

BY AUTHORITY

1
2 ORDINANCE NO. _____
3 SERIES OF 2021

COUNCIL BILL NO. CB21-0833
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**
7 **Revised 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,~~
32 ~~as amended, or successor SBA regulation or classification system, which are incorporated herein~~
33 ~~by reference. The size standard is based on annual receipts averaged over the three (3) preceding~~
34 ~~consecutive fiscal years; whether the applicant business has otherwise achieved a size standard~~

1 ~~based upon its number of employees; or other criteria applicable to any of the work activities for~~
2 ~~which the applicant business enterprise seeks certification or is certified. The director may adjust or~~
3 ~~modify such MWBE graduation size standards if it appears, after further inquiry and review by the~~
4 ~~director, that such standards are no longer appropriate to the purposes of this article III and its~~
5 ~~divisions.~~

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

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

18 (c) If an MWBE has been certified by the city in more than one (1) NAICS Code or has an
19 affiliate that has been certified by the city in a NAICS Code other than that of the MWBE, then the
20 annual receipt level or employee or other criterion used as the graduation criterion for such MWBE
21 shall apply separately to each NAICS Code for which the MWBE and its affiliate have been certified.
22 Such an MWBE and any affiliate that has exceeded the graduation criteria in one (1) NAICS Code
23 shall be deemed to be graduated from this article III and its divisions as to that code, and, if the
24 graduation requirements of subsections (a) or (b) above do not apply, may continue to be certified
25 in another NAICS Code having a higher monetary or employee number graduation level but shall no
26 longer be considered eligible to be or remain certified in the NAICS Code with the lower size
27 standard. Such an MWBE or any affiliate that has exceeded the graduation criteria for the largest
28 NAICS Code applicable to its activities shall be deemed to be graduated from this article III and its
29 divisions for the duration of the period in which the MWBE exceeds the graduation criteria.
30 Graduated MWBEs may reapply for certification if they meet the criteria for certification including the
31 requisite size standard. ~~Utilization of MWBEs shall count toward a goal, if any, to the extent that an~~
32 ~~MWBE is performing a commercially useful function corresponding to a NAICS Code in which it is~~
33 ~~certified.~~

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

3 (5) 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 5.** That Section 28-66(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 6.** That Section 28-68(c) of Subdivision II of Division 3 of Article III of Chapter 28
12 of the Revised Municipal Code is hereby revised to read as follows:

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

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

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

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

33 (b) *Eligibility and application procedures.* Only applicant business enterprises who meet the
34 applicable certification criteria may participate as ~~MWBEs or SBEs~~ EBEs, MWBEs, SBEs and

1 SBECs in the programs established under this article V. The certification criteria, requirements, and
2 application procedures contained in sections 28-35 and 28-53 through 28-56 of this Code will apply
3 to the certification, renewal of certification, decertification, and graduation of MWBEs under this
4 article V. The certification criteria, requirements, and application procedures contained in sections
5 28-205 and 28-206 of this Code will apply to the certification, renewal of certification, decertification,
6 and graduation of EBEs, SBEs and SBECs under this article V.

7 (c) No applicant business enterprise shall be certified as an ~~MWBE or SBE~~ EBEs, MWBEs,
8 SBEs, and SBECs, and following certification of an ~~MWBE or SBE~~ EBEs, MWBEs, SBEs, and
9 SBECs, no certification shall be renewed if on the effective date of the application or renewal the
10 applicant business enterprise, the ~~MWBE or SBE~~ EBEs, MWBEs, SBEs, and SBECs (combined with
11 all affiliates) has achieved a size standard established by the DSBO in accordance with section 28-
12 55 of article III or section 28-206 of article VII. exceeding one hundred (100) percent of the applicable
13 size standards established by the U.S. Small Business Administration ("SBA") at C.F.R. § 121.201,
14 as amended, or successor SBA regulation or classification system, which are incorporated herein
15 by reference. The size standard is based on annual receipts averaged over the three (3) preceding
16 consecutive fiscal years; whether the applicant business has otherwise achieved a size standard
17 based upon its number of employees; or other criteria, applicable to any of the work activities for
18 which the applicant business enterprise seeks certification or is certified. The DSBO director may
19 adjust or modify such MWBE/SBE graduation size standards if it appears, after further inquiry and
20 review by the DSBO director, that such standards are no longer appropriate to the purposes of this
21 article V.

