

1 **BY AUTHORITY**

2 ORDINANCE NO. _____
3 SERIES OF 2021

COUNCIL BILL NO. CB21-____
COMMITTEE OF REFERENCE:

4 Business, Arts, Workforce & Aviation Services

5 **A BILL**

6 **For an ordinance revising Articles III, V and VII of Chapter 28 of the Denver Revised**
7 **Municipal Code.**

8
9 **NOW, THEREFORE, BE IT ENACTED BY THE COUNCIL OF THE CITY AND COUNTY OF**
10 **DENVER:**

11
12 **Section 1.** That Section 28-35(1) of Subdivision I of Division 1 of Article III of Chapter 28 of
13 the Revised Municipal Code is hereby revised to read as follows:

14 (1) *Affiliate* means any business ~~enterprise~~ that is ~~affiliated~~ associated with an MWBE or
15 with the owner(s) of such MWBE. ~~Businesses Business enterprises~~ are affiliates of each other
16 when one (1) controls or has the power to control the other, or a third party or parties' controls or
17 has the power to control both. It does not matter whether control is exercised, so long as the power
18 to control exists. The director may utilize, in the interpretation of this definition, the definition of
19 affiliate set forth in C.F.R. § 121 or successor regulation, including related SBA guidance
20 documents, as from time to time amended.

21 **Section 2.** That Section 28-55(a) of Subdivision I of Division 3 of Article III of Chapter 28 of
22 the Revised Municipal Code is hereby revised to read as follows:

23 (a) The DSBO is authorized to establish the size standards for the certification of business
24 enterprises as further provided in the applicable rules and regulations and in accordance with articles
25 of III, V and VII of this chapter 28. No applicant business enterprise shall be certified as an MWBE,
26 and following certification of an MWBE, no certification shall be renewed, if on the effective date of
27 the application or renewal the applicant business enterprise or MWBE (combined with all affiliates)
28 has achieved a size standard established by the DSBO. ~~exceeding the following size standards:~~

29 (1) ~~For construction, reconstruction and remodeling, and construction management~~
30 ~~services, applicant business enterprises cannot exceed one hundred (100) percent of the applicable~~
31 ~~size standards established by the U.S. Small Business Administration ("SBA") at C.F.R. § 121.201,~~

1 ~~as amended, or successor SBA regulation or classification system, which are incorporated herein~~
2 ~~by reference. The size standard is based on annual receipts averaged over the three (3) preceding~~
3 ~~consecutive fiscal years; whether the applicant business has otherwise achieved a size standard~~
4 ~~based upon its number of employees; or other criteria applicable to any of the work activities for~~
5 ~~which the applicant business enterprise seeks certification or is certified. The director may adjust or~~
6 ~~modify such MWBE graduation size standards if it appears, after further inquiry and review by the~~
7 ~~director, that such standards are no longer appropriate to the purposes of this article III and its~~
8 ~~divisions.~~

9 ~~_____ (2) For professional design and construction services (excluding construction~~
10 ~~management), applicant business enterprises cannot exceed fifty (50) percent of the applicable size~~
11 ~~standards established by the U.S. Small Business Administration ("SBA") at C.F.R. § 121.201, as~~
12 ~~amended, or successor SBA regulation or classification system, which are incorporated herein by~~
13 ~~reference. The size standard is based on annual receipts averaged over the three (3) preceding~~
14 ~~consecutive fiscal years; whether the applicant business has otherwise achieved a size standard~~
15 ~~based upon its number of employees; or other criteria applicable to any of the work activities for~~
16 ~~which the applicant business enterprise seeks certification or is certified. The director may adjust or~~
17 ~~modify such MWBE graduation size standards if it appears, after further inquiry and review by the~~
18 ~~director, that such standards are no longer appropriate to the purposes of this division 3.~~

19 **Section 3.** That Section 28-55(c) of Subdivision I of Division 3 of Article III of Chapter 28 of
20 the Revised Municipal Code is hereby revised to read as follows:

21 (c) If an MWBE has been certified by the city in more than one (1) NAICS Code or has an
22 affiliate that has been certified by the city in a NAICS Code other than that of the MWBE, then the
23 annual receipt level or employee or other criterion used as the graduation criterion for such MWBE
24 shall apply separately to each NAICS Code for which the MWBE and its affiliate have been certified.
25 Such an MWBE and any affiliate that has exceeded the graduation criteria in one (1) NAICS Code
26 shall be deemed to be graduated from this article III and its divisions as to that code, and, if the
27 graduation requirements of subsections (a) or (b) above do not apply, may continue to be certified
28 in another NAICS Code having a higher monetary or employee number graduation level but shall no
29 longer be considered eligible to be or remain certified in the NAICS Code with the lower size
30 standard. Such an MWBE or any affiliate that has exceeded the graduation criteria for the largest
31 NAICS Code applicable to its activities shall be deemed to be graduated from this article III and its

1 divisions for the duration of the period in which the MWBE exceeds the graduation criteria.
2 Graduated MWBEs may reapply for certification if they meet the criteria for certification including the
3 requisite size standard. ~~Utilization of MWBEs shall count toward a goal, if any, to the extent that an~~
4 ~~MWBE is performing a commercially useful function corresponding to a NAICS Code in which it is~~
5 ~~certified.~~

6 **Section 4.** That Section 28-62(a) of Subdivision II of Division 3 of Article III of Chapter 28
7 of the Revised Municipal Code is hereby revised by adding a new subsection (5) to read as follows:

8 (5) Utilization of MWBEs shall count toward a goal, if any, to the extent that an
9 MWBE is performing a commercially useful function corresponding to a NAICS Code in which it is
10 certified.

11 **Section 5.** That Section 28-66(a) of Subdivision II of Division 3 of Article III of Chapter 28
12 of the Revised Municipal Code is hereby revised by adding a new subsection (5) to read as follows:

13 (5) Utilization of MWBEs shall count toward a goal, if any, to the extent that an
14 MWBE is performing a commercially useful function corresponding to a NAICS Code in which it is
15 certified.

16 **Section 6.** That Section 28-68(c) of Subdivision II of Division 3 of Article III of Chapter 28
17 of the Revised Municipal Code is hereby revised to read as follows:

18 (c) For any contract for which the director has set a participation goal, it shall be an
19 ongoing, affirmative obligation of the contractor or consultant on such contract to maintain
20 compliance with all applicable provisions of this article III and its divisions to include, at a minimum,
21 compliance with the originally achieved level of MWBE participation upon which the contract was
22 awarded, for the duration of the contract, unless the city initiates a material alteration to the scope
23 of work affecting MWBEs performing on the contract through change order, contract amendment,
24 force account or as otherwise described in section 28-70. Graduation of an MWBE shall not affect
25 the contribution made by the MWBE toward satisfaction of a participation goal if the work was bid or
26 proposed to be performed by the MWBE prior to the date of ineligibility for certification based on
27 achievement of the graduation criteria.

28 **Section 7.** That Section 28-122 of Article V of Chapter 28 of the Revised Municipal Code
29 is hereby revised to read as follows:

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

1 (a) *Procedures and methods.* The DSBO director shall, by rule and regulation or guidelines
2 relating solely to internal management and procedure, establish reasonable procedures and
3 methods for the certification of applicant business enterprises as ~~MWBEs or SBEs~~ EBEs, MWBEs,
4 SBEs and SBECs in order to effectuate the purposes of this article V. The DSBO director may seek
5 input and advice from appropriate industry sources as to appropriate aspects of work performance,
6 equipment and staffing in these industry areas in which certification is being sought.

7 (b) *Eligibility and application procedures.* Only applicant business enterprises who meet the
8 applicable certification criteria may participate as ~~MWBEs or SBEs~~ EBEs, MWBEs, SBEs and
9 SBECs in the programs established under this article V. The certification criteria, requirements, and
10 application procedures contained in sections 28-35 and 28-53 through 28-56 of this Code will apply
11 to the certification, renewal of certification, decertification, and graduation of MWBEs under this
12 article V. The certification criteria, requirements, and application procedures contained in sections
13 28-205 and 28-206 of this Code will apply to the certification, renewal of certification, decertification,
14 and graduation of EBEs, SBEs and SBECs under this article V.

15 (c) No applicant business enterprise shall be certified as an ~~MWBE or SBE~~ EBEs, MWBEs,
16 SBEs, and SBECs, and following certification of an ~~MWBE or SBE~~ EBEs, MWBEs, SBEs, and
17 SBECs, no certification shall be renewed if on the effective date of the application or renewal the
18 applicant business enterprise, the ~~MWBE or SBE~~ EBEs, MWBEs, SBEs, and SBECs (combined with
19 all affiliates) has achieved a size standard established by the DSBO in accordance with section 28-
20 55 of article III or section 28-206 of article VII. exceeding one hundred (100) percent of the applicable
21 size standards established by the U.S. Small Business Administration ("SBA") at C.F.R. § 121.201,
22 as amended, or successor SBA regulation or classification system, which are incorporated herein
23 by reference. The size standard is based on annual receipts averaged over the three (3) preceding
24 consecutive fiscal years; whether the applicant business has otherwise achieved a size standard
25 based upon its number of employees; or other criteria, applicable to any of the work activities for
26 which the applicant business enterprise seeks certification or is certified. The DSBO director may
27 adjust or modify such MWBE/SBE graduation size standards if it appears, after further inquiry and
28 review by the DSBO director, that such standards are no longer appropriate to the purposes of this
29 article V.

30 **Section 8.** That Section 28-126(a) of Article V of the Revised Municipal Code is hereby
31 revised by adding a new subsection (5) to read as follows:

1 (5) Utilization of MWBEs shall count toward a goal, if any, to the extent that an
2 MWBE is performing a commercially useful function corresponding to a NAICS Code in which it is
3 certified.

