Section 1 becomes effective
on July 1, 2013

ADOPTED BY THE
MAYOR AND COUNCIL

June 12, 2012

ORDINANCE NO. 10993

RELATING TO PROCUREMENT OF GENERAL GOODS AND SERVICES BY THE CITY; AMENDING ARTICLE XIII OF CHAPTER 28 OF THE TUCSON CODE; ESTABLISHING THE SMALL BUSINESS ENTERPRISE PROGRAM; AND DECLARING AN EMERGENCY.

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 is amended to read as follows:

ARTICLE XIII.
SMALL 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 Business Enterprise (SBE) program. The following terms shall have the following meanings for article XIII:

(1) *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, has met the requirements set forth in 49 CFR Part 26, and holds a current City of Tucson Business license.

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

(3) *Commercially Useful Function* shall mean the performance of real and actual services in the discharge of any contractual endeavor. An SBE 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 SBE is performing a commercially useful function, factors including, but not limited to, the following will be considered:

(a) If a Certified SBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force.

(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-SBE 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 SBE utilization goals; and

(f) Standard industry practices.

(4) *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 Statues.

(5) *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.

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

(7) *Controlled* shall mean the SBE 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.

(8) *Director* shall mean the director of the city's Office of Equal Opportunity programs.

(9) *Disadvantaged Business Enterprise (DBE)* shall mean a for-profit 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.

(10) *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

(11) *Eligible Contract for Professional Design Services* shall mean any contract for professional design services. This term does not include sole source contracts, special procurements, small purchases, emergency purchases, or contracts for non-competitive purchases, as provided under provisions of the Tucson Procurement Code.

(12) Eligible *Construction or Construction Services Project* shall mean any construction or construction services project, unless otherwise precluded by law, provided the estimate for construction meets or exceeds the formal solicitation threshold established by the Tucson Procurement Code. This term does not include any 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) sections 28-21 (sole source procurement), 28-22 (emergency procurement), or 28-23 (special procurement).

(13) *Formal Solicitation Threshold* shall mean the dollar amount as specified in Tucson Code section 28-20(1).

(14) *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 SBE 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-SBE partner and is assigned a commercially reasonable dollar value. Furthermore, the SBE 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 SBE, as a member of the joint venture, may be counted towards relevant SBE participation goals.

(15) *Local* shall mean that the principal place of business of the enterprise is physically located within the Tucson/Pima County Metropolitan Area.

(16) *OEOP* shall mean city Office of Equal Opportunity Programs.

(17) *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.

(18) *Owned*, for purposes of determining whether an enterprise is owned by an SBE, shall mean that the small business owner(s) meet the ownership requirements in accordance with 49 CFR Part 26:

(a) Possesses interest in the business, along with the incidents of ownership;

(b) Contributed capital, equipment, and expertise to the business;

(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.

(19) *Professional Design Services Contract* shall mean a contract 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.

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

(21) *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.

(22) *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.

(23) *Small Business Enterprise (SBE)* shall mean a business that meets the North American Industry Classification System (NAIC) size standard adopted by the city for purposes of qualifying for SBE certification.

(24) *Subcontractor and subconsultant* shall mean a person or entity that contract 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.

Sec. 28-148. Administrative provisions.

Sec. 28-148(1). Duties of the Director of the OEOP. The director shall implement and monitor the small 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 SBE firms.

Sec. 28-148(2). Records Retention Requirements.

(1) The director shall, ensure that data and records are maintained in order to conduct on-going analysis and evaluation of the SBE program and its objectives and may make recommendations to the city manager and mayor and council regarding additional efforts necessary to ensure SBE participation.

(2) All city departments shall maintain and retain complete and accurate records relating to any professional design, construction, or construction services procurements.

(3) The director of the procurement department shall maintain records of source selections, and record of the inclusion of SBEs 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 SBE. Only local firms shall qualify for certification as a SBE. Firms outside of the Tucson/Pima Metropolitan Area meeting the eligibility criteria for DBE certification will qualify only as a DBE and are not eligible to participate in the local SBE program. The director shall:

(1) Maintain a listing of certified SBEs 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 SBE Certification. The director shall certify and monitor contractors, subcontractors, professional services consultants, professional services subcontractors, vendors, and suppliers as a bona fide SBE for participation in the SBE 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) A SBE shall be an independent business enterprise, continuing in operation for profit, performing a commercially useful function. The ownership and control 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.