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

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

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

29 (c) For any contract or purchase order for which the DSBO director has set a participation
30 goal, it shall be an ongoing, affirmative obligation of the vendor, contractor or consultant on such
31 contract to maintain, at a minimum, compliance with provisions of this article V as well as the
32 originally achieved level of MWBE participation upon which the contract or purchase order was
33 awarded, for the duration of the contract or purchase order, unless the city initiates a material

1 alteration to the services affecting MWBEs performing on the contract or purchase order through a
2 contract amendment, or as otherwise described in section 28-133. Graduation of an MWBE shall not
3 affect the contribution made by the MWBE toward satisfaction of a participation goal if the work was
4 bid or proposed to be performed by the MWBE prior to the date of ineligibility for certification based
5 on achievement of the graduation criteria.

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

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

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

21 **ARTICLE VII. OPPORTUNITIES FOR SMALL BUSINESS ENTERPRISES AND**
22 **EMERGING BUSINESS ENTERPRISES IN CITY CONTRACTS FOR CONSTRUCTION,**
23 **RECONSTRUCTION, AND REMODELING, AND PROFESSIONAL DESIGN AND**
24 **CONSTRUCTION SERVICES, AND FOR SMALL BUSINESS ENTERPRISE**
25 **CONCESSIONAIRES IN CONCESSION AGREEMENTS, THROUGH DEFINED SELECTION**
26 **POOL CONTRACTS AND CONCESSION AGREEMENTS**

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

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

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

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

33 The purpose of this article VII is to enable the city, through the department of transportation
34 and infrastructure, department of aviation, general services and other user departments, and the
35 division of small business opportunity ("DSBO"), to undertake specific activities to promote use of

1 small business enterprises ("SBEs"), small business enterprise concessionaires ("SBECs"), and
2 emerging business enterprises ("EBEs"), in construction and professional design and construction
3 services contracts and in concession agreements, in the execution by the above user departments
4 of their duties pursuant to the Charter of the City and County of Denver. The director of the DSBO
5 and the department heads of the user departments are expressly delegated the necessary powers
6 and rule-making authority to effectuate the purpose of this article VII, and to undertake such
7 additional studies or inquiries as they may deem appropriate.

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

10 **Sec. 28-204. - Definitions.**

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

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

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

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

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

31 (5) *Business enterprise* means an individual, sole proprietorship, corporation, limited liability
32 company, partnership, limited partnership, limited liability limited partnership, joint stock company,
33 joint venture, professional association or any other legal entity operated for profit that is properly

1 licensed or registered, as applicable, owned, and controlled by persons who are citizens of the
2 United States or lawful permanent residents of the United States, and otherwise authorized to do
3 business in the State of Colorado.

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

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

10 (8) *City project; city contract; city construction practices* mean any contract or project
11 encompassed within the definition of contract in this article VII, regardless of whether the project
12 owner is the city or a private owner. All provisions of this article VII shall apply to such contracts let
13 by private owners, provided that the city shall not dictate means and methods of construction to such
14 private owners. Copies of all documents required to be provided by a subcontractor, subconsultant,
15 supplier, manufacturer, manufacturer's representative or broker hereunder shall be sent to the
16 director when the originals are sent to a private owner.

17 (9) *Commercially useful function* means an EBE, SBE, or SBEC is responsible for the
18 execution of a distinct element of the work of a contract or concession agreement and is carrying out
19 the work by actually performing, maintaining control, managing, and supervising the work involved,
20 or fulfilling responsibilities as a joint venturer. In determining whether an EBE, SBE, or SBEC is
21 performing or has performed a commercially useful function, the DSBO will analyze whether the SBE
22 is performing functions set forth in this definition and this division including but not limited to being
23 responsible for, with respect to materials, supplies or equipment used for the contract work,
24 negotiating price, determining quantity and quality of the materials, supplies or equipment, ordering
25 the materials, supplies or equipment, performing installation where applicable, and paying for the
26 materials, supplies or equipment. To determine whether an EBE, SBE, or SBEC is performing a
27 commercially useful function, the DSBO will evaluate the amount of work contracted or
28 subcontracted, industry practices, amounts paid to the EBE, SBE, or SBEC in proportion to the work
29 actually performed, progress toward compliance with this article, and other relevant factors.
30 Commercially useful function is measured for purposes of determining participation on a contract or
31 concession agreement, not for determination of certification eligibility.