4 **Section 9.** That Section 28-132(c) of Article V of Chapter 28 of the Revised Municipal Code
5 is hereby revised to read as follows:

6 (c) For any contract or purchase order for which the DSBO director has set a participation
7 goal, it shall be an ongoing, affirmative obligation of the vendor, contractor or consultant on such
8 contract to maintain, at a minimum, compliance with provisions of this article V as well as the
9 originally achieved level of MWBE participation upon which the contract or purchase order was
10 awarded, for the duration of the contract or purchase order, unless the city initiates a material
11 alteration to the services affecting MWBEs performing on the contract or purchase order through a
12 contract amendment, or as otherwise described in section 28-133. Graduation of an MWBE shall not
13 affect the contribution made by the MWBE toward satisfaction of a participation goal if the work was
14 bid or proposed to be performed by the MWBE prior to the date of ineligibility for certification based
15 on achievement of the graduation criteria.

16 **Section 10.** That Section 28-146(a) of Article V of the Revised Municipal Code is hereby
17 revised to read as follows:

18 (a) Upon award of a city contract or city purchase order, compliance with the commercially
19 useful function requirement and other performance requirements required under this article V by the
20 SBE becomes a covenant of performance by the SBE vendor, contractor or consultant in favor of
21 the city. It shall be an ongoing, affirmative obligation of the SBE on such contract or purchase order
22 to perform all requirements, including, but not limited to, the provision of a commercially useful
23 function, for the duration of the city contract or purchase order, unless the city initiates a material
24 alteration to the goods to be provided or services to be performed affecting the SBE's performance
25 of a commercially useful function on the contract or purchase order through a written amendment.
26 Graduation of an SBE shall not affect the contribution made by the SBE toward participation if the
27 work was bid or proposed to be performed by the SBE prior to the date of ineligibility for certification
28 based on achievement of the graduation criteria.

29 **Section 11.** That title of Article VII the Revised Municipal Code is hereby revised to read as
30 follows:

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

7 **Section 12.** That Article VII of the Revised Municipal Code are hereby revised to add
8 Section 28-201 to read as follows:

9 **Sec. 28-201. - [Reserved].**

10 **Section 13.** That Section 28-202 of Article VII of the Revised Municipal Code is hereby
11 revised to read as follows:

12 **Sec. 28-202. - Purpose and scope.**

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

23 **Section 14.** That Section 28-204 of Article VII of the Revised Municipal Code is hereby
24 revised to read as follows:

25 **Sec. 28-204. - Definitions.**

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

28 (1) *Affiliate* means any business ~~enterprise~~ is affiliated associated with an SBE, SBEC or
29 EBE, or with the owner(s) of such SBE, SBEC or EBE. ~~Businesses Business enterprises~~ are affiliates
30 of each other when one controls or has the power to control the other, or a third party or parties'
31 controls or has the power to control both. It does not matter whether control is exercised, so long as

1 the power to control exists. The director may utilize, in the interpretation of this definition, the
2 definition of affiliate set forth in C.F.R. § 121 or successor regulation, as from time to time amended.

3 (2) *Applicant business enterprise* means a business enterprise seeking to be certified as
4 a small business enterprise under this article VII.

5 (3) *Bidder* means a business enterprise that submits a bid on a construction contract that
6 is offered for competitive bidding by the city or otherwise offered by a private owner.

7 (4) *Broker* means a business enterprise that performs a commercially useful function as an
8 intermediary, for a fee, in the acquisition of materials, supplies or equipment, regardless of whether
9 or not it takes title to such materials, supplies or equipment, for the city or a private owner or its
10 contractors, consultants or suppliers, but is not a manufacturer, manufacturer's representative or
11 regular dealer. Only bona fide commissions earned by a broker for its activities in performing a
12 commercially useful function on a city contract shall be counted toward legitimate participation by an
13 SBE on such contract as set out in this article VII. A packager shall be considered and treated as a
14 broker.

15 (5) *Business enterprise* means an individual, sole proprietorship, corporation, limited liability
16 company, partnership, limited partnership, limited liability limited partnership, joint stock company,
17 joint venture, professional association or any other legal entity operated for profit that is properly
18 licensed or registered, as applicable, owned, and controlled by persons who are citizens of the
19 United States or lawful permanent residents of the United States, and otherwise authorized to do
20 business in the State of Colorado.

21 (6) *Certification* means completion by a business enterprise of an application procedure to
22 be developed by the DSBO, and formal authorization by the director to participate as an SBE or
23 SBEC under this article VII. Certification neither represents nor implies that a business enterprise is
24 qualified to perform on a contract or concession agreement, nor that it performs a commercially
25 useful function.

26 (7) *City* means the City and County of Denver and its participating user departments.

27 (8) *City project; city contract; city construction practices* mean any contract or project
28 encompassed within the definition of contract in this article VII, regardless of whether the project
29 owner is the city or a private owner. All provisions of this article VII shall apply to such contracts let
30 by private owners, provided that the city shall not dictate means and methods of construction to such
31 private owners. Copies of all documents required to be provided by a subcontractor, subconsultant,

1 supplier, manufacturer, manufacturer's representative or broker hereunder shall be sent to the
2 director when the originals are sent to a private owner.

3 (9) *Commercially useful function* means an EBE, SBE, or SBEC is responsible for the
4 execution of a distinct element of the work of a contract or concession agreement and is carrying out
5 the work by actually performing, maintaining control, managing, and supervising the work involved,
6 or fulfilling responsibilities as a joint venturer. In determining whether an EBE, SBE, or SBEC is
7 performing or has performed a commercially useful function, the DSBO will analyze whether the SBE
8 is performing functions set forth in this definition and this division including but not limited to being
9 responsible for, with respect to materials, supplies or equipment used for the contract work,
10 negotiating price, determining quantity and quality of the materials, supplies or equipment, ordering
11 the materials, supplies or equipment, performing installation where applicable, and paying for the
12 materials, supplies or equipment. To determine whether an EBE, SBE, or SBEC is performing a
13 commercially useful function, the DSBO will evaluate the amount of work contracted or
14 subcontracted, industry practices, amounts paid to the EBE, SBE, or SBEC in proportion to the work
15 actually performed, progress toward compliance with this article, and other relevant factors.
16 Commercially useful function is measured for purposes of determining participation on a contract or
17 concession agreement, not for determination of certification eligibility.

18 (10) *Competitive selection process* has the meaning ascribed to that phrase in sections
19 2.3.(A) and 2.11.3(B) of the Denver City Charter, and in D.R.M.C. sections 5-19 and 20-56, as that
20 meaning may pertain to a contract(s) at issue.

21 (11) *Concessionaire* or small business enterprise concessionaire or SBEC means a
22 business enterprise that enters into a competitively selected or negotiated concession agreement
23 with the city, in privity of contract with the city, for the operation of a retail, food service or other
24 concession in a building, or aviation or aeronautical facility, or improvements thereto, situated on
25 real property owned or operated by the city. A certified SBE may be included as a concessionaire or
26 SBEC under this article VII.

27 (12) *Concession agreement* means any city agreement for the operation of a retail, food
28 service or other concession authorized by any provision of the Charter or ordinances of the city,
29 including, but not limited to, agreements awarded by competitive selection procedures or negotiated
30 contracts, in a building, or aviation or aeronautical facility, or improvements thereto, situated on real
31 property owned or operated by the city.

1 (13) *Conduit* means an EBE, SBE, or SBEC that knowingly agrees to pass the scope of
2 work for which it is listed for participation and is scheduled to perform or supply on a contract or
3 concession agreement, to a non-EBE, non-SBE, or non-SBEC, or does not carry out the
4 responsibilities required by actually performing, managing, controlling and supervising the work
5 involved. In this type of relationship, the EBE, SBE, or SBEC has not performed a commercially
6 useful function and the arranged agreement between the two (2) parties is not consistent with
7 standard industry practice. This arrangement does not meet the commercially useful function
8 requirement, and therefore the EBE's, SBE's, or SBEC's participation is not considered to be a
9 legitimate portion of the work on the contract or concession agreement. Conduit is also referred to
10 as a passthrough.

11 (14) *Construction* means those areas of construction, reconstruction and remodeling as
12 encompassed within the city's contracting processes authorized by the Charter and ordinances of
13 the city. This definition shall encompass design-build contracts as appropriate.

14 (15) *Consultant* means a business enterprise that enters into a negotiated contract with the
15 city, in privity of contract with the city, for professional design and construction services or enters
16 into such a contract with a private owner, in privity of contract with such private owner, for such
17 services on a building or aviation or aeronautical facility, or improvements thereto, situated on real
18 property owned by the city.

19 (16) *Contract* means any city contract for construction or for professional design and
20 construction services authorized by any provision of the Charter or ordinances of the city, excepting
21 only those contracts subject to division of article III of this chapter 28, or to federal requirements,
22 or city concession contracts. Contract shall also include other contracts ancillary to cooperative
23 agreements or understandings with other public and private agencies for purposes including the
24 development of public facilities, park and recreational facilities, museums, zoological and other
25 gardens, collections of natural history, and observatories, if such contracts provide for funding in
26 whole or in part by the city and provide for utilization of such funds for the purpose of construction or
27 professional design and construction services for any public facility or area owned or leased by the
28 city or situated on real property owned or leased by the city. Notwithstanding the foregoing, contract
29 shall also include construction or professional design and construction services for buildings or
30 aviation or aeronautical facilities or improvements thereto, constructed by private owners on real
31 property owned by the city, without regard to the utilization of city funding.

1 (17) *Contractor* means a business enterprise that enters into a competitively bid, otherwise
2 competitively selected or negotiated construction contract with the city, in privity of contract with the
3 city, or enters into such a construction contract with a private owner, whether or not bid, in privity of
4 contract with such private owner for such work on a building or aviation or aeronautical facility, or
5 improvements thereto, situated on real property owned by the city. Contractor includes general
6 contractors and prime contractors.