(2) A certified SBE shall have a valid City of Tucson Business License.

(3) A certified SBE shall be a local enterprise as defined by this article and an active participant within the Tucson/Pima County Metropolitan area.

(4) The SBE applicant(s) must not exceed the personal net worth standard as defined in 49 CFR Part 26.

(5) The SBE 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 (3) 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 SBE 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 SBE ownership, contract transactions, and other relevant arrangements beyond formal documentation at initial certification, during certification, during the annual update, or based on a complaint to the OEOP. 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 SBE's eligibility, certification, or decertification.

(2) Personal interviews with bidders, contractors, vendors, and/or suppliers involved in a contractual relationship with the SBE.

(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 SBE 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, ownership, or control requirements or material changes in the information provided in its application form. If an SBE 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 section 28-148(9).

Sec. 28-148(7). Continuing Certification. All certified SBEs 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 because of, but not limited to, the following, in accordance with 49 CFR Part 26 where applicable, or demonstrates continued poor performance on contracts as determined by City of Tucson Staff:

(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.

(5) Fails to comply with annual reporting requirements.

(6) Fails to fulfill the requirements of 28-148 (4).

(7) Fails to cooperate as directed in 28-148 (5).

(8) Continued poor performance ratings.

Sec. 28-148(9). Protest Procedures for SBE Certification and Decertification Decisions.

(1) *SBE Certification/Decertification Decisions.* All decisions regarding certifications and decertifications 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 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.

(2) Appeal of Director's Certification and Decertification Decisions. If the protest is denied, the aggrieved party may request an appeal review 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 will 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 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 review officer.

(b) The review officer shall make a decision based solely on the administrative record.

(c) The review officer shall make a written decision on the appeal, as soon as practical, which decision shall affirm, alter, or reverse the decision by the director.

(d) The review officer's decision will be forwarded to the director for a final decision regarding certification or decertification.

Sec. 28-149. Establishment of SBE Program Goals for Construction and Construction Services Projects.

Sec. 28-149(1). Eligible Projects for Subcontractor SBE Participation Goals.

(1) All eligible projects shall be reviewed by the director for determination of subcontracting opportunities for SBE participation.

Where there is sufficient availability of SBEs, the director may establish individual project participation goals.

(2) Specific participation 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 SBEs 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 certified SBE firms to readily expand their capacity to meet additional demand.

(c) The level of participation by such firms in past projects awarded by the city.

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

(3) SBE goals for a construction contract must be clearly published as part of the contract specifications in the SBE specifications issued with each invitation for bid (IFB).

(4) Specific SBE requirements or procedures for construction services shall be issued in the request for qualifications (RFQ).

(5) SBE goals shall apply to the initial contract award for construction contracts and to the individual project or phase awards for construction services.

Sec. 28-150. SBE Plans for Eligible Projects.

Sec. 28-150(1). Contractor's SBE 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 SBE plan or granted a

waiver on the project. Such SBE 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 SBE plan or fully documented waiver request with the bid submission.

Sec. 28-150(2). Contractor's SBE Plan for Construction Services Projects. Notwithstanding its compliance with any other requirement of the Tucson Procurement Code, respondents shall receive director approval of the SBE plan or be granted a waiver on the project in accordance with the requirements set forth in the solicitation. Such SBE 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 SBE project goals through the following methods:

(1) Prime contractor participation.

(a) Certified SBE prime contractors may use their own participation towards fulfillment of the project's subcontracting goals.

(2) *Subcontractor* participation.

(a) When a contractor utilizes one or more certified SBE subcontractors to satisfy its SBE 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 SBE subcontractor enters into second tier subcontracts consistent with the standard industry practices, such SBE subcontractor is performing a commercially useful function. If a SBE subcontractor subcontracts a significantly greater portion of its work to a non-SBE than would be expected by standard industry practices, it should be presumed that the SBE is not performing a commercially useful function

(3) *Supplier Participation.* Contractors for construction or construction services may contract with one or more certified SBE suppliers provided that the supplier is a regular dealer of the materials supplied to obtain credits toward SBE goals. The value of the commercially useful function to be performed by such SBEs and credited toward satisfaction of the applicable SBE goals is as follows:

(a) If a certified SBE supplier manufactures the goods supplied, one hundred (100) percent of the contract amount is credited towards the applicable SBE participation goal.