1 (10) *Competitive selection process* has the meaning ascribed to that phrase in sections
2 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
3 meaning may pertain to a contract(s) at issue.

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

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

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

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

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

1 (16) *Contract* means any city contract for construction or for professional design and
2 construction services authorized by any provision of the Charter or ordinances of the city, excepting
3 only those contracts subject to division of article III of this chapter 28, or to federal requirements,
4 or city concession contracts. Contract shall also include other contracts ancillary to cooperative
5 agreements or understandings with other public and private agencies for purposes including the
6 development of public facilities, park and recreational facilities, museums, zoological and other
7 gardens, collections of natural history, and observatories, if such contracts provide for funding in
8 whole or in part by the city and provide for utilization of such funds for the purpose of construction or
9 professional design and construction services for any public facility or area owned or leased by the
10 city or situated on real property owned or leased by the city. Notwithstanding the foregoing, contract
11 shall also include construction or professional design and construction services for buildings or
12 aviation or aeronautical facilities or improvements thereto, constructed by private owners on real
13 property owned by the city, without regard to the utilization of city funding.

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

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

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

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

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

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

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

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

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

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

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

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

30 (29) *Manufacturer's representative* means a business enterprise that sells products for one
31 (1) or more manufacturers. A manufacturer's representative does not take legal title to or physical
32 possession of the products that it sells, such products generally being sent directly from the
33 manufacturer to the contractor or subcontractor purchasing such products. Only bona fide

1 commissions earned by a manufacturer's representative in performing a commercially useful
2 function on a contract shall be counted toward legitimate participation by an SBE or EBE on such
3 contract as set out in this article VII.

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

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

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

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

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

32 (35) *Proposer* means a business enterprise that submits a proposal on a city construction
33 contract or professional services, including design and construction services contract, or for a

1 concession agreement, that is negotiated and not competitively bid or that utilizes a competitive
2 selection process.

3 (36) *Regular dealer* means a business enterprise that owns, operates or maintains a store,
4 warehouse or other establishment in which the materials, supplies, articles or equipment of the
5 general character described by the contract specifications and required for the performance of the
6 contract are bought and regularly sold or leased to the public in the usual course of business. To be
7 a regular dealer, the business enterprise must be an established, regular business engaged in, as a
8 substantial and material portion of its business, and in its own name, the purchase and sale or lease
9 of the products in question. A regular dealer is presumed to keep such materials, supplies, articles
10 or equipment in stock, but must in any event bear the risk of loss of such items. A regular dealer in
11 such bulk items as steel, cement, gravel, stone, asphalt and petroleum products need not own,
12 operate or maintain a place of business if it both owns and operates distribution equipment for the
13 products. Any supplementation of a regular dealer's distribution equipment shall be by a long-term
14 lease agreement and not on an ad hoc or contract-by-contract basis. For regular dealers, sixty (60)
15 percent of the value of the commercially useful function performed by the SBE shall be counted
16 toward the participation goal. Brokers, conduits, packagers, manufacturers and manufacturer's
17 representatives shall not be regarded as regular dealers within the meaning of this term.

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

21 (38) *Subcontractor* or *subconsultant* means a business enterprise that either directly
22 contracts with a contractor or consultant or directly contracts with subcontractors or subconsultants
23 under such contractor or consultant on a city contract or concession agreement, and which business
24 enterprise will provide services or perform work under agreements with the contractor or consultant
25 or with other subcontractors or subconsultants under such contractor or consultant.

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

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

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

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

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

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

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

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

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

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

31 d. Have acquired the interest with a contribution of his or her own capital
32 resources, by having put his or her own financial resources at risk in the operation of the applicant
33 business enterprise, or subject to requirements below, with a contribution of expertise. All

1 contributions by the owner(s) to acquire the ownership interest in the applicant business enterprise
2 must be verifiable, substantial, and continuing, which in part, means that it be commensurate with
3 the ownership interest acquired.

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

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

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

24 a. If federal or state law or city ordinance requires the owner(s) to have a
25 particular license or other credential to own or control a certain type of business enterprise, then the
26 owner(s) must possess the required license or other credential. If federal or state law or city
27 ordinance does not require that the owner possess the license or other credential to own or control
28 the business enterprise, including control, direction, or supervision of the work performed under the
29 license, to determine whether the owner(s) manage and control the business enterprise, the DSBO
30 may consider whether the owner(s) holds the license or other credential as a factor. If there is not a
31 legal requirement for the owner to hold the license or other credential to own or control a certain type
32 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.

