

1 **BY AUTHORITY**

2 ORDINANCE NO. _____
3 SERIES OF 2020

COUNCIL BILL NO. CB20-0286
COMMITTEE OF REFERENCE:

4 Business, Arts, Workforce & Aviation Services

5 **A BILL**

6 **For an ordinance amending Articles III, V and VII of Chapter 28 of the Denver**
7 **Revised Municipal Code by repealing and reenacting a new Division 3 of Article**
8 **III establishing a Minority and Women Business Enterprise contracting**
9 **ordinance in furtherance of nondiscrimination in City Contracts for**
10 **Construction, Reconstruction, and Remodeling, and Professional Design and**
11 **Construction Services; repealing and reenacting a new Article V establishing a**
12 **Minority and Women Business Enterprise contracting ordinance in furtherance**
13 **of nondiscrimination in City Contracts and Purchase Orders for Goods and**
14 **Services and Opportunities for Minority and Woman-Owned Businesses and**
15 **Small Business Enterprises in Procurements for Goods and Services; and**
16 **repealing and reenacting a new Article VII pertaining to the development and**
17 **utilization of Small Business Enterprises in City contracting and concessions.**

18 **WHEREAS**, The City has undertaken formal and informal programs and initiatives to address,
19 remedy and eliminate demonstrated discrimination against minorities and women in construction,
20 reconstruction, remodeling, design and professional construction services; and in the purchase of
21 non-construction goods and services in the City market area in which the City was both an active
22 and passive participant; and

23 **WHEREAS**, in furtherance of its ongoing attempts to remediate this discrimination, the City
24 conducted extensive public hearings prior to the enactments of Ordinance No. 246, Series of 1983;
25 Ordinance No. 424, Series of 1988; Ordinance No. 213, Series of 1989; Ordinance No. 513, Series
26 of 1990; Ordinance No. 760, Series of 2006; Ordinance No. 85, Series of 2014 for construction; and
27 Ordinance No. 86, Series of 2014 for the purchase of goods and services; hired independent
28 consultants who found evidence of discrimination in 1990; and who in 1995, 1996, 2004, and 2012,
29 and 2018 found continuing evidence of disparities between the availability and utilization of woman-
30 and minority-owned business enterprises in said industries and, in some studies, in the purchase of
31 non-construction good and services; and

32 **WHEREAS**, in 2011, prior to enactment of Ordinance Nos. 85 and 86, Series of 2014, the
33 City through the Division of Small Business Opportunity (“DSBO”) convened a task force to study

1 such continuing discrimination and commissioned a study by MGT of America, Inc., which study in
2 2013 found continued evidence of both impediments to the development of availability and
3 underutilization of minority and women-owned business enterprises in said industries, and such
4 conclusions were found to be consistent with the existence of racial and gender discrimination in
5 such industries resulting in a reauthorized program; and

6 **WHEREAS**, after reauthorization of the programs in 2014, which included continuation of the
7 goals program for construction; a goals program for the purchase of certain goods and services; and
8 a small business enterprise (“SBE”) defined selection pool for construction and for the purchase of
9 goods and services; DSBO, the City and various community groups continued to examine the
10 numerous areas and program initiatives and improvements for the program; and

11 **WHEREAS**, in 2017, the City commissioned BBC Research and Consulting, Inc. (“BBC”) to
12 perform a study of disparities in the construction, professional services and in the purchase of non-
13 construction goods and services in the City’s market areas; and

14 **WHEREAS**, also in 2017, as a part of the recommendations received from City Council and
15 the community, provisions of Article III were revised to ensure accurate and prompt payment to
16 minority and woman-owned businesses and small businesses, and to require minority- and women-
17 owned businesses and small businesses, to submit certain information monthly to allow the City to
18 monitor payment and change order issues between minority, women and small business
19 subcontractors and a prime contractor; and

20 **WHEREAS**, while the study proceeded, and through a series of community meetings
21 including through the Construction Empowerment Initiative advisory group and its subcommittees,
22 the City received numerous and invaluable recommendations for the improvement of the programs;
23 and

24 **WHEREAS**, in 2018 BBC concluded and provided to the City its study which included data
25 and evidence-based analysis measuring continuing disparities in construction and the purchase of
26 non-construction goods and services in the City as well as within the relevant markets, and anecdotal
27 accounts of experiences suffered by participants in such industries, which was consistent with and
28 indicative of continued racial and gender discrimination in the said industries; and

29 **WHEREAS**, BBC also found in its study evidence that although improvements in the City’s efforts
30 in eliminating disparities can be measured through the use of a goals program, disparities still existed in
31 the wider industry; and

1 **WHEREAS**, along with the data and conclusions provided, BBC received information from in-
2 depth interviews and recommended, among other things, that the City unbundle large projects in an
3 effort to pursue additional minority- and women-owned business enterprises (“MWBE”) participation,
4 and implement further prompt payment measures to ensure both prime contractors and subcontractors
5 are paid in a timely manner; and

6 **WHEREAS**, the City has assessed whether it would serve legitimate interests of the City and
7 serve a public purpose to continue its programs to assist smaller business enterprises in the
8 construction, reconstruction and remodeling, and professional design and construction services
9 industries markets; and in the purchase of goods and services, in which the City participates,
10 together with concession activity at Denver International Airport (DIA) through a variety of race and
11 gender neutral components, including but not limited to, the development of a variety of outreach
12 and development programs together with a reenacted minority and women business enterprise goals
13 program and a defined pool small business enterprise program as components of the initiative; and

14 **WHEREAS**, the City Council has reviewed documentation and records evidencing the
15 program and studies, which include anecdotal evidence and other public comment referenced above
16 regarding this proposed legislation, and based on all of the above, hereby **finds**:

17 (a) *History of discrimination.*

18 (1) There exists a prima facie showing that woman business enterprises and minority
19 business enterprises owned by Black/African-Americans, Hispanic-Americans, Asian-Americans,
20 and Native Americans, who have done business or attempted to do business in the private and public
21 construction, reconstruction and remodeling, professional design and construction services
22 industries, and the purchase of non-construction goods and services within the City and the City’s
23 market area or marketplace for these industries, which encompasses the State of Colorado, have
24 suffered and continue to suffer from discrimination. This discrimination has existed in the City’s
25 construction, reconstruction and remodeling, professional design and construction services, and in
26 the purchase of non-construction goods and services contracting practices, and in the private sector
27 industry contracting in such industries, in which the City has been a passive participant. Because of
28 such discrimination, such woman business enterprises and minority business enterprises have been
29 denied equal opportunity to participate in such contracts.