(b) If a certified SBE supplier is a wholesaler warehousing the goods supplied or a manufacturer's representative, then the total contract amount is credited toward the established SBE goal; however, only twenty-five (25) percent of the total SBE 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 SBE Plan for Construction Projects.

(1) The city shall publish its SBE subcontracting goals in the solicitation and the specifications. All bidders shall submit the SBE participation plan or request for good faith waiver with the bid unless otherwise specified.

(2) The completed and signed SBE plan for the project must include a list of names of the certified SBE prime contractor, SBE subcontractors and/or suppliers to be used in the project, the type of work or service each business will perform, and the dollar amount of a certified SBE prime contractor and/or each certified SBE's subcontract and/or suppliers of the total project.

(3) The bidder shall certify that the SBE plan has met the established SBE 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 SBE 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 SBE plan for Construction Services Projects.

(1) The solicitation shall contain SBE requirements. All respondents shall comply with the SBE requirements as set forth in the solicitation.

(2) The contractor shall submit an SBE participation plan or request for good faith waiver for each project awarded under the job order contracts, that are over the Formal Solicitation Threshold and has a goal established by the Director unless exempted by Tucson Code section 28-21 or 28-22.

(3) The contractor shall submit an SBE participation plan or request for good faith waiver for all 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 SBE plan for the project shall include a list of names of the certified SBE prime contractor, SBE subcontractors and/or suppliers to be used in the eligible project, the type of work or service each business will perform, and the dollar amount of a certified SBE Prime contractor, and/or each certified SBE's subcontract and/or suppliers of the total project.

(5) The contractors shall certify that the SBE plan has met the established SBE 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 SBE Plans for Construction Projects.

(1) The director shall review and evaluate the apparent low bidder's SBE 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 SBE 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 SBE plan;

(b) Failed to identify SBEs by name, the scope of work, and value of work as a percent of the total bid sufficient to meet the applicable SBE goals for that project;

(c) Failed to achieve the dollar value and/or percentage of credible participation by certified SBEs necessary to meet the project goals; or

(d) Failed to meet the requirements for a waiver of the SBE 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 section 28-153(2).

(5) Replacement of an SBE.

(a) Notwithstanding the requirements of Sec. 28-48(2) of the Tucson Procurement Code, the Director shall review and approve the replacement of an SBE from a construction project.

(b) Removal of an SBE does not relieve the contractor of responsibility for meeting the SBE project goal.

(c) The Contractor shall immediately take adequate good faith efforts to obtain another certified SBE to perform equal or greater dollar value of the work.

Sec. 28-150(7). Review of SBE Plans for Construction Services Projects.

(1) The director shall review and evaluate SBE plans and determine whether the contractor met the project goals, and approve or reject such plan. The director may clarify information relative to the SBE plan with the respondent and/or any listed subcontractors.

(2) For job order contracts, the director may determine that the plan is not acceptable where the contractor:

(a) Failed to provide a completed SBE plan;

(b) Failed to identify SBEs by name, the scope of work, and value of work as a percent of the total bid sufficient to meet the applicable SBE goals for that project;

(c) Failed to achieve the dollar value of credible participation by certified SBEs necessary to meet the project goals; or

(d) Failed to meet the requirements for a waiver of the SBE goals. In the event that a plan is found unacceptable, the Director may pursue remedies up to and including termination of the contract.

(3) For all 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 SBE plan;

(b) Failed to identify SBEs by name, the scope of work and value of work of the total bid sufficient to meet the applicable SBE goals for that project;

(c) Failed to achieve the dollar value of credible participation by certified SBEs necessary to meet the project goals; or

(d) Failed to meet the requirements for a waiver of the SBE goals. In the event that a plan is found unacceptable, 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 SBE 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 section 28-153(2).

Sec. 28-150(8). Maintenance of Records and Reports by Construction 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 at the completion of each individual project.

Sec. 28-151. Establishment of SBE Program Goals for Professional Design Services

Sec. 28-151(1). Eligible Projects for Professional Design Services SBE Participation Goals.