32 h. An owner(s) may not engage in outside employment or other business
33 interests that conflict with the management of the applicant business enterprise or prevent the

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

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

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

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

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

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

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

32 (5) *Other ownership criteria*. The director may establish by rule and regulation other
33 appropriate criteria of ownership, including but not limited to conditions of personal net worth of SBEs

1 owners, other than those certified solely as concessionaires. Personal net worth shall be the amount
2 of personal net worth described in subsection 28-204(31).

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

- 5 a. Formation of the applicant business enterprise;
- 6 b. Commencement of sustained business activity in the trade or profession
7 described on the certification application; and
- 8 c. Commencement of ownership, management and control of daily business
9 operations by the identified owner(s).

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

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

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

31 (10) *Interviews, investigation and onsite visits.* The DSBO shall personally interview
32 all persons upon whom eligibility for certification is based, and is empowered to interview such other
33 persons and conduct such onsite visits and investigations as may be appropriate in its sole discretion

1 to verify eligibility for certification. An applicant business enterprise wishing to be certified as an SBE,
2 SBEC, or EBE shall cooperate with the DSBO in supplying additional information that may be
3 requested in order to make a determination.

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

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

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

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

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

22 ~~(1) For construction, reconstruction and remodeling, and construction management~~
23 ~~services, applicant business enterprises cannot exceed one hundred (100) percent of the applicable~~
24 ~~size standards established by the U.S. Small Business Administration ("SBA") at C.F.R. § 121.201,~~
25 ~~as amended, or successor SBA regulation or classification system, which are incorporated herein~~
26 ~~by reference. The size standard is based on annual receipts averaged over the three (3) preceding~~
27 ~~consecutive fiscal years; whether the applicant business has otherwise achieved a size standard~~
28 ~~based upon its number of employees; or other criteria applicable to any of the work activities for~~
29 ~~which the applicant business enterprise seeks certification or is certified. The director may adjust or~~
30 ~~modify such SBE graduation size standards if it appears, after further inquiry and review by the~~
31 ~~director, that such standards are no longer appropriate to the purposes of this division 3.~~

32 ~~_____ (2) For professional design and construction services (excluding construction~~
33 ~~management), applicant business enterprises cannot exceed fifty (50) percent of the applicable size~~
34 ~~standards established by the U.S. Small Business Administration ("SBA") at C.F.R. § 121.201, as~~

1 ~~amended, or successor SBA regulation or classification system, which are incorporated herein by~~
2 ~~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 SBE 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 VII.~~

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

16 ~~(b)(e) If an SBE, SBEC, or EBE has been certified by the city in more than one (1) NAICS~~
17 ~~Code or has an affiliate that has been certified by the city in a NAICS Code other than that of the~~
18 ~~SBE, SBEC, or EBE, then the annual receipt level or employee or other criterion used as the~~
19 ~~graduation criterion for such SBE, SBEC, or EBE shall apply separately to each NAICS Code for~~
20 ~~which the SBE or EBE and its affiliate have been certified. Such an SBE, SBEC, or EBE and any~~
21 ~~affiliate that has exceeded the graduation criteria in one (1) NAICS Code shall be deemed to be~~
22 ~~graduated from this article VII as to that Code, and if the graduation requirements of subsection (a)~~
23 ~~above do not apply, may continue to be certified in another NAICS Code having a higher monetary~~
24 ~~or employee number graduation level but shall no longer be considered eligible to be or remain~~
25 ~~certified in the NAICS Code with the lower size standard. Such an SBE, SBEC, or EBE, or any~~
26 ~~affiliate thereof that has exceeded the graduation criteria for the largest NAICS Code applicable to~~
27 ~~its activities shall be deemed to be graduated from this article VII criteria. Graduated SBEs, SBECs,~~
28 ~~and EBEs may reapply for certification if they meet the criteria for certification. Utilization of SBE or~~
29 ~~SBEC contractors, consultants and concessionaires shall be counted under defined selection pool~~
30 ~~contracts to the extent that an SBE is performing a commercially useful function corresponding to a~~
31 ~~NAICS Code in which it is certified.~~

32 ~~(d) Graduation of an SBE shall not affect the contribution made by the SBE toward its~~
33 ~~performance under defined selection pool requirements if the work was bid or proposed to be~~

1 performed by the SBE prior to the date of ineligibility for certification based on achievement of the
2 graduation criterion.