30 (2) Such denial of equal opportunity has been aggravated by impediments to the creation of
31 minority and women-owned business enterprises in the said industries, as measured by lending

1 discrimination affecting such industries, comparison of business formation rates of minority and
2 women employees and majority employees in such industries, and a comparison between self-
3 employment earnings of minorities and women as compared to majority persons in such industries.

4 (3) Such discrimination has prevented such woman business enterprises and minority
5 business enterprises from participating both in the city's contracting opportunities in the construction,
6 reconstruction and remodeling, professional design and construction services areas, in the non-
7 construction goods and services procurement areas, and in the private sector construction,
8 reconstruction and remodeling, professional design and construction services areas, and in the
9 private sector non-construction goods and services procurement at a level that would have existed
10 absent such discrimination.

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

14 (5) Such discrimination continues to require action to prevent discrimination and to remedy
15 its effects including outreach and education efforts to promote access to procurement opportunities,
16 improved instructional resources for enterprises inexperienced in dealing with the city insofar as the
17 city may effectively and lawfully do so, the adoption of a participation goals program for appropriately
18 and lawfully designated procurements, and implementation of defined pool procedures for small
19 businesses to encourage equal opportunities to compete for City funded procurement contracts and
20 subcontracts.

21 (6) Without the adoption of these programs, such woman business enterprises and minority
22 business enterprises would not have an equal opportunity to participate in city contracts for
23 construction, reconstruction and remodeling, and for professional design and construction services.

24 (b) *Goals program for construction.* The city has a compelling governmental interest in
25 prohibiting, preventing and eliminating race and gender discrimination and its effects in city contracts
26 for construction, reconstruction and remodeling, professional design and construction services, and
27 for this purpose adopts the specific program of good-faith goals as set forth in Division 3 of Article III
28 of Chapter 28. This goal program has been carefully structured to take into consideration factors
29 such as present availability of such woman business enterprises and minority business enterprises
30 to perform work on such City contracts. The goals program is narrowly tailored as required by
31 prevailing law and does not authorize the use of set-asides, quotas, or sheltered markets, or bid

1 preferences. The program is narrowly tailored to prevent and eliminate discrimination and its effects
2 against such minority business enterprises and woman business enterprises with a minimum of
3 burden on other contractors, including:

4 (1) A specific goal for participation of woman and minority business enterprises is to be
5 established for each contract for professional design and construction services, for construction,
6 reconstruction and remodeling work, based on the availability of woman business enterprises and
7 minority business enterprises for that particular contract;

8 (2) The program does not impose a quota, set-aside, sheltered market, or bid preference,
9 never excludes any party, including nonminority- and male- owned business enterprises, from
10 competing for any contract, and never denies contracts for failure to meet the participation goal, if
11 nondiscrimination is demonstrated by a showing of a good-faith attempt to comply with the goal
12 established therein;

13 (3) The program provides for the ability of individual persons not within the program's
14 identified categories of minorities and women to be individually certified to participate as a minority
15 business enterprise if such person can demonstrate individualized social discrimination; and

16 (4) The program provides for graduation from the program of minority business enterprises
17 and woman business enterprises whose size indicates that they have had the opportunity to
18 overcome the effects of discrimination.

19 (c) *Small Business Enterprise Program*

20 (1) One Hundred Percent (100%) of national SBA size standards is reasonably reflective of
21 business size in the metropolitan Denver construction, reconstruction and remodeling; and
22 professional design and construction services industries, food service, and other concession
23 industries. Further, a development program to assist such small business enterprises, regardless of
24 the race or gender of the owners thereof, in contracting with the City in the areas of construction,
25 reconstruction and remodeling, and professional design and construction services, both as general
26 contractors and as subcontractors, subconsultants, and suppliers, and in the City's retail, food
27 services, and other concession activities would benefit the City contracting by promoting competition
28 in bidding and benefit the metropolitan area, including the City, by promoting the economic growth
29 of such small business enterprises, and such a development program is therefore justified as being
30 related to a legitimate governmental interest of the City;

1 (2) The continuing maintenance of an SBE ordinance would benefit City contracting, and
2 SBEs doing business in the Denver metropolitan area would continue to be assisted in their
3 development and expansion into general contracting roles, and City contracting would be further
4 benefited, if functioning as a contractor, consultant or concessionaire on certain contracts and
5 concession agreements were restricted to small business enterprises (SBEs), as defined herein,
6 through a defined selection pool (set-aside) program in which such contracts and concession
7 agreements were restricted for the exclusive competition by SBEs, together with a mandated
8 minimum percentage of utilization of SBEs as subcontractors, subconsultants and suppliers on
9 certain of such contracts, and that such features of an SBE ordinance would also be justified as
10 being related to a legitimate governmental interest of the City;

11 (d) *DSBO Program*

12 It would serve a legitimate and compelling governmental interest of the City to continue the
13 comprehensive, multi-tiered program of race and gender conscious and race and gender neutral
14 assistance to small business enterprises, generally referred to as the DSBO Program, the details of
15 such as developed by the agencies of the City, with the reauthorized MWBE ordinance and the SBE
16 defined selection pool program forming components of such construction empowerment initiative.

17 (e) *Procurement program components for Article V.*

18 (1) SBE Defined Procurement Pool for Goods and Services - Procurements between
19 \$50,000 and \$1,000,000.

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

28 B. A defined procurement pool that assists SBEs, regardless of the race or
29 gender of the owners thereof, would assist all SBEs in their development and expansion into general
30 contracting roles, and would benefit City procurement contracting by encouraging competition for
31 goods or services for which the estimated cost is at least fifty thousand dollars but not more than

1 one million dollars. The scope of the defined procurement pool will be limited to bid or proposal
2 opportunities for exclusive competition among SBEs identified through a DSBO certification list. Only
3 business enterprises that meet the certification criteria for small business enterprises, as set forth
4 herein, are eligible for the pool. The defined procurement pool is therefore justified as being related
5 to a legitimate governmental interest of the City;

6 (2) MWBE Goals Program - Procurements for services of \$250,000 or more.

