

BY AUTHORITY

ORDINANCE NO. _____
SERIES OF 2014

COUNCIL BILL NO. CB14-0039
COMMITTEE OF REFERENCE:
Business, Workforce & Sustainability

A BILL

For an ordinance repealing and reenacting a new Article V of Chapter 28 of the Revised Municipal Code entitled “Nondiscrimination in City Contracts and Purchase Orders for Covered Goods and Covered Services and Opportunities for Minority and Woman-Owned Businesses and Small Business Enterprises in Procurements for Covered Goods and Covered Services”.

WHEREAS, it is in the best interests of the City to promote equal opportunity in the City's goods and services contracting efforts; and

WHEREAS, procurement policies that reach broader segments of the business community maximize opportunities for more businesses to compete for and participate in City procurements; and

WHEREAS, the City has the constitutional duty to prohibit, prevent, and eliminate race-and gender-based discrimination and the effects of such discrimination in City procurement opportunities; and

WHEREAS, since as early as 1991, the City has made various inquiries to determine whether discrimination existed in the City's goods and services contracting opportunities and in the private sector goods and services industries in the Denver metropolitan area into which the city infuses its public tax dollars. These inquiries include a 1991 study of the utilization and availability of minority and woman business enterprises (“MBEs” and “WBEs”) and of evidence of race-and gender-based discrimination against them in the goods and services industries, in both city contracting and in the Denver metropolitan area (“the 1991 Disparity Study”); a 1995 supplement containing additional marketplace analysis of disparities between utilization and availability of MBEs and WBEs in the goods and services sectors of the Denver metropolitan area (“the 1995 Marketplace Analysis”); and a 1995-1996 Affirmative Action Community Task Force Purchasing Subcommittee that conducted extensive public meetings regarding the need for affirmative action programs in the City's procurement activities and concluded in a final report dated February 28, 1996, that MBEs and WBEs were underutilized in the areas of goods and services procurement in the Denver metropolitan area marketplace and a need existed for an MBE and WBE procurement program; and

1 **WHEREAS**, such inquiries provided evidence of race-and gender-based discrimination by
2 the City and by the private sector goods and services industries in which the City as a passive
3 participant; and

4 **WHEREAS**, based upon the scope of the identified public and private discrimination
5 established by these inquires, the Denver City Council, in 1996, enacted Ordinance No. 305,
6 entitled “Nondiscrimination in City Contracts for Goods and Services”, establishing an aspirational
7 goals program for the Department of General Services to prevent discrimination and its effects
8 against MBEs and WBEs in City procurement opportunities; and

9 **WHEREAS**, in 2000, the City suspended this program after the U.S. District Court enjoined
10 the City from implementing the City’s construction goal program in *Concrete Works of Colorado,*
11 *Inc. v. The City and County of Denver*, 86 F. Supp. 1042 (D. Colo. 2000). Even though the
12 procurement program established under Ordinance No. 305 itself was not the subject of this
13 litigation, the Court restricted all activities related to the collection of data and the certification of
14 MBEs and WBEs for both the construction and the procurement goals programs. The Tenth
15 Circuit Court of Appeals in 2003 reversed the U.S. District Court’s decision and upheld the
16 constitutionality of the City’s construction goal ordinance; and

17 **WHEREAS**, in 2007, BBC Research & Consulting released a Procurement Opportunity
18 Study addressing the utilization and availability of MBEs and WBEs in the Denver metropolitan
19 area goods and services marketplace; and

20 **WHEREAS**, the Purchasing Division of the Department of General Services implemented
21 various outreach efforts, since as early as 2009, to encourage the participation of local, small,
22 disadvantaged and minority and woman-owned firms in City procurement opportunities and these
23 efforts were periodically successful in raising awareness of particular projects; and

24 **WHEREAS**, in 2011 the City retained MGT of America, Inc., to study the utilization and
25 availability of MBEs and WBEs and to identify evidence of race-and gender-based discrimination in
26 designated goods and services industries, in both city contracting and in the Denver metropolitan
27 area, which study was completed in 2013 (“the 2013 Disparity Study”); and

28 **WHEREAS**, the 2013 Disparity Study found evidence of impediments to the development of
29 the availability of MBEs and WBEs and the underutilization of those businesses in the following
30 procurement industries: electronic parts and equipment; office equipment; machinery, equipment
31 and supplies; electrical and industrial equipment including parts and supplies; communication
32 equipment; building management and maintenance services including janitorial services; parking
33 services; security services; maintenance and repair services including landscaping; communication
34 equipment related services; and general business services consisting of staffing, interpretation,

1 graphic design, printing and photocopying, transportation, and courier delivery services, and such
2 evidence was overall found to be consistent with the existence of racial and gender differences in
3 such industries; and

4 **WHEREAS**, the scope of the identified underutilization encompasses the types of contracts
5 within the purview of Part 9 of Article II of the Charter of the City and County of Denver
6 (Department of General Services) and also certain other contract activities within the purview of
7 other sections of the Charter, ordinances, and executive orders; and

8 **WHEREAS**, on behalf of the City, MGT held public hearings on August 28-29, 2012,
9 concerning procurement practices in the Department of General Services and in the local private
10 sector goods and services industries in which the City participates; and

11 **WHEREAS**, the manager of the department of general services, the director of the
12 purchasing division, and the director of the division of small business opportunity have reviewed
13 the size standards established by the U.S. Small Business Administration (“SBA”) for small
14 business enterprises (“SBEs”) participating in SBA programs, with respect to business size in the
15 metropolitan Denver private sector goods and services industries, and assessed whether a
16 development program to assist SBEs, regardless of the race or gender of the owners thereof, in
17 designated City procurement opportunities, both as vendors and as subcontractors, would benefit
18 City procurement by promoting competition in bidding and benefit the metropolitan area, including
19 the City, by promoting the economic growth of such SBEs; and

20 **WHEREAS**, the City has assessed whether it would serve legitimate interests of the City
21 and serve a public purpose to develop a multi-tiered procurement opportunity program to assist
22 smaller business enterprises in certain goods and services industries and markets in which the City
23 participates through a variety of race and gender neutral components, including but not limited to
24 outreach and education programs, a small business preference program, and small business
25 defined procurement pool; and

26 **WHEREAS**, the City Council has reviewed documentation and records evidencing these
27 programs, public hearings and studies referenced above, has conducted a public hearing on
28 February 18, 2014 on this proposed legislation, and based on all of the above, hereby finds:

- 29 (a) History of discrimination.
 - 30 (1) There exists a prima facie showing that woman business enterprises, and
 - 31 minority business enterprises owned by Black/African-Americans, Hispanic-Americans, Asian-
 - 32 Americans and Native Americans, who have done business or attempted to do business in the
 - 33 private and public goods and services industries within the City and the City’s market area for
 - 34 these industries, which encompasses the State of Colorado, have suffered and continue to suffer

1 from discrimination. This discrimination has existed in the city's goods and services contracting
2 practices and in private sector industry contracting in such industries in which the city has been a
3 passive participant. Because of such discrimination, such woman business enterprises and
4 minority business enterprises have been denied equal opportunity to participate in such contracts.

5 (2) Such denial of equal opportunity has been aggravated by impediments to the
6 creation of woman and minority-owned business enterprises in the said industries, as measured by
7 lending discrimination affecting such industries, comparison of business formation rates of women
8 and minority employees and majority employees in such industries, and a comparison between
9 self-employment earnings of women and minorities as compared to majority persons in such
10 industries.

11 (3) Such discrimination has prevented such woman business enterprises and
12 minority business enterprises from participating both in the City's contracting opportunities in the
13 goods and services procurement areas and in the private sector goods and services procurement
14 areas at a level which would have existed absent such discrimination.

15 (4) Such discrimination in contracting opportunities violates the city's
16 constitutional duty to prohibit, prevent and eliminate race- and gender-based discrimination and its
17 effects in the conduct of its business.

18 (5) Such discrimination requires action to prevent discrimination and to remedy its
19 effects, including outreach and education efforts to promote access to procurement opportunities,
20 improved instructional resources for vendors inexperienced in dealing with the city insofar as the
21 city may effectively and lawfully do so, the adoption of a good-faith goal program for designated
22 procurements, implementation of bid preferences and defined pool procedures for small
23 businesses, and promotion of independent partnerships to encourage equal opportunities to
24 compete for City funded procurement contracts and subcontracts.

25 (6) Without the adoption of a multi-tiered program, such woman business
26 enterprises and minority business enterprises would not have an equal opportunity to participate in
27 city contracts for goods and services procurement.

28 (b) Procurement program components. The city has a compelling governmental interest
29 in prohibiting, preventing and eliminating race-and gender-based discrimination and its effects in
30 city goods and services contracts, and for this purpose adopts the specific procurement programs
31 set forth in this article V. This program has been carefully structured to take into consideration
32 factors such as present availability of such woman business enterprises and minority business
33 enterprises to perform work on designated city procurement contracts. The procurement program,
34 which is narrowly tailored to prevent and eliminate discrimination and its effects against such

1 minority business enterprises and woman business enterprises with a minimum of burden on other
2 contractors, contains the following components:

3 (1) SBE Defined Procurement Pool - Procurements less than \$50,000.

4 a. One Hundred Percent (100%) of national SBA size standards is
5 reasonably reflective of business size in the metropolitan Denver goods and services industries. A
6 development program to assist such SBEs, regardless of the race or gender of the owners thereof,
7 in competing for prime contracts with the City for covered goods and covered services as vendors,
8 contractors, or consultants, would benefit City procurement contracting by promoting competition in
9 bidding and benefit the metropolitan area, including the City, by promoting the economic growth of
10 SBEs, and such a development program is therefore justified as being related to a legitimate
11 governmental interest of the City;

12 b. A defined procurement pool that assists SBEs, regardless of the race or
13 gender of the owners thereof, would assist all SBEs in their development and expansion into
14 general contracting roles, and would benefit City procurement contracting by encouraging
15 competition for covered goods or covered services for which the estimated cost is less than fifty
16 thousand dollars. The scope of the defined procurement pool will be limited to bid or proposal
17 opportunities for exclusive competition among SBEs identified on the division of small business
18 opportunity ("DSBO") certification list. Only business enterprises that meet the certification criteria
19 for small business enterprises, as set forth herein, are eligible for the pool. The defined
20 procurement pool is therefore justified as being related to a legitimate governmental interest of the
21 City;

22 (2) SBE Bid Preference - Procurements \$50,000 to \$250,000.

23 a. A bid preference program to assist SBEs, regardless of the race or
24 gender of the owners thereof, in competing for prime contracts with the City for covered goods and
25 covered services as vendors, contractors, or consultants, would benefit City procurement
26 contracting by promoting opportunities for all small businesses to compete for City procurement
27 contracts. The SBE bid preference does not exclude any potential bidders from competing for City
28 procurement contracts. The program benefits the metropolitan area, including the City, by
29 promoting the economic growth of SBEs. The bid preference is therefore justified as being related
30 to a legitimate governmental interest of the City;

31 b. The scope of the SBE bid preference will be limited to bid opportunities
32 for covered goods or covered services for which the estimated cost is from fifty thousand to two
33 hundred fifty thousand dollars. Only business enterprises that meet the certification criteria for
34 SBEs, as set forth herein, are eligible for the bid preference.

1 (3) Independent Partnerships - Procurements for covered goods or covered
2 services that are not included in goal, bid preference, or defined procurement pool programs.

3 a. The City has a legitimate governmental interest in promoting fair
4 opportunities to compete for all City procurement contracts and encouraging greater participation
5 in City procurement contracts by MBEs, WBEs, SBEs, and other business entities. It would serve
6 a legitimate governmental interest of the City to encourage, but not require, independent
7 partnerships by MBEs, WBEs, SBEs, and other business entities bidding or proposing on City
8 procurement projects as prime contractors for covered goods or covered services.

9 b. The scope of the Independent Partnerships mechanism will be limited
10 to bidding and competitive selection procedures for covered goods or covered services for which
11 the estimated cost is over two hundred fifty thousand but less than one million dollars and for all
12 other purchases of covered goods or covered services that are not included in the goal program,
13 defined procurement pool, or bid preference program.

14 (4) Goal Program - Procurements \$1,000,000 or more.

