terms defined in Chapter 28 of the Tucson Code. The application of definitions specifically included herein is limited to contracts initiated under the Small, Minority and Women Owned Business Enterprise (S/M/WBE) Program. The following terms shall have the following meanings for Article XIV:

(1) *AZUCP* shall mean the Arizona Unified Certification Plan for the Arizona Department of Transportation, the City of Phoenix and the City of Tucson approved by the Federal Transit Administration of the U.S. Department of Transportation on April 17, 2003 and executed by all participating entities on October 1, 2004.

(2) *Certified MBE or WBE* shall mean a Local disadvantaged business enterprise (DBE) minority or women-Owned business (M/WBE) that has completed the application process for certification and has met the requirements set forth in Title 49, Code of Federal Regulations, Part 26 (49 CFR Part 26). All criteria and definitions relative to DBE and/or S/M/WBE certification shall be followed in accordance with 49 CFR Part 26.

(3) *Certified Small Business Enterprise (SBE)* shall mean a Local small business that is an independent and continuing enterprise for profit performing a Commercially Useful Function, that has completed the application process for certification, and has met the requirements set forth in 49 CFR Part 26.

(5) *City* shall mean City of Tucson.

(6) *Commercially Useful Function* shall mean the performance of real and actual services in the discharge of any contractual endeavor. An S/M/WBE Contractor is performing a Commercially Useful Function when it is responsible for execution of a distinct element of a contract and carries out its responsibilities by actually performing, managing, and supervising the work involved. In determining whether an S/M/WBE is performing a Commercially Useful Function, factors including, but not limited to, the following will be considered:

- (a) the amount of work subcontracted;
- (b) the type of prime contract;
- (c) whether the business has the skill and expertise to perform work for which it is being/has been certified;
- (d) whether the business actually performs, manages and supervises the work for which it is being or has been certified;
- (e) whether the business purchases goods and/or services from a non-minority Owned business enterprise and resells goods to the City, City Contractor, or other person doing business with the City for the purpose of allowing these goods to be counted towards the fulfillment of S/M/WBE utilization goals; and
- (f) standard industry practices.

(7) *Construction Project* shall mean a contract that has been awarded using the design-bid-build project delivery method as prescribed in Title 34 of the Arizona Revised Statutes.

(8) *Construction Services Project* shall mean a contract that has been awarded using one of the following alternative project delivery methods as prescribed in Title 34 of the Arizona Revised Statutes:

- (a) construction-manager-at-risk;
- (b) design-build; or
- (c) job-order-contracting.

(9) *Contractor* shall mean any person or entity that has a contract with the City.

(10) *Controlled* shall mean the minority or woman owner(s) possess the legal authority to manage business assets, goodwill and daily operations of the business and actively and continuously exercise managerial authority in determining the policies and in directing the operations of the business. If the non-minority/women owner or owners is disproportionately responsible for operation of the business, the business is not controlled by a minority or a woman.

(11) *Director* shall mean the Director of the City's Office of Equal Opportunity Programs.

(12) *Disadvantaged Business Enterprise (DBE)* shall mean a for-profit small business concern that is at least fifty-one (51) percent Owned by one or more individuals who are both socially and economically disadvantaged consistent with 49 CFR Part 26.

(14) *Disparity* shall mean an indication of underutilization or overutilization of an M/WBE group as used in the third generation disparity study.

(15) *Eligible Contract for General Procurement* shall mean any contract for goods, materials, or services. This term does not include sole source contracts, special procurements, petty cash purchases, small purchases, emergency purchases, contracts with nonprofit agencies, or contracts for non-competitive purchases, as provided under provisions of the Tucson Procurement Code.

(16) *Eligible Project* shall mean any professional design or construction contract, unless otherwise precluded by law, provided the estimate for professional design or construction meets or exceeds the Formal Solicitation Threshold established by the Tucson Procurement Code. This term does not include any professional design or Construction Project in which the estimated value is below the Formal Solicitation Threshold, projects which require a DBE goal pursuant to federal law, contracts awarded under sections Tucson Code (TC) §§ 28-21 (sole source procurement), 28-22 (emergency procurement), or 28-23 (special procurement).

(17) *Formal Solicitation Threshold* shall mean the dollar amount as specified in TC § 28-20(1).

(18) *Joint Venture* shall mean an association of two (2) or more persons, partnerships, corporations, business enterprises, or any combination of these entities established to form a single business enterprise but limited in scope and duration for the purpose of carrying out

a business activity. The agreement establishing the Joint Venture shall be in writing. The S/MBE or WBE partner(s) must be responsible for a clearly defined portion of the work performed which is set forth in detail and separately from the work to be performed by the non-S/M/WBE partner and is assigned a commercially reasonable dollar value. Furthermore, the S/MBE or WBE's interest shall be based on sharing real economic interest in the venture, include proportionate control over management, and interest in capital acquired by the Joint Venture and interest in earnings. Only the portion of work, supplies, and/or services attributed to the S/MBE and/ or WBE, as a member of the Joint Venture, may be counted towards relevant S/MBE/WBE participation goals.