7 A. A specific goal for participation of MWBEs is to be established for each
8 city procurement contract for certain applicable services for which the estimated cost is two hundred
9 fifty thousand dollars or more, based on the availability of MWBEs for that particular City procurement
10 contract;

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

16 C. The goal program provides for the ability of individual persons not within
17 the program's identified categories of minorities and women to be individually certified to participate
18 as a minority business enterprise if such person can demonstrate individualized social discrimination;
19 and

20 D. The program provides for graduation from the program of minority
21 business enterprises and woman business enterprises whose size indicates that they have had the
22 opportunity to overcome the effects of discrimination.

23 **NOW, THEREFORE, BE IT ENACTED BY THE COUNCIL OF THE CITY AND COUNTY OF**
24 **DENVER:**

25 **Section 1.** That Division 1 of Article III of Chapter 28 of the Revised Municipal Code is hereby
26 repealed and reenacted to read as follows:

27 **ARTICLE III. NONDISCRIMINATION IN CITY CONTRACTS FOR CONSTRUCTION,**
28 **RECONSTRUCTION, AND REMODELING, AND PROFESSIONAL DESIGN, AND**
29 **CONSTRUCTION SERVICES**

30 **DIVISION 1. DIVISION OF SMALL BUSINESS OPPORTUNITY**

31 **Subdivision I.**

1 **Sec. 28-31. – DSBO and program objectives.**

2 The division of small business opportunity (DSBO), under the Denver Economic Development
3 and Opportunity (DED0) agency, shall be responsible for the performance of the functions, powers
4 and duties assigned to DSBO by this chapter 28 or as may be assigned by the executive director of
5 the DED0, which shall report to the mayor. Such duties shall include development and enforcement
6 of programs for enhancing minority, women and small business enterprise utilization in city
7 construction, professional design and construction services, and DEN concession contracting.
8 DSBO shall also be responsible for promoting economic development of such minority, women and
9 small business enterprises.

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

11 The purpose of article III and, in part, article V is to enable the city, through the departments
12 and agencies of the city, including the departments of transportation and infrastructure, aviation and
13 general services and other user departments, and the DSBO, to undertake specific activities to
14 promote equity, maximize opportunities, and prevent discrimination and its effects against business
15 enterprises that have been certified as MWBEs in the areas of construction, reconstruction and
16 remodeling, and professional design and construction services, in the execution by the above
17 departments of their duties pursuant to the Charter and ordinances of the City and County of Denver.
18 The director and the user departments are hereby expressly delegated the necessary powers to
19 effectuate the purpose of article III and V and to undertake such additional studies or inquiries as
20 they may deem appropriate.

21 **Sec. 28-33. - Powers and duties.**

22 (a) The DSBO shall perform all duties and responsibilities established by this chapter 28
23 together with such other duties and responsibilities as may be assigned to the office by ordinance,
24 executive order or which may be otherwise delegated to it by operation of federal law, including, but
25 not limited to, administration and oversight of such federally-established disadvantaged business
26 enterprise (DBE) or similar programs that may be made applicable to city contracting activities.

27 (b) The director is hereby delegated the authority to promulgate such rules and regulations
28 or guidelines as may be necessary to effectuate the purposes of this chapter 28 and other programs
29 within the purview of the DSBO.

30 **Sec. 28-34. - Race- and gender-neutral measures to promote equal opportunities for all**
31 **business enterprises.**

1 The city, through the DSBO, in cooperation with user departments, other governmental
2 agencies and private parties and organizations, is authorized to develop and utilize discretionary
3 programs and activities to provide outreach to, and to facilitate the participation of, all business
4 enterprises in city contracting and concession activities, including but not limited to MWBEs and
5 SBEs. These programs and activities may include, but are not limited to:

6 (a) Collection and analysis, for informational purposes only, of data and information from
7 each bidder or proposer on a city contract regarding the ongoing availability and utilization of minority
8 and women-owned business enterprises, including MWBEs, on such bidder's or proposer's private
9 contracts in the construction and professional design and construction services industries in the city's
10 marketplace. DSBO and the user departments will explore making provision of such data and
11 information a condition precedent to or an element of prequalification for bidding or proposing on city
12 contracts within the scope of this chapter 28.

13 (b) Development of such other programs or activities as the director may from time to time
14 recommend.

15 **Sec. 28-35. - Definitions.**

16 As used in this article III and its divisions, the following words and phrases shall have the
17 following meanings, unless otherwise clearly required by the context:

18 (1) *Affiliate* means any business enterprise that is affiliated with an MWBE or with the
19 owner(s) of such MWBE. Business enterprises are affiliates of each other when one (1) controls or
20 has the power to control the other, or a third party or parties' controls or has the power to control
21 both. It does not matter whether control is exercised, so long as the power to control exists. The
22 director may utilize, in the interpretation of this definition, the definition of affiliate set forth in C.F.R.
23 § 121 or successor regulation, including related SBA guidance documents, as from time to time
24 amended.

25 (2) *Annual goal* means the targeted level for the aspirational goal established by the city for
26 the annual aggregate participation of MWBEs in city contracts.

27 (3) *Applicant business enterprise* means a business enterprise seeking to be certified as a
28 minority and/or woman business enterprise under this article III and its divisions.

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

1 (5) *Broker* means a business enterprise that performs a commercially useful function as an
2 intermediary, for a fee, in the acquisition of materials, supplies or equipment, regardless of whether
3 it takes title to such materials, supplies or equipment, for the city or a private owner or its contractors,
4 consultants or suppliers, but is not a manufacturer, manufacturer's representative or regular dealer.
5 Only bona fide commissions earned by a broker for its activities in performing a commercially useful
6 function on a city contract shall be counted toward the participation goal as set out in sections 28-59
7 and 28-63. A packager shall be considered and treated as a broker.