15 a. A specific goal for participation of WBEs and MBEs is to be established
16 for each City procurement contract for covered goods or covered services for which the estimated
17 cost is one million dollars or more, based on the availability of WBEs and MBEs for that particular
18 City procurement contract;

19 b. The goal program does not impose a quota, set-aside, sheltered market
20 or bid preference, never excludes any party, including nonminority-and male-owned business
21 enterprises, from competing for any procurement contract, and never denies contracts or purchase
22 orders for failure to meet the procurement goal, if nondiscrimination is demonstrated by a showing
23 of a good-faith attempt to comply with the procurement goal established therein;

24 c. The goal program provides for the ability of individual persons not within
25 the program's identified categories of minorities and women to be individually certified to
26 participate as a minority business enterprise if such person can demonstrate individualized social
27 discrimination; and

28 d. The program provides for graduation from the program of minority
29 business enterprises and woman business enterprises whose size indicates that they have had the
30 opportunity to overcome the effects of discrimination.

31 (5) Procurement Advisory Committee. It would serve a legitimate governmental
32 interest of the City to establish a procurement advisory committee comprised of MBEs, WBEs,
33 SBEs, and other business entities or trade industry groups to make recommendations to the

1 manager of the department of general services and DSBO director to further the policies and
2 objectives of the City's procurement program established under this article V.

3 **BE IT ENACTED BY THE COUNCIL OF THE CITY AND COUNTY OF DENVER:**

4 **Section 1.** That Article V of Chapter 28 of the Revised Municipal Code be and the same is
5 hereby repealed and reenacted to read as follows:

6 **ARTICLE V. NONDISCRIMINATION IN CITY CONTRACTS AND PURCHASE ORDERS FOR**
7 **COVERED GOODS AND COVERED SERVICES AND OPPORTUNITIES FOR MINORITY AND**
8 **WOMAN-OWNED BUSINESSES AND SMALL BUSINESS ENTERPRISES IN**
9 **PROCUREMENTS FOR COVERED GOODS AND COVERED SERVICES**

10
11 **Sec. 28-117. Purpose and scope of programs.**

12 (a) The purpose of this article V is to enable the city, through the department of general
13 services, user departments, and the DSBO, to undertake specific activities to prevent
14 discrimination and its effects against business enterprises that have been certified as MBEs and/or
15 WBEs in the award of City contracts and purchase orders for covered goods and covered services
16 and to increase opportunities for all small business enterprises that have been certified as SBEs to
17 compete for City contracts and purchase orders for covered goods and covered services, as
18 awarded by the department of general services or user departments pursuant to the provisions of
19 the Charter, ordinances, and executive orders of the City and County of Denver. The director of
20 the division of small business opportunity, the manager of the department of general services, and
21 City department heads are hereby expressly delegated the necessary powers to effectuate the
22 purpose of this article V and to undertake such additional studies or inquiries as they deem
23 appropriate.

24 (b) The scope of this article V will encompass an MBE and WBE goal program, an SBE
25 defined procurement pool program, an SBE preference program, a program to encourage
26 independent partnerships with MBEs, WBEs, SBEs, and other business enterprises, and other
27 outreach and education programs.

28 (c) The City, through the DSBO or the purchasing division, is authorized to develop and
29 utilize programs and activities to provide outreach to and to facilitate the participation of all
30 business enterprises in the City's purchasing activities, including but not limited to MBEs, WBEs,
31 and SBEs. These programs and activities include, but are not limited to:

32 (1) Commencement of collection and analysis, for informational purposes only, of
33 data and information from each bidder or proposer on a City procurement contract or purchase
34 order regarding the ongoing availability and utilization of minority and women-owned business

1 enterprises, including MBEs and WBEs, on such bidder's or proposer's private contracts in the
2 covered goods and covered services industries in the City's market area.

3 (2) Development of such other programs or activities as the DSBO director,
4 purchasing director, or manager of the department of general services may from time to time
5 recommend.

6 **Sec. 28-118. Contracts and Purchase Orders excluded from Article V.**

7 Article V excludes from coverage the following purchases:

8 (a) Contracts and purchase orders for which bids or proposals are sought under the
9 minority and women business enterprise ordinance for construction, reconstruction, and
10 remodeling, and professional design and construction services set forth in Article III of this Chapter
11 28 and under the small business enterprise ordinance set forth in Article VII of this Chapter 28.

12 (b) Contracts and purchase orders paid with funds from the United States Government
13 or the State of Colorado and for which the United States Government or the State of Colorado
14 have made applicable contract requirements, terms or conditions that are inconsistent with the
15 terms of this article V in which event the provisions of this article V shall not apply to such contract
16 or purchase order to the extent of the inconsistency.

17 (c) Contracts and purchase orders excluded by the purchasing division from
18 procurement bidding procedures as identified in section 20-64 of this code.

19 (d) Contracts and purchase orders made pursuant to section 20-64.5 of this code
20 concerning cooperative purchases under purchase contracts of the United States Government,
21 State of Colorado, or other governmental jurisdictions.

22 (e) Contracts or purchase orders, or parts thereof, excluded by the Manager by
23 implementing order.

24 (f) Purchases made through the City's Non-Purchase Order Voucher procedures as
25 identified in City Fiscal Rule 8.1.

26 **Sec. 28-119. Procurement Advisory Committee.**

27 The DSBO director, in consultation with the purchasing director, may establish an advisory
28 committee to advise and recommend to the DSBO director and manager, as appropriate, policy
29 and initiatives to assist MBEs, WBEs, SBEs, and other business enterprises in seeking
30 procurement opportunities for covered goods and covered services under this article V. The
31 details of this committee will be established by rules and regulations promulgated by the DSBO
32 director, in consultation with the purchasing director and manager of the department of general
33 services.

34 **Sec. 28-120. Administrative review of court proceedings.**

1 All disputes concerning any determination made by or on behalf of the City pursuant to the
2 authority of the DSBO director as set forth in this Article V will be governed by administrative
3 review and court proceedings provision contained in section 28-33 of this code.

4 **Sec. 28-121. Collection of fees by DSBO to defray certification costs for procurement**
5 **programs.**

6 DSBO shall charge a certification fee of not to exceed Three Hundred Dollars (\$300.00) to
7 each applicant business enterprise seeking to be certified or to have certification(s) renewed under
8 the provisions this article V of chapter 28.

9 **Sec. 28-122. MBE/WBE/SBE Certification eligibility; renewal of certification; decertification;**
10 **graduation; Graduation size standards.**

11 (a) Procedures and methods. The DSBO director shall, by rule and regulation or
12 informal guidelines relating solely to internal management and procedure, establish reasonable
13 procedures and methods for the certification of applicant business enterprises as MBEs, WBEs or
14 SBEs in order to effectuate the purposes of this article V. The DSBO director may seek input and
15 advice from appropriate industry sources as to appropriate aspects of work performance,
16 equipment and staffing in these industry areas in which certification is being sought.

17 (b) Eligibility and application procedures. Only applicant business enterprises who meet
18 the applicable certification criteria may participate as MBEs, WBEs, or SBEs in the programs
19 established under this article V. The certification criteria, requirements, and application procedures
20 contained in sections 28-54 and 28-55 through 28-57 of this code will apply to the certification,
21 renewal of certification, decertification, and graduation of MBEs and WBEs under this article V.
22 The certification criteria, requirements, and application procedures contained in sections 28-205
23 and 28-206 of this code will apply to the certification, renewal of certification, decertification, and
24 graduation of SBEs under this article V.

25 (c) No applicant business enterprise shall be certified as an MBE, WBE or SBE, and
26 following certification of an MBE, WBE or SBE, no certification shall be renewed if on the effective
27 date of the application or renewal the applicant business enterprise, the MBE, WBE, or SBE
28 (combined with all affiliates) has achieved a size standard exceeding one hundred percent (100%)
29 of the applicable size standards established by the U.S. Small Business Administration ("SBA") at
30 13 C.F.R. § 121.201, as amended, or successor SBA regulation or classification system, which are
31 incorporated herein by reference. The size standard is based on annual receipts averaged over
32 the three (3) preceding consecutive fiscal years; whether the applicant business has otherwise
33 achieved a size standard based upon its number of employees; or other criteria, applicable to any
34 of the work activities for which the applicant business enterprise seeks certification or is certified.

1 The DSBO director may adjust or modify such MBE/WBE/SBE graduation size standards if it
2 appears, after further inquiry and review by the DSBO director, that such standards are no longer
3 appropriate to the purposes of this article V.

4 **Sec. 28-123. Definitions.**

5 As used in this article V, the following words and phrases shall have the following meanings,
6 unless otherwise clearly required by the context:

7 (1) *Affiliate* for purposes of this Article V will have the meaning set forth in section 28-
8 54(1) and the meaning set forth in section 28-204(1), as applicable.

9 (2) *Annual Goal* means the targeted level for the aspirational goal established by the City
10 for the annual aggregate participation of MBEs and WBEs in City contracts and City purchase
11 orders.

12 (3) *Applicant Business Enterprise* means a business enterprise seeking to be certified as
13 a minority, woman, or small business enterprise, as appropriate, to provide Covered Goods or
14 Covered Services under this article V.

15 (4) *Bid* means an offer to provide covered goods or perform covered services for a price
16 under a City contract or purchase order with the City in response to a bidding procedure.

17 (5) *Bidder* means a business enterprise that submits a bid on a City contract or purchase
18 order that is offered for bidding by the City to acquire covered goods or covered services.

19 (6) *Bid preference* means an amount deducted from the total bid price in order to
20 evaluate and calculate the price of a bid, to be awarded solely on the basis of price, submitted in
21 response to a request for bid for covered goods or covered services for which the estimated cost is
22 from fifty thousand to two hundred fifty thousand dollars.

23 (7) *Broker* means a business enterprise that performs a commercially useful function as
24 an intermediary, for a fee, in the acquisition of covered goods regardless of whether it takes title to
25 such goods for the City or its vendors, contractors, consultants, or suppliers, but is not a
26 manufacturer, manufacturer's representative, supplier, or distributor. Acting as a broker as is
27 required and sought by the City or as is normal industry practice for a specific purchase of covered
28 goods is considered a commercially useful function. A packager shall be considered and treated
29 as a broker.

30 (8) *Business Enterprise* means an individual, sole proprietorship, corporation, limited
31 liability company, partnership, limited partnership, limited liability limited partnership, joint stock
32 company, joint venture, professional association or any other legal entity operated for profit that is
33 properly licensed or registered, as applicable, owned, and controlled by persons who are citizens

1 of the United States or lawful permanent residents of the United States, and otherwise authorized
2 to do business in the State of Colorado.

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

8 (10) *City* means the City and County of Denver and its participating user departments.

9 (11) *City contract* or *City purchase order* means any city contract, purchase order, or
10 master purchase order for the acquisition of covered goods or covered services authorized by the
11 charter, municipal code, and executive orders of the City, including but not limited to contracts and
12 purchase orders awarded by a formal or informal bidding procedure or competitive selection
13 process, but will not include a contract or purchase order excluded under section 28-118 of this
14 code or a contract or purchase order for professional services that are not covered services.

15 City contract or City purchase order shall include the acquisition of covered goods or
16 covered services by the city through other contracts and purchase orders ancillary to cooperative
17 agreements or understandings with other public and private agencies for the maintenance, repair,
18 management, or operation of public facilities, park and recreational facilities, museums, zoological
19 and other gardens, collections of natural history, and observatories or for the provision of public
20 services, programs, or activities by public or private agencies at public facilities, park and
21 recreational facilities, museums, zoological and other gardens, collections of natural history, and
22 observatories.

23 (12) *Commercially Useful Function* means responsibility for the provision of covered
24 goods or a distinct element of covered services of a contract or purchase order that is carried out
25 by a business enterprise actually performing, managing, and supervising the goods or services
26 provided.

27 (13) *Conduit* means an MBE, WBE, or SBE that knowingly agrees to pass all or part of the
28 goods or services for which it is listed for participation, and is scheduled to perform or supply on a
29 City contract or purchase order to a business entity that is not an MBE, WBE, or SBE. In this type
30 of relationship, the MBE, WBE, or SBE has not performed a commercially useful function and the
31 arranged agreement between the two parties is not consistent with standard industry practice.
32 This arrangement does not meet the commercially useful function requirement, and therefore the
33 participation of the MBE, WBE, or SBE does not count toward the procurement goal or annual
34 goal, as appropriate.

