ADOPTED BY THE
MAYOR AND COUNCIL

August 5, 2009

ORDINANCE NO. 10703

RELATING TO PROCUREMENT; AMENDING CHAPTER 28, ARTICLE XIII, MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISE PROGRAM SECTION 28-147, DEFINITIONS; SECTION 28-149, ESTABLISHMENT OF S/M/WBE PROGRAM GOALS FOR PROFESSIONAL DESIGN, CONSTRUCTION, AND CONSTRUCTION SERVICES PROJECTS; SECTION 28-150, S/M/WBE PLANS FOR ELIGIBLE PROJECTS; AND SECTION 28-151, APPLICABILITY TO PROCUREMENT OF GOODS, MATERIALS AND SERVICES; AND DECLARING AN EMERGENCY.

WHEREAS, on February 10, 2009, Mayor and Council passed, adopted and approved Ordinance No. 10634 adopting a new Chapter 28, Article XIII, Small, Minority and Women-owned Business Enterprise Program; and

WHEREAS, it is in the best interest of the City to amend certain provisions of Chapter 28, Article XIII, relating to professional design services, eligible projects and procurement of goods, materials and services.

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

SECTION 1. Tucson Code Chapter 28, Article XIII, Section 28-147 is amended 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 XIII:

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.

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.

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.

City shall mean City of Tucson.

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:

(1) the amount of work subcontracted;

(2) the type of prime contract;

(3) whether the business has the skill and expertise to perform work for which it is being/has been certified;

(4) whether the business actually performs, manages and supervises the work for which it is being or has been certified;

(5) 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

(6) standard industry practices.

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.

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:

(1) construction-manager-at-risk;

(2) design-build; or

(3) job-order-contracting.

Contractor shall mean any person or entity that has a contract with the City.

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.

Director shall mean the Director of the City's Office of Equal Opportunity Programs.

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.

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

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.

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.

Eligible Project shall mean any construction project 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) §§ 28-21 (sole source procurement), 28-22 (emergency procurement), or 28-23 (special procurement).

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

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.

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

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:

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

(2) 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;

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

(4) 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.

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

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.

OEOP shall mean City Office of Equal Opportunity Programs.

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.

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:

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

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

(3) 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

(4) 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.

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.

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

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.

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

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.

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.

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.

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.

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.

SECTION 2. Tucson Code Chapter 28 Article XIII Section 28-149 is amended as follows:

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

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

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

* * *

SECTION 3. Tucson Code Chapter 28 Article XIII Section 28-150 is amended as follows:

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

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

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(2) The Contractor shall submit an S/M/WBE 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 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 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.

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

* * *

(2) For 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 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.

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

* * *

(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 Construction Services.* If the waiver is denied, the Director's determination shall be subject to TC § 28-150(i).

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Sec. 28-150(10) Professional Design Services S/M/WBE application of preference points in formal solicitations. Preference points will be applied in professional design contracts specifically addressing the city's underutilization of certain professional design groups and the desire to provide opportunities to small businesses. In the evaluation of a Request for Qualifications, a maximum of ten (10) preference points may be applied by the department of procurement for the use of M/WBE certified firms which fall within the race/gender category for which there is a statistical disparity and/or certified SBE firms.

(1) *S/M/WBE Certification of the Prime Consultant.* Four preference points will be awarded to Certified Small, Minority and Women-owned firms who submit a response as a prime consultant to a Request for Qualifications and are eligible to receive such preference based on disparity or certification as a small business enterprise. To be eligible for any certification points, a firm must be certified prior to the submittal due date and a copy of the certification must be submitted with the solicitation response.

(2) *S/M/WBE Certification of a Subconsultant.* Preference points may be awarded for the use of certified, Small, Minority and Women-owned firms as subconsultants to the prime under a Request for Qualifications. For each eligible certified subconsultant included in the proposed team, the prime consultant may receive two preference points with a maximum of ten preference points total awarded for an eligible, certified prime consultant (if applicable under section (1) and/or eligible, certified subconsultants. To be eligible for any certification points, the proposed subconsultant must:

(a) be performing a commercially useful function as defined in Section 28-147 of the Tucson Procurement Code;

(b) be expected to perform at least ten percent (10%) of the anticipated scope of services as determined by the City; and

(c) be certified prior to the submittal due date; a copy of the certification shall be submitted with the solicitation response.

(3) *Substitution of a Subconsultant.* Award of preference points for an eligible, certified subconsultant under section (2) shall act as certification that the work shall be performed by the listed subconsultant. Substitutions may be allowed at the discretion of the Director, for reasons including but not limited to, subconsultant non-responsiveness, insolvency, or any other reason deemed by the Director to be in the best interest of the City.

(4) *Application of Preference Points.* Preference points shall be awarded as part of the evaluation for selecting firms under a one-step process, and only for screening firms in the two-step process to advance to the second phase. Consultants may seek to maximize awarded points through the prime consultant's certification and the use of certified subconsultants or entirely through the use of certified subconsultants.

Sec. 28-150(11) 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 Sec. 28-20(2) and (3), 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. When Certified SBEs compete against non-SBEs for professional design services, the submittal received from a Certified SBE shall receive seven preference points in the evaluation.

Where no Certified SBEs exist for construction or professional design services, this section shall not apply and the purchase shall be governed solely by Sec. 28-20.

SECTION 4. Tucson Code Chapter 28 Article XIII Section 28-151 is amended as follows:

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

* * *

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 between one hundred fifty thousand dollars ($150,000) and five hundred thousand ($500,000) in the initial term of the contract. This adjustment shall be solely for the purpose of applying the price preference.

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Sec. 28-151(4) 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 Sec. 28-20(2) and (3), 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 Sec. 28-20.

SECTION 5. 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 6. 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, August 5, 2009.

MAYOR

ATTEST:

CITY CLERK

APPROVED AS TO FORM:

CITY ATTORNEY

REVIEWED BY:

CITY MANAGER

MMD/tl
7/28/09