(19) *Local* shall mean that the principal place of business of the enterprise is physically located within the Tucson Metropolitan Statistical Area (TMSA).

(20) *Minority* shall mean citizens or lawful permanent residents of the United States including any individual in the following groups, members of which are presumed to be socially and economically disadvantaged in accordance with 49 CFR Part 26:

(a) Black Americans includes persons having origins in any of the black racial groups of Africa;

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

(c) Native Americans include persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;

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

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

(21) *Minority-Owned Business Enterprise (MBE)* shall mean a Local disadvantaged business which is an independent and continuing business for profit, performing a Commercially Useful Function, Owned and Controlled by one or more Minority persons who possess an interest of fifty-one (51) percent or more in the business in accordance with 49 CFR Part 26.

(22) *OEOP* shall mean City Office of Equal Opportunity Programs.

(23) *Office* shall mean a fixed established place where work of a clerical, administrative, professional, or production nature is carried on and directly related to the business being certified. A temporary location, movable property, or location established to oversee a project does not qualify as an Office.

(24) *Owned*, for purposes of determining whether an enterprise is owned by an S/M/WBE, shall mean that the small, Minority individual or woman, as the context requires and in accordance with 49 CFR Part 26:

(a) possesses in his or her own name at least fifty-one (51) percent interest in the business, along with the incidents of ownership;

(b) contributed capital, equipment, and expertise to the business equal to at least the required ownership percentage;

(c) acquired the interest with his or her own financial resources or has put his or her own financial resources at risk in the operation of the enterprise; and

(d) enjoys the customary incidents of ownership and shall have a risk in profits commensurate with the ownership interest, as demonstrated by an examination of the substance, rather than the form, of ownership arrangements.

(25) *Professional Design Services Project* shall mean a project that has been awarded for architect services, engineer services, landscape architect services, surveyor services, or assayer services in accordance with Title 34 of the Arizona Revised Statutes.

(26) *Race/Gender Conscious Measure, Activity, or Program* shall mean one that is focused specifically on addressing identified Disparity in procurement practices.

(27) *Race/Gender Neutral Measure, Activity, or Program* shall mean one that is, or can be, used to assist all small businesses and one which supports the prevention of Disparity in procurement practices.

(28) *Responsive Bidder* shall mean a person or entity submitting a bid conforming in all material respects to an invitation for bids.

(29) *Responsible Bidder, Offeror, or Respondent* shall mean a person or entity that has the capability to perform the contract requirements and the integrity and reliability to assure good faith performance.

(30) *Solicitation* shall mean an invitation for bids, a request for technical proposals, a request for proposals, a request for qualifications, a request for quotations, an invitation for reverse auction bids, or any other invitation or request by which the City invites a person to participate in a procurement.

(31) *Small Business Enterprise (SBE)* shall mean a Minority, woman, or non-Minority Owned business that meets the North American Industry Classification System (NAIC) size standard adopted by the City for purposes of qualifying for S/M/WBE certification.

(32) *Subcontractor* and *Subconsultant* shall mean a person or entity that contracts to perform work or render service to a Contractor as defined by this Section or to another Subcontractor as part of a contract with the City.

(33) *Woman-Owned Business Enterprise (WBE)* shall mean a Local, non-Minority disadvantaged entity which is an independent and continuing business for profit, performing a Commercially Useful Function and Owned and Controlled by one or more non-Minority women who possess an interest of fifty-one (51) percent or more in the business, in accordance with 49 CFR Part 26.

#### **Sec. 28-148. Administrative Provisions.**

*Sec. 28-148(1) Duties of the Director of the OEOP.* The Director shall implement and monitor the small, Minority, and women-Owned business enterprise program. The Director shall be the chief administrative officer for the program and consistent with all provisions of this Code shall have the following duties and authority:

- (1) The administration and enforcement of this Article.

(2) Coordination of the development of administrative procedures and policies with the applicable department(s) to effectuate this Article.

(3) Coordination of outreach efforts, including increased working relationships with local community organizations to identify and increase the availability of S/M/WBE firms.

*Sec. 28-148(2) Periodic Review and Reporting Requirements.*

(1) The Director shall be responsible for monitoring and reporting city utilization of small, Minority and women-Owned businesses (S/M/WBE) and shall, through a coordinated record keeping and reporting effort with all applicable departments, ensure that data and records are maintained in order to ensure on going analysis and evaluation of the S/M/WBE program and its objectives. The following reports shall be provided:

(A) An annual or more frequent S/M/WBE utilization and availability report.