(1) All eligible projects shall be reviewed by the director for determination of Professional Design Services SBE participation. Where there is sufficient availability of SBEs, the Director may establish individual project participation goals.

(2) Specific participation 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 SBEs ready, willing, and able to provide design services in the profession or industry/trade classifications relevant to the project.

(b) The ability of certified SBE firms to readily expand their capacity to meet additional demand.

(c) The level of participation by such firms in past projects awarded by the city.

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

(3) SBE program requirements for a design contract must be clearly identified in the Request for Qualifications (RFQ) issued for each applicable project.

(4) SBE program requirements shall apply to the initial contract award for design contracts and to the individual project or phase awards for design services.

Sec. 28-151(2). Professional Design Services Small Purchase Reserve. Insofar as practical and where a sufficient number of certified SBE firms exist to comply with the small purchase requirements set forth in section 28-20(2), the director of procurement may reserve competition for small purchases for professional design services to certified SBEs. Where insufficient certified SBEs exist, non-SBEs may be included in the quoting process for small purchases.

Sec. 28-152. SBE Plans for Eligible Design Projects.

Sec. 28-152(1). Prime Consultant's SBE Plan for Design Services Projects. Notwithstanding its compliance with any other requirement of the Tucson Procurement Code, respondents shall receive Director approval of the SBE plan or be granted a waiver on the project in accordance with the requirements set forth in the solicitation. Such SBE plan shall be designed to meet the applicable project goals, which shall be incorporated into the resulting contract.

Sec. 28-152(2). Consultants for eligible projects. Consultants for eligible projects may meet the SBE project goals through the following methods:

(1) Prime consultant participation.

(a) Certified SBE prime consultants may use their own participation towards fulfillment of the project's SBE goals.

(2) Subconsultant participation.

(a) When a prime consultant utilizes one or more certified SBE subconsultants to satisfy its SBE participation commitment, the prime consultant 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 SBE subconsultant enters into second tier subcontracts consistent with the standard industry practices, such SBE subconsultant is performing a commercially useful function. If a SBE subconsultant subcontracts a significantly greater portion of its work to a non-SBE than would be expected by standard industry practices, it should be presumed that the SBE is not performing a commercially useful function.

Sec. 28-152(3). Submission of SBE plan for Professional Design Services Projects

(1) The solicitation shall contain any applicable SBE requirements. All respondents shall comply with the SBE requirements as set forth in the solicitation.

(2) The prime consultant shall submit an SBE participation plan or request for good faith waiver for each design project awarded under a Request for Qualification (RFQ) or job order contracts, that are over the Formal Solicitation Threshold and has a goal established by the Director, in accordance with the solicitation, prior to award. Plan(s) shall be submitted during the negotiation stage after the selection committee has identified the top ranked firm(s).

(3) The completed and signed SBE plan for the project shall include a list of names of the certified SBE prime consultant and SBE subconsultants to be used in the eligible project, the type of work or service each business will perform, and the dollar amount of a certified SBE prime consultant, and/or each certified SBE's subcontract of the total project.

(4) The prime consultant shall certify that the SBE plan has met the established SBE project participation goals or, notwithstanding good faith efforts to meet the goals, the consultant has been unable to do so and therefore is entitled to a good faith effort waiver in part or in full.

Sec. 28-152(4). Review of SBE Plans for Professional Design Services Projects.

(1) The Director shall review and evaluate SBE plans and determine whether the consultant met the project goals, and approve or reject the plan. The director may clarify information relative to the SBE plan with the respondent and/or any listed subconsultants.

(2) For all Professional Design Services contracts, the director may determine that the plan is not acceptable where the respondent:

(a) Failed to provide a completed SBE plan;

(b) Failed to identify SBEs by name, the scope of work and value of work of the total negotiated fees sufficient to meet the applicable SBE goals for that project;

(c) Failed to achieve the dollar value of credible participation by certified SBEs necessary to meet the project goals; or

(d) Failed to meet the requirements for a waiver of the SBE goals. In the event that a plan is found unacceptable, 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 SBE provisions.

(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 section 28-153(2).

(5) Replacement of an SBE:

(a) The Director shall review and approve the replacement of an SBE from a Professional Design Services project.

(b) Removal of an SBE does not relieve the Prime Consultant of responsibility for meeting the SBE project goal.