8 (6) *Business enterprise* means an individual, sole proprietorship, corporation, limited liability
9 company, partnership, limited partnership, limited liability limited partnership, joint stock company,
10 joint venture, professional association or any other legal entity operated for profit that is properly
11 licensed or registered, as applicable, owned and controlled by person(s) who are citizens of the
12 United States or lawful permanent residents of the United States, and otherwise authorized to do
13 business in the State of Colorado.

14 (7) *Certification* means completion by a business enterprise of an application procedure to
15 be developed by the DSBO, and formal authorization by the director to participate as an MWBE
16 under this article III and its divisions. Certification neither represents nor implies that a business
17 enterprise is qualified to perform on a contract, nor that it performs a commercially useful function.

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

19 (9) *City's marketplace* means the geographic and procurement area in which the city
20 contracts on an ongoing basis, as established by the findings of the Denver City Council.

21 (10) *City project; city contract; city construction practices* mean any contract or project
22 encompassed within the definition of contract in article III and its divisions, regardless of whether the
23 project owner is the city or a private owner. All provisions of this article III and its divisions shall apply
24 to such contracts let by private owners, provided that the city shall not dictate means and methods
25 of construction to such private owners. Copies of all documents required to be provided by a
26 subcontractor, subconsultant, supplier, manufacturer, manufacturer's representative or broker
27 hereunder shall be sent to the director when the originals are sent to a private owner.

28 (11) *Commercially useful function* means an MWBE is responsible for the execution of a
29 distinct element of the work of a contract and carries out the work by actually performing, maintaining
30 control, managing, and supervising the work involved, or fulfilling responsibilities as a joint venturer.
31 In determining whether an MWBE is performing or has performed a commercially useful function,

1 the DSBO will analyze and evaluate the quantity of work subcontracted; the amount paid to the
2 MWBE in proportion to the work actually performed; whether the MWBE is performing functions set
3 forth in this definition and this article III and its divisions including but not limited to responsibility for,
4 with respect to materials, supplies or equipment used for the contract work; negotiating price for the
5 materials, supplies or equipment; determining quantity and quality of the materials, supplies or
6 equipment; ordering materials, supplies or equipment; performing installation where applicable;
7 paying for the materials, supplies or equipment; credit claimed toward participation goal
8 achievement; and other relevant factors. Commercially useful function is measured for purposes of
9 determining participation on a contract, not for determination of certification eligibility.

10 (12) *Competitive selection process* has the meaning ascribed to that phrase in sections
11 2.3.3(A) and 2.11.3(8) of the Denver City Charter, and in D.R.M.C. sections 5-19 and 20-56, as that
12 meaning may pertain to a contract(s) at issue.

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

21 (14) *Construction* means those areas of construction, reconstruction and remodeling as
22 encompassed within the city's contracting processes authorized by the Charter and ordinances of
23 the city, including construction management services. This definition shall encompass design-build
24 contracts as appropriate.

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

30 (16) *Contract* means any city contract for construction or for professional design and
31 construction services authorized by any provision of the Charter or ordinances of the city, excepting

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

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

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

19 (19) *Department head* means the manager or director of the city department, user
20 department or agency entering into contract(s) utilizing MWBE participation, or such person's
21 designee.

22 (20) *Design-build contract* means a contract for the procurement of both the design and the
23 construction, reconstruction or remodeling of a public work in a single contract with a single design-
24 build contractor or combination of such contractors that are capable of providing the necessary
25 design and construction, reconstruction or remodeling services.

26 (21) *Director* means the director of the division of small business opportunity or successor
27 agency, or such director's designee.

28 (22) *DSBO* or the DSBO means the division of small business opportunity.

29 (23) *DSBO required forms* means the certifications, letters of intent, commitment forms and
30 other forms and documents developed by DSBO or described in this article III and its divisions and
31 the rules and regulations, referenced in applicable procurement documents, and required by DSBO

1 to confirm and evaluate a bidder's or proposer's commitment to utilization of certified firms and other
2 DSBO program requirements. No unauthorized alteration or modification of a DSBO required form
3 is permitted. DSBO reserves the right to reject altered or modified forms.

4 (24) *Doing business* means having a physical location from which to engage in for-profit
5 activities in the scope(s) of expertise of the business enterprise.

6 (25) *Economically disadvantaged* means an individual with a personal net worth equal to
7 or less than the permissible net worth amount determined by the U.S. Department of Transportation
8 to be applicable to its DBE programs, or as otherwise promulgated by the director by rule and
9 regulation.

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

13 (27) [Reserved]

14 (28) *Good faith efforts* means substantive and meaningful good faith actions undertaken by
15 a contractor or consultant to achieve the MWBE participation goal as defined in more detail in
16 sections 28-60 and 28-64 of this article III and its divisions.

17 (29) *Individual or person* means a natural human being, and not a legally-created or
18 maintained entity.

19 (30) *Integrated contract* means contract or contracts for construction procured and awarded
20 for a city construction project or program, including where the awarded contractor may be authorized
21 to conduct bidding or solicit proposal of contractors or subcontractors under city requirements,
22 without a specific pre-determined project or scope of work. Once specific scope or scopes of work
23 are identified, various projects, separate procurements, or individual work orders or task orders are
24 authorized, and the contractor proceeds to complete the work under the separate contracts, projects
25 or the individual work orders or task orders.

26 (31) *Joint venture* means an association of two (2) or more business enterprises to
27 constitute a single business enterprise to perform a city construction or professional design and
28 construction services contract for which purpose they combine their property, capital, efforts, skills
29 and knowledge and in which endeavor each joint venturer is responsible for a distinct, clearly defined
30 portion of the work of the contract, performs a commercially useful function, and whose share in the
31 capital contribution, control, management responsibilities, risks and profits of the joint venture are

1 equal to its ownership interest. Joint ventures must have an agreement in writing specifying the terms
2 and conditions of the relationships between the joint venturers and their relationship and
3 responsibility to the contract. Only the portion of the total dollar value of a joint venture contract equal
4 to the distinct, clearly defined work that the MWBE performs with its own forces as a commercially
5 useful function will count towards MWBE participation.