(B) An annual review and evaluation of the effectiveness of the S/M/WBE program and its provisions. To accomplish this evaluation the Director may, in addition to the above reports, provide for other studies and surveys as needed.

(2) Recommendations to the City Manager and Mayor and Council regarding additional efforts necessary to ensure S/M/WBE participation, pursuant to periodic review and reporting requirements contained herein.

(3) For purposes of monitoring, analyses, and future Disparity analyses and studies, all City department Directors shall maintain and retain complete and accurate records relating to any professional design, construction, or construction services procurements.

(4) The Director of the Procurement Department shall maintain records of source selections, the application of preference points or percentages, and record of the inclusion of S/M/WBEs for procurements below the Formal Solicitation Threshold.

*Sec. 28-148(3) Administrative Provisions for Certification.* The Director shall be responsible for the certification and verification of program eligibility. DBE and SBE criteria and definitions shall be applied in accordance with 49 CFR Part 26 to establish eligibility for certification of

Local firms as a disadvantaged S/M/WBE. Only Local firms shall qualify for certification as an S/M/WBE. Firms outside of the TMSA meeting the eligibility criteria for MWBE certification will qualify only as a DBE and are not eligible to participate in the Local S/M/WBE program. The Director shall:

(1) Maintain a listing of Certified S/M/WBEs segmented into specified trades or lines of business to be maintained as public record; and

(2) participate and effectuate reciprocity of DBE certification through the AZUCP.

*Sec. 28-148(4) Standards for S/M/WBE Certification.* The Director shall certify and monitor Contractors, Subcontractors, vendors, and suppliers as bona fide S/M/WBE for participation in the S/M/WBE program based on the certification criteria and definitions as set forth in 49 CFR Part 26 including but not limited to the following standards:

(1) An MBE or WBE shall be an independent business enterprise, continuing in operation for profit, performing a Commercially Useful Function, and Owned and Controlled by one or more minorities or women respectively who are citizens or lawful permanent residents of the United States. The ownership and control by a Minority or a woman shall be real and substantial, but in no event less than 51%, and shall be indicated by customary incidents of ownership, as demonstrated by an examination of the substance rather than the form of ownership and operating arrangements.

(2) An SBE shall be an independent business enterprise, continuing in operation for profit, performing a Commercially Useful Function, and Owned and Controlled by one or more parties who are minorities, women or non-minorities who are citizens or lawful permanent residents of the United States. The ownership and control by a Minority, woman, or non-Minority shall be real and substantial and be indicated by customary incidents of ownership, as demonstrated by an examination of the substance rather than the form of ownership and operating arrangements.

(3) An eligible S/M/WBE shall be a Local enterprise as defined by this article and an active participant within the TMSA marketplace.

(4) The S/M/WBE applicant must be disadvantaged as defined in 49 CFR Part 26.

(5) The S/M/WBE applicant is responsible for cooperating with the Director and providing all necessary documentation in support of all eligibility as set forth in 49 CFR Part 26 and this Article. A complete certification application is required along with supportive documents including, but not limited to, three years of income tax records (personal and business), bank signature card, a current personal net worth statement, and various other documents confirming ownership, management, and control of the S/M/WBE applicant firm. Additionally, an on-site audit is required at the firm's place of business.

*Sec. 28-148(5) Certification Investigations.* In accordance with 49 CFR Part 26, the Director may investigate S/M/WBE ownership, contract transactions, and other relevant arrangements beyond formal documentation at initial certification, during certification, and during the annual update. To the extent reasonably necessary to ensure compliance, such investigations may include, but are not limited to, the following:

(1) Personal interviews with persons having knowledge or relevant information relating to an S/M/WBE's eligibility, certification, or decertification.

(2) Personal interviews with bidders, Contractors, vendors, and/or suppliers involved in a contractual relationship with the S/M/WBE.

(3) Reviewing records pertaining to certification.

(4) Conducting random on-site visits, audits, and/or relevant inquiries.

*Sec. 28-148(6) Certification Period.* In accordance with 49 CFR Part 26, the Director shall grant certification to an approved S/M/WBE for a period of not less than three (3) years with the requirement for an annual update affirming there have been no changes in the firm's circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements or material changes in the information provided in its application form. If an S/M/WBE is denied certification on the basis of the information submitted, the entity may not reapply for a period of one (1) year from the date of the notice of denial provided that such firm shall have the right to appeal such denial to the Director in accordance with the process specified in TC § 28-148(9).