1 (14) *Contractor, Consultant or Vendor* means a business enterprise that enters into a City
2 contract or purchase order for acquisition of covered goods or covered services pursuant to the
3 charter, municipal code, and executive orders of the City. The terms *Contractor, Consultant* or
4 *Vendor* include prime contractors and general contractors.

5 (15) *Covered Goods* means:
6 (1) electronic parts and equipment,
7 (2) office equipment,
8 (3) machinery, equipment and supplies,
9 (4) electrical and industrial equipment including parts and supplies, and
10 (5) communication equipment purchased by the city pursuant to the charter,
11 municipal code, and executive orders, but shall not include goods expressly excluded by section
12 28-118 above. The DSBO will establish, in consultation with the purchasing division,
13 subcategories of covered goods corresponding to the codes set forth in the North American
14 Industrial Classification Standard (NAICS) codes system, or successor classification system.

15 (16) *Covered Services* means all:
16 (1) building management and maintenance services including janitorial services,
17 (2) parking services,
18 (3) security services,
19 (4) maintenance and repair services including landscaping,
20 (5) communication equipment related services, and
21 (6) general business services consisting of staffing, interpretation, graphic design,
22 printing and photocopying, transportation, and courier delivery services purchased by the city
23 pursuant to the charter, municipal code, and executive orders, but shall not include goods
24 expressly excluded by section 28-118 above. The DSBO will establish, in consultation with the
25 purchasing division, subcategories of covered services corresponding to the codes set forth in the
26 North American Industrial Classification Standard (NAICS) codes system, or successor
27 classification system.

28 (17) *Day*, unless otherwise indicated, means calendar day.

29 (18) *Defined Procurement Pool* means City bid opportunities for covered goods or
30 covered services for which the estimated cost is less than fifty thousand dollars.

31 (19) *Department Head* means the manager or director of the City department or agency or
32 the elected official initiating or requesting the City enter into contract(s) for covered goods or
33 covered services utilizing MBE/WBE or SBE participation, or such person's designee.

1 (20) *Distributor* has the same definition as the term *Supplier* as set forth in section 28-
2 123(45) below.

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

4 (22) *DSBO director* means the director of the division of small business opportunity or
5 successor agency, or such director's designee.

6 (23) *Doing Business* means having a physical location from which to engage in for-profit
7 activities in the scope(s) of expertise of the business enterprise.

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

11 (25) *Goal Committee* or *Goal Committees* mean a committee or committees of persons
12 engaged in the covered goods or covered services industries or experienced in the implementation
13 of MBE/WBE or SBE programs, that will be established by the DSBO director to advise the director
14 as to procurement goal setting.

15 (26) *Good Faith Efforts* means substantive and meaningful good faith actions undertaken
16 by a contractor, consultant, or vendor to achieve the MBE/WBE procurement goal as defined in
17 more detail in section 28-128 of this article V.

18 (27) *Goods* means tangible, physical items that may or may not be fungible and that are
19 not a service. The term "goods" includes "supplies" as such term is set forth in section 20-61(i) of
20 this code.

21 (28) *Invitation for Bid or Request for Bid* means a written invitation or request to
22 prospective vendors, contractors, or consultants to submit a bid to provide covered goods or
23 perform covered services for a price in response to bidding procedures conducted by user
24 departments as authorized by the charter, ordinances, or executive orders of the City.

25 (29) *Joint venture* means an association of two (2) business enterprises to constitute a
26 single business enterprise to perform a City contract or purchase order for covered goods or
27 covered services for which purpose they combine their property, capital, efforts, skills, and
28 knowledge, and in which endeavor each joint venturer is responsible for a distinct, clearly defined
29 portion of the work of the contract or purchase order, performs a commercially useful function, and
30 whose share in the capital contribution, control, management responsibilities, risks, and profits of
31 the joint venture are equal to its ownership interest. Joint ventures must have an agreement in
32 writing specifying the terms and conditions of the relationships between the joint venturers and
33 their relationship and responsibility to the contract or purchase order.

1 (30) *Letter of intent* means a written communication from a bidder or proposer to the City
2 with respect to a contract or purchase order evidencing an understanding between an MBE or
3 WBE and the bidder or proposer that such MBE or WBE has or will enter into a contractual
4 relationship with the bidder or proposer on such contract or purchase order or that such bidder or
5 proposer will self-perform as an MBE or WBE on such contract or purchase order.

6 (31) *Manufacturer* means a business enterprise that operates or maintains a factory or
7 establishment that produces or substantially alters on the premises the covered goods to a vendor,
8 contractor, or consultant, or to subcontractors, subconsultants, subvendors, suppliers, brokers,
9 manufacturer's representatives, or distributors on a City contract or purchase order in connection
10 with a City contract or purchase order.

11 (32) *Manufacturer's Representative* means a business enterprise that sells products for
12 one or more manufacturers. A manufacturer's representative does not take legal title to or physical
13 possession of the products that it sells, such products generally being sent directly from the
14 manufacturer to the vendor, contractor, consultant or subcontractor purchasing such products.
15 Acting as a manufacturer's representative, as is required and sought by the City or as is normal
16 industry practice for a specific purchase of covered goods is considered a commercially useful
17 function.

18 (33) *Manager* means the manager of the department of general services, or such
19 manager's designee.

20 (34) *Minority Business Enterprise* or MBE for purposes of this article V will have the
21 meaning set forth in section 28-54(34) of this code.

22 (35) *On-Call Procurement Contracts* means contracts for covered goods or covered
23 services that are awarded in accordance with section 20-68 of this code or that are procured and
24 awarded without a pre-determined specific quantity in the case of covered goods or scope of work
25 in the case of covered services. Once a specific quantity or scope of work is identified, individual
26 work orders or task orders are authorized, and the contractor, consultant, or vendor proceeds to
27 provide the covered goods or covered services under the individual work order or task order.

28 (36) *Packager* means a business enterprise that performs a commercially useful function
29 in the packaging of covered goods used in or delivered under a City contract regardless of whether
30 it takes title to such goods for the City or their vendors, contractors, or consultants, but is not itself
31 a manufacturer, manufacturer's representative, supplier, or distributor. Acting as a packager, as is
32 required and sought by the City or as is normal industry practice for a specific purchase of covered
33 goods is considered a commercially useful function. A packager shall be considered and treated
34 as a broker.

1 (37) *Procurement goal* means the specific MBE/WBE goal established for a particular City
2 contract or purchase order for covered goods or covered services based upon the availability of
3 MBEs and WBEs in the statement of goods or work to be provided in the contract.

4 (38) *Proposal* means an offer to provide covered goods or perform covered services
5 under a City contract or purchase order with either the City in response a competitive selection
6 process.

7 (39) *Proposer* means a business enterprise that submits a proposal on a City contract or
8 purchase order for covered goods or covered services that utilizes a competitive selection process.

9 (40) *Purchasing Director* means the director of the division of purchasing of the
10 department of general services or successor agency, or such director's designee.

11 (41) *Purchase Order or Master Purchase Order* means an approved document to a bidder
12 or proposer formalizing all the terms and conditions of a proposed transaction, such as a
13 description of the requested items, delivery schedule, terms of payment, and transportation.

14 (42) *Qualified*, with respect to good faith efforts in this article V, means that a business
15 enterprise has the financial ability, expertise, skill, experience, and access to the necessary staff,
16 facilities and equipment to complete contract(s) or subcontract(s) that it may undertake on projects.
17 The City makes no representations as to the qualifications of any applicant business enterprise,
18 MBE, WBE, or SBE.

19 (43) *Request for proposal* means a written request to prospective vendors, contractors, or
20 consultants to submit a proposal to provide covered goods or perform covered services where an
21 award is made in consideration of best value and not necessarily lowest price in response to a
22 selection procedure conducted by user departments as authorized by the charter, ordinances, or
23 executive orders of the City.

24 (44) *Services* means all work offered for public or private use that are purchased by user
25 departments under authority of the charter, municipal code, and executive orders of the City and
26 that does not consist primarily of goods. This definition does not include services expressly
27 excluded under section 28-118 or professional or technical services that are not covered services.

28 (45) *Small Business Enterprise or SBE* will have the meaning set forth in section 28-
29 204(35) of this code.

30 (46) *Solicitation* means a written bid or selection procedure to procure covered goods or
31 covered services.

32 (47) *Subcontractor, Subconsultant, or Subvendor* means a business enterprise that either:
33 (1) directly contracts with a contractor, consultant, or vendor to provide covered goods pursuant to
34 a City contract or purchase order; or (2) directly contracts with subcontractors, subconsultants, or

1 subvendors under such contractors, consultants, or vendors on a City contract or purchase order,
2 and which business enterprise will provide covered goods or covered services under agreements
3 with the vendor, contractor, or consultant, or with other subcontractors, subconsultants, or
4 subvendors under such contractor, consultant, or vendor.

5 (48) *Supplier* means a business enterprise that will provide covered goods on a City
6 contract or purchase order under agreements with a vendor, contractor, or consultant, or with
7 subcontractors, subconsultants, or subvendors under such a vendor, contractor, or consultant.

8 (49) *Woman Business Enterprise* or WBE for purposes of this Article V will have the
9 meaning set forth in section 28-54(51) of this code.

10 (50) *User department* means the City department, agency, board, commission, authority,
11 officer, or elected official, excluding the board of water commissioners but including without
12 limitation the County Courts, Library Commission, Civil Service Commission, Career Service
13 Authority (Office of Human Resources), Auditor, City Council, and Clerk and Recorder, initiating or
14 requesting a city contract or city purchase order for the acquisition of covered goods or covered
15 services, utilizing MBE/ WBE/SBE participation, under authority of the charter, municipal code, or
16 executive orders of the City.

17 **Sec. 28-124. Annual goal.**

18 (a) Of the total dollars spent annually for covered goods and covered services, the
19 DSBO director, in consultation with the purchasing director, no later than six (6) months after the
20 enactment of this article V, shall establish an aspirational annual goal for MBE/WBE utilization
21 based on the dollars to be spent for covered goods and covered services. The DSBO will
22 establish, in consultation with the purchasing division, subcategories of covered goods
23 corresponding to the codes set forth in the North American Industrial Classification Standard
24 (NAICS) codes system, or successor classification system. The DSBO director may also consult
25 with user departments in establishing the annual goal.

26 (b) The DSBO director, in consultation with the purchasing director, as a basis for the
27 establishment of the annual goal shall annually determine the present availability of all MBEs and
28 WBEs providing covered goods or performing covered services in the relevant market area and
29 recommend the annual goal to the city council for its review. The DSBO shall conduct such
30 inquiries, studies and hearings, and utilize such information and assistance from such persons,
31 consultants, entities or organizations, within or without the City, including the purchasing director
32 and city department heads as the DSBO director at his or her sole discretion deems necessary to
33 make such annual recommendation.

1 (c) The city council shall review the annual goal recommended by the DSBO director,
2 may undertake such additional inquiries as it deems appropriate, and may approve, disapprove or
3 modify the recommended annual goal by ordinance in each succeeding year.

4 (d) The following participation shall count toward the annual goal, to the extent provided
5 in section 28-129, concerning individual procurement goals; section 28-138 concerning Defined
6 Procurement Pool; section 28-142, concerning SBE Bid Preference; and section 28-151,
7 concerning Independent Partnerships, portions of work undertaken by MBEs and WBEs as
8 contractors, consultants, vendors, subcontractors, subconsultants, subvendors, suppliers,
9 manufacturers, manufacturer's representatives, brokers, distributors, or joint venturers, including
10 appropriate portions of work undertaken by subcontractors, subconsultants, suppliers,
11 manufacturers, manufacturer's representatives, brokers and distributors on subsidiary tiers under
12 MBEs and WBEs, whether or not such subsidiary tier business enterprises are MBEs or WBEs.

13 (e) The DSBO director, in the best interests of the City, may waive a representative
14 sample of City contracts or purchase orders for covered goods or covered services to be bid or
15 otherwise selected without a goal, in order to determine MBE and WBE utilization on such
16 contracts in the absence of such a goal. A written justification for such a waiver will be included in
17 DSBO's annual report. Following the first full year of operation of this article V, the DSBO director
18 shall analyze, based upon such representative sample and other contracts that may otherwise be
19 let with a procurement goal of zero percent, to what extent the originally established annual goal
20 has been met without the imposition of procurement goals. To the extent ascertainable, this
21 information shall be utilized in the setting of the annual goal.