6 (32) *Letter of intent* means a DSBO required form that shall be a written communication
7 from a project bidder or proposer to the city or a private owner with respect to a contract, evidencing
8 an understanding between an MWBE and the bidder or proposer that, if the bidder or proposer is
9 selected, then such MWBE has or will enter into a contractual relationship with the bidder or proposer
10 on such contract or that such bidder or proposer will self-perform as an MWBE on such contract.

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

18 (34) *Manufacturer's representative* means a business enterprise that sells products for one
19 (1) or more manufacturers. A manufacturer's representative does not take legal title to or physical
20 possession of the products that it sells, such products generally being sent directly from the
21 manufacturer to the contractor or subcontractor purchasing the products. Only bona fide
22 commissions earned by a manufacturer's representative in performing a commercially useful
23 function on a contract shall be counted toward the participation goal as set out in sections 28-59 and
24 28-63.

25 (35) *Mentor-Protégé* means a relationship between a subcontractor certified as an MWBE
26 (protégé) and a more experienced contractor (mentor) approved by DSBO. In a mentor-protégé
27 relationship, the mentor provides guidance on technical, financial, bonding, equipment, and
28 personnel assistance to the protégé. The purpose of the relationship is to increase the capacity of
29 MWBEs to perform city contracts.

30 (36) *Minority business enterprise* or *MBE* means a business enterprise that is certified by
31 the director under this article III and its divisions as meeting all of the requirements for certification

1 set forth in sections 28-53 and 28-55 as an MBE. A business enterprise owned by individuals who
2 are both socially and economically disadvantaged minority individuals and women may be certified
3 as both an MBE and a WBE. For purposes of this article III and its divisions, an MBE or WBE certified
4 with DSBO in accordance with this article III and its divisions and the applicable rules and regulations
5 shall be referred to as an MWBE.

6 (37) *Minority individual* means:

7 (a) An individual whose lifelong cultural and social affiliation is with one (1) of the
8 following groups encompassed within the findings of the Denver City Council, which are rebuttably
9 presumed to be socially disadvantaged:

10 (i) Blacks/African-Americans, which includes persons having origins in any of
11 the black racial groups of Africa;

12 (ii) Hispanic-Americans, which includes persons of Mexican, Puerto Rican,
13 Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin,
14 regardless of race;

15 (iii) Native-Americans, which includes persons who are American Indians,
16 Eskimos, Aleuts, or Native Hawaiians; or

17 (iv) Asian-Americans (persons whose origins are in any of the original peoples
18 of the far east, Southeast Asia, the islands of the Pacific or the Northern Marianas, or the Indian
19 subcontinent); or

20 (b) Alternatively, on a case-by-case basis for the purposes of this article III and its
21 divisions, an individual found by the city to have been subjected to individualized racial or ethnic
22 prejudice or cultural bias within American society within the city's marketplace because of his or her
23 identity as a member of a group other than the groups referenced in subsection (a) above, without
24 regard to individual qualities, and therefore determined by the director to be individually socially
25 disadvantaged under this subsection; and

26 (c) Individual social disadvantage must stem from circumstances beyond the
27 individual's control. Evidence of individual social disadvantage must include:

28 (i) At least one (1) objective, distinguishing feature that has contributed to
29 social disadvantage, such as disability, long-term residence in an environment isolated from the
30 mainstream of American society within the city's marketplace or other similar barriers not common
31 to individuals who are not socially disadvantaged.

1 (ii) Personal experiences of substantial and chronic social disadvantage in
2 American society within the city's marketplace.

3 (iii) Negative impact on entry into or advancement in the city's marketplace
4 and participating on city contracts because of the disadvantage, as demonstrated by the individual's
5 education, employment and business history.

6 (38) *On-call construction or design contracts or on-call projects* means contracts that are
7 procured and awarded without a pre-determined specific project or scope of work. Once a specific
8 scope of work is identified, individual work orders or task orders are authorized, and the contractor
9 proceeds to complete the work under the individual work order or task order.

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

15 (40) *Participation goal* means the specific MWBE goal established for a particular contract,
16 on-call contract, or city project including task orders or work orders, or at the City's option for separate
17 procurements under an integrated contract, based upon the availability of MWBEs in the scope(s)
18 of work of the contract.

19 (41) *Personal net worth* means the net value of the assets of an individual after total
20 liabilities are deducted. An individual's personal net worth does not include the individual's ownership
21 interest in an applicant business enterprise or participating MWBE or the individual's equity, if any,
22 in his or her primary place of residence. An individual's personal net worth includes only his or her
23 share of assets held individually and jointly with the individual's spouse. For the purposes of
24 certification as an MWBE under this article III and its divisions, an individual must have a personal
25 net worth equal to or less than the permissible personal net worth amount determined by the U.S.
26 Department of Transportation to be applicable to its DBE programs or as otherwise promulgated by
27 the director by rule and regulation.

28 (42) *Private owner* means a private or other non-city owner undertaking to contract for
29 construction work or for design or construction management services on buildings or aviation or
30 aeronautical facilities or improvements thereto, on real property owned by the city.

1 (43) *Professional design and construction services* means those areas of services ancillary
2 to construction as encompassed within the city's contracting processes authorized by the charter
3 and ordinances of the city, including, but not limited to, engineering, architectural, testing, and
4 planning services and all other professional services related to construction projects.

5 (44) *Proposal* means an offer to perform construction or professional design and
6 construction services pursuant to a negotiated or otherwise competitively selected city contract with
7 either the city or a private owner, and whether in response to a request for qualifications, request for
8 proposals or otherwise. The department head shall designate the proposal, and the date of receipt
9 for each solicitation of proposers subject to this article III and its divisions.

10 (45) *Proposer* means a business enterprise that submits a proposal on a city construction
11 contract or professional design and construction services contract that is negotiated and not
12 competitively bid or that utilizes a competitive selection process.