*Sec. 28-148(7) Continuing Certification.* All Certified S/M/WBEs must re-submit disclosure affidavits and any other required documents to the Director annually.

*Sec. 28-148(8) Decertification.* The Director may decertify a business enterprise if the Director determines it is no longer a bona fide S/M/WBE because of, but not limited to, the following, in accordance with 49 CFR Part 26:

- (1) A change in ownership and/or control.
- (2) A change in management structuring.
- (3) Exceeding small business administration size limits by industry designation.
- (4) Exceeding program standard for owner(s) personal net worth.

*Sec. 28-148(9) Protest Procedures for S/M/WBE Certification and Decertification Decisions.*

(1) *S/M/WBE Certification/De-certification Decisions.* All decisions regarding certifications and de-certifications made by the Director shall be made in writing and shall include the reasons for the decision. The notice shall be sent to the affected party and the affected party shall have the right to seek administrative review as provided herein.

(A) An aggrieved party may submit a protest in writing to the Director within ten (10) days from the date of notice of the adverse decision. The protest must include the legal and factual basis for the protest along with any supporting documents.

(B) Within fifteen (15) days of receipt of the protest, the Director shall review the protest and all relevant supporting documents and render a decision notice in writing which includes the basis for the decision.

(C) An aggrieved M/WBE as a DBE applicant may file a request for an appeal to the U.S. Department of Transportation in accordance with the AZUCP Operating Procedures and 49 CFR Part 26.

(2) *Appeal of Director's Certification and De-Certification Decisions.* If the protest is denied, the aggrieved party may request an appeal

hearing through the Director. The request must be in writing and received by the Director within seven (7) days of the aggrieved party's receipt of the decision notice from the Director. The aggrieved party shall set forth the legal and factual basis for the appeal of the decision. The Director shall retain an independent hearing officer who shall have knowledge of the certification standards/criteria as set forth in 49 CFR Part 26, construction and procurement law and the Tucson Procurement Code, including the Small, Minority, Women-Owned Business Enterprise Program.

(A) Within seven (7) days of receipt of the notice of appeal from the aggrieved party, the Director shall forward the notice to the hearing officer.

(B) The hearing officer shall set a hearing date as soon as administratively feasible and shall serve notice of the hearing to all parties.

(C) The hearing officer shall make a written decision on the appeal within 30 days following the conclusion of the hearing, which decision shall affirm, alter, or reverse the decision by the Director.

(D) The hearing officer's decision will be forwarded to the Director for a final decision regarding certification or de-certification.

**Sec. 28-149. Establishment of S/M/WBE Program Goals for Professional Design, Construction, and Construction Services Projects.**

*Sec. 28-149(1) Annual S/M/WBE Program Participation Goals.* To promote equal opportunity for professional design and construction contracting with the City and the development of small businesses, the Director shall establish annual S/M/WBE program participation goals for City professional design and construction contracts based upon, but not limited to, the following:

(1) The present availability of Certified S/M/WBEs that are identified as professional design or construction firms at the time of the review/evaluation.

(2) A forecast of Eligible Contracts to be awarded within the fiscal year and the level of participation by such firms in past projects awarded by the City.

(3) Review and analysis of the reports including, but not limited to, those generated in accordance with TC § 28-148(2) which shall provide Disparity analysis.

(4) Annual M/WBE program participation goals are only intended to be a benchmark target for evaluating the overall performance of the M/WBE program in the elimination of the existing Disparity and/or in ensuring that once eliminated, Disparity does not re-emerge. M/WBE program participation goals shall be narrowly tailored, reasonable, and attainable targets based on availability and shall not be quotas.

*Sec. 28-149(2) Eligible Projects for Subcontractor S/M/WBE Participation Goals.*

(1) All Eligible Projects shall be reviewed by the Director for determination of sub-contracting opportunities for S/M/WBE participation. Where there is sufficient availability of S/M/WBEs, the Director may establish individual project participation goals.

(2) Specific participation Race and/or Gender conscious and/or SBE goals are to be established on Eligible Projects that exceed the Formal Solicitation Threshold and according to the criteria established by the Director including, but not be limited to, the following:

(A) The present availability of Certified S/M/WBEs ready, willing, and able to provide labor and/or material on a particular project in the profession or industry/trade classifications relevant to the project.

(B) The ability of qualified S/M/WBE firms to readily expand their capacity to meet additional demand.

(C) A forecast of Eligible Projects to be awarded within the fiscal year.

(D) The level of participation by such firms in past projects awarded by the City.

(E) The design scope of work, plans, and project specifications.

(F) The annual Subcontractor participation goals.

(G) Race/Gender Conscious Goals shall be established only in cases where significant statistical Disparity exists or re-emerges.