(c) The Consultant shall immediately take adequate good faith efforts to obtain another certified SBE to perform equal or greater dollar value of the work.

Sec. 28-153. SBE Good Faith Effort

Sec. 28-153(1). Good Faith Effort Waiver.

(1) If the SBE 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 section 28-150(4), 28-150(5) and 28-152(3). 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 SBE plan must also be submitted. When a full waiver is sought, an SBE 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 OEOP seeking technical/professional assistance identifying available SBEs.

(b) Copies of written notification to certified SBEs regarding subcontracting opportunities on a project.

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

(d) Documentation of efforts to assist and negotiate with SBEs for specific sub-bids and reasons for rejection of any such offered, including the names, addresses, and telephone numbers of SBEs who were contacted and reason for the rejection.

(e) As to each SBE 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 SBEs seeking subcontract work with prime contractors at the time of the solicitation submittal.

(g) Verification that the contractor/prime consultant rejected available SBEs because they submitted bids/proposals 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/subconsultants 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 SBEs in one trade area exceeds the quote or proposal of the lowest non SBE competing for the same work by the lesser of fifteen (15) percent or two hundred fifty thousand dollars ($250,000.00), and no other trade area is available to meet the established SBE goal. A bidder may not compare self-performed costs against an SBE subcontractor proposal as justification for the rejection of a bid.

(3) If after consultation with certified SBE firms and/or appropriate city employees, the director determines that SBE availability is less than projected, the director may waive or reduce established project goals. In such circumstances, the director shall certify that SBEs are not available.

(4) If the director determines that SBE 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 Tucson Code section 28-153(2).

(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 Tucson Code section 28-153(2).

(b) *Waiver* Denial *for Construction Services.* If the waiver is denied, the director's determination shall be subject to Tucson Code section 28-153(2).

(c) *Waiver Denial for Professional Design Services.* If the waiver is denied, the director's determination shall be subject to Tucson Code section 28-153(2).

Sec. 28-153(2). 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.

The decision of the director is final and not appealable.

Sec. 28-154. Applicability to Procurement of Goods, Materials, and Services.

Sec. 28-154(1). Price Preference Below the Competitive Bid Threshold (Small Purchase Reserve). Insofar as is practical and where a sufficient number of certified SBE firms exist to comply with the small purchase requirements set forth in section 28-20(2), the director of procurement may reserve competition for small purchases for goods and services to certified SBEs. Where insufficient certified SBEs exist, non-SBEs may be included in the quoting process for small purchases. When certified SBEs compete against non-SBEs, the price of a quote received from a certified SBE shall be adjusted by seven (7) percent for purposes of evaluating price. Where no certified SBEs exist for a good or service, this section shall not apply and the purchase shall be governed solely by section 28-20.

Sec. 28-154(2). Reducing Size, Scope, or Terms of Certain Contracts. To the extent practicable, the procurement director may 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 SBEs.

Sec. 28-155. Program Compliance.

Sec. 28-155(1) Complaints, Investigations of Compliance, Non-retaliation. The director may receive and investigate complaints and allegations by SBEs 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 SBEs on a project or work sites.

(2) Bid-shopping by prime contractors which has an adverse effect on SBE participation.

(3) Failure to make prompt payment to SBE contractors.

(4) Failure to utilize SBE contractors and consultants once the contract has been awarded.

(5) Substitution of subcontractor issues.

(6) Allegations of non-performance by SBE sub-contractors.

Sec. 28-156. Additional Terms.

Sec. 28-156(1). Non-interference. The process of determining and appealing eligibility, certification, continuing certification or decertification of the SBE status of enterprises shall not be subject to interference, influence, or coercion of any sort by parties including departmental and elected officials.

Sec. 28-156(2). Authority. The director shall promulgate rules and regulations, consistent with the provisions of article XIII, for implementation of the SBE program.

Sec. 28-156(3). Termination. The SBE program may be terminated by the mayor and council, in accordance with the review and reporting requirements under section 28-148(2).

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SECTION 2. Section 1 is effective on and after July 1, 2013.

SECTION 3. 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 June 12, 2012.

MAYOR

ATTEST:

CITY CLERK

APPROVED BY:

CITY ATTORNEY

REVIEWED BY:

CITY MANAGER

DLD/mg
6/1/2012