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

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

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

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

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

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

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

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

29 The director, in collaboration with the department heads, may on the basis of contract or
30 concession agreement categories, types, size standards or other consistent criteria for selection,
31 identify and determine those contracts and concession agreements proposed to be restricted by the
32 director for award to SBEs, SBECs, or EBEs under this article VII. The stated selection criteria may
33 differ among agencies of the city. Certification as an SBE, SBEC, or EBE shall thereupon be
34 established as a condition of responsiveness to a bid or proposal on such selected contracts and

1 concession agreements. Such selected contracts and concession agreements, referred to as
2 defined selection pool contracts and concession agreements, shall be awarded only to responsive
3 low-bidder SBE, SBEC, or EBE (as applicable) bidders on bid contracts and to responsive SBE,
4 SBEC, or EBE proposers (as applicable) on non-bid contracts and concession agreements. Such
5 bidders and proposers may also function as brokers, joint venturers, manufacturers, manufacturer's
6 representatives, packagers, regular dealers or suppliers, to the extent consistent with the definitions
7 of those terms contained in section 28-204, so long as the SBE, SBEC, or EBE bidder or proposer,
8 also performs a commercially useful function as a contractor, consultant, or concessionaire, as
9 applicable, on the contract or concession agreement, and does not function as a conduit.

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

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

16 **Section 19.** That Section 28-211(b) of Article VII is hereby revised to read as follows:

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

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

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

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

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

4 (2) If the proposer submits a joint venture agreement that includes one (1) or more SBEs,
5 SBECs, or EBEs, the value of the commercially useful function to be performed by the SBEs, SBECs,
6 or EBEs (as applicable) in the joint venture shall count to the extent provided in section 28-218
7 toward satisfaction of the SBE, SBEC or EBE defined selection pool requirements. The joint venture
8 is subject to the review and approval by the director and the joint venture agreement shall be
9 provided to the director within a time period before the date of proposal defined by the director. Joint
10 venturer participation will count toward the satisfaction of the SBE, SBEC, or EBE defined selection
11 pool requirements upon confirmation by the director of the utilization in the joint venture of joint
12 management and full integration of work forces by the joint venturers. Graduation of an SBE, SBEC,
13 or EBE shall not affect the contribution made by the SBE, SBEC or EBE toward its performance
14 under defined selection pool requirements if the work was bid or proposed to be performed by the
15 SBE, SBEC or EBE prior to the date of ineligibility for certification based on achievement of the
16 graduation criteria.

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

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

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

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

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

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

9 (a) The competitive selection process specifications for each defined selection pool
10 professional design and construction services contract shall require that all proposers seeking to
11 contract with the city on such project shall address any project SBE or EBE minimum utilization
12 requirements as follows. If the proposer utilizes SBEs or EBEs as subconsultants, suppliers,
13 manufacturers, manufacturer's representatives or brokers, the value of the commercially useful
14 function to be performed by such SBEs or EBEs, including the cost of supplies and materials
15 obtained by the SBE for the work of the contract, and supplies purchased or equipment leased by
16 the SBE, except supplies and equipment the SBE: purchases or leases from the proposer or its
17 affiliate, shall count to the extent provided in section 28-218 toward satisfaction of the SBE or EBE
18 minimum utilization requirements. Graduation of an SBE or EBE shall not affect the contribution
19 made by the SBE toward its performance under defined selection pool requirements if the work was
20 bid or proposed to be performed by the SBE prior to the date of ineligibility for certification based on
21 achievement of the graduation criterion.