22 **Sec. 28-125. Prebid/Preproposal meetings.**

23 (a) In order to inform bidders and proposers of procurement contracting opportunities
24 under this article V, the purchasing director or user department, in consultation with the DSBO
25 director, may conduct prebid or preselection meetings in which representatives of the purchasing
26 division or user department and DSBO will explain the opportunities and requirements of this
27 article V and the appropriate rules and regulations for each bid or proposal.

28 (b) If prebid or preproposal meetings are scheduled by the City at which SBEs, MBEs
29 and WBEs may be informed of procurement contracting opportunities for covered goods or
30 covered services, and attendance at such prebid or preproposal meetings is not mandatory,
31 bidders and proposers remain responsible for the information provided at these meetings.

32 **Sec. 28-126. City Procurement Goals—Contracts/Purchase Orders of \$1,000,000 or more.**

33 (a) The DSBO director, in consultation with the purchasing director or department head,
34 as appropriate, shall assign for each purchase of covered goods or covered services with an

1 estimated cost of one million dollars or more a unitary procurement goal for MBE/WBE utilization
2 based upon a percentage of the dollar value of all covered goods and covered services to be
3 provided on such contract and, as set out below, the availability of MBEs and WBEs to perform the
4 anticipated work and the City's progress toward meeting the annual goal; provided that, the DSBO
5 director may in his or her sole discretion waive the application of a procurement goal for a given
6 contract or purchase order. The DSBO director will provide a written justification to the purchasing
7 director or department head, as appropriate, for each waiver granted. The goal percentage
8 assigned by the DSBO director to each such contract or purchase order may vary from contract to
9 contract consistent with meeting the appropriate overall annual goals, when established. The
10 DSBO shall establish a methodology for the setting of the procurement goal, including the
11 methodology to be followed by the goal committee(s), through rules and regulations. Such
12 methodology shall consider the following factors:

13 (1) To the extent applicable, the effect on annual goal achievement of the varying
14 levels of availability of MBEs and WBEs among covered goods and covered services industry
15 groupings associated with individual procurements and the effect on annual goal achievement of
16 the procurement goal compliance being achieved through good-faith efforts resulting in non-
17 utilization of MBEs and WBEs.

18 (2) The reasonably known availability of MBEs and WBEs in specific industry
19 groupings that are associated with individual procurements.

20 (b) The following contributions shall count toward the procurement goal as more
21 specifically provided below: portions of goods and services procurement undertaken by WBEs and
22 MBEs as vendors, contractors, consultants, subcontractors, subconsultants, suppliers,
23 manufacturers, manufacturer's representatives, brokers, packagers, joint venturers, or distributors.

24 (c) As an aid in the establishment of such an individual procurement goal, the DSBO
25 director shall appoint at least one goal committee to advise and assist the DSBO director in the
26 determination of an individual procurement goal. Membership on the goal committee(s) shall
27 include as a nonvoting member(s) such representatives of the purchasing division of the
28 department of general services as may be appointed by the purchasing director, with the
29 concurrence of the manager.

30 (d) The DSBO will establish procedures for committee operations, records maintenance,
31 and goal recommendation through rules and regulations.

32 (e) The goal committee(s) shall meet on a regular basis established by the DSBO
33 director and when requested to do so by the manager or purchasing director to consider and
34 recommend an individual procurement goal pursuant to guidelines developed by the DSBO. The

1 goal committee(s) shall consider data as to availability of types of MBEs and WBEs doing business
2 in the City with respect to each individual procurement for covered goods or covered services
3 under consideration. The DSBO director may utilize such advice and assistance from the goal
4 committee(s) to the extent that the director deems it to be appropriate and consistent with the
5 purposes of this article V, as well as other information helpful to a determination as to a
6 procurement goal. The DSBO director shall in the director's sole discretion establish a goal for
7 each procurement in bid or proposal instructions or as otherwise promulgated by regulations.

8 **Sec. 28-127. Procurement Goals—compliance with assigned goal.**

9 (a) The bidding or competitive selection instructions for each purchase of covered goods
10 or covered services shall require that all bidders or proposers seeking to contract with the City shall
11 address the procurement goal through one (1) or more of the following subsections, or by
12 demonstrating good faith efforts as set out in section 28-128:

13 (1) If the bidder or proposer is an MBE or WBE, the value of the commercially
14 useful function to be self-performed by the MBE or WBE shall count to the extent provided in
15 section 28-129 toward satisfaction of the goal as assigned, provided that the goal to the extent not
16 met by bidder or proposer self-performance shall be addressed as otherwise set out in this section;

17 (2) If the bidder or proposer submits a joint venture agreement that includes one
18 (1) or more MBEs or WBEs, the value of the commercially useful function to be performed by the
19 MBEs or WBEs in the joint venture as the distinct, clearly defined portion of the work of the joint
20 venture agreement that the MBE or WBE performs with its own forces or for which it is separately
21 at risk shall count to the extent provided in section 28-129 toward satisfaction of the procurement
22 goal. The joint venture is subject to review and approval by the DSBO director. The joint venture
23 agreement shall be provided to the DSBO director at least ten (10) days prior to the date of bid or
24 proposal opening or as set forth in the bidding or selection instructions. Joint venturer participation
25 will count toward the satisfaction of the procurement goal upon confirmation by the DSBO director
26 of the utilization in the joint venture of joint management and full integration of work forces by the
27 joint venturers; or

28 (3) If the bidder or proposer utilizes MBEs or WBEs as subcontractors, suppliers,
29 manufacturer, manufacturer's representatives, brokers, distributors, or packagers, the value of the
30 commercially useful function to be performed by such MBEs and WBEs, shall count to the extent
31 provided in section 28-129 toward satisfaction of the procurement goal.

32 (b) For on-call contracts and purchase orders awarded in accordance with section 20-68
33 of this code and any other on-call procurement contract, the purchasing director or department
34 head may determine to address the procurement goal by means of a compliance plan for utilization

1 of MBEs and WBEs on such contract or purchase order, or for alternative demonstration of good
2 faith efforts by the bidder or proposer. In that event, the purchasing director or department head
3 shall request the DSBO director to approve the utilization of such a compliance plan, consistent
4 with the scope and intent of this article V. The development, scope and utilization of such
5 compliance plans shall be addressed in rules and regulations promulgated by the DSBO director.

6 **Sec. 28-128. Procurement Goals—Good-faith efforts.**

7 (a) If the bidder or proposer has not fully met the procurement goal as provided in
8 section 28-127, then it shall demonstrate that it has made good faith efforts to meet such goal.
9 The bidder or proposer shall submit with its bid or proposal a detailed statement of its good-faith
10 efforts to meet the procurement goal set by the DSBO director. This statement shall address each
11 of the items in subsection (b) and any additional criteria that the DSBO director may establish by
12 rule or regulation consistent with the purposes of this article V. Good faith efforts must be
13 demonstrated to be meaningful and not merely for formalistic compliance with this article V. The
14 scope and intensity of the efforts will be considered in determining whether the bidder or proposer
15 has achieved a good faith effort.

16 (b) The statement of good-faith efforts shall include a specific response and verification
17 with respect to each of the following good faith effort categories, which may be further defined by
18 rule or regulation. A bidder or proposer may include any additional information it believes may be
19 relevant. Failure of a bidder or proposer to show good faith efforts as to any one (1) of the
20 following categories shall render its overall good faith showing insufficient and its bid or proposal
21 non-responsive.

22 (1) The bidder or proposer must solicit through all reasonable and available
23 means the interest of all MBEs and WBEs certified in the covered goods or covered services
24 category set forth in the bid or proposal instructions. The bidder or proposer must solicit the
25 interest of such MBEs and WBEs within sufficient time, prior to the date bids or proposals are
26 submitted to the purchasing division or user department, to allow such MBEs and WBEs to
27 respond to the solicitation. The bidder or proposer must determine with certainty if the MBEs and
28 WBEs are interested by demonstrating appropriate steps to follow up initial solicitations.

29 (2) The bidder or proposer must select portions of the covered goods to be
30 provided or covered services to be performed by MBEs and WBEs in order to increase the
31 likelihood that the procurement goal will be achieved. This includes, where appropriate, breaking
32 out contract work items into economically feasible units to facilitate MBE and WBE participation as
33 subcontractors or joint venturers, and for bidder or proposer self-performed work, as suppliers,
34 manufacturers, manufacturer’s representatives, brokers, distributors, or packagers, all reasonably

1 consistent with industry practice, even when the bidder or proposer would otherwise prefer to
2 perform these work items with its own forces. The bidder or proposer must identify what portions
3 of the contract will be self-performed and what portions of the contract will be opened to solicitation
4 of bids, proposals and quotes from MBE and WBEs. All portions of the contract not self-performed
5 must be solicited for MBE and WBE participation. The ability or desire of a bidder or proposer to
6 perform the work of a contract with its own forces does not relieve the bidder or proposer of the
7 responsibility to meet the procurement goal or demonstrate good faith efforts to do so.

8 (3) The bidder or proposer, consistent with industry practice, must provide MBEs
9 and WBEs at a clearly stated location with timely, adequate access to and information about the
10 plans, documents, specifications, and requirements of the contract or purchase order, including
11 bonding and insurance requirements, if any, to assist them in responding to a solicitation.

12 (4) The bidder or proposer must negotiate in good faith with interested MBEs and
13 WBEs and provide written documentation of such negotiation with each such MBE or WBE.

14 (5) For each MBE or WBE that contacted the bidder or proposer or that the bidder
15 or proposer contacted or attempted to subcontract or joint venture with, consistent with industry
16 practice, the bidder or proposer must supply a statement giving the reasons why the bidder or
17 proposer and the MBE or WBE did not succeed in negotiating a subcontracting, supplier,
18 manufacturer, manufacturer's representative, broker, distributor, packager, or joint venture
19 agreement, as applicable.

20 (6) The bidder or proposer must provide verification that it rejected each non-
21 utilized MBE and WBE because the MBE or WBE did not submit the lowest bid or it was not
22 qualified. Such verification shall include a verified statement of the amounts of all bids received
23 from potential or utilized subcontractors, suppliers, manufacturers, manufacturer's representatives,
24 brokers, distributors, packagers, or joint venturers on the contract, whether or not they are MBEs or
25 WBEs. In making such a determination of not being qualified, the bidder or proposer shall be
26 guided by the definition of qualified in section 28-123(42). For each MBE or WBE found not to be
27 qualified by the bidder or proposer, the verification shall include a statement giving the bidder's or
28 proposer's reasons for its conclusion. A bidder's or proposer's industry standing or group
29 memberships may not be the cause of rejection of an MBE or WBE. A bidder or proposer may not
30 reject an MBE or WBE as being unqualified without sound reasons based on a reasonably
31 thorough investigation and assessment of the MBE's or WBE's capabilities and expertise.

32 (7) If requested by a solicited MBE or WBE, the bidder or proposer must make
33 reasonable efforts to assist interested MBEs and WBEs in obtaining bonding, lines of credit,
34 alternative payment or performance guarantees, or insurance as required by the City or by the

1 bidder or proposer, provided that the bidder or proposer need not provide financial assistance
2 toward this effort.

3 (8) If requested by a solicited MBE or WBE, the bidder or proposer must make
4 reasonable efforts to assist interested MBEs and WBEs in obtaining necessary and competitively
5 priced equipment, supplies, materials, or related assistance or services for performance under the
6 contract or purchase order, provided that the bidder or proposer need not provide financial
7 assistance toward this effort.

8 (9) The bidder or proposer must use the DSBO MBE/WBE directories to identify,
9 recruit, and place MBEs and WBEs.

10 (c) In determining whether a bidder or proposer has satisfied good faith efforts as to a
11 procurement goal, the success or failure of other bidders or proposers on the contract or purchase
12 order in meeting such procurement goal may be considered.