(3) S/M/WBE goals for a construction contract must be clearly published as part of the contract specifications in the S/M/WBE specifications issued with each Invitation for Bid (IFB).

(4) Specific S/M/WBE requirements or procedures for construction services or professional design services shall be issued in the Request for Qualifications (RFQ).

(5) S/M/WBE goals shall apply to the initial contract award for construction contracts and to the individual project awards for construction services or professional design services.

(6) All subsequent contract modifications and change orders of equal to or more than the Formal Solicitation Threshold may be reviewed by the Director for determination of applicable S/M/WBE participation goals.

#### **Sec. 28-150. S/M/WBE Plans for Eligible Projects**

*Sec. 28-150(1) Contractor's S/M/WBE Plan for Construction Projects.* Notwithstanding its compliance with any other requirement of the Tucson Procurement Code, no bidder shall be awarded a contract for an Eligible Project, unless the Director has approved the S/M/WBE plan or granted a waiver on the project. Such S/M/WBE plan shall be designed to meet the applicable project goals which shall be incorporated into the contract. Each bidder shall submit a completed and signed S/M/WBE plan or fully documented waiver request with the bid submission.

*Sec. 28-150(2) Contractor's S/M/WBE Plan for Professional Design and Construction Services Projects.* Notwithstanding its compliance with any other requirement of the Tucson Procurement Code, respondents shall receive Director approval of the S/M/WBE plan or be granted a waiver on the project in accordance with the requirements set forth in the Solicitation. Such S/M/WBE plan shall be designed to meet the applicable project goals which shall be incorporated into the contract.

*Sec. 28-150(3) Contractors for Eligible Projects.* Contractors for Eligible Projects may meet the S/M/WBE project goals through the following methods:

(1) *Subcontractor Participation.*

(A) When a Contractor utilizes one or more Certified S/M/WBE Subcontractors to satisfy its S/M/WBE participation commitment, the Contractor may claim only the

value of the Commercially Useful Function to be performed by such Subcontractor(s) in order to obtain credit toward the satisfaction of the applicable goal.

(B) If a Certified S/M/WBE Subcontractor enters into second tier subcontracts consistent with the standard industry practices, such S/M/WBE Subcontractor is performing a Commercially Useful Function. If an S/M/WBE Subcontractor subcontracts a significantly greater portion of its work to a non-S/M/WBE than would be expected by standard industry practices, it shall be presumed that the S/M/WBE is not performing a Commercially Useful Function.

(C) S/M/WBE Contractors may not use their own participation towards fulfillment of the project's subcontracting goals.

(2) *Supplier Participation.* Contractors for construction or construction services may contract with one or more Certified S/M/WBE suppliers provided that the supplier is a regular dealer of the materials supplied to obtain credits toward S/M/WBE goals. The value of the Commercially Useful Function to be performed by such S/M/WBEs and credited toward satisfaction of the applicable S/M/WBE goals is as follows:

(A) If a Certified S/M/WBE supplier manufactures the goods supplied, one hundred (100%) percent of the contract amount is credited towards the applicable S/M/WBE participation goal.

(B) If a Certified S/M/WBE supplier is a wholesaler warehousing the goods supplied or a manufacturer's representative then the total contract amount is credited toward the established S/M/WBE goal; however, only twenty-five (25%) percent of the total S/M/WBE project goal may be met in this manner.

(C) If an extraordinarily large proportion of a contract price is for equipment or supplies, a lower project goal may be set than otherwise would be required, the twenty-five (25) percent limit for suppliers may be increased, or a combination of these two (2) methods may be utilized.

*Sec. 28-150(4) Submission of S/M/WBE Plan for Construction Projects.*

(1) The City shall publish its S/M/WBE subcontracting goals in the Solicitation and the specifications. All bidders shall submit the S/M/WBE participation plan or request for good faith waiver with the bid unless otherwise specified.

(2) The completed and signed S/M/WBE plan for the project must include a list of names and addresses of the Certified S/M/WBE Subcontractors and/or suppliers to be used in the project, the type of work or service each business will perform, and the percentage and/or dollar amount of each Certified S/M/WBE's subcontract and/or suppliers of the total project.

(3) The bidder shall certify that the S/M/WBE plan has met the established S/M/WBE project participation goals, or notwithstanding good faith efforts to meet the goals, the bidder has been unable to do so and therefore is entitled to a good faith effort waiver in part or in full. If the bidder's certification, the S/M/WBE plan, or, if applicable, a fully documented good faith effort waiver (partial or full) is not submitted with the bid for any reason, the bid shall be deemed non-responsive by the Procurement Director.