13 (46) *Public-private partnership agreement (or P3 agreements)* means city contract or
14 contracts for some combination of the following for the development, financing, design, construction,
15 operation and maintenance of public facilities, buildings or aviation or aeronautical facilities, or
16 improvements thereto, where such contracts provide for funding in whole or in part by the city or
17 private funding and provide for utilization of such funds for the purpose of development, financing,
18 construction, professional design and construction, professional services or operation and
19 maintenance services for public facilities or areas owned or leased by the city or situated on real
20 property owned or leased by the city. For purposes of this article III and its divisions, such contracts
21 shall allow the performance of design, professional services or construction, subject to city laws,
22 rules and regulations, of a public facility by a public or private entity on city owned or leased land.
23 Notwithstanding the foregoing, such contract or contracts shall also include development, financing,
24 construction, professional design, professional services and construction services contracts by
25 private owners on real property owned or leased by the city, without regard to the utilization of city
26 funding.

27 (47) *Qualified*, with respect to good faith efforts in this article III and its divisions, means
28 that a business enterprise has the financial ability, expertise, skill, experience, and access to the
29 necessary staff, facilities and equipment to complete contract(s) or subcontract(s) that it may
30 undertake on projects. The city makes no representations as to the qualification of any applicant
31 business enterprise MWBE.

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

16 (49) *Socially disadvantaged* means a minority individual or woman who has been subjected
17 to racial, ethnic or gender prejudice or significant cultural bias within American society in the city's
18 marketplace because of his or her identity as a member of a group and without regard to individual
19 qualities. Social disadvantage must stem from circumstances beyond the individual's control. A
20 socially disadvantaged individual must be a citizen or lawfully admitted permanent resident of the
21 United States.

22 (50) *Subcontractor* or *subconsultant* means a business enterprise that has entered into a
23 contract with a general contractor or prime contractor to provide goods or services pursuant to a
24 contract between the general contractor or prime contractor and the city. A subcontractor or
25 subconsultant means a business enterprise that either directly contracts with a contractor or
26 consultant or directly contracts with subcontractors or subconsultants under such contractor or
27 consultant on a city contract, and which business enterprise will provide services or perform work
28 under agreements with the contractor or consultant or with other subcontractors or subconsultants
29 under such contractor or consultant.

30 (51) *Supplier* means a business enterprise that either directly contracts with a contractor or
31 consultant or directly contracts with subcontractors or subconsultants under such contractor or

1 consultant on a city contract, and which business enterprise will provide materials, supplies or
2 equipment under agreements with the contractor or consultant, or with other subcontractors or
3 subconsultants under such contractor or consultant. A supplier may be a regular dealer,
4 manufacturer, manufacturer's representative or broker. The participation goal shall be counted in
5 accordance with the function performed by the MWBE supplier under a contract and determined on
6 a per-contract or per-project basis.

7 (52) *Teaming agreement* means an agreement between a prime or general contractor and
8 an MWBE subcontractor or an agreement between a consultant and an MWBE subconsultant to:

- 9 (a) Develop the capacity of the MWBE under the bid or proposal to the city; and
- 10 (b) Describes how the parties are going to share work under the bid or proposal for
11 the primary scope of work under the bid or proposal.

12 (53) *Utilization plan* means a required plan, prepared by or on behalf of the bidder or
13 proposer as required by DSBO and set forth in the applicable contract procurement documents that
14 describes the bidder's or proposer's approach to satisfying the small, minority, and women-owned
15 business enterprise requirements including but not limited to the participation goal.

16 (54) *Woman* means a person of the female gender, encompassed within the findings of,
17 the Denver City Council, who is rebuttably presumed to be socially disadvantaged.

18 (55) *Woman business enterprise* or *WBE* means a business enterprise that is certified by
19 the director under this article III and its divisions as meeting all of the requirements for certification
20 set forth in sections 28-53 and 28-55 as a WBE.

21 For purposes of this article III and its divisions, the director shall classify business enterprises
22 with both minority and women owners, and meeting the requirements for certification as an MWBE,
23 as MBEs if socially and economically disadvantaged minority individual(s) own fifty-one (51) percent
24 or more of ownership, and as WBEs if socially and economically disadvantaged women own fifty-
25 one (51) percent or more of ownership. A business enterprise owned by individuals who are both
26 socially and economically disadvantaged minority individuals and women may be certified as both
27 an MBE and a WBE. For purposes of this article III and its divisions, an MBE or WBE certified with
28 DSBO in accordance with ordinance and the applicable rules and regulations shall be referred to as
29 an MWBE.

30 **Subdivision II. Administrative Requirements for MWBE Program.**

31 **Sec. 28-36. - Program administration.**

1 (a) The DSBO shall perform additional duties in the administration of the programs
2 established under this chapter 28 or otherwise, which duties shall include:

3 (1) Formulating, proposing and implementing rules and regulations for the
4 development, implementation, administration, compliance and monitoring, and reporting of the
5 various programs established through chapter 28, by other city programs or by federal law.

6 (2) Providing information, education, outreach and assistance to MWBEs, SBEs and
7 other business enterprises relating to city contracting practices and procedures, and bid
8 specifications, requirements and prerequisites.

9 (3) Assisting letting agencies with applicable portions of procurement documents
10 and advertisements related to MWBE or SBE requirements;

11 (4) Assisting letting agencies with reviewing applicable portions of procurement
12 proposal submissions to assess for responsiveness;

13 (5) Establishing uniform rules and regulations, procedures, and criteria for
14 certification, renewal of certification, decertification and graduation, as an MWBE or SBE and
15 appeals of and challenges to all such certification decisions and maintaining certification records and
16 directories of such MBEs, WBEs and SBEs.

17 (6) Establishing annual and participation goals for the MWBE contracting program
18 established in division 3 of this article III of chapter 28, and tracking progress toward the annual goal.

19 (7) Evaluating contractors' and consultants' achievement of participation goals or
20 good faith efforts to meet participation goals.

21 (8) Working with user departments to monitor contracts to ensure prompt payments
22 to MWBEs and SBEs, and compliance with applicable participation goals and commitments.

23 (9) Receiving, reviewing, and acting upon complaints and suggestions concerning
24 the various programs established through chapter 28 or by federal law.

25 (10) Collecting payment, goal compliance, and other pertinent data to evaluate the
26 programs and other city contracting initiatives.

27
28 (11) Developing technical assistance programs to assist MWBEs, SBEs and other
29 businesses relating to contracting, business and professional development.