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

8 (19) *Defined selection pool contract or concession agreement* means a contract or
9 concession agreement which is determined by the director to be appropriate for restriction of the
10 selection of the contractor, consultant or concessionaire and, as applicable, subcontractors,
11 subconsultants and suppliers on such contract or concession agreement to the pool of certified
12 SBEs, SBECs, or EBEs ~~SBEs or PBEs~~, as determined by the director.

13 (20) *Department head* means the manager or director of the city department entering into
14 contract(s) or concession agreement(s) with SBE(s) or SBECs, or such person's designee.

15 (21) *Design-build contract* means a contract for the procurement of both the design and the
16 construction, reconstruction or remodeling of a public work in a single contract with a single design-
17 build contractor or combination of such contractors that are capable of providing the necessary
18 design and construction, reconstruction or remodeling services.

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

21 (23) *DSBO* or the DSBO means the division of small business opportunity.

22 (24) *DSBO required forms* means the certifications, letters of intent, commitment forms and
23 other forms and documents developed by the DSBO or described in this article VII and the rules and
24 regulations, referenced in the applicable procurement documents, and required by the DSBO to
25 confirm and evaluate a bidder's or proposer's commitment to utilization of certified firms and other
26 DSBO program requirements. No authorized alteration or modification of a DSBO required form is
27 permitted. The DSBO reserves the right to reject altered or modified forms.

28 (25) *Emerging business enterprise or EBE* means a business enterprise that is certified by
29 the director under this article VII as meeting all of the requirements for certification set forth in
30 sections 28-205 and 28-206.

1 (26) *Expertise* means demonstrated skills, knowledge or ability to perform in the field of
2 endeavor in which certification is sought by the business enterprise as defined by normal industry
3 practices, including licensure or registration where required.

4 (27) *Joint venture* means an association of two (2) or more business enterprises to
5 constitute a single business enterprise to perform a city construction or professional design or
6 construction services contract, or concession agreement for which purpose they combine their
7 property, capital, efforts, skills and knowledge and in which venture each joint venturer is responsible
8 for a distinct, clearly defined portion of the work of the contract or concession agreement, performs
9 a commercially useful function, and whose share in the capital contribution, control, management
10 responsibilities, risks and profits of the joint venture are equal to its ownership interest. Joint ventures
11 must have an agreement in writing specifying the terms and conditions of the relationships between
12 the joint venturers and their relationship and responsibility to the contract or concession agreement.

13 (28) *Manufacturer* means a business enterprise that operates or maintains a factory or
14 establishment that produces, or substantially alters on the premises the materials, supplies or
15 equipment provided to contractors, consultants, subcontractors, subconsultants, suppliers, brokers
16 or manufacturer's representatives on a contract, required under the contract and of the general
17 character described by the contract specifications. For manufacturers, one hundred (100) percent of
18 the value the materials, supplies or equipment provided by an SBE or EBE under a contract shall
19 count toward SBE participation.

20 (29) *Manufacturer's representative* means a business enterprise that sells products for one
21 (1) or more manufacturers. A manufacturer's representative does not take legal title to or physical
22 possession of the products that it sells, such products generally being sent directly from the
23 manufacturer to the contractor or subcontractor purchasing such products. Only bona fide
24 commissions earned by a manufacturer's representative in performing a commercially useful
25 function on a contract shall be counted toward legitimate participation by an SBE or EBE on such
26 contract as set out in this article VII.

27 (30) *Packager* means a business enterprise that performs a commercially useful function
28 in the packaging of goods for the city or a private owner or its contractors, consultants,
29 manufacturers, manufacturer's representatives or suppliers but is not itself a regular dealer or a
30 manufacturer or manufacturer's representative. A packager shall be considered as, and treated as,
31 a broker. A packager shall be considered and treated as a broker.

1 (31) *Personal net worth* means the net value of the assets of an individual after total
2 liabilities are deducted. An individual's personal net worth does not include the individual's ownership
3 interest in an applicant business enterprise or participating EBE, SBE, or SBEC, or the individual's
4 equity, if any, in his or her primary place of residence. An individual's personal net worth includes
5 only his or her share of assets held individually and jointly with the individual's spouse. For the
6 purposes of certification as an SBE, SBEC, or an EBE under this article VII, an individual must have
7 a personal net worth equal to or less than the permissible personal net worth amount determined by
8 the U.S. Department of Transportation to be applicable to its DBE programs, or as otherwise
9 promulgated by the director by rule and regulation. ~~This requirement shall not apply to SBECs SBEs~~
10 ~~certified under this article VII solely as concessionaires.~~

11 (32) *Private owner* means a private or other non-city owner undertaking to contract for
12 construction work or for professional design and construction services on buildings or aviation or
13 aeronautical facilities or improvements thereto, on real property owned by the city.

14 (33) *Professional design and construction services* means those areas of services ancillary
15 to construction as encompassed within the city's contracting processes authorized by the Charter
16 and ordinances of the city, including engineering, architectural, testing, construction management
17 services and planning services related to a construction project.

18 (34) *Proposal* means an offer to perform construction or professional design and
19 construction services or to operate a concession pursuant to a negotiated or otherwise competitively
20 selected city contract or concession agreement with either the city or a private owner, and whether
21 in response to a request for qualifications, request for proposals or otherwise. The department head
22 shall designate the proposal, and the date of receipt for each solicitation of proposers subject to this
23 article VII.

24 (35) *Proposer* means a business enterprise that submits a proposal on a city construction
25 contract or professional services, including design and construction services contract, or for a
26 concession agreement, that is negotiated and not competitively bid or that utilizes a competitive
27 selection process.

28 (36) *Regular dealer* means a business enterprise that owns, operates or maintains a store,
29 warehouse or other establishment in which the materials, supplies, articles or equipment of the
30 general character described by the contract specifications and required for the performance of the
31 contract are bought and regularly sold or leased to the public in the usual course of business. To be

1 a regular dealer, the business enterprise must be an established, regular business engaged in, as a
2 substantial and material portion of its business, and in its own name, the purchase and sale or lease
3 of the products in question. A regular dealer is presumed to keep such materials, supplies, articles
4 or equipment in stock, but must in any event bear the risk of loss of such items. A regular dealer in
5 such bulk items as steel, cement, gravel, stone, asphalt and petroleum products need not own,
6 operate or maintain a place of business if it both owns and operates distribution equipment for the
7 products. Any supplementation of a regular dealer's distribution equipment shall be by a long-term
8 lease agreement and not on an ad hoc or contract-by-contract basis. For regular dealers, sixty (60)
9 percent of the value of the commercially useful function performed by the SBE shall be counted
10 toward the participation goal. Brokers, conduits, packagers, manufacturers and manufacturer's
11 representatives shall not be regarded as regular dealers within the meaning of this term.

12 (37) *Small business enterprise* or *SBE* means a business enterprise, including an SBEC,
13 that is certified by the director under this article VII as meeting all of the requirements for certification
14 set forth in sections 28-205 and 28-206.

15 (38) *Subcontractor* or *subconsultant* means a business enterprise that either directly
16 contracts with a contractor or consultant or directly contracts with subcontractors or subconsultants
17 under such contractor or consultant on a city contract or concession agreement, and which business
18 enterprise will provide services or perform work under agreements with the contractor or consultant
19 or with other subcontractors or subconsultants under such contractor or consultant.

20 (39) *Supplier* means a business enterprise that either directly contracts with a contractor or
21 consultant or directly contracts with subcontractors or subconsultants under such contractor or
22 consultant on a city contract, and which business enterprise will provide materials, supplies or
23 equipment under agreements with the contractor or consultant, or with other subcontractors or
24 subconsultants under such contractor or consultant. A supplier may be a regular dealer,
25 manufacturer, manufacturer's representative or broker. Participation goal shall be counted in
26 accordance with the function performed by the SBE supplier under a contract and determined on a
27 per-contract or per-project basis.

28 **Section 15.** That Section 28-205 of Article VII of the Revised Municipal Code is hereby
29 revised to read as follows:

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

1 (a) *Procedures and methods.* The director shall, by rule and regulation or informal
2 guidelines relating solely to internal management and procedure, establish reasonable procedures
3 and methods for the certification of applicant business enterprises as SBEs, SBECs, and EBEs ~~SBEs~~
4 ~~and EBEs~~ in order to effectuate the purposes of this article VII. The director may seek input and
5 advice from appropriate industry sources as to appropriate aspects of work performance, equipment
6 and staffing in these industry areas in which certification is being sought.

7 (b) Only applicant business enterprises that meet the criteria for certification as an SBE,
8 SBEC, or EBE ~~SBE or EBE~~ may participate in the program established under this article VII. The
9 SBEs, SBECs and EBEs applicant business enterprise has the burden of persuasion by a
10 preponderance of the evidence. ~~SBEs and EBEs~~ shall be certified only for the certification area(s)
11 for which they apply and in which they have had sustained business activity for a minimum of six (6)
12 months. Certification areas shall correspond to the codes set forth in North American Industrial
13 Classification Standard (NAICS) Codes, or successor classification system, Code of Federal
14 Regulations § 121.201, as amended, or successor regulation.

15 (c) To determine whether the requirements set forth below are met, the division must
16 consider all of the facts in the record, viewed as a whole.

17 (1) *Ownership.* In order for the owner(s) to be found to own the applicant business
18 enterprise for purposes of certification, as applicable, the applicant business enterprise or owner(s)
19 must meet the requirements set forth below.