*Sec. 28-150(5) Submission of S/M/WBE Plan for Professional Design Services and Construction Services Projects.*

(1) The Solicitation shall contain S/M/WBE requirements. All respondents shall comply with the S/M/WBE requirements as set forth in the Solicitation.

(2) The Contractor shall submit an S/M/WBE participation plan or request for good faith waiver for each project awarded under the on-call Professional Design Services Contracts and job order contracts, that are over the Formal Solicitation Threshold and has a goal established by the Director unless exempted by TC §§ 28-21 or 28-22.

(3) The Contractor shall submit an S/M/WBE participation plan or request for good faith waiver for all Professional Design Service Contracts, construction manager at risk contracts, and design build contracts, in accordance with the Solicitation, prior to award or prior to establishing a Guaranteed Maximum Price (GMP), if applicable.

(4) The completed and signed S/M/WBE plan for the project shall include a list of names and addresses of the Certified S/M/WBE Subcontractors and/or suppliers to be used in the Eligible Project, the type of work or service each business will perform, and

the percentage and/or dollar amount of each Certified S/M/WBE's subcontract and/or suppliers of the total Project.

(5) The Contractor's shall certify that the S/M/WBE plan has met the established S/M/WBE project participation goals or, notwithstanding good faith efforts to meet the goals, the Contractor has been unable to do so and therefore is entitled to a good faith effort waiver in part or in full.

*Sec. 28-150(6) Review of S/M/WBE Plans for Construction Projects.*

(1) The Director shall review and evaluate the apparent low bidder's S/M/WBE goals plan and determine whether the bidder met the project goals for the contract and approve or reject such plan. The Director may clarify information relative to the S/M/WBE plan with the bidder and/or any listed Subcontractors.

(2) The Director may reject the plan and determine that the bid is non-responsive where the bidder:

(A) failed to provide a completed S/M/WBE plan;

(B) failed to identify S/M/WBEs by name, the scope of work, and value of work as a percent of the total bid sufficient to meet the applicable S/M/WBE goals for that project;

(C) failed to achieve the dollar value and/or percentage of credible participation by Certified S/M/WBEs necessary to meet the project goals; or

(D) failed to meet the requirements for a waiver of the S/M/WBE goals.

(3) The Director's determination shall be in writing and state the basis for such decision.

(4) The Director's determination shall be subject to the remedy provisions of TC § 28-148(9).

*Sec. 28-150(7) Review of S/M/WBE Plans for Construction Services and Professional Design Services Projects.*

(1) The Director shall review and evaluate S/M/WBE plans and determine whether the respondent met the project goals, and

approve or reject such plan. The Director may clarify information relative to the S/M/WBE plan with the respondent and/or any listed Subcontractors.

(2) For On-Call Professional Design Services Contracts and Job Order Contracts, the Director may determine that the plan is not acceptable where the respondent:

(A) failed to provide a completed S/M/WBE plan;

(B) failed to identify S/M/WBEs by name, the scope of work, and value of work as a percent of the total bid sufficient to meet the applicable S/M/WBE goals for that project;

(C) failed to achieve the dollar value and/or percentage of credible participation by Certified S/M/WBEs necessary to meet the project goals; or

(D) failed to meet the requirements for a waiver of the S/M/WBE goals. In the event that a plan is found unacceptable, the Director may pursue remedies up to and including termination.

(3) For all other Professional Design Service Contracts, Construction Manager at Risk contracts and Design Build contracts, the Director may determine that the plan is not acceptable where the respondent:

(A) failed to provide a completed S/M/WBE plan;

(B) failed to identify S/M/WBEs by name, the scope of work and value of work as a percent of the total bid sufficient to meet the applicable S/M/WBE goals for that project;

(C) failed to achieve the dollar value and/or percentage of credible participation by Certified S/M/WBEs necessary to meet the project goals; or

(D) failed to meet the requirements for a waiver of the S/M/WBE goals. In the event that a plan is found unacceptable by the Director may:

(i) if the contract has not been awarded, formally cease negotiations with the firm and enter

into negotiations with the next ranked firm or reject all submittals; or

(ii) if the contract has been awarded, formally terminate the contract for failure to comply with the S/M/WBE provisions.

(4) The Director's determination shall be in writing and state the basis for such decision.

(5) The Director's determination shall be subject to the remedy provisions of TC § Sec. 28-150(i).