30 (12) Establishing a mentor-protégé program to encourage trade associations and
31 individual businesses to work jointly to connect MWBE protégés with well-established mentor firms.

1 DSBO shall in coordination and cooperation with other city agencies facilitate the implementation
2 and coordination of this program. The program may encourage firms to mentor MWBE protégés.

3 (13) Establishing by the DSBO director advisory committee or committees to advise
4 and recommend to the DSBO director, as appropriate, policies and initiatives to assist the city with
5 regard to the programs under articles III, V and VII. The purpose, functions, roles and procedures of
6 a committee will be established by the director and applicable rules and regulations promulgated by
7 the director.

8 (14) Periodically, at the director's discretion and based on DSBO's specific needs,
9 DSBO shall perform, or cause to have performed, an evaluation of DSBO including, but not limited
10 to, the following:

11 a. Program goals, responsibilities, and staffing necessary to fulfill all
12 compliance requirements and accomplish annual and aspirational goals;

13 b. Documentation on total MWBE and SBE completed work payments for
14 each compliance program participant and its relationship to established goals;

15 c. Monitoring of SBE contractor billing and payment process procedures as
16 well as MWBE and SBE subcontractor billing and payment process procedures as required through
17 this chapter 28;

18 d. Number of certified MWBE and SBE firms and their participation in city
19 contracts over a defined period to establish a relevant participation trend;

20 e. Number of MWBE and SBE educational activities and mentorships, the
21 number of participants, and an evaluation of the educational programs, including education on how
22 to utilize city systems for tracking activity and payments;

23 f. Compliance with section 28-58 regarding establishing participation goals.

24 (b) The user departments that receive appropriate delegation for project management,
25 contract and concession agreement management, or construction or design or professional services
26 contract responsibility shall have the following duties and responsibilities with regard to the programs
27 established through chapter 28, by other city programs or by federal law:

28 (1) Assisting the DSBO with setting participation goals for MWBE participation on
29 individual contracts.

30 (2) Assisting in the identification of available MWBEs and providing other assistance
31 in meeting the annual goal and participation goals.

1 (3) Assisting in the identification of contracts and concession agreements
2 appropriate for the utilization of the SBE defined selection pool contracting established by article VII
3 of chapter 28.

4 (4) Assuring that MWBEs, SBEs and other business enterprises are informed of city
5 contracting and concession opportunities.

6 (5) Performing other activities to support the various programs established through
7 this chapter 28, by other city programs or by federal law.

8 (6) Gathering and maintaining contracting, consulting, subcontracting and
9 subconsulting data or documents for those contracts that the user departments manage, as provided
10 under this chapter 28.

11 (7) Submitting subcontracting and subconsulting data or documents as required to
12 the director.

13 (8) Managing contracts and concession agreements in a consistent manner to
14 assure contract and concession agreement compliance in utilization of MWBEs and SBEs.

15 (c) Pursuant to its authority under articles I and III of chapter 28, DSBO may adopt rules
16 and regulations, which shall be for and aid in the interpretation, administration and enforcement of
17 this ordinance, and which shall be periodically amended and revised.

18 **Sec. 28-37—28-40. – [Reserved].**

19 **Section 2.** That Division 3 of Article III of Chapter 28 of the Revised Municipal Code is
20 hereby repealed and reenacted to read as follows:

21 **DIVISION 3. NONDISCRIMINATION IN CITY CONTRACTS FOR CONSTRUCTION,**
22 **RECONSTRUCTION, REMODELING, PROFESSIONAL DESIGN AND CONSTRUCTION**
23 **SERVICES**

24 **Subdivision I. MWBE Program for city contracts for construction, reconstruction, remodeling,**
25 **and professional design and construction services.**

26 **Sec. 28-51. – [Reserved].**

27 **Sec. 28-52. - Contracts excluded from coverage by this division 3.**

28 (a) Contracts and concession agreements for which bids or proposals are sought under the
29 SBE defined selection pool contracting program established pursuant to article VII of this chapter 28
30 are excluded from the coverage of this division 3. In addition, in the case of a contract hereunder for
31 which a part of the contract price is to be paid with funds from the United States Government or the
32 State of Colorado and for which the United States Government or the State of Colorado has made

1 applicable to such contract requirements terms or conditions which are inconsistent with the
2 provisions of this division 3, the provisions of this division 3 shall not apply to such contract to the
3 extent of such inconsistency.

4 (b) Contracts where the director has authorized the waiver of a participation goal, or has
5 otherwise authorized a contract to be advertised in collaboration with the user departments without
6 participation goals to assist in the determination of ongoing MWBE utilization on city contracts in the
7 absence of participation goals are excluded from the coverage of this division 3. However, this
8 reference to contracts without participation goals shall not include contracts that are advertised with
9 a zero percent participation goal after due assessment of availability.

10 **Sec. 28-53. - MWBE certification; eligibility of applicant business enterprises.**

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

17 (b) Only applicant business enterprises that meet the criteria for certification as an MWBE
18 may participate in the goals program established under this article III and its divisions. The applicant
19 business enterprise has the burden of persuasion by a preponderance of the evidence. Only an
20 applicant business enterprise owned and managed and controlled by socially and economically
21 disadvantaged individual(s) may be certified as an MWBE, as applicable. MWBEs may be certified
22 only for specific types of work for which they apply and in which they have had sustained business
23 activity for a minimum of six (6) months. Certification areas shall correspond to the codes set forth
24 in North American Industrial Classification Standard (NAICS) Codes, or successor classification
25 system, Code of Federal Regulations § 121.201, as amended, or successor regulation.

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

28 (1) *Ownership.* In order for the socially and economically disadvantaged owner(s) to
29 be found to own the applicant business enterprise for purposes of certification, as applicable, the

1 applicant business enterprise or socially and economically disadvantaged owner(s) must meet the
2 requirements set forth below.