20 a. Own in his or her own name the legal and equitable interest in the applicant
21 business enterprise;

22 b. Have acquired the interest in a verifiable and substantial arms-length
23 transaction utilizing verifiable, substantial, and continuing consideration, going beyond pro forma
24 ownership of the applicant business enterprise as reflected in ownership documents;

25 c. Enjoy customary incidents of ownership and share in the risks and profits
26 commensurate with his or her ownership interest in practice, not merely in the form of arrangements;
27 and

28 d. Have acquired the interest with a contribution of his or her own capital
29 resources, by having put his or her own financial resources at risk in the operation of the applicant
30 business enterprise, or subject to requirements below, with a contribution of expertise. All
31 contributions by the owner(s) to acquire the ownership interest in the applicant business enterprise

1 must be verifiable, substantial, and continuing, which in part, means that it be commensurate with
2 the ownership interest acquired.

3 (A) If expertise is relied upon as part of an owner's contribution to
4 acquire ownership, the expertise must be of the requisite quality generally recognized in a
5 specialized field, in areas critical to the operations of the applicant business enterprise, indispensable
6 to the applicant business enterprise's potential success, specific to the type of work the applicant
7 business enterprise performs and documented in the applicant business enterprise's records. These
8 records must clearly show the contribution of expertise, including its equivalent monetary value. The
9 individual(s) whose expertise is relied upon must have a commensurate capital investment in the
10 applicant business enterprise.

11 (2) *Management and control.* The owner(s) shall manage and control the daily
12 business operations of the applicant business enterprise. The owner(s) management and control
13 must be verifiable, substantial, and continuing and go beyond the pro forma ownership of the
14 applicant business enterprise as reflected in its ownership documents. Ownership alone is not
15 sufficient to establish management and control. To determine whether the owner(s) satisfy these
16 requirements, the DSBO shall consider the criteria below.

17 (3) *Management and control.* The owner(s) shall manage and control the daily
18 business operations of the applicant business enterprise. The owner's(s') management and control
19 must be real, substantial, and continuing and go beyond the pro forma ownership of the applicant
20 business enterprise as reflected in its ownership documents. Ownership alone is not sufficient to
21 establish management and control. To determine whether the owner(s) satisfy these requirements,
22 the DSBO shall consider the criteria below.

23 a. If federal or state law or city ordinance requires the owner(s) to have a
24 particular license or other credential to own or control a certain type of business enterprise, then the
25 owner(s) must possess the required license or other credential. If federal or state law or city
26 ordinance does not require that the owner possess the license or other credential to own or control
27 the business enterprise, including control, direction, or supervision of the work performed under the
28 license, to determine whether the owner(s) manage and control the business enterprise, the DSBO
29 may consider whether the owner(s) holds the license or other credential as a factor. If there is not a
30 legal requirement for the owner to hold the license or other credential to own or control a certain type
31 of business enterprise, failure of the owner to hold the license or other credential does not by itself

1 indicate lack of management and control of a business enterprise without other factors indicating to
2 the contrary.

3 b. An owner(s) shall have substantial experience in the trade or industry that
4 would be necessary to make routine and major decisions for the applicant business enterprise.

5 c. An owner(s) shall regularly make decisions, hold himself or herself out to
6 the public, and sign important documents and financial instruments in a manner that is indicative of
7 primary management and control of daily business operations and responsibility for routine and
8 major decisions.

9 d. There may not be any restriction through corporate charter provisions, by
10 law provisions, contracts or any other formal or informal devices that prevent the owner(s), without
11 the cooperation or vote of any other individual, from making any business decision of the applicant
12 business enterprise, including the making of obligations or the dispersing of funds.

13 e. The owner(s) must possess the power to direct or cause the direction of the
14 management and policies of the applicant business enterprise and to make day-to-day as well as
15 long-term decisions on management, policy, and operations.

16 f. The owner(s) may delegate various areas of the management, policymaking,
17 or daily operations of the applicant business enterprise to another participant or other participant(s)
18 who are not owner(s). Such delegations of authority must be revocable, and the owner(s) must retain
19 the power to hire and fire any such person. The owner(s) must actually exercise control over the
20 applicant business enterprise's operations, management, and policies.

21 g. The owner(s) must have an overall understanding of, and managerial and
22 technical competence, experience and expertise, directly related to the type of business in which the
23 applicant business enterprise is engaged and its operations. The owner(s) is not required to have
24 experience or expertise in every critical area of the applicant business enterprise's operations or
25 have greater experience or expertise in a given field than managers or key employees. The owner(s)
26 must have the ability to intelligently and critically evaluate information presented by other participants
27 in the applicant business enterprise's activities and to make independent decisions concerning the
28 applicant business enterprise's daily operations, management, and policymaking. Generally,
29 expertise or responsibilities primarily in office management, administration, bookkeeping, or other
30 functions unrelated to the principal business activities of the applicant business enterprise are
31 insufficient to demonstrate management and control.

1 h. An owner(s) may not engage in outside employment or other business
2 interests that conflict with the management of the applicant business enterprise or prevent the
3 owner(s) from devoting sufficient time and attention to the affairs of the applicant business enterprise
4 to manage and control its day to day activities. For example, absentee ownership of a business and
5 part-time work in a full-time applicant business enterprise are not viewed as constituting
6 management and control. An individual, however, could be viewed as controlling a part-time
7 business that operates only evenings or weekends or both, provided the individual manages and
8 controls it throughout all hours of operation.

9 (4) *Independence.* Only an independent applicant business enterprise may be
10 certified as an SBE, SBEC or an EBE. An independent applicant business enterprise is one whose
11 viability does not depend on its relationship with another business enterprise. Recognition of an
12 applicant business enterprise as a separate entity for tax or corporate purposes is not necessarily
13 sufficient to demonstrate that the applicant business enterprise is independent and not an affiliate.
14 In determining whether an applicant business enterprise is an independent business, the director
15 shall:

16 a. Examine whether there is actual or potential affiliation between the
17 applicant business enterprise and individuals or non-certified business enterprises. To determine
18 whether affiliation exists, the division considers factors such as ownership, management, previous
19 relationships with or ties to another individual or non-certified business entity, and contractual
20 relationships. Affiliation may be based on common management, identity of interest, newly organized
21 concern rule, joint venture, or any combination thereof.

22 b. Scrutinize relationships with non-certified business enterprises in areas of
23 personnel, finance, facilities, equipment, and other resources. The division may consider shared
24 employees (including administrative staff), office space, phone numbers, and equipment and
25 whether there is any support or sharing of bonding capacity, lines of credit, and other resources.

26 c. Consider present or recent employer/employee relationships between the
27 owner(s) of the applicant and non-owner individuals, non-certified business enterprises, and persons
28 associated with non-certified business enterprises.

29 d. Examine the applicant business enterprise's relationships with non-certified
30 business enterprises to determine whether there is a pattern of exclusive or primary dealings with
31 non-certified business enterprises.

1 e. Consider whether relationships between the applicant business enterprise
2 and other non-certified persons and business enterprises is consistent with normal industry practice.

3 (5) *Other ownership criteria.* The director may establish by rule and regulation other
4 appropriate criteria of ownership, including but not limited to conditions of personal net worth of SBEs
5 owners, other than those certified solely as concessionaires. Personal net worth shall be the amount
6 of personal net worth described in subsection 28-204(31).

7 (6) *Actively in business for six (6) months.* The applicant business enterprise may
8 not be certified until six (6) months after the satisfaction of each of the following:

9 a. Formation of the applicant business enterprise;
10 b. Commencement of sustained business activity in the trade or profession
11 described on the certification application; and

12 c. Commencement of ownership, management and control of daily business
13 operations by the identified owner(s).

14 (7) *Lawfully present in the United States.* The owner(s) must be a citizen of the
15 United States or a lawfully admitted permanent resident of the United States, and must not have the
16 status of an unauthorized worker or otherwise be disqualified from lawfully residing in the United
17 States, engaging in business and seeking this certification. As a condition of certification, owner(s)
18 must comply with all reporting, submittal and other requirements that may be imposed by the city,
19 State of Colorado or United States governments regarding such lawful presence.

20 (8) *Threshold size; continued eligibility and renewal of certification.* No applicant
21 business enterprise or SBE, SBEC or EBE shall be eligible for initial or subsequent renewal of
22 certification if such applicant business enterprise or SBE or EBE combined with any affiliates meets
23 the criteria set forth in section 28-206 for graduation from this article VII. An SBE, SBEC or EBE will
24 be certified for a three-year period. Following initial certification, an SBE, SBEC or EBE that desires
25 to continue its certification shall, no later than thirty (30) days prior to each three-year anniversary of
26 the certification, submit a certification renewal application that shall update and reaffirm all
27 requirements for certification. No later than thirty (30) days prior to each annual anniversary of the
28 certification, an SBE, SBEC or EBE shall submit an affidavit certifying that there has been no change
29 in any information affecting certification eligibility, and other required tax or other financial information
30 and documents. A certification may be terminated by the director upon the failure of the SBE, SBEC
31 or EBE to satisfy any certification requirement set forth in this article VII.

1 (9) *City officials, officers and employees ineligible.* No applicant business enterprise
2 shall be eligible to be certified as an EBE, SBE, SBEC if ownership or control of such business
3 enterprise is held by a current official, officer or employee of the city.

4 (10) *Interviews, investigation and onsite visits.* The DSBO shall personally interview
5 all persons upon whom eligibility for certification is based, and is empowered to interview such other
6 persons and conduct such onsite visits and investigations as may be appropriate in its sole discretion
7 to verify eligibility for certification. An applicant business enterprise wishing to be certified as an SBE,
8 SBEC, or EBE shall cooperate with the DSBO in supplying additional information that may be
9 requested in order to make a determination.

10 (d) An applicant business enterprise shall be certified only for specific types of work in which
11 the owner(s) has the ability and expertise to manage and control the applicant business enterprise's
12 operations and work.