*Sec. 28-150(8) Good Faith Effort Waiver.*

(1) If the S/M/WBE plan does not meet the project goals, the bidder or respondent may seek a waiver. A request for waiver shall be available only when certified firms are determined to not be ready, willing, or able to perform. The application for a waiver shall be in writing and must be fully completed and submitted in accordance with TC §§ 28-150(3) and (4). The waiver request shall indicate whether a complete or partial waiver is sought. If a partial waiver is being sought the scope of such waiver must be indicated and an S/M/WBE plan must also be submitted. When a full waiver is sought, an S/M/WBE plan does not need to be submitted. The bidder or respondent must provide documented evidence including a narrative statement with supporting affidavits and/or exhibits verifying the bidder's/respondent's good faith efforts to meet the goals. Evidence of the bidder's/respondent's good faith efforts should include, but is not limited to the following:

(A) Documentation of communication with the Director seeking technical/professional assistance identifying available S/M/WBE.

(B) Copies of written notification to Certified S/M/WBEs regarding subcontracting opportunities on a project.

(C) Documentation of efforts made to select portions of work for S/M/WBE subcontracting in order to increase the likelihood of meeting the S/M/WBE goals, including where appropriate breaking down subcontracts into economically feasible units in order to facilitate S/M/WBE participation.

(D) Documentation of efforts to assist and negotiate with S/M/WBEs for specific sub-bids and reasons for

rejection of any such offered, including the names, addresses, and telephone numbers of S/M/WBEs who were contacted and reason for the rejection.

(E) As to each S/M/WBEs contacted which the bidder/respondent considered not to be qualified, a written statement of the reasons for the bidder's/respondent's conclusion.

(F) Written quotes or records of verbal quotes solicited from all S/M/WBEs seeking subcontract work with prime contractors at the time of the Solicitation submittal.

(G) Verification that the bidder rejected available S/M/WBEs because they submitted bids which were unreasonably high, or they were not qualified. Such verification shall include a statement of the amounts of all bids received from potential Subcontractors and all relevant dates.

(2) A project goal may be waived, at least in part, if the bid or proposals received by the bidder requesting a waiver from all S/M/WBEs in one trade area exceeds the quote or proposal of the lowest non S/M/WBE competing for the same work by the lesser of fifteen percent (15%) or two hundred fifty thousand dollars (\$250,000), and no other trade area is available to meet the established S/M/WBE goal. A bidder may not compare self-performed costs against an S/M/WBE Subcontractor proposal as justification for the rejection of a bid.

(3) If after consultation with Certified S/M/WBE firms and/or appropriate City employees, the Director determines that S/M/WBE availability is less than projected, the Director may waive or reduce established project goals. In such circumstances, the Director shall certify that S/M/WBEs are not available.

(4) If the Director determines that S/M/WBE availability is sufficient to support the established project goals the Director shall deny the good faith waiver request. All decisions regarding the denial of good faith waiver requests or plan decisions made by the Director shall be made in writing and shall include the reasons for the decision. The notice shall be sent to the affected party and the affected party shall have the right to seek administrative review pursuant to TC §28-148(9).

(A) *Waiver Denial for Construction.* If the apparent low bidder is denied a waiver the Director shall determine the bid

is non-responsive. The determination shall be subject to of TC § 28-150(i).

(B) *Waiver Denial for Professional Design Services and Construction Services.* If the waiver is denied, the Director's determination shall be subject to TC § 28-150(i).

*Sec. 28-150(9) Right to Appeal Good Faith Effort Waiver or Plan Decision.* An aggrieved party has a right to protest a good faith waiver request or plan decision made by the Director as follows:

(1) An aggrieved party may submit a protest in writing to the Director within five (5) days from the date of notice of the adverse decision notice. The protest must include the legal and factual basis for the protest along with any supporting documents.

(2) Within five (5) days of receipt of the protest, the OEOP Director shall review the protest and all relevant supporting documents and render a decision notice in writing which includes the basis for the decision.

(3) The decision of the Director is final and not appealable.

**Sec. 28-151. Applicability to Procurement of Goods, Materials, and Services.**

*Sec. 28-151(1) Price Preference.* The Procurement director may apply up to seven (7) percent competitive price preference to bids and offers received from Certified MBEs and WBEs that are eligible to receive such preference based on Disparity, including re-emerging significant underutilization. Such firms must provide City M/WBE certification verification with their bid or offer. The price preference shall apply to Eligible Contracts.

*Sec. 28-151(2)* The price of bids or offers received from a Certified M/WBE shall be adjusted by seven (7) percent for Solicitations with a projected contract value between the bid threshold and below one hundred fifty thousand dollars (\$150,000) and five (5) percent for Solicitations with a projected value exceeding one hundred fifty thousand dollars (\$150,000) in the initial term of the contract. This adjustment shall be solely for the purpose of applying the price preference.