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

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

28 (a) At the time of the proposal submitted to and authorized by the city or a private owner
29 the proposer shall provide to the city or private owner a list of all SBEs or EBEs that are being utilized
30 on the contract or concession agreement whether as a self-performing proposer or as
31 subconsultants, suppliers, manufacturers, manufacturer's representatives, brokers or members of a
32 joint venture. Unless otherwise specified in a request for qualifications, request for proposal or other
33 proposal solicitation, in the event that a proposal is requested for the provision of on-call services for
34 a period of time, with no delineation of the dollar amount of specific on-call projects, the proposer

1 need list only the anticipated percentage participation of SBEs or EBEs rather than specific dollar
2 amounts. The list shall specify:

3 (1) The name and contact information for each SBE or EBE;

4 (2) The description and percentage of the value of the commercially useful function
5 to be performed by the SBE or EBE or the percentage of the revenues expected to be generated by
6 the concession agreement, consistent with subsections (b) and (c), as compared to the total contract
7 amount or the total revenues expected to be generated by the concession agreement. In the case
8 of utilization of a supplier, manufacturer, manufacturer's representative, or broker, the appropriate
9 percentage of dollar value attributable to such SBE or EBE as a commercially useful function shall
10 be calculated with all underlying data supplied. If the proposer provides a dollar fee amount, then
11 both the dollar value and percentage must be listed in the proposal.

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

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

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

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

32 (c) All SBE or EBE consultants, subconsultants, joint venturers, suppliers, manufacturers,
33 manufacturer's representatives or brokers listed in a proposal must actually perform a commercially

1 useful function in the work of a contract or the operation of a concession agreement within the area(s)
2 for which they are certified, and must not function as a conduit. Consistent with industry or
3 professional practice, and as permitted by rules and regulations adopted by the director, SBEs or
4 EBEs may enter into subcontracts, including subcontracts with non-SBEs or non-EBEs. In no case,
5 however, shall an SBE act as a conduit, nor shall the participation of an SBE or EBE count toward
6 satisfaction of the requirements of this article VII to the extent it fails to perform a commercially useful
7 function.

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

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

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

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

29 (b) *Failure to meet requirements.* The director shall notify the department head to regard
30 the proposal as nonresponsive if such proposal subject to the defined selection pool requirements
31 does not demonstrate performance by the SBE or EBE proposer of a commercially useful function,
32 as set out in section 28-214, minimum utilization of SBE or EBE subconsultants and suppliers as set
33 out in section 28-217, as applicable, or provide timely information as set out in section 28-218. Such

1 determination that the proposal is nonresponsive shall result in no further consideration by the city
2 or private owner of the proposal.

3 (c) *Commercially useful function or minimum utilization of SBE or EBE subcontractors or*
4 *suppliers—Informal meeting.* In the event the director finds inadequacies in a bidder or proposer's
5 demonstration of commercially useful function under section 28-214 or minimum utilization of SBE
6 or EBE subcontractors or suppliers under section 28-217, the director will provide written notice of
7 such inadequacies to the bidder or proposer prior to notifying the appropriate department head of
8 bid or proposal responsiveness. Within two (2) business days from the date that the city notifies the
9 bidder or proposer of such inadequacies, the bidder or proposer may request an informal meeting
10 with the director. Such informal meeting shall be scheduled by the director. All deficiencies shall be
11 explained to the bidder or proposer at such informal meeting. Within twenty-four (24) hours after the
12 informal meeting, the bidder or proposer shall be allowed to submit additional information or to clarify
13 its performance of a commercially useful function. At no time, however, will the director count toward
14 the minimum utilization the addition of subconsultants, joint venturers, suppliers, manufacturers,
15 manufacturer's representatives, or brokers that may later be added to the contract or to the original
16 SBE participation submitted at either the time of the bid or the date of proposal, in the case of a
17 competitive selection process. After this informal meeting, the director will:

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

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

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

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

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

33 (a) Upon award of a defined selection pool contract or concession agreement by the city,
34 including those containing a minimum SBE, SBEC, or EBE utilization requirement, compliance with

1 the performance and utilization requirements set out in this article VII by the bidder or proposer
2 becomes a covenant of performance by the contractor or consultant in favor of the city.

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

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

21 (d) The DSBO shall evaluate the performance of the SBE, SBEC, or EBE contractor,
22 consultant or concessionaire to determine whether such contractor, consultant or concessionaire,
23 and any utilized SBE, SBEC, or EBE subcontractor, subconsultant or supplier, is performing a
24 commercially useful function on the contract or concession agreement. The evaluation shall examine
25 the amount of work subcontracted, industry practice and other relevant factors. The amount of SBE,
26 SBEC, or EBE participation credited toward defined selection pool requirements and minimum SBE,
27 SBEC, or EBE utilization requirements shall be based upon an analysis of the specific duties
28 performed by the SBE, SBEC, or EBE contractor, consultant or concessionaire, and any utilized
29 SBE, SBEC, or EBE subcontractor, subconsultant or supplier, and the extent to which such duties
30 constitute a commercially useful function. The director may undertake such inquiries or studies,
31 engage such employees or retain such consultants as may be necessary to assist the director in
32 rendering these determinations. In order for the DSBO to accurately track the amount of SBE, SBEC,
33 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
32 of whether such increase or decrease in scope of work has been reduced to writing at the time of
33 notification.