13 (e) In lieu of conducting its own certifications, the DSBO may accept formal certifications
14 by other governmental entities as meeting the requirements of this article VII provided that the
15 director determines that the certification standards and safeguards of such entities are substantially
16 equivalent to those of the city.

17 **Section 16.** That Section 28-206 of Article VII of the Revised Municipal Code is hereby
18 revised to read as follows:

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

21 (a) The DSBO is authorized to establish the size standards for the certification of business
22 enterprises as further provided in the applicable rules and regulations and in accordance with articles
23 of III, V and VII of this chapter 28. No applicant business enterprise shall be certified as an SBE,
24 SBEC or EBE, and following certification of an SBE, SBEC or EBE, no certification shall be renewed
25 if on the effective date of the application or renewal the applicant business enterprise, SBE, SBEC
26 or EBE (combined with all affiliates) has achieved a size standard established by the DSBO.
27 ~~exceeding the following size standards:~~

28 ~~(1) For construction, reconstruction and remodeling, and construction management~~
29 ~~services, applicant business enterprises cannot exceed one hundred (100) percent of the applicable~~
30 ~~size standards established by the U.S. Small Business Administration ("SBA") at C.F.R. § 121.201,~~
31 ~~as amended, or successor SBA regulation or classification system, which are incorporated herein~~

1 by reference. The size standard is based on annual receipts averaged over the three (3) preceding
2 consecutive fiscal years; whether the applicant business has otherwise achieved a size standard
3 based upon its number of employees; or other criteria applicable to any of the work activities for
4 which the applicant business enterprise seeks certification or is certified. The director may adjust or
5 modify such SBE graduation size standards if it appears, after further inquiry and review by the
6 director, that such standards are no longer appropriate to the purposes of this division 3.

7 ~~————— (2) For professional design and construction services (excluding construction~~
8 ~~management), applicant business enterprises cannot exceed fifty (50) percent of the applicable size~~
9 ~~standards established by the U.S. Small Business Administration ("SBA") at C.F.R. § 121.201, as~~
10 ~~amended, or successor SBA regulation or classification system, which are incorporated herein by~~
11 ~~reference. The size standard is based on annual receipts averaged over the three (3) preceding~~
12 ~~consecutive fiscal years; whether the applicant business has otherwise achieved a size standard~~
13 ~~based upon its number of employees; or other criteria applicable to any of the work activities for~~
14 ~~which the applicant business enterprise seeks certification or is certified. The director may adjust or~~
15 ~~modify such SBE graduation size standards if it appears, after further inquiry and review by the~~
16 ~~director, that such standards are no longer appropriate to the purposes of this article VII.~~

17 ~~(b) No applicant business enterprise shall be certified as an EBE, and following certification~~
18 ~~of an EBE, no certification shall be renewed if on the effective date of the application or renewal the~~
19 ~~applicant business enterprise or EBE (combined with all affiliates) has achieved a size standard,~~
20 ~~based on annual receipts averaged over the three (3) preceding consecutive fiscal years, of more~~
21 ~~than three million dollars (\$3,000,000.00) for a construction company, or more than one million~~
22 ~~dollars (\$1,000,000.00) for a professional design or construction services firm. The director may~~
23 ~~adjust or modify such EBE graduation size standards if it appears, after further inquiry and review~~
24 ~~by the director, that such standards are no longer appropriate to the purposes of this article VII.~~

25 ~~(b)(c) If an SBE, SBEC, or EBE has been certified by the city in more than one (1) NAICS~~
26 ~~Code or has an affiliate that has been certified by the city in a NAICS Code other than that of the~~
27 ~~SBE, SBEC, or EBE, then the annual receipt level or employee or other criterion used as the~~
28 ~~graduation criterion for such SBE, SBEC, or EBE shall apply separately to each NAICS Code for~~
29 ~~which the SBE or EBE and its affiliate have been certified. Such an SBE, SBEC, or EBE and any~~
30 ~~affiliate that has exceeded the graduation criteria in one (1) NAICS Code shall be deemed to be~~
31 ~~graduated from this article VII as to that Code, and if the graduation requirements of subsection (a)~~

1 above do not apply, may continue to be certified in another NAICS Code having a higher monetary
2 or employee number graduation level but shall no longer be considered eligible to be or remain
3 certified in the NAICS Code with the lower size standard. Such an SBE, SBEC, or EBE, or any
4 affiliate thereof that has exceeded the graduation criteria for the largest NAICS Code applicable to
5 its activities shall be deemed to be graduated from this article VII criteria. Graduated SBEs, SBECs,
6 and EBEs may reapply for certification if they meet the criteria for certification. Utilization of SBE or
7 SBEC contractors, consultants and concessionaires shall be counted under defined selection pool
8 contracts to the extent that an SBE is performing a commercially useful function corresponding to a
9 NAICS Code in which it is certified.

10 ~~(d) Graduation of an SBE shall not affect the contribution made by the SBE toward its~~
11 ~~performance under defined selection pool requirements if the work was bid or proposed to be~~
12 ~~performed by the SBE prior to the date of ineligibility for certification based on achievement of the~~
13 ~~graduation criterion.~~

14 ~~(c)(e)~~ Application to affiliates. The graduation criteria set forth above shall be deemed to
15 apply to the owner(s) upon whom eligibility for certification is based and all affiliates of such owner(s).
16 No applicant business enterprise shall be certified based upon one (1) or more owner(s) who owned
17 or who was an affiliate of an SBE, SBEC, or EBE that has become ineligible for renewal of
18 certification because of the achievement of graduation criteria.

19 ~~(d)(f)~~ The certification status of all SBEs, SBECs, and EBEs shall be reviewed periodically
20 by the DSBO. Failure of a certified and eligible SBE or EBE to seek timely renewal of certification by
21 filing the necessary documentation with the DSBO may result in decertification.

22 ~~(e)(g)~~ The DSBO shall decertify an SBE, SBEC, or EBE that does not continuously meet
23 the eligibility criteria for certification.

24 (1) The SBE shall notify the DSBO of any change in its circumstances affecting its
25 continued eligibility for certification under this article VII within thirty (30) days of the SBE's, SBEC's,
26 or EBE's actual awareness of such change of circumstances. Failure to do so may result in the
27 SBE's, SBEC's, or EBE's decertification.

28 (2) The director may move to decertify an SBE, SBEC, or EBE that repeatedly fails
29 to submit bids or proposals on city contracts, attend relevant pre-bid or pre-proposal conferences,
30 or otherwise comply with the requirements of this article VII.

1 ~~(g)~~(h) An applicant business enterprise or SBE, SBEC, or EBE that has been denied
2 certification or renewal of certification or decertified may protest the denial of certification or
3 decertification by the procedure set out in section 28-69. An applicant business enterprise or SBE,
4 SBEC, or EBE found to be ineligible for certification or renewal of certification may not apply for
5 certification or recertification for one (1) year after the effective date of the final decision.

6 **Section 17.** That Section 28-207 of Article VII of the Revised Municipal Code is hereby
7 revised to read as follows:

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

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

25 **Section 18.** That Section 28-208 of Article VII of the Revised Municipal Code is hereby
26 revised to add a new subsection (c) to read as follows:

27 (c) Graduation of an SBE, SBEC, or EBE shall not affect the contribution made by the
28 SBE, SBEC, or EBE toward its performance under defined selection pool requirements if the work
29 was bid or proposed to be performed by the SBE, SBEC, or EBE prior to the date of ineligibility for
30 certification based on achievement of the graduation criteria.

31 **Section 19.** That Section 25-211(b) of Article VII is hereby revised to read as follows:

1 (b) In order for its bid or proposal to be deemed responsive, a bidder or proposer must meet
2 the minimum utilization requirements for SBEs on a particular contract as well as the bidder's or
3 proposer's self-performance or joint venture obligations set out in section 28-208 above. Graduation
4 of an SBE, SBEC, or EBE shall not affect the contribution made by the SBE, SBEC or EBE toward
5 its performance under defined selection pool requirements if the work was bid or proposed to be
6 performed by the SBE, SBEC or EBE prior to the date of ineligibility for certification based on
7 achievement of the graduation criterion.

8 **Section 20.** Those Sections 28-214 through 28-232 of Article VII are hereby revised to read
9 as follows:

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

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

17 (1) The value of the commercially useful function to be self-performed by the SBE, SBEC,
18 or EBE (as applicable) proposer shall count to the extent provided in section 28-218 toward
19 satisfaction of the SBE, SBEC, or EBE defined selection pool requirements; or

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

1 SBE, SBEC or EBE prior to the date of ineligibility for certification based on achievement of the
2 graduation criteria.

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

5 (a) In addition to determining that a contract should be subject to the defined selection pool
6 requirements set out in section 28-214, the director may, in collaboration with the department heads,
7 also add a requirement to the proposal instructions for each defined selection pool professional
8 design and construction services contract assigning a minimum utilization requirement on such
9 contract for SBE or EBE utilization as subconsultants and/or suppliers, based upon a percentage of
10 the dollar value of all work on such contract; provided that, if the director determines it to be in the
11 best interests of the city, the director may in consultation with the user department waive the
12 application of minimum SBE or EBE subconsultant or supplier utilization for a given contract. The
13 minimum utilization requirement assigned by the director to each such contract may vary from
14 contract to contract consistent with the availability of SBEs or EBEs with respect to such contract.
15 Such minimum utilization requirement, if established, is not a goal, but a mandatory requirement of
16 the contract. The DSBO shall establish a methodology for the establishment of minimum utilization
17 requirements through rules and regulations. Such methodology shall consider the reasonably known
18 availability of SBEs in specific industry groupings that are associated with individual projects.

19 (b) The following factors shall count toward SBE or EBE utilization requirements as more
20 specifically provided below: portions of work undertaken by SBEs or EBEs as subconsultants,
21 suppliers, manufacturers, manufacturer's representatives or brokers.