*Sec. 28-151(3) Reducing size, scope, or terms of certain contracts.* The Director shall evaluate large purchases of certain commodities and services for purchase through smaller, shorter-term contracts that are

more accessible to and enhance participation of local M/W/SBEs. Such evaluation will include but shall not be limited to the following factors:

- (1) The feasibility of annual contracts where several small contracts could be administered.
- (2) A review of multi-item package purchase contracts for breakdown into smaller line-item contracts.
- (3) A review of all contracts estimated to exceed two hundred and fifty thousand dollars (\$250,000.00) for possible reduction in size, scope, or terms of the contracts to enhance S/M/WBE participation.
- (4) The administrative cost of the contract.

*Sec. 28-151(4) Small purchases as defined in TC §28-20(2).* For small purchases as defined in TC §28-20(2) at least one Certified M/WBE vendor, if available, shall be solicited.

**Sec. 28-152. Program Compliance.**

*Sec. 28-152(1) Complaints, Investigations of Compliance, Non-Retaliation.* The Director may receive and investigate complaints and allegations by S/M/WBEs and third parties. All affected parties shall cooperate fully with an investigation conducted by the Director. Retaliation against anyone who initiates or assists in an investigation is strictly prohibited. Any Contractor who engages in retaliatory conduct will be subject to sanctions up to and including debarment. Any City employee who engages in retaliatory actions will be subject to discipline. Complaints filed with the Director may include, but are not limited to the following:

- (1) Discriminatory treatment of S/M/WBEs on a project or work sites.
- (2) Bid-shopping by prime contractors which have an adverse effect on S/M/WBE participation.
- (3) Failure to make prompt payment to S/M/WBE Contractors.
- (4) Failure to utilize S/M/WBE Contractors and consultants once the contract has been awarded.
- (5) Substitution of Subcontractor issues.

*Sec. 28-152(2) Maintenance of Records and Reports by Contractors.* Unless otherwise specified in the Solicitation, Contractors awarded Eligible Contracts shall submit a participation report which summarizes the number and dollar amount of all subcontract awards during the contract term and submit the report to the Director no later than one month after the contract has been awarded and with the final payment request. In addition to the statutory requirement for retention, failure to submit the one month participation report of all proposed Subcontractors will result in the City withholding an additional ten (10) percent of all future payments on the Eligible Contract until it is determined that the Contractor is in compliance. Failure to submit the participation report at the time of request for final payment shall result in withholding final payment from the Contractor until it is determined that the Contractor is in compliance. For Job Order Contracts, the Contractor shall submit Subcontractor utilization reports to the Director on a semi-annual basis in addition to certification of payments to S/M/WBE Subcontractors.

**Sec. 28-153. Additional Terms.**

*Sec. 28-153(1) Non-Interference.* The process of determining and appealing eligibility, certification, continuing certification or decertification of the S/M/WBE status of enterprises shall not be subject to interference, influence, or coercion of any sort by parties including departmental and elected officials.

*Sec. 28-153(2) Authority.* The Director shall promulgate rules and regulations, consistent with the provisions of Article XIII, for implementation of the S/M/WBE Program.

*Sec. 28-153(3) Termination.* The M/WBE Program may be terminated by the Mayor and Council based upon their determination that the on-going effects of marketplace disparity in the TMSA, in accordance with the review and reporting requirements under TC § 28-148(2) have been fully remedied and that statistical disparities in the utilization of M/WBEs has been eliminated in public and private sectors of the Tucson MSA.”

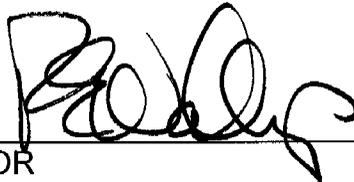
SECTION 3. *Sunset Provision.* Article XIII of Chapter 28, Tucson Code, shall be considered by the Mayor and Council for reauthorization five (5) years from the effective date of this ordinance. This program may be extended for additional five (5) year periods, on the condition that the Mayor and Council, after review and consideration of all reports, other relevant information and public hearing testimony,

finds that there is a continuing need for the program because its purpose and objectives have not been achieved.

SECTION 4. If any provision of this Ordinance or the application thereof to any person or circumstance is invalid, the invalidity shall not affect other provisions or application of this Ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this Ordinance are severable.

SECTION 5. WHEREAS, it is necessary for the preservation of the peace, health and safety of the City of Tucson that this ordinance become immediately effective, an emergency is hereby declared to exist and this ordinance shall be effective immediately upon its passage and adoption.

PASSED, ADOPTED AND APPROVED by the Mayor and Council of the City of Tucson, Arizona, February 10, 2009.

  
MAYOR

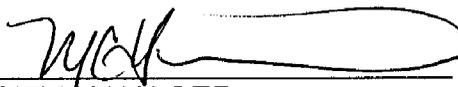
ATTEST:

  
CITY CLERK

APPROVED AS TO FORM:

  
CITY ATTORNEY

REVIEWED BY:

  
CITY MANAGER

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