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

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

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

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

33 (a) Each contractor on a city contract with certified SBEs, SBECs or EBEs as
34 subcontractors shall pay the respective subcontractors any invoiced and undisputed amounts for

1 accepted and completed work within thirty-five (35) days of the contractor's receipt of the
2 subcontractor's invoice. Payment to the subcontractor shall be timely made as required under this
3 section regardless of whether the contractor has been paid for the same work or payment period.
4 For the purposes of the section 28-225, any subcontractor, regardless of whether that subcontractor
5 holds a city contract, may be required to make payments to ~~MWBEs~~, SBEs, SBECs, or EBEs as set
6 forth in this section.

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

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

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

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

17 (f) This section 28-225 shall apply only to contracts in the amount of one million dollars
18 (\$1,000,000.00) or more based on the original contract amount before amendments or changes.

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

21 (a) A contractor that has been awarded a contract which includes SBE, SBEC, or EBE
22 participation, or has duly added an additional or substitute SBE, SBEC, or EBE subcontractor to the
23 contract in accordance with this division, may not substitute or terminate an SBE, SBEC, or EBE
24 subcontractor without the DSBO's and user department's prior written concurrence as set forth
25 herein. This includes, but is not limited to, instances in which a contractor seeks to perform work with
26 its own forces or those of an affiliate, a non-SBE, non-SBEC, or non-EBE firm, or with another SBE,
27 SBEC, or EBE firm that was originally designated for an SBE, SBEC, or EBE subcontractor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

30 (5) The SBE, SBEC, or EBE subcontractor shall be provided the opportunity to
31 advise the DSBO, user department and the contractor of the reasons, if any, why it objects to the
32 proposed termination, and why the DSBO should not concur with the contractor's action. If required

1 in a particular case as a matter of public necessity (e.g., safety), DSBO may provide a response
2 period shorter than five (5) business days.

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

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

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

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

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

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

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

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

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

- 1 (5) Retaliate against any SBE, SBEC, or EBE subcontractor that reports issues to
- 2 the DSBO or user department;
- 3 (6) Participate in a conduit relationship with an SBE, SBEC, or EBE subcontractor
- 4 scheduled to perform work on the contract;
- 5 (7) Otherwise fail to meet the minimum utilization requirements; or
- 6 (8) Commit any other violation of this article VII, or rules and regulations promulgated
- 7 hereunder, which constitutes a material breach of the contract, not mentioned above.

8 (b) Any action by a contractor, consultant or concessionaire in violation of subsections (a)(1)

9 through (8) hereof, shall constitute a material breach of the contract or concession agreement that

10 shall entitle the city or private owner to exercise all of its rights at law or equity for such material

11 breach, in addition to exercising any of the other sanctions set out in section 28-229. If, following

12 contract or concession agreement award, an SBE, SBEC, or EBE has its certification terminated for

13 reasons other than expiration of certification, or graduation from certification under section 28-206,

14 or an SBE, SBEC, or EBE fails to perform a commercially useful function, the participation of which

15 was originally counted for that SBE, SBEC, or EBE in awarding the contract or concession

16 agreement, or an SBE, SBEC, or EBE voluntarily withdraws its ~~SBE~~ participation on the contract or

17 concession agreement and the contractor, consultant or concessionaire can demonstrate that such

18 termination or failure did not result from any action or inaction, whether direct or indirect, of or by the

19 contractor, consultant or concessionaire, such termination of certification or failure to perform a

20 commercially useful function shall not be deemed to affect compliance with the contract or

21 concession agreement defined selection pool requirements or minimum SBE, SBEC, or EBE

22 utilization requirements, and shall not be deemed a breach of the contract or concession agreement.