13 **Sec. 28-129. Procurement Goals—Identification of participating MBEs and WBEs.**

14 (a) At the time a bid or proposal is submitted to the City, the bidder or proposer shall
15 provide to the City a list of all MBEs and WBEs that are being utilized toward the satisfaction of the
16 procurement goal whether as a self-performing bidder or proposer or as a subcontractor, supplier,
17 manufacturer, manufacturer’s representative, broker, distributor, packager, or member of a joint
18 venture. The list shall specify:

19 (1) The name and contact number for the MBE or WBE;

20 (2) The dollar value and description of the commercially useful function to be
21 performed by the MBE or WBE, consistent with subsections (d) and (e). In the case of utilization of
22 a supplier, manufacturer, manufacturer’s representative, broker, distributor, or packager, the
23 appropriate percentage of dollar value attributable to such MBE or WBE as a commercially useful
24 function shall be calculated with all underlying data supplied. If the bidder or proposer provides a
25 dollar value amount, then both the dollar value and percentage must be listed in the bid or
26 proposal

27 (3) If applicable, the percentage of the value of the commercially useful function to
28 be performed by the MBE or WBE, consistent with subsections (d) and (e), as compared to the
29 total contract or purchase order amount;

30 (4) An adequate statement from the bidder or proposer that the dollar amount of
31 covered goods or covered services to be performed or provided by such MBEs or WBEs on the
32 contract or purchase order, other than that self-performed by the bidder or proposer, was furnished
33 to the bidder or proposer and agreed upon prior to bid or proposal opening; and

1 (b) Only that level of MBE/WBE utilization demonstrated in accordance with this section
2 at the time of bid or proposal submission may be counted in satisfaction of the procurement goal,
3 except as otherwise set out in sections 28-132 and 28-133. Bidders or proposers must submit an
4 executed letter of intent for each MBE or WBE listed by the bidder or proposer, including a self-
5 performing bidder or proposer, with its bid or proposal. Failure to do so will render the bid or
6 proposal non-responsive.

7 (c) For on-call procurement contracts, the purchasing director or department head may
8 determine to utilize a compliance plan, pursuant to section 28-127(b). In such event, the bidder or
9 proposer shall not be required to demonstrate MBE/WBE utilization at the time of bid opening, but
10 will be required to develop an approved compliance plan to demonstrate compliance with the
11 requirements of this article V. For on-call procurement contracts that are not determined to utilize
12 a compliance plan and that do not delineate the dollar amount of specific on-call projects, the
13 bidder or proposer need list only the anticipated percentage of participation of MBEs and WBEs
14 rather than specific dollar amounts, as required in subsection (a)(2), above.

15 (d) All MBE or WBE vendors, contractors, consultants, subcontractors, subconsultants,
16 joint venturers, manufacturers, manufacturer's representatives, suppliers, brokers, distributors, or
17 packagers listed in a bid or proposal must actually perform a commercially useful function in the
18 work of a contract within the area(s) for which they are certified, and must not function as a
19 conduit. Consistent with industry or professional practice, and as permitted by rules and
20 regulations adopted by the DSBO director, MBEs and WBEs may enter into subcontracts, including
21 subcontracts with non-MBEs and non-WBEs. In no case, however, shall an MBE or WBE act as a
22 conduit, nor shall the participation of an MBE or WBE count toward a procurement goal to the
23 extent it fails to perform a commercially useful function.

24 (e) All expenditures for covered goods obtained from an MBE or WBE manufacturer,
25 supplier, distributor shall count toward the appropriate procurement goal as specified herein.
26 Expenditures for covered goods obtained from MBE and WBE broker, manufacturer's
27 representatives or packager may count toward an appropriate procurement goal only to the extent
28 of fees or commissions charged for providing a bona fide service, such as professional, technical,
29 consultant, or managerial services and assistance in the procurement of essential personnel,
30 facilities, equipment, materials, or supplies required for performance of the contract or purchase
31 order, provided that the fee or commission is determined by the DSBO director to be reasonable
32 and not excessive as compared with fees customarily allowed for similar services.

33 (f) Any agreement between a bidder or proposer and an MBE or WBE in which the
34 bidder or proposer requires that the MBE or WBE not provide subcontracting quotations to other

1 bidders or proposers is prohibited and shall render a bidder's or proposer's bid or proposal non-
2 responsive.

3 **Sec. 28-130. Procurement Goals—Responsive and nonresponsive bids.**

4 (a) *Responsive; compliance with requirements.* If the low monetary bid or proposal
5 subject to a procurement goal meets such goal, as set out in sections 28-127, or shows adequate
6 good faith, as set out in section 28-128, then the DSBO director shall notify the purchasing director
7 or department head to regard the bid or proposal as responsive as to compliance with this article
8 V.

9 (b) *Failure to meet requirements.* If a bid or proposal subject to a procurement goal does
10 not meet such goal, as set out in section 28-127, or show good faith, as set out in section 28-128,
11 or if a bidder or proposer fails to provide timely information, as set out in section 28-129, then the
12 DSBO director shall notify the purchasing director or department head to regard the bid or proposal
13 as non-responsive, and such determination shall result in no further consideration by the city of the
14 bid or proposal.

15 (c) *Statement of Good Faith Efforts - Informal meeting.* If the DSBO director finds
16 inadequacies in a bidder or proposer's demonstration of good faith efforts, as such good faith
17 efforts are described in section 28-128, the DSBO director will provide written notice of such
18 inadequacies to the bidder or proposer prior to notifying the purchasing director or department
19 head of bid or proposal responsiveness. Within two (2) business days from the date that the City
20 notifies the bidder or proposer of the inadequacies of its demonstration of good faith efforts, the
21 bidder or proposer may request an informal meeting with the DSBO director. Such informal
22 meeting shall be scheduled by the DSBO director. All deficiencies in good faith efforts shall be
23 explained to the bidder or proposer at such informal meeting. Within twenty-four (24) hours after
24 the informal meeting, the bidder or proposer shall be allowed to submit additional information or to
25 clarify the original good faith efforts. The DSBO director will at no time, however, allow additional
26 subcontractors, joint venturers, suppliers, manufacturers, manufacturer's representatives, brokers,
27 packagers, or distributors that may later be added to the contract or to the original MBE/WBE
28 participation submitted in the bid or proposal to be counted toward meeting of the procurement
29 goal. After this informal meeting, the DSBO director will (i) determine whether the bidder or
30 proposal will be responsive or non-responsive; (ii) make the notification as stated in subsection (b)
31 above, as applicable; and (iii) provide written notice to the bidder or proposer of the DSBO
32 director's final determination.

33 **Sec. 28-131. Procurement Goals—Time periods for documentation submitted to the city.**

1 The documentation of good faith efforts of a bidder or proposer and, as applicable, its
2 subcontractors, subconsultants, subvendors, joint venturers, suppliers, manufacturers,
3 manufacturer’s representatives, brokers, packagers, or distributors, of letters of intent to perform,
4 shall be submitted to the DSBO director at the time of submission of the bid or proposal.

5 **Sec. 28-132. Procurement Goals—Compliance with achieved goal level a requirement of**
6 **contract.**

7 (a) Upon award of a City contract or purchase order that includes a procurement goal,
8 the procurement goal becomes a covenant of performance by the vendor, contractor or consultant
9 in favor of the City.

10 (b) All contracts or purchase order subject to this article V shall be reviewed by the
11 DSBO for compliance with the provisions hereof. This review shall examine, but not be limited to,
12 whether the MBE and WBE participation dollar amounts and percentages and achieved
13 procurement goal levels upon which the contract or purchase order was awarded are maintained
14 over the term or duration of the contract or purchase order.

15 (c) For any contract or purchase order for which the DSBO director has set a
16 procurement goal, it shall be an ongoing, affirmative obligation of the vendor, contractor or
17 consultant on such contract to maintain, at a minimum, compliance with the originally achieved
18 level of MBE and WBE participation upon which the contract or purchase order was awarded, for
19 the duration of the contract or purchase order, unless the City initiates a material alteration to the
20 covered goods or covered services affecting MBEs or WBEs performing on the contract or
21 purchase order through a contract amendment, or as otherwise described in section 28-133.

22 (d) The DSBO shall evaluate the utilization of MBEs and WBEs to determine whether
23 such MBEs and WBEs are performing a commercially useful function. The evaluation shall
24 examine the amount of work subcontracted, industry practice and other relevant factors. The
25 amount of MBE and WBE participation credited toward a procurement goal shall be based upon an
26 analysis of the specific duties performed by the MBE or WBE, and the extent to which such duties
27 constitute a commercially useful function. The DSBO director may undertake such inquiries or
28 studies, engage such employees or retain such consultants as may be necessary to assist the
29 director in rendering these determinations.

30 (e) The work performed by an MBE or WBE not providing a commercially useful function,
31 or functioning as a conduit, shall not count toward meeting the procurement goal.

32 **Sec. 28-133. Procurement Goals—Amendments and modifications to contracts and**
33 **purchase orders.**

1 (a) Vendors, contractors, and consultants on contracts and purchase orders for covered
2 goods or covered services shall have a continuing obligation to immediately inform the DSBO in
3 writing of any agreed upon increase or decrease in the covered goods or covered services to be
4 provided under such contract or purchase order, upon any of the bases discussed in this section
5 28-133, regardless of whether such increase or decrease in covered goods or covered services
6 has been reduced to writing at the time of notification.

7 (b) Any increase in the covered goods or covered services to be provided under a
8 contract or purchase order for covered goods or covered services, whether by amendment or
9 otherwise, which increases the dollar value of the contract or purchase order, whether or not such
10 change is within the scope of covered goods or covered services designated to be provided by an
11 MBE or WBE at the time of contract award, shall be contemporaneously submitted to the DSBO.
12 Those amendments or other contract modifications that involve a change in covered goods or
13 covered services that cannot be performed by existing subcontractors, subconsultants,
14 subvendors, joint venturers, suppliers, manufacturer, manufacturer's representative, brokers,
15 distributors, or packagers or by the vendor, contractor, or consultant, shall be subject to a goal for
16 MBEs and WBEs equal to the original goal on the contract which were included in the bid or
17 proposal requirements. The vendor, contractor or consultant shall satisfy such goal as respects
18 such changed covered goods or covered services by soliciting new MBEs or WBEs in accordance
19 with section 28-127, or the vendor, contractor or consultant must show each element of modified
20 good faith set out in section 28-135(d). The vendor, contractor, or consultant, shall supply to the
21 DSBO director the documentation described in section 28-135(d) with respect to the increased
22 dollar value of the contract or purchase order.

23 **Sec. 28-134. Procurement Goals—Payments to subcontractors, subconsultants, joint**
24 **venturers, suppliers, manufacturers, manufacturer's representatives and brokers.**

25 All vendors, contractors and consultants shall promptly render payment to all
26 subcontractors, subconsultants, joint venturers, suppliers, manufacturers, manufacturer's
27 representatives, brokers, distributors, and packagers on a contract or purchase order.

28 **Sec. 28-135. Procurement Goals—Potential violations.**

29 (a) A vendor, contractor or consultant that has been awarded a City contract or purchase
30 order based upon a given level of MBE and WBE participation shall not, at any time before or
31 during the performance of such contract or purchase order:

32 (1) Fail to in fact utilize an MBE or WBE that was originally listed at bid or
33 proposal opening in order to satisfy the procurement goal, and that submitted a timely letter of
34 intent, without substituting another MBE or WBE performing the same commercially useful function

1 and dollar amount, or demonstrating each element of modified good faith efforts, as defined in
2 subsection (d) hereof, to substitute another MBE or WBE; or

3 (2) Fail to allow an MBE or WBE functioning as a subcontractor, subconsultant,
4 joint venturer, supplier, manufacturer, manufacturer's representative, or broker to perform the
5 commercially useful function, the value of which was originally counted for that MBE or WBE in
6 awarding the contract or purchase order; or

7 (3) Modify or eliminate all or a portion of the covered goods or covered services
8 attributable to an MBE or WBE upon which the contract was awarded, unless directed by the City;
9 or

10 (4) Terminate an MBE or WBE originally utilized as a subcontractor,
11 subconsultant, joint venturer, supplier, manufacturer, manufacturer's representative or broker in
12 order to be awarded the contract without replacing such MBE or WBE with another MBE or WBE,
13 performing the same commercially useful function and dollar amount, or demonstrating each
14 element of modified good faith efforts, as defined in subsection (c) hereof, to substitute another
15 MBE or WBE; or

16 (5) Participate in a conduit relationship with an MBE or WBE scheduled to perform
17 work on the contract or purchase order; or

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

20 (b) Any action by a vendor, contractor or consultant in violation of subsections (a) (1)
21 through (6) hereof, shall constitute a material breach of the City contract or purchase order that
22 shall entitle the City to exercise all of its rights at law or equity for such material breach, in addition
23 to exercising any of the other sanctions set out in section 28-137(c).