22 (c) The SBE or EBE minimum utilization requirements shall not be applied to concession
23 agreements under this article VII.

24 **Sec. 28-216. - [Reserved].**

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

27 (a) The competitive selection process specifications for each defined selection pool
28 professional design and construction services contract shall require that all proposers seeking to
29 contract with the city on such project shall address any project SBE or EBE minimum utilization
30 requirements as follows. If the proposer utilizes SBEs or EBEs as subconsultants, suppliers,
31 manufacturers, manufacturer's representatives or brokers, the value of the commercially useful

1 function to be performed by such SBEs or EBEs, including the cost of supplies and materials
2 obtained by the SBE for the work of the contract, and supplies purchased or equipment leased by
3 the SBE, except supplies and equipment the SBE: purchases or leases from the proposer or its
4 affiliate, shall count to the extent provided in section 28-218 toward satisfaction of the SBE or EBE
5 minimum utilization requirements. Graduation of an SBE or EBE shall not affect the contribution
6 made by the SBE toward its performance under defined selection pool requirements if the work was
7 bid or proposed to be performed by the SBE prior to the date of ineligibility for certification based on
8 achievement of the graduation criterion.

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

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

15 (a) At the time of the proposal submitted to and authorized by the city or a private owner
16 the proposer shall provide to the city or private owner a list of all SBEs or EBEs that are being utilized
17 on the contract or concession agreement whether as a self-performing proposer or as
18 subconsultants, suppliers, manufacturers, manufacturer's representatives, brokers or members of a
19 joint venture. Unless otherwise specified in a request for qualifications, request for proposal or other
20 proposal solicitation, in the event that a proposal is requested for the provision of on-call services for
21 a period of time, with no delineation of the dollar amount of specific on-call projects, the proposer
22 need list only the anticipated percentage participation of SBEs or EBEs rather than specific dollar
23 amounts. The list shall specify:

- 24 (1) The name and contact information for each SBE or EBE;
- 25 (2) The description and percentage of the value of the commercially useful function
26 to be performed by the SBE or EBE or the percentage of the revenues expected to be generated by
27 the concession agreement, consistent with subsections (b) and (c), as compared to the total contract
28 amount or the total revenues expected to be generated by the concession agreement. In the case
29 of utilization of a supplier, manufacturer, manufacturer's representative, or broker, the appropriate
30 percentage of dollar value attributable to such SBE or EBE as a commercially useful function shall

1 be calculated with all underlying data supplied. If the proposer provides a dollar fee amount, then
2 both the dollar value and percentage must be listed in the proposal.

3 (3) The percentage of the value of the commercially useful function to be performed
4 by the SBE_or EBE, consistent with subsections (c) and (d), as compared to the total contract or
5 concession agreement amount;

6 (4) An adequate statement from the proposer that the dollar amount of work and/or
7 the percentage of the work to be performed by such SBE_or EBE on the contract or concession
8 agreement, other than that self-performed by the proposer, was furnished to the proposer and
9 agreed upon prior to the time of submission of the proposal submitted to and authorized by the city
10 or a private owner; and

11 (5) An adequate statement from the proposer that it understands that a letter of
12 intent, including, but not limited to, values provided by self-performing proposers, joint venturers,
13 subconsultants, suppliers, manufacturers, manufacturer's representatives and brokers, expressed
14 in dollar values and as a percentage of the overall work, must be submitted to the director for each
15 SBE_or EBE listed, including a self-performing proposer, at the time of submission of the proposal
16 submitted to and authorized by the city or a private owner.

17 (b) Only that level of SBE_or EBE utilization demonstrated in accordance with this section
18 at the time of such date of proposal submitted and authorized by the city or a private owner may be
19 counted in satisfaction of the requirements of this article VII. Proposers must submit an executed
20 letter of intent for each SBE_or EBE listed by the proposer, including a self-performing proposer, at
21 the time of submission of the proposal submitted to and authorized by the city or a private owner.
22 Failure to do so will render the proposal nonresponsive.

23 (c) All SBE_or EBE consultants, subconsultants, joint venturers, suppliers, manufacturers,
24 manufacturer's representatives or brokers listed in a proposal must actually perform a commercially
25 useful function in the work of a contract or the operation of a concession agreement within the area(s)
26 for which they are certified, and must not function as a conduit. Consistent with industry or
27 professional practice, and as permitted by rules and regulations adopted by the director, SBEs_or
28 EBEs may enter into subcontracts, including subcontracts with non-SBEs_or non-EBEs. In no case,
29 however, shall an SBE act as a conduit, nor shall the participation of an SBE_or EBE count toward
30 satisfaction of the requirements of this article VII to the extent it fails to perform a commercially useful
31 function.

1 (d) All expenditures for materials, supplies and equipment obtained from an SBE or EBE
2 manufacturer, manufacturer's representative or supplier shall count toward SBE self-performance or
3 utilization as specified in subsection 28-204(39). Expenditures for materials, supplies and equipment
4 paid to SBEs or EBEs that are not manufacturers, manufacturer's representatives or suppliers may
5 count toward compliance with the requirements of this article VII only to the extent of fees or
6 commissions charged for providing a bona fide service, such as professional, technical, consultant
7 or managerial services and assistance in the procurement of essential personnel, facilities,
8 equipment, materials or supplies required for performance of the contract or concession agreement,
9 provided that the fee or commission is determined by the director to be reasonable and not excessive
10 as compared with fees customarily allowed for similar services.

11 (e) Any agreement between a proposer and an SBE or EBE in which the proposer requires
12 that the SBE not provide subconsulting quotations to other proposers is prohibited and shall render
13 a proposer's proposal nonresponsive.

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

16 (a) *Responsive; compliance with requirements.* The director shall notify the department
17 head to regard the proposal as responsive if such proposal submitted to and authorized by the city
18 or a private owner subject to the defined selection pool requirements indicates that the SBE or EBE
19 proposer is appropriately performing a commercially useful function on the contract or concession
20 agreement, and is otherwise responsive to the requirements of the contract or concession agreement
21 and this article VII.

22 (b) *Failure to meet requirements.* The director shall notify the department head to regard
23 the proposal as nonresponsive if such proposal subject to the defined selection pool requirements
24 does not demonstrate performance by the SBE or EBE proposer of a commercially useful function,
25 as set out in section 28-214, minimum utilization of SBE or EBE subconsultants and suppliers as set
26 out in section 28-217, as applicable, or provide timely information as set out in section 28-218. Such
27 determination that the proposal is nonresponsive shall result in no further consideration by the city
28 or private owner of the proposal.

29 (c) *Commercially useful function or minimum utilization of SBE or EBE subcontractors or*
30 *suppliers—Informal meeting.* In the event the director finds inadequacies in a bidder or proposer's
31 demonstration of commercially useful function under section 28-214 or minimum utilization of SBE

1 or EBE subcontractors or suppliers under section 28-217, the director will provide written notice of
2 such inadequacies to the bidder or proposer prior to notifying the appropriate department head of
3 bid or proposal responsiveness. Within two (2) business days from the date that the city notifies the
4 bidder or proposer of such inadequacies, the bidder or proposer may request an informal meeting
5 with the director. Such informal meeting shall be scheduled by the director. All deficiencies shall be
6 explained to the bidder or proposer at such informal meeting. Within twenty-four (24) hours after the
7 informal meeting, the bidder or proposer shall be allowed to submit additional information or to clarify
8 its performance of a commercially useful function. At no time, however, will the director count toward
9 the minimum utilization the addition of subconsultants, joint venturers, suppliers, manufacturers,
10 manufacturer's representatives, or brokers that may later be added to the contract or to the original
11 SBE participation submitted at either the time of the bid or the date of proposal, in the case of a
12 competitive selection process. After this informal meeting, the director will:

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

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

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

24 **Sec. 28-221. - [Reserved].**

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

28 (a) Upon award of a defined selection pool contract or concession agreement by the city,
29 including those containing a minimum SBE, SBEC, or EBE utilization requirement, compliance with
30 the performance and utilization requirements set out in this article VII by the bidder or proposer
31 becomes a covenant of performance by the contractor or consultant in favor of the city.

1 (b) All contracts and concession agreements subject to this article VII shall be reviewed by
2 the DSBO for compliance with the provisions hereof. This review shall examine, but not be limited
3 to, whether the EBE, SBE, or SBEC contractor, consultant or concessionaire performance dollar
4 amounts and percentages and achievement of defined selection pool requirements and minimum
5 utilization of SBE, SBEC, or EBE subcontractors, subconsultants and suppliers upon which the
6 contract or concession agreement was awarded are maintained over the term or duration of the
7 contract or concession agreement.

8 (c) For any defined selection pool contract or concession agreement, it shall be an ongoing,
9 affirmative obligation of the contractor, consultant or concessionaire on such contract or concession
10 agreement to maintain, at a minimum, compliance with such defined selection pool requirements
11 and with the minimum utilization, if applicable, of SBE, SBEC, or EBE subcontractors,
12 subconsultants and suppliers upon which the contract or concession agreement was awarded, for
13 the duration of the contract or concession agreement, unless the city initiates a material alteration to
14 the scope of work affecting SBE, SBEC, or EBE performance of a commercially useful function on
15 the contract or concession agreement through change order, contract or concession agreement
16 amendment, force account or as otherwise described in section 28-223. SBE, SBEC, or EBE
17 performance of such material alteration of the contract or concession agreement scope shall be
18 documented in writing to the director by the SBE, SBEC, or EBE.