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

24 Any business enterprise affected by the operation of this article VII shall have the burden of

25 proving its compliance with the requirements and obligations of the article, as applicable. The DSBO

26 is empowered to receive and investigate complaints and allegations by SBEs, SBECs, EBEs, third

27 parties or city personnel, or to initiate its own investigations regarding compliance with the

28 requirements and obligations of this article VII. If the DSBO determines in its sole discretion that an

29 investigation is warranted, upon written notice of such investigation the affected party shall be

30 obligated to cooperate fully with the investigation and shall have a continuing burden of providing

31 complete, truthful information to the director and of otherwise proving compliance with the

32 requirements and obligations of this article VII.

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

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

13 (b) If the director determines, in his or her sole discretion, that a contractor, consultant or
14 concessionaire is in noncompliance with article VII, the contractor, consultant or concessionaire may
15 be assessed a civil, remedial penalty of not more than one hundred fifty (150) percent of the value
16 of the minimum SBE, SBEC, or EBE participation underutilization, or in the case of a concession
17 agreement, of not more than the revenues accruing to the concessionaire from its concession
18 operations over the past three-month period. In assessing such civil penalty:

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

- 22 a. The length of the period of noncompliance;
- 23 b. The history of previous noncompliance with this article VII;
- 24 c. The monetary impact of the civil penalty on the contractor, consultant or
25 concessionaire in correcting such noncompliance; or
- 26 d. The other facts and circumstances relevant to the noncompliance of the
27 contractor, consultant or concessionaire.

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

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

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

7 (5) The debarment board established under Denver Revised Municipal Code Section
8 20-77, upon request of the director, may suspend or debar the contractor, consultant or
9 concessionaire from participation in city or private contracting covered hereunder for a period as
10 may be determined by the debarment board, in its sole discretion, based upon the grounds of
11 violating this article VII, pursuant to such suspension and debarment procedures as may be
12 established by the city, as set forth in Denver Revised Municipal Code Section 20-77. The director
13 in that event shall regard as nonresponsive any bid, proposal or competitive selection process
14 proposal received during this time period that includes the contractor, consultant or concessionaire
15 as a contractor, consultant, concessionaire, subcontractor, subconsultant, joint venturer, supplier,
16 manufacturer, manufacturer's representative, or broker.

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

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

30 (c) The director may, in his or her sole discretion, impose any one (1) or more of the
31 sanctions set out in this section against any contractor, consultant, concessionaire or joint venturer
32 determined to be in violation of the section, provided that the director shall first advise the affected
33 department head of the proposed sanction in writing. If the department head advises the director in

1 writing that the department head believes that imposition of such sanction would not be in the best
2 interests of the city, the director shall consult with the department head prior to making a final
3 decision as to whether to impose such sanctions.

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

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

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

10 In making any findings required herein, the director may incorporate by reference rules,
11 procedures and powers of C.R.S. § 24-4-101 et seq. as they may exist on the date of repeal and
12 reenactment of this article VII or as they may be amended. In making any findings required herein
13 or in aid of definition or interpretation of any term or phrase herein, the director may utilize as a guide
14 or adopt by rule and regulation, insofar as they are consistent with the purposes of this article VII,
15 provisions of federal law, including without limitation the provisions of 49 Code of Federal
16 Regulations and 13 Code of Federal Regulations, or successor regulations, as they exist on the date
17 of repeal and reenactment of this article VII or as they may be amended.

18 **Sec. 28-231. - Reporting.**

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

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

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

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

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

9 COMMITTEE APPROVAL DATE: August 4, 2021

10 MAYOR-COUNCIL DATE: August 10, 2021 by Consent

11 PASSED BY THE COUNCIL: _____ August 23, 2021

12 Steve Gilmore - PRESIDENT

13 APPROVED: _____ - MAYOR _____

14 ATTEST: _____ - CLERK AND RECORDER,
15 EX-OFFICIO CLERK OF THE
16 CITY AND COUNTY OF DENVER

17 NOTICE PUBLISHED IN THE DAILY JOURNAL: _____; _____

18 PREPARED BY: Jason D. Moore, Assistant City Attorney DATE: August 12, 2021

19 Pursuant to section 13-9, D.R.M.C., this proposed ordinance has been reviewed by the office of the
20 City Attorney. We find no irregularity as to form and have no legal objection to the proposed
21 ordinance. The proposed ordinance is not submitted to the City Council for approval pursuant to §
22 3.2.6 of the Charter.

23
24 Kristin M. Bronson, Denver City Attorney

25 BY: Jonathan Griffin, Assistant City Attorney DATE: Aug 12, 2021
26