24 (c) If, following award of a contract or purchase order, an MBE or WBE has its
25 certification terminated for reasons other than (i) expiration from certification; (ii) graduation from
26 certification; (iii) nonperformance of a commercially useful function, the value of which was
27 originally counted for that MBE or WBE, as applicable, when the contract or purchase order was
28 awarded; or (iv) the voluntary withdrawal of MBE or WBE participation on the contract or purchase
29 order, such termination of certification or failure to perform a commercially useful function shall not
30 be deemed to affect compliance with the procurement goal, and shall not be deemed a breach of
31 the contract or purchase order as long as the vendor, contractor or consultant can demonstrate
32 that such termination or failure did not result from any action or inaction, whether direct or indirect,
33 of or by the vendor, contractor or consultant. In such event, the vendor, contractor, or consultant
34 will substitute another MBE or WBE, performing the same commercially useful function and dollar

1 amount, or will demonstrate modified good faith efforts to substitute another MBE or WBE, as
2 defined in subsection (d) below.

3 (d) The following modified good faith requirements shall apply to sections 28-132 and
4 133. In the event that a vendor, contractor or consultant must add or replace an MBE or WBE
5 subcontractor, subconsultant, joint venturer, supplier, manufacturer, manufacturer's representative,
6 broker or distributor or in the event that a new covered good or covered services is added to the
7 ongoing contract or purchase order, and the vendor, contractor or consultant in such event is in
8 non-compliance with maintenance of the original procurement goal upon which the contract or
9 purchase order was awarded, due to failure to utilize additional MBEs or WBEs, the following
10 modified good faith efforts must be completed. Failure of a vendor, contractor or consultant to
11 show good faith efforts as to any one (1) of the following categories shall render its overall good
12 faith efforts showing insufficient; and its contract performance in non-compliance with this article V.

13 (1) Verification in writing to the DSBO of the vendor's, contractor's or consultant's
14 intention to terminate or replace an MBE or WBE originally identified for participation in the bid or
15 proposal upon which the contract or purchase order was awarded. The reason for the termination
16 or replacement must be stated and the type of work or services must be identified.

17 (2) Verification that the vendor, contractor or consultant used the most current
18 MBE and WBE directory from the DSBO in order to contact MBEs and WBEs that are certified in
19 the applicable area of work or supply at the time of the modified good faith effort.

20 (3) Verification of efforts to contact appropriate MBEs and WBEs within the same
21 identified covered goods or covered services area must be documented. The DSBO director may
22 verify such contacts as he or she deems appropriate.

23 (4) Documentation of the modified good faith efforts must be submitted to the
24 DSBO prior to the payment to the vendor, contractor or consultant of the next progress or other
25 partial payment or fund release under the contract or purchase order.

26 **Sec. 28-136. Procurement Goals—Burden of proof; investigations of compliance.**

27 Any business enterprise affected by the operation of this article V shall have the burden of
28 proving its compliance with the requirements and obligations of the division. The DSBO is
29 empowered to receive and investigate complaints and allegations by MBEs, WBEs, third parties or
30 City personnel, or to initiate its own investigations regarding compliance with the requirements and
31 obligations of this article V. If the DSBO determines in its sole discretion that an investigation is
32 warranted, upon written notice of such investigation the affected party shall be obligated to
33 cooperate fully with the investigation and shall have a continuing burden of providing complete,

1 truthful information to the DSBO director and of otherwise proving compliance with the
2 requirements and obligations of this article V.

3 **Sec. 28-137. Procurement Goals—sanctions for failure to comply with article V**
4 **requirements.**

5 (a) If a vendor, contractor or consultant is found to be in violation of the provisions of
6 article V, to otherwise be in breach of a contract, to perform as or to utilize MBEs or WBEs for a
7 non-commercially useful function or as a conduit, to fail to submit information required in section
8 28-131, to submit false, misleading, or materially incomplete statements, documentation or
9 records, including but not limited to good faith efforts or letters of intent, or to fail to cooperate in an
10 investigation, it shall be subject to sanctions. The City may exercise any or all of its rights,
11 including but not limited to withholding funds, imposition of monetary penalty, suspension or
12 termination, contained in the terms and conditions of the contract or purchase order. If the contract
13 or purchase order is suspended or terminated, the City reserves all its rights at law or equity.

14 (b) In the event that the DSBO director determines, in his or her sole discretion, that a
15 vendor, contractor or consultant is in noncompliance with article V, the vendor, contractor or
16 consultant may be assessed a civil, remedial penalty, of not more than one hundred fifty percent
17 (150%) of the total amount of MBE/WBE utilization demonstrated in the contract or purchase order
18 for each MBE or WBE involved. In assessing such civil penalty:

19 (1) The DSBO director shall calculate the applicable amount of civil penalty, and
20 may 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 any provision of this article
24 V;
- 25 c. The monetary impact of the civil penalty on the vendor, contractor or
26 consultant in correcting such noncompliance; or
- 27 d. The other facts and circumstances relevant to the noncompliance of the
28 vendor, contractor or consultant;

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

33 (3) Any such assessed civil penalties may also be offset against any amount
34 otherwise due and owing to the vendor, contractor or consultant on the contract or purchase order.

1 (4) The City contract or purchase order may be suspended or terminated with the
2 City reserving all its rights at law or equity.

3 (5) The debarment board, established under section 20-77 of this code, upon
4 request of the DSBO director, may suspend or debar the vendor, contractor or consultant from
5 participation in City or private contracting covered hereunder for a period as may be determined by
6 the debarment board, in its sole discretion, based upon the grounds of violating this article V,
7 pursuant to such suspension and debarment procedures as may be established by the City, as set
8 forth in section 20-77. The DSBO director in that event shall regard as non-responsive any bid or
9 proposal received during this time period that includes the vendor, contractor or consultant as a
10 vendor, contractor, consultant, subcontractor, subconsultant, joint venturer, supplier, manufacturer,
11 manufacturer's representative, broker or distributor.

12 (6) If a vendor, contractor or consultant or other business enterprise knowingly
13 receives new or additional work on a contract or purchase order as a result of actions set out in
14 this section, then the penalties in this section may be applied to such business enterprise.

15 (7) The DSBO may either suspend or revoke an offending MBE's or WBE's
16 eligibility for certification as an MBE or WBE or may suspend its participation from counting toward
17 a procurement goal, and, the City subject to other City law, may suspend or debar MBEs or WBEs
18 from participating in future City contracts, based upon such MBE's or WBE's acting as a conduit,
19 failing to comply with the provisions of article V, failing to perform a commercially useful function on
20 a contract or purchase order, failing to submit information as required by section 28-131,
21 submitting false, misleading or materially incomplete statements, documentation or records, or
22 failing to cooperate in investigations.

23 (c) The DSBO director may, in his or her sole discretion, impose any one or more of the
24 sanctions set out in this section against any vendor, contractor, consultant, subcontractor,
25 subconsultant, joint venturer, supplier, manufacturer, manufacturer's representative, broker, or
26 distributor determined to be in violation of the section, provided that the DSBO director shall first
27 advise the manager and purchasing director or department head, as appropriate, of the proposed
28 sanction in writing. If the manager, purchasing director, or department head advises the DSBO
29 director in writing that the imposition of such sanction would not be in the best interests of the City,
30 the DSBO director shall consult with the appropriate official to make a final decision as to whether
31 to impose such sanctions.

32 (d) Suspected criminal violations shall be referred to the proper authorities for
33 prosecution. If a conviction or a guilty plea is obtained pursuant to such prosecution, the
34 perpetrator may be barred from contracting with the City to the extent authorized by law.

1 **Sec. 28-138. SBE Defined Procurement Pool for Contracts/Purchase Orders less than**
2 **\$50,000.**

3 The purpose of the defined procurement pool is to enable the City, through the DSBO, the
4 purchasing division of the department of general services, and other user departments to
5 undertake specific activities to promote the use of SBEs, that are not brokers, packagers, or
6 manufacturer’s representatives, in contracts and purchase orders for covered goods and covered
7 services awarded by the purchasing division and user departments pursuant to the charter, revised
8 municipal code, and executive orders of the City and County of Denver. The scope of the
9 procurement pool will be limited to procurement opportunities for covered goods or covered
10 services for which the estimated cost is less than fifty thousand dollars.

11 **Sec. 28-139. Defined Procurement Pool—Administration of defined pool.**

12 (a) When the purchasing division or user department seeks to acquire covered goods or
13 covered services with an estimated cost of less than fifty thousand dollars pursuant to the charter,
14 revised municipal code, and executive orders of the City and County of Denver, it will notify the
15 DSBO of the proposed procurement. The DSBO director will determine if there are three or more
16 SBEs, that are not brokers, packagers, or manufacturer’s representatives, listed in the most current
17 DSBO certification directory for the covered goods or covered services to be acquired. The DSBO
18 in consultation with the purchasing division and user departments will adopt rules and regulations
19 or informal guidelines to timely notify the purchasing director or department head of such
20 determinations.

21 (b) If there are three or more SBEs, that are not brokers, packagers, or manufacturer’s
22 representatives, on the most current DSBO certification list, the purchasing division or user
23 department will provide the procurement opportunity to such SBEs through bidding or selection
24 procedures authorized by the charter, municipal code, or executive orders for that specific contract
25 or purchase order. The bidding or proposal instructions will require that such SBEs will self-
26 perform no less than seventy-five percent (75%) of the total amount of the contract or purchase
27 order with their own forces.

28 (c) If there are not three or more SBEs, that are not brokers, packagers, or
29 manufacturer’s representatives, on the most current DSBO certification list, or if the purchasing
30 division or user department does not receive a bid or proposal from such an SBE offering to self-
31 perform no less than seventy-five percent (75%) of the total amount of the contract or purchase
32 order with its own forces, the purchasing division or user department will obtain the covered goods
33 or covered services through procurement methods required or authorized by the charter, municipal
34 code, or executive orders for that specific contract or purchase order.

1 (d) Certification by DSBO as an SBE shall thereupon be established as a condition of
2 responsiveness to a bid or proposal on such selected contracts and purchase orders. Defined
3 procurement pool contracts and purchase orders shall be evaluated and awarded in accordance
4 with sections 28-140 through 142 below and any other procedure and method required or
5 authorized by the charter, municipal code, or executive orders for that specific contract or purchase
6 order.

7 (e) User departments will not split, combine, revise, restructure, or modify purchases of
8 covered goods or covered services with other goods or one or more other services to avoid the
9 dollar thresholds for inclusion in the defined procurement pool or perform other actions with the
10 intent of avoiding the requirements of this article V.

11 **Sec. 28-140. Defined Procurement Pool—Commercially useful function.**

12 (a) An SBE awarded a contract or purchase order through the defined procurement pool
13 will self-perform no less than seventy-five percent (75%) of the total amount of the contract or
14 purchase order with its own forces. All SBE contractors, consultants, or vendors listed in a bid or
15 proposal, must actually perform a commercially useful function on a defined procurement pool
16 contract or purchase order within the area(s) for which they are certified, and must not function as
17 a conduit. The bidding or proposal instructions for each defined procurement pool contract or
18 purchase order shall require that all bidders and proposers seeking to provide covered goods or
19 covered services under a City contract or purchase order shall provide a commercially useful
20 function on such contract or purchase order.

21 (b) All expenditures for covered goods or covered services obtained from such an SBE
22 who is also an MBE or WBE manufacturer, supplier, or distributor will be counted toward the
23 annual goal set forth in section 28-124 based upon an analysis by DSBO of the specific duties
24 performed by the MBE or WBE and the extent to which such duties constitute a commercially
25 useful function for each defined procurement pool contract or purchase order. All expenditures for
26 covered goods or covered services obtained from an SBE who is not an MBE or WBE
27 manufacturer, supplier, or distributor will be calculated separately by DSBO based upon an
28 analysis of the specific duties performed by the SBE and the extent to which such duties constitute
29 a commercially useful function for each defined procurement pool contract or purchase order.

30 (c) The DSBO director or manager may undertake such inquiries or studies, engage
31 such employees or retain such consultants as may be necessary to assist the director in rendering
32 these determinations.