19 (d) The DSBO shall evaluate the performance of the SBE, SBEC, or EBE contractor,
20 consultant or concessionaire to determine whether such contractor, consultant or concessionaire,
21 and any utilized SBE, SBEC, or EBE subcontractor, subconsultant or supplier, is performing a
22 commercially useful function on the contract or concession agreement. The evaluation shall examine
23 the amount of work subcontracted, industry practice and other relevant factors. The amount of SBE,
24 SBEC, or EBE participation credited toward defined selection pool requirements and minimum SBE,
25 SBEC, or EBE utilization requirements shall be based upon an analysis of the specific duties
26 performed by the SBE, SBEC, or EBE contractor, consultant or concessionaire, and any utilized
27 SBE, SBEC, or EBE subcontractor, subconsultant or supplier, and the extent to which such duties
28 constitute a commercially useful function. The director may undertake such inquiries or studies,
29 engage such employees or retain such consultants as may be necessary to assist the director in
30 rendering these determinations. In order for the DSBO to accurately track the amount of SBE, SBEC,
31 or EBE participation credited toward defined selection pool requirements and minimum SBE, SBEC,

1 or EBE utilization requirements, SBE, SBEC, or EBE contractors, consultants and concessionaires,
2 as well as any utilized SBE, SBEC, or EBE subcontractors, subconsultants or suppliers, shall submit
3 regularly the following information on a form prescribed by the DSBO:

4 (1) Prime contractor information (name, address, contact person, telephone, and
5 email address);

6 (2) SBE, SBEC, or EBE subcontractor information (name, address, contact person,
7 telephone, email address, and certification number);

8 (3) Contract information and city contract control number (report for month of,
9 contract name, date executed, original dollar amount, current dollar amount if changed, and all
10 change orders);

11 (4) Subcontract information (original amount, current amount if changed, scope of
12 work, and change orders);

13 (5) Payment received in current month;

14 (6) Total payments received;

15 (7) Percent of work completed;

16 (8) Billing request rejection date and reason for rejection; and

17 (9) Past due invoices (invoice date, reference number, number of days past due,
18 and amount outstanding).

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

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

28 (a) Contractors and consultants on contracts and concessionaires on concession
29 agreements hereunder shall have a continuing obligation to immediately inform the DSBO in writing
30 of any agreed upon and user department approved increase or decrease in the scope of work of
31 such contract or concession agreement, upon any of the bases discussed in this section, regardless

1 of whether such increase or decrease in scope of work has been reduced to writing at the time of
2 notification.

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

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

18 All contractors and consultants shall promptly render payment to all subcontractors,
19 subconsultants, joint venturers, suppliers, manufacturers, manufacturer's representatives and
20 brokers on a contract. Each contractor and consultant shall provide with each pay request to the city
21 or private owner on each contract, beginning with the second pay request, partial claim releases
22 from subcontractors, subconsultants, joint venturers, suppliers, manufacturers, manufacturer's
23 representatives and brokers in form and content satisfactory to the city, or shall provide, at the city's
24 sole option, alternative proof of payment to subcontractors, subconsultants, joint venturers,
25 suppliers, manufacturers, manufacturer's representatives and brokers, in form and content approved
26 by the department head and the director, evidencing that all subcontractors, subconsultants,
27 suppliers, manufacturers, manufacturer's representatives and brokers have been duly paid out of
28 the proceeds of the contractor's or consultant's payments from the city or private owner under the
29 contract; unless a bona fide dispute, documented in writing, exists between the contractor or
30 consultant and the unpaid subcontractor, subconsultant, joint venturer, supplier, manufacturers,
31 manufacturer's representatives or broker. As provided by city and state law and city contracts, an

1 agency, upon request from a contractor, may authorize payments to contractors from withheld
2 retainage for contractors who have completed their work in a manner acceptable to the city.

3 **Sec. 28-225. - Prompt Payment to SBE, SBEC, or EBE subcontractors.**

4 (a) Each contractor on a city contract with certified SBEs, SBECs or EBEs as
5 subcontractors shall pay the respective subcontractors any invoiced and undisputed amounts for
6 accepted and completed work within thirty-five (35) days of the contractor's receipt of the
7 subcontractor's invoice. Payment to the subcontractor shall be timely made as required under this
8 section regardless of whether the contractor has been paid for the same work or payment period.
9 For the purposes of the section 28-225, any subcontractor, regardless of whether that subcontractor
10 holds a city contract, may be required to make payments to ~~MWBEs,~~ SBEs, SBECs, or EBEs as set
11 forth in this section.

12 (b) Contractor is required to provide written notice of either approval or rejection of the
13 subcontractor's invoice within ten (10) days of receipt. If the invoice is rejected, the written notice to
14 the subcontractor shall include the objections, discrepancies or disputes regarding the invoice.

15 (c) Failure to comply with the payment requirements in this section may be grounds for
16 withholding of payment by the city to the contractor, and may be grounds for breach of the city
17 contract.

18 (d) The payment requirements under this section shall apply to ~~SBEs~~ SBE, SBEC, or EBE
19 subcontractors utilized for satisfaction of the minimum utilization goal regardless of tier.

20 (e) SBEs performing as prime contractors shall be subject to the requirements under this
21 section 28-225 regarding payment to ~~MWBE, EBE, SBEC~~ or SBE subcontractors.

22 (f) This section 28-225 shall apply only to contracts in the amount of one million dollars
23 (\$1,000,000.00) or more based on the original contract amount before amendments or changes.

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

26 (a) A contractor that has been awarded a contract which includes SBE, SBEC, or EBE
27 participation, or has duly added an additional or substitute SBE, SBEC, or EBE subcontractor to the
28 contract in accordance with this division, may not substitute or terminate an SBE, SBEC, or EBE
29 subcontractor without the DSBO's and user department's prior written concurrence as set forth
30 herein. This includes, but is not limited to, instances in which a contractor seeks to perform work with

1 its own forces or those of an affiliate, a non-SBE, non-SBEC, or non-EBE firm, or with another SBE,
2 SBEC, or EBE firm that was originally designated for an SBE, SBEC, or EBE subcontractor.

3 (b) In the event that a contractor or consultant must substitute or terminate an SBE, SBEC,
4 or EBE subcontractor, subconsultant, joint venturer, supplier, manufacturer, manufacturer's
5 representative or broker, except in cases where directed by the city, the following must be completed:

6 (1) The contractor must provide notice in writing to the SBE, SBEC, or EBE
7 subcontractor, with a copy to DSBO and the user department, of its intent to request to terminate or
8 substitute, and the reason for the request.

9 (2) The contractor must give the SBE, SBEC, or EBE subcontractor at least five (5)
10 business days to respond to the contractor's notice.

11 (3) The DSBO in conjunction with the user department must provide concurrence
12 and the reasons therefor stated in a written notification that the prime contractor has good cause to
13 substitute or terminate the firm.

14 (4) In determining good cause to substitute or terminate the DSBO will consider all
15 circumstances as a whole based on the following factors:

16 (i) The SBE, SBEC, or EBE subcontractor fails or refuses to execute a written
17 contract;

18 (ii) The SBE, SBEC, or EBE subcontractor fails or refuses to perform the work
19 consistent with normal industry standards; provided, however, that good cause does not exist if the
20 failure or refusal of the SBE, SBEC, or EBE subcontractor to perform its work results from the bad
21 faith or discriminatory action of the contractor;

22 (iii) The SBE, SBEC, or EBE subcontractor fails or refuses to meet the
23 contractor's reasonable, nondiscriminatory bond requirements or insurance requirements;

24 (iv) The SBE, SBEC, or EBE subcontractor becomes bankrupt, insolvent, or
25 exhibits credit unworthiness;

26 (v) The SBE, SBEC, or EBE subcontractor is or becomes ineligible to work on
27 city projects because of suspension and debarment;

28 (vi) The non-city owner or contractor has determined that the SBE, SBEC, or
29 EBE subcontractor is not a responsible contractor;

30 (vii) The SBE, SBEC, or EBE subcontractor voluntarily withdraws from the
31 project and provides to you written notice of its withdrawal;

1 (viii) The SBE, SBEC, or EBE subcontractor's participation cannot be counted
2 toward the minimum participation requirement;

3 (ix) A SBE, SBEC, or EBE subcontractor owner dies or becomes disabled
4 resulting in the SBE subcontractor's inability to perform or complete its work on the contract; or

5 (x) Other documented good cause that the DSBO determines requires
6 termination of the SBE subcontractor.

7 (5) The SBE, SBEC, or EBE subcontractor shall be provided the opportunity to
8 advise the DSBO, user department and the contractor of the reasons, if any, why it objects to the
9 proposed termination, and why the DSBO should not concur with the contractor's action. If required
10 in a particular case as a matter of public necessity (e.g., safety), DSBO may provide a response
11 period shorter than five (5) business days.

12 (6) In addition to post-award substitutions or terminations, the provisions of this
13 section apply to reductions in scope of work and pre-award deletions of or substitutions of SBE,
14 SBEC, or EBE firms by bidders or proposers prior to execution of a contract.

15 (c) If the DSBO and the user department concurs with the contractor's request to
16 substitute, terminate or reduce the scope of work of the SBE subcontractor, the contractor must
17 replace the terminated SBE, SBEC, or EBE subcontractor with another SBE, SBEC, or EBE firm
18 certified to perform the same scope of work unless the contractor can demonstrate that it cannot
19 replace the subcontractor to the DSBO's satisfaction.

20 (d) If a contractor substitutes or terminates the SBE subcontractor, or reduces the scope
21 of work of the SBE, SBEC, or EBE subcontractor, without first complying with this section 28-226,
22 the DSBO may find the contractor in violation of this ordinance and the contractor may be subject to
23 enforcement and sanctions.