33 **Sec. 28-141. Defined Procurement Pool—Review of bid or proposal responses.**

1 (a) *Review of bids or proposals; compliance with requirements.* The DSBO director shall
2 review bid or proposals submitted for defined procurement pool opportunities and will notify the
3 purchasing director or department head to regard the submission as responsive to the
4 requirements of this article V if such bid or proposal establishes that the bidder or proposer will
5 perform a commercially useful function on the defined procurement pool contract or purchase
6 order.

7 (b) *Failure to meet requirements.* The DSBO director shall notify the purchasing director
8 or department head to regard the submission as non-responsive to the requirements of this article
9 V if such bid does not establish that the bidder or proposer will perform a commercially useful
10 function on the defined procurement pool contract or purchase order. Such determination that the
11 bid as submitted is non-responsive shall result in no further consideration by the City of the bid.

12 (c) *Commercially useful function - Informal meeting.* In the event the DSBO director
13 finds inadequacies in a bidder or proposer's demonstration of commercially useful function under
14 section 28-140, the DSBO director will provide written notice of such inadequacies to the bidder or
15 proposer. Within two (2) business days from the date that the City notifies the bidder or proposer
16 of such inadequacies, the bidder or proposer may request an informal meeting with the DSBO
17 director. Such informal meeting shall be scheduled by the DSBO director or the director's
18 designee. All deficiencies shall be explained to the bidder or proposer at such informal meeting.
19 Within twenty-four (24) hours after the informal meeting, the bidder or proposer shall be allowed to
20 submit additional information or to clarify its performance of a commercially useful function. After
21 this informal meeting, the DSBO director will (i) determine whether the bid will be responsive or
22 non-responsive; (ii) make the notification as stated in subsection (b) above, as applicable; and (iii)
23 provide written notice to the bidder or proposer of the DSBO director's final determination.

24 **Sec. 28-142. SBE Bid Preference for City Contracts and Purchase Orders for Covered**
25 **Goods and Covered Services from \$50,000 to \$250,000.**

26 The SBE bid preference invites small businesses to compete for City procurement
27 opportunities for covered goods and covered services. The SBE bid preference will enable the
28 City, through the DSBO, the purchasing division of the department of general services, and other
29 user departments to promote the use of SBEs that are not brokers, packagers, or manufacturer's
30 representatives, in contracts and purchase orders for covered goods and covered services
31 awarded by the purchasing division and user departments pursuant to the charter, revised
32 municipal code, and executive orders of the City and County of Denver. The scope of the
33 preference will be limited to procurement opportunities for covered goods or covered services for
34 which the estimated cost is from fifty thousand to two hundred fifty thousand dollars. The bidding

1 instructions will require that such SBEs will self-perform no less than seventy-five percent (75%) of
2 the total amount of the contract or purchase order with their own forces.

3 **Sec. 28-143. SBE Bid preferences – Request for Bids/Invitation for Bid.**

4 (a) An SBE, whose bid is otherwise responsive and responsible, will be given a bid
5 preference on bids equal to ten (10) percent of the total bid price. The bid preference shall be
6 used only to evaluate the bid or bids and shall not affect the contract price.

7 (b) At bid opening, the City department or agency managing the bidding procedure will
8 reduce the bids of SBEs by the amount of the bid preference set forth in section 28-143(a) in order
9 to establish the apparent low bidder. The adjusted bid price of any SBE bid will then be used to
10 determine the lowest, responsive, qualified bidder based on the bid price submitted.

11 (c) “Low tie bids” means low responsible bids from bidders that are identical in amount
12 and that meet all the requirements and criteria set forth in the invitation for bid or request for bid
13 pursuant to this article V. Where an SBE bid preference causes or results in low tie bids from an
14 SBE and a non-SBE, then the preference will be given to the SBE apparent low bidder. Where an
15 SBE bid preference causes or results in low tie bids from two SBEs, then the purchasing director or
16 department head, in consultation with the DSBO director, will use a fair and reasonable procedure
17 for determining which apparent low SBE bidder receives the preference. The procedure will at a
18 minimum provide for the presence, at the time and place the determination is made, of the bidders
19 or the bidders’ representatives and an impartial witness designated by the purchasing director or
20 department head who is not an employee of the purchasing division or user department, as
21 appropriate.

22 (d) Each invitation for bid or request for bid subject to an SBE bid preference will contain
23 a clause explaining the SBE bid preference. The DSBO director, in consultation with the
24 purchasing director, will provide guidance to user departments to implement, monitor, and enforce
25 the requirements contained in this section.

26 **Sec. 28-144. SBE Bid Preference – SBEs to provide commercially useful function.**

27 (a) An SBE awarded a contract or purchase order through the bid preference will self-
28 perform no less than seventy-five percent (75%) of the total amount of the contract or purchase
29 order with its own forces. All SBE contractors, consultants, or vendors listed in a bid, must actually
30 perform a commercially useful function on a contract or purchase order within the area(s) for which
31 they are certified, and must not function as a conduit. The bidding instructions for each such
32 contract or purchase order shall require that all bidders seeking to provide covered goods or
33 covered services under a City contract or purchase order shall provide a commercially useful
34 function on such contract or purchase order.

1 (b) All expenditures for covered goods or covered services obtained from such an SBE
2 who is also an MBE or WBE manufacturer, supplier, or distributor will be counted toward the
3 annual goal set forth in section 28-124 based upon an analysis by DSBO of the specific duties
4 performed by the MBE or WBE and the extent to which such duties constitute a commercially
5 useful function for each contract or purchase order. All expenditures for covered goods or covered
6 services obtained from an SBE who is not an MBE or WBE manufacturer, supplier, or distributor
7 will be calculated separately by DSBO based upon an analysis of the specific duties performed by
8 the SBE and the extent to which such duties constitute a commercially useful function for each
9 contract or purchase order.

10 (c) The DSBO director or manager may undertake such inquiries or studies, engage
11 such employees or retain such consultants as may be necessary to assist the director in rendering
12 these determinations.

13 **Sec. 28-145. SBE Bid Preference – Review of bid responses.**

14 (a) *Review of bids; compliance with requirements.* Except as permitted herein, the
15 DSBO director shall review bids subject to an SBE bid preference and will notify the purchasing
16 director or user department to regard the submission as responsive to the requirements of this
17 article V if such bid establishes that the bidder will perform a commercially useful function on the
18 contract or purchase order. The DSBO director may delegate this review to the purchasing
19 director for bids solicited by the purchasing division.

20 (b) *Failure to meet requirements.* The DSBO director shall notify the purchasing director
21 or department head to regard the submission as non-responsive to the requirements of this article
22 V if such bid does not establish that the bidder or proposer will perform a commercially useful
23 function on the contract or purchase order. Such determination that the bid as submitted is non-
24 responsive shall result in no further consideration by the City of the bid.

25 (c) *Commercially useful function - Informal meeting.* In the event the DSBO director
26 finds inadequacies in a bidder’s demonstration of commercially useful function under section 28-
27 144, the DSBO director will provide written notice of such inadequacies to the bidder. Within two
28 (2) business days from the date that the City notifies the bidder of such inadequacies, the bidder
29 may request an informal meeting with the DSBO director. Such informal meeting shall be
30 scheduled by the DSBO director or the director’s designee. All deficiencies shall be explained to
31 the bidder at such informal meeting. Within twenty-four (24) hours after the informal meeting, the
32 bidder shall be allowed to submit additional information or to clarify its performance of a
33 commercially useful function. After this informal meeting, the DSBO director will (i) determine
34 whether the bid will be responsive or non-responsive; (ii) make the notification as stated in

1 subsection (b) above, as applicable; and (iii) provide written notice to the bidder of the DSBO
2 director's final determination.

3 **Sec. 28-146. SBE Defined Procurement Pool/Bid Preference — Compliance by SBEs**
4 **required throughout performance of City contract or purchase order.**

5 (a) Upon award of a City contract or City purchase order, compliance with the
6 commercially useful function requirement and other performance requirements required under this
7 article V by the SBE becomes a covenant of performance by the SBE vendor, contractor or
8 consultant in favor of the City. It shall be an ongoing, affirmative obligation of the SBE on such
9 contract or purchase order to perform all requirements, including but not limited to the provision of
10 a commercially useful function, for the duration of the City contract or purchase order, unless the
11 City initiates a material alteration to the goods to be provided or services to be performed affecting
12 the SBE's performance of a commercially useful function on the contract or purchase order
13 through a written amendment.

14 (b) The DSBO shall review all contracts and purchase orders to determine compliance
15 by SBEs with the provisions contained in sections 28-138 through 28-150. The review shall
16 include, but not be limited to:

17 (1) an examination of the goods provided, work performed, industry practice, and
18 other relevant factors to determine whether the commercially useful function on the contract or
19 purchase order was has been maintained over the term or duration of the contract or purchase
20 order; and

21 (2) a determination of whether the SBE has performed its other contract
22 performance obligations over the term or duration of the contract or purchase order.

23 The purchasing division or user department, as appropriate, will provide bid documentation
24 for each specific procurement opportunity to the DSBO director within three (3) business days after
25 bid opening.

26 (c) All participation by SBEs who are also MBEs or WBEs will be credited toward the
27 annual goal based upon an analysis by DSBO of the specific duties performed by the MBE or WBE
28 and the extent to which such duties constitute a commercially useful function for each contract or
29 purchase order. SBE participation on contracts or purchase orders that does not include utilization
30 of or by MBEs or WBEs shall be calculated separately by DSBO based upon an analysis of the
31 specific duties performed by the SBE and the extent to which such duties constitute a commercially
32 useful function for each contract or purchase order. The DSBO director or manager may
33 undertake such inquiries or studies, engage such employees or retain such consultants as may be
34 necessary to assist the director in rendering these determinations.

1 **Sec. 28-147. Defined Procurement Pool/SBE Bid Preference—Amendments and**
2 **modifications.**

3 (a) User departments will have a continuing obligation to immediately inform the DSBO
4 in writing of any agreed upon increase or decrease to the dollar value of a contract or purchase
5 order, as appropriate, whether by amendment or any other modification to the contract or purchase
6 order regardless of whether such increase or decrease concerning the covered goods or covered
7 services to be provided has been reduced to writing at the time of notification.

8 (b) The SBE shall provide a commercially useful function as respects the changed goods
9 or services by providing such goods or services itself, by retaining additional SBEs listed in the
10 most current DSBO certification list for the additional covered goods or covered services to be
11 acquired, or showing each element of modified good faith set out in section 28-148(c). The SBE
12 shall supply to the DSBO director all documentation establishing the revised dollar value of the
13 contract or purchase order as well as the SBE's maintenance of the commercially useful function
14 requirement.

15 **Sec. 28-148. Defined Procurement Pool/SBE Bid Preference—Potential violations during**
16 **contract performance.**

17 (a) An SBE that has been awarded a City contract or purchase order through the defined
18 procurement pool or a bid preference shall not, at any time before or during the performance of
19 such contract or purchase order:

20 (1) Fail to in fact self-perform, as a certified vendor, contractor, or consultant, no
21 less than seventy-five percent (75%) of the total amount of the contract or purchase order for
22 covered goods or covered services with its own forces as originally listed at bid or proposal
23 opening, as appropriate; or

24 (2) Modify or eliminate all or a portion of the covered goods or covered services to
25 be provided and attributable to the certified vendor, contractor, or consultant, unless directed by
26 the City in writing.

27 (b) Any action by an SBE in violation of subsections (a) (1) or (2) hereof, shall constitute
28 a material breach of the contract or purchase order that shall entitle the City to exercise all of its
29 rights at law or equity for such material breach, in addition to exercising any of the other sanctions
30 set out in section 28-150 below. If, following award of a contract or purchase order, an SBE has its
31 certification terminated for reasons other than expiration or graduation from certification, such
32 termination of certification shall not be deemed to affect compliance with the contract or purchase
33 order and shall not be deemed a breach of the contract or purchase order as long as the vendor,

1 contractor or consultant can demonstrate that such termination or failure did not result from any
2 action or inaction, whether direct or indirect, of or by the vendor, contractor or consultant.

3 (c) The following modified good faith requirements shall apply to sections 28-146 and
4 147. In the event that additional covered goods or covered services are added to an on-going
5 contract or purchase order and the SBE in such event is in non-compliance with either the
6 requirement to self-perform no less than seventy-five percent (75%) of the total amount of the
7 contract or purchase order with its own forces or to perform a commercially useful function for the
8 provision of the additional covered goods or covered services, the following modified good faith
9 efforts must be completed. Failure of a vendor, contractor or consultant to show good faith efforts
10 as to any one (1) of the following categories shall render its overall good faith efforts showing
11 insufficient; and its contract performance in non-compliance with this article V.

12 (1) Verification that the vendor, contractor or consultant used the most current
13 SBE directory from the DSBO in order to contact SBEs that are certified in the identified covered
14 goods or covered services area(s) at the time of the modified good faith effort.

15 (2) Verification of efforts to contact appropriate SBEs within the same identified
16 covered goods or covered services area must be documented. The DSBO director may verify
17 such contacts as he or she deems appropriate.

18 (3) Documentation of the modified good faith efforts must be submitted to the
19 DSBO prior to the payment to the vendor, contractor or consultant of the next progress or other
20 partial payment or fund release under the contract or purchase order.

21 **Sec. 28-149. Defined Procurement Pool/SBE Bid Preference—Burden of proof;**
22 **investigations of compliance.**

23 Any business enterprise affected by the operation of sections 28-138 through 28-150, shall
24 have the burden of proving its compliance with the requirements and obligations herein. The
25 DSBO is empowered to receive and investigate complaints and allegations by SBEs, third parties,
26 or City personnel, or to initiate its own investigations regarding compliance with the requirements
27 and obligations of this article V. If the DSBO determines in its sole discretion that an investigation
28 is warranted, upon written notice of such investigation the affected party shall be obligated to
29 cooperate fully with the investigation and shall have a continuing burden of providing complete,
30 truthful information to the DSBO director and of otherwise proving compliance with the
31 requirements and obligations of this article V.

32 **Sec. 28-150. Defined Procurement Pool/SBE Bid preference—Sanctions for failure to**
33 **comply with bid preference requirements.**

1 (a) If a vendor, contractor, or consultant is found to be in violation of the provisions of
2 article V, to otherwise be in breach of a contract or purchase order, to perform a non-commercially
3 useful function or act as a conduit, to fail to submit information required under this article V, to
4 submit false, misleading, or materially incomplete statements, documentation, or records, or to fail
5 to cooperate in an investigation, it shall be subject to sanctions. The City may exercise any or all
6 of its rights, including withholding funds, imposition of monetary penalty, suspension, or
7 termination, contained in the contract or purchase order terms and conditions. If the contract or
8 purchase order is suspended or terminated, the City reserves all its rights at law or equity.

9 (b) If the DSBO director determines, in his or her sole discretion, that an SBE is in
10 noncompliance with the defined procurement pool or bid preference requirements contained in
11 sections 28-138 through 28-150, the SBE may be assessed a civil, remedial penalty of not more
12 than One Hundred Fifty Percent (150%) of the contract or purchase order. In assessing such civil
13 penalty:

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

- 17 a. The length of the period of noncompliance;
- 18 b. The history of previous noncompliance with this article V;
- 19 c. The monetary impact of the civil penalty on the SBE vendor, contractor,
20 or consultant in correcting such noncompliance; or
- 21 d. The other facts and circumstances relevant to the noncompliance of the
22 SBE vendor, contractor, or consultant.

23 (2) The DSBO director shall collect assessed and unpaid civil penalties under this
24 subsection by action initiated in the state district court for collection of such penalty. A stay of any
25 order of the DSBO director pending judicial review shall not relieve any SBE vendor, contractor, or
26 consultant from any civil penalty obligation imposed under this subsection.

27 (3) Any such assessed civil penalties may also be offset against any amount
28 otherwise due and owing to the SBE vendor, contractor, or consultant on the contract or purchase
29 order.

30 (4) The contract or purchase order may be suspended or terminated with the City
31 reserving all its rights at law or equity.

32 (5) The debarment board established under section 20-77 of this code, upon
33 request of the DSBO director, may suspend or debar the vendor, contractor, or consultant from
34 participation in City contracting covered hereunder for a period as may be determined by the

1 debarment board, in its sole discretion, based upon the grounds of violating this article V, pursuant
2 to such suspension and debarment procedures as may be established by the City, as set forth in
3 section 20-77. The DSBO director, in that event, shall regard as non-responsive any bid or
4 proposal received during this time period that includes the vendor, contractor, or consultant as a
5 vendor, contractor, consultant, subcontractor, subconsultant, supplier, manufacturer, or distributor.

6 (6) If a vendor, contractor, consultant, or other business enterprise knowingly
7 receives new or additional work as a result of actions set out in this section, then the penalties in
8 this section may be applied to such business enterprise.

9 (7) The DSBO may suspend or revoke an offending SBE's eligibility for
10 certification, as an SBE, may suspend its participation in a City contract or purchase order from the
11 calculation of annual goals, and, subject to other City law, may suspend or debar the SBE from
12 participating in future City contract's, based upon the SBE's acting as a conduit, failing to comply
13 with the provisions of article V, failing to perform a commercially useful function on a contract or
14 purchase order, failing to submit information as required by section 147, or submitting false,
15 misleading, or materially incomplete statements, documentation, or records, or failing to cooperate
16 in investigations.

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

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

27 **Sec. 28-151. Procurement Opportunities for Contracts/Purchase Orders through**
28 **Independent Partnerships.**

29 (a) For all purchases of covered goods or covered services that are not included in the
30 goal, bid preference, or defined procurement pool programs contained in this article V, the
31 purchasing division or user department, as appropriate, will include a clause in the solicitation
32 encouraging, but not requiring, participation by and independent partnerships with SBEs, MBEs,
33 WBEs, and other business enterprises in supply chain activities, prime/subcontractor
34 arrangements including partnerships, and joint ventures on City contracts and purchase orders.

1 The purchasing division or user department will not, in encouraging participation by and
2 independent partnerships with SBEs, MBEs, WBEs, and other business enterprises, require or
3 compel a specific outcome in favor of an MBE or WBE. The purchasing division or user
4 department will not score responses or lack of responses to the solicitation clause for contract or
5 purchase order award purposes.

6 (b) Voluntary disclosures of such independent partnerships to the City, if any, by the
7 vendor awarded the contract or purchase order, will be forwarded by the purchasing division or
8 user department to the DSBO for review. If such review reveals participation of or performance by
9 an SBE who is also an MBE or WBE, then such participation or performance will be credited
10 toward the annual goal based upon an analysis of the specific duties performed by the MBE or
11 WBE and the extent to which such duties constitute a commercially useful function for each
12 contract or purchase order. If the City's review reveals participation of or performance by an SBE
13 who is not an MBE or WBE, then such participation or performance will be calculated separately
14 based upon an analysis of the specific duties performed by SBE and the extent to which such
15 duties constitute a commercially useful function for each contract or purchase order. The DSBO
16 director or the manager may undertake such inquiries or studies, engage such employees or retain
17 such consultants as may be necessary to assist the DSBO director in rendering these
18 determinations.

19 **Sec. 28-152. State or federal law and other guidelines.**

20 In making any findings required herein, the DSBO director may incorporate by reference
21 rules, procedures and powers of C.R.S. § 24-4-101 et seq. as they may exist on the date of
22 enactment of this article V or as they may hereinafter be amended. In making any findings required
23 herein, or in aid of definition or interpretation of any term or phrase herein, the DSBO director may
24 utilize as a guide, insofar as they are consistent with the purposes of this article V, provisions of
25 federal law, including without limitation the provisions of 49 Code of Federal Regulations and 13
26 Code of Federal Regulations, or successor regulations, as they exist on the date of enactment of
27 this article V or as they may hereafter be amended.

28 **Sec. 28-153. Quarterly reports.**

29 The DSBO director shall prepare written reports four (4) times each year which shall
30 describe progress in meeting the annual goals set out in section 28-124, as well as progress
31 under defined procurement pool, bid preference, and independent partnerships as applied to City
32 contracts and purchase orders for covered goods and covered services under this article V.
33 Copies of quarterly reports shall be provided to the manager, purchasing director, affected
34 department heads, city council, and the mayor according to the following schedule:

Period Covered	Date Due
January 1 — March 31	June 1
April 1 — June 30	September 1
July 1 — September 30	December 1
October 1 — December 31	March 1

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In addition, the quarterly report shall describe the implementation of this article V and provide an evaluation of individual contracts and purchase orders, including all change orders, amendments, and modifications awarded for covered goods and covered services through the procurement goal, defined procurement pool, bid preference, and independent partnerships provisions of this article V.

In calculating MBE/WBE participation under this article V, all funds paid to such firms on City contracts and purchase orders for covered goods and covered services during the year shall be counted independent of whether or not such funds were (1) used to accomplish procurement goal applicable at the time of bid opening or other proposal receipt; or (2) used to compensate SBEs who are MBEs or WBES for the performance of a commercially useful function under an independent partnership, defined procurement pool, or bid preference contract or purchase order.

Sec. 28-154. Annual report.

(a) *MWBE utilization.* If the annual goal in section 28-124 is not met in any year, then by March 1 of the following year, the DSBO director shall submit to the mayor, city council, manager, purchasing director, and affected department heads a report comparing MBE/WBE utilization achieved in the year to the aspirational annual goal through the procurement goals, defined procurement pool, bid preferences, and independent partnerships, stating the reasons why the goal was not met, substantiating any waivers for procurement goals granted under section 28-124, and advising and making recommendations as to continuing or further efforts that the city should make in remedying discrimination and its effects in contracting for covered goods and covered services, and recommending what should be done to assist in meeting such goal in the future.

(b) *SBE utilization.* The DSBO director will submit to the mayor, city council, manager, purchasing director, and affected department heads a report that does the following: (1) describe utilization levels achieved for SBEs in the preceding year through the defined procurement pool, bid preferences, and independent partnerships; (2) make recommendations as to further efforts that the City should make to assist in the development and utilization of such firms in the

1 acquisition of covered goods and covered services; and (3) recommending what should be done to
2 assist in achieving such participation by SBEs in the future.

3 **Sec. 28-155. Rules and regulations; informal guidelines.**

4 The DSBO director shall have the power and authority to adopt rules and regulations or
5 informal guidelines to effectuate the purpose, procedures, and operations of this article V. The
6 manager and department heads shall each have the power and authority to adopt policies,
7 procedures, or informal guidelines consistent with DSBO rules to effectuate the purpose,
8 procedures, and operations of this article V.

9 **Sec. 28-156. Severability.**

10 If any provision of this article V or its application is held invalid or unenforceable, such
11 invalidity or unenforceability shall not affect other provisions or applications of this article V which
12 can be given effect without the invalid provisions or applications, and the remaining provisions are
13 to be severable and shall remain in full force and effect.

14 **Sec. 28-157. Effective date of ordinance.**

15 This article V shall become effective on April 1, 2014, and shall apply to all contracts and
16 purchase orders within the scope of the article for which bids or proposals are made available for
17 bidding or competitive selection on or after April 1, 2014.

18 **Sec. 28-158. Review and sunset.**

19 (a) This article V shall be reviewed by the mayor, manager, purchasing director, and
20 DSBO director on the third (3rd) anniversary of its enactment, in order to determine whether
21 adjustments or revisions to article V or additional studies or inquiries in furtherance of article V are
22 deemed appropriate and should be undertaken or recommended to further and maintain the
23 purpose and intent of article V.

24 (b) This article V shall be repealed effective April 1, 2019.

25 **Secs. 28-159 through 199. Reserved.**

26

1 COMMITTEE APPROVAL: January 29, 2014.

2 MAYOR-COUNCIL DATE: February 4, 2014.

3 PASSED BY THE COUNCIL _____ 2014

4 _____ - PRESIDENT

5 APPROVED: _____ - MAYOR _____ 2014

6 ATTEST: _____ - CLERK AND RECORDER,
7 EX-OFFICIO CLERK OF THE
8 CITY AND COUNTY OF DENVER

9 NOTICE PUBLISHED IN THE DAILY JOURNAL _____ 2014; _____ 2014

10 PREPARED BY: Victoria J. Ortega - ASSISTANT CITY ATTORNEY February 6, 2014

11 Pursuant to Section 13-12, D.R.M.C., this proposed ordinance has been reviewed by the office of
12 the City Attorney. We find no irregularity as to form, and have no legal objection to the proposed
13 ordinance. The proposed ordinance is not submitted to the City Council for approval pursuant to
14 §3.2.6 of the Charter.

15

16 D. Scott Martinez, Denver City Attorney

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18 BY: _____, Assistant City Attorney DATE: _____, 2014