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

25 (a) A contractor, consultant or concessionaire that has been awarded a contract or
26 concession agreement based upon a given level of SBE, SBEC, or EBE participation shall not, at
27 any time before or during the performance of such contract or concession agreement:

28 (1) Fail to in fact perform as an SBE, SBEC, or EBE, as applicable, to achieve the
29 work scope that was originally listed at bid opening or proposal submission in order to achieve
30 defined selection pool requirements; or

1 (2) Fail to in fact utilize SBE, SBEC, or EBE subcontractor(s), subconsultant(s) or
2 supplier(s) to achieve the work scope that was originally listed at bid opening or proposal submission
3 in order to achieve required minimum utilization of SBE, SBEC, or EBE subcontractors,
4 subconsultants and suppliers, if applicable; or

5 (3) Modify or eliminate all or a portion of the scope of work attributable to the SBE or
6 EBE upon which the contract or concession agreement was awarded, unless directed by the city; or

7 (4) Terminate an SBE, SBEC, or EBE originally utilized as a subcontractor,
8 subconsultant, joint venturer, supplier, manufacturer, manufacturer's representative or broker in
9 order to be awarded the contract without replacing such SBE, SBEC, or EBE subcontractor with
10 another SBE, SBEC, or EBE subcontractor, performing the same commercially useful function and
11 dollar amount, ~~or demonstrating good faith efforts, as defined in subsection (c) hereof,~~ to substitute
12 another SBE subcontractor; all subject to the DSBO's approval;

13 (5) Retaliate against any SBE, SBEC, or EBE subcontractor that reports issues to
14 the DSBO or user department;

15 (6) Participate in a conduit relationship with an SBE, SBEC, or EBE subcontractor
16 scheduled to perform work on the contract;

17 (7) Otherwise fail to meet the minimum utilization requirements; or

18 (8) Commit any other violation of this article VII, or rules and regulations promulgated
19 hereunder, which constitutes a material breach of the contract, not mentioned above.

20 (b) Any action by a contractor, consultant or concessionaire in violation of subsections (a)(1)
21 through (8) hereof, shall constitute a material breach of the contract or concession agreement that
22 shall entitle the city or private owner to exercise all of its rights at law or equity for such material
23 breach, in addition to exercising any of the other sanctions set out in section 28-229. If, following
24 contract or concession agreement award, an SBE, SBEC, or EBE has its certification terminated for
25 reasons other than expiration of certification, or graduation from certification under section 28-206,
26 or an SBE, SBEC, or EBE fails to perform a commercially useful function, the participation of which
27 was originally counted for that SBE, SBEC, or EBE in awarding the contract or concession
28 agreement, or an SBE, SBEC, or EBE voluntarily withdraws its ~~SBE~~ participation on the contract or
29 concession agreement and the contractor, consultant or concessionaire can demonstrate that such
30 termination or failure did not result from any action or inaction, whether direct or indirect, of or by the
31 contractor, consultant or concessionaire, such termination of certification or failure to perform a

1 commercially useful function shall not be deemed to affect compliance with the contract or
2 concession agreement defined selection pool requirements or minimum SBE, SBEC, or EBE
3 utilization requirements, and shall not be deemed a breach of the contract or concession agreement.

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

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

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

15 (a) If a contractor, consultant or concessionaire is found to be in violation of the provisions
16 of article VII, to otherwise be in breach of a contract or concession agreement, to perform as an
17 SBE, SBEC, or EBE for a non-commercially useful function or as a conduit, to fail to achieve required
18 minimum SBE subcontractor, subconsultant and/or supplier utilization, if applicable, to fail to submit
19 information required in section 28-220, to submit false, misleading or materially incomplete
20 statements, documentation or records, or to fail to cooperate in an investigation, it shall be subject
21 to sanctions. The city may exercise any or all of its rights, including, but not limited to, withholding
22 funds including retentions, imposition of monetary penalty, suspension or termination, contained in
23 the contract or concession agreement terms and conditions. If the contract or concession agreement
24 is suspended or terminated, the city reserves all its rights at law or equity, with such suspension or
25 termination being deemed a response to a contractor, consultant or concessionaire default, as
26 appropriate, by applicable law.

27 (b) If the director determines, in his or her sole discretion, that a contractor, consultant or
28 concessionaire is in noncompliance with article VII, the contractor, consultant or concessionaire may
29 be assessed a civil, remedial penalty of not more than one hundred fifty (150) percent of the value
30 of the minimum SBE, SBEC, or EBE participation underutilization, or in the case of a concession

1 agreement, of not more than the revenues accruing to the concessionaire from its concession
2 operations over the past three-month period. In assessing such civil penalty:

3 (1) The director shall calculate the applicable amount of civil penalty, and may
4 reduce or waive all or part of such penalty, in his or her sole discretion, in consideration of the
5 following factors:

- 6 a. The length of the period of noncompliance;
- 7 b. The history of previous noncompliance with this article VII;
- 8 c. The monetary impact of the civil penalty on the contractor, consultant or
9 concessionaire in correcting such noncompliance; or
- 10 d. The other facts and circumstances relevant to the noncompliance of the
11 contractor, consultant or concessionaire.

12 (2) The director shall collect assessed and unpaid civil penalties under this
13 subsection by action initiated in the state district court for collection of such penalty. A stay of any
14 order of the director pending judicial review shall not relieve any contractor, consultant or
15 concessionaire from any civil penalty obligation imposed under this subsection.

16 (3) Any such assessed civil penalties may also be offset against any amount,
17 including, but not limited to, contract retainage, otherwise due and owing to the contractor, consultant
18 or concessionaire on the contract or concession agreement.

19 (4) The contract or concession agreement may be suspended or terminated with the
20 city reserving all its rights at law or equity, with such suspension or termination being deemed a
21 response to a contractor, consultant or concessionaire default, as appropriate, by applicable law.

22 (5) The debarment board established under Denver Revised Municipal Code Section
23 20-77, upon request of the director, may suspend or debar the contractor, consultant or
24 concessionaire from participation in city or private contracting covered hereunder for a period as
25 may be determined by the debarment board, in its sole discretion, based upon the grounds of
26 violating this article VII, pursuant to such suspension and debarment procedures as may be
27 established by the city, as set forth in Denver Revised Municipal Code Section 20-77. The director
28 in that event shall regard as nonresponsive any bid, proposal or competitive selection process
29 proposal received during this time period that includes the contractor, consultant or concessionaire
30 as a contractor, consultant, concessionaire, subcontractor, subconsultant, joint venturer, supplier,
31 manufacturer, manufacturer's representative, or broker.

1 (6) If a contractor, consultant, concessionaire or other business enterprise knowingly
2 receives new or additional work on a contract or concession agreement as a result of actions set out
3 in this section, then the penalties in this section may be applied to such business enterprise.

4 (7) The DSBO may suspend or revoke an offending SBE's, SBEC's or EBE's
5 eligibility for certification, may suspend its participation from counting toward achieving defined
6 selection pool and/or SBE minimum utilization requirements if applicable, and, subject to other city
7 law, may refer to the debarment board to suspend or debar it from participating in future city contracts
8 or concession agreements, based upon such SBE's, SBEC's, or EBE's acting as a conduit, failing to
9 comply with the provisions of article VII, failing to perform a commercially useful function on a project,
10 failing to achieve required SBE minimum subcontractor, subconsultant and/or supplier utilization if
11 applicable, failing to submit information as required by section 28-220, submitting false, misleading
12 or materially incomplete statements, documentation or records, or failing to cooperate in
13 investigations.

14 (c) The director may, in his or her sole discretion, impose any one (1) or more of the
15 sanctions set out in this section against any contractor, consultant, concessionaire or joint venturer
16 determined to be in violation of the section, provided that the director shall first advise the affected
17 department head of the proposed sanction in writing. If the department head advises the director in
18 writing that the department head believes that imposition of such sanction would not be in the best
19 interests of the city, the director shall consult with the department head prior to making a final
20 decision as to whether to impose such sanctions.

21 (d) Consistent with article VII and the rules and regulations, the DSBO may prescribe
22 corrective actions in the case of potential violations or in lieu of potential enforcement.

23 (e) Suspected criminal violations shall be referred to the proper authorities for prosecution.
24 If a conviction or a guilty plea is obtained pursuant to such prosecution, the perpetrator may be
25 barred from contracting with the city to the extent authorized by law.

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

27 In making any findings required herein, the director may incorporate by reference rules,
28 procedures and powers of C.R.S. § 24-4-101 et seq. as they may exist on the date of repeal and
29 reenactment of this article VII or as they may be amended. In making any findings required herein
30 or in aid of definition or interpretation of any term or phrase herein, the director may utilize as a guide
31 or adopt by rule and regulation, insofar as they are consistent with the purposes of this article VII,

1 provisions of federal law, including without limitation the provisions of 49 Code of Federal
2 Regulations and 13 Code of Federal Regulations, or successor regulations, as they exist on the date
3 of repeal and reenactment of this article VII or as they may be amended.

4 **Sec. 28-231. - Reporting.**

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

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

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

18 **Sec. 28-232. - Annual report.**

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

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1 COMMITTEE APPROVAL DATE: _____
2 MAYOR-COUNCIL DATE: _____
3 PASSED BY THE COUNCIL: _____
4 _____ - PRESIDENT
5 APPROVED: _____ - MAYOR _____
6 ATTEST: _____ - CLERK AND RECORDER,
7 EX-OFFICIO CLERK OF THE
8 CITY AND COUNTY OF DENVER
9 NOTICE PUBLISHED IN THE DAILY JOURNAL: _____;
10 PREPARED BY: _____, Assistant City Attorney DATE: _____
11 Pursuant to section 13-12, D.R.M.C., this proposed ordinance has been reviewed by the office of the
12 City Attorney. We find no irregularity as to form, and have no legal objection to the proposed
13 ordinance. The proposed ordinance is not submitted to the City Council for approval pursuant to §
14 3.2.6 of the Charter.
15
16 Kristin M. Bronson, Denver City Attorney
17
18 BY: _____, Assistant City Attorney DATE: _____