3 a. To be an eligible MWBE, each socially and economically disadvantaged
4 owner must:

5 (i) Own in his or her own name the legal and equitable interest in the
6 applicant business enterprise;

7 (ii) Have acquired the interest in a verifiable and substantial arms-
8 length transaction, utilizing verifiable, substantial, and continuing consideration; going beyond pro
9 forma ownership of the applicant business enterprise as reflected in ownership documents;

10 (iii) Enjoy customary incidents of ownership and share in the risks and
11 profits commensurate with their ownership interests in practice, not merely in the form of
12 arrangements; and

13 (iv) Have acquired the interest with a contribution of his or her own
14 capital resources, by having put his or her own financial resources at risk in the operation of the
15 applicant business enterprise, or, subject to requirements below, with a contribution of expertise. All
16 contributions by the socially and economically disadvantaged owner(s) to acquire the ownership
17 interest in the applicant business enterprise must be verifiable, substantial, and continuing, which in
18 part, requires that it be commensurate with the ownership interest acquired. All contributions to
19 acquire an ownership interest, including any portion of it, must have been made at the time the
20 socially and economically disadvantaged individuals acquired the interest in business enterprise.

21 (A) If expertise is relied upon as part of a socially and
22 economically disadvantaged owner's contribution to acquire ownership, the expertise must be of the
23 requisite quality generally recognized in a specialized field, in areas critical to the operations of the
24 applicant business enterprise, indispensable to the applicant business enterprise's potential
25 success, specific to the type of work the applicant business enterprise performs, and is documented
26 in the applicant business enterprise's records. These records must clearly show the contribution of
27 expertise, including its equivalent monetary value. The socially and economically disadvantaged
28 individual(s) whose expertise is relied upon must have a commensurate capital investment in the
29 applicant business enterprise.

30 (B) Examples of insufficient contributions include a promise to
31 contribute capital, an unsecured note payable to the business enterprise or to an owner who is not

1 socially and economically disadvantaged individual, or mere participation in the business enterprise
2 as an employee. Debt instruments from financial institutions or other organizations that lend funds
3 in the normal course of their business do not render an applicant business enterprise ineligible, even
4 if the debtor's ownership interest is security for the loan.

5 (2) *Management and control.* Only an applicant business enterprise that is managed
6 and controlled by a socially and economically disadvantaged individual(s) may be certified as an
7 MWBE. The socially and economically disadvantaged minority or woman owner(s) shall direct the
8 management, policies, and day-to-day business operations of the applicant business enterprise and
9 shall have the power to make, and shall in fact make, routine and major decisions on matters of
10 management, policy, and operations. The socially and economically disadvantaged minority or
11 woman owner's(s') management and control must be verifiable, substantial, and continuing and go
12 beyond the pro forma ownership of the applicant business enterprise as reflected in its ownership
13 documents. Ownership alone is not sufficient to establish management and control. To determine
14 whether each socially and economically disadvantaged individual satisfies these requirements, the
15 DSBO shall consider the criteria below:

16 a. If federal or state law or city ordinance requires the owner(s) to have a
17 particular license or other credential in order to own or control a certain type of business enterprise,
18 then the socially and economically disadvantaged owner(s) must possess the required license or
19 credential. If federal or state law or city ordinance does not require that the owner possess the license
20 or other credential to own or control the business enterprise, to determine whether the socially and
21 economically disadvantaged owner(s) manage and control the business enterprise, DSBO may
22 consider whether the socially and economically disadvantaged owner(s) hold the license or other
23 credential required to conduct the specific type of work in which certification is sought as a factor. If
24 there is not a legal requirement for the owner to hold the license or other credential to own or control
25 a certain type of business enterprise, failure of the owner to hold the license or other credential does
26 not by itself indicate lack of management and control of a business enterprise without other factors
27 indicating to the contrary.

28 b. The socially and economically disadvantaged minority or woman owner(s)
29 shall have substantial experience in the trade or industry that would be necessary to make routine
30 and major decisions for the applicant business enterprise.

1 c. The socially and economically disadvantaged minority or woman owner(s)
2 shall regularly make decisions, hold themselves out to the public, and sign important documents and
3 financial instruments in a manner that is indicative of primary management and control of daily
4 business operations and responsibility for routine and major decisions.

5 d. No restriction through corporate charter provisions, by-law provisions,
6 contracts, or any other formal or informal devices may prevent the socially and economically
7 disadvantaged owner(s), without the cooperation or vote of any non-socially and economically
8 disadvantaged owner, from making any business decision of the applicant business enterprise,
9 including the making of obligations or the disbursing of funds.

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

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

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

1 activities of the applicant business enterprise are insufficient to demonstrate management and
2 control.

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

11 i. An applicant business enterprise may be certified only for specific types of
12 work in which the socially and economically disadvantaged owner(s) has the ability and expertise to
13 manage and control the applicant business enterprise's operations and work. To become certified in
14 an additional type of work, the enterprise must sufficiently demonstrate only that its socially and
15 economically disadvantaged owners are able to control the enterprise with respect to that type of
16 work. It is not required to be recertified, unless it is also seeking renewal, or submit a new application
17 for certification, but DSBO must be able to verify that the socially and economically disadvantaged
18 owner(s) manages and controls the enterprise with regard to the additional type of work.

19 (3) *Independence.* Only an independent applicant business enterprise may be
20 certified as an MWBE. An independent applicant business enterprise viability cannot depend on its
21 relationship with another business enterprise. Recognition of an applicant business enterprise as a
22 separate entity for tax or corporate purposes is not necessarily sufficient to demonstrate that the
23 applicant business enterprise is independent and not an affiliate. In determining whether an applicant
24 business enterprise is an independent business, the DSBO shall, at minimum:

25 a. Examine whether there is actual or potential affiliation between the
26 applicant business enterprise and individuals or non-certified business enterprises. To determine
27 whether affiliation exists, the DSBO considers factors such as ownership, management, previous
28 relationships with or ties to another individual or non-certified business entity, and contractual
29 relationships. Affiliation may be based on common management, identity of interest, the newly-
30 organized-concern rule, joint venture, or any combination thereof;

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

5 c. Consider present or recent employer/employee relationships between the
6 socially and economically disadvantaged individuals of the applicant and non-certified business
7 enterprises or persons associated with non-certified business enterprises;

8 d. Examine the applicant business enterprise's relationships with non-certified
9 business enterprises to determine whether there is a pattern of exclusive or primary dealings with
10 non-certified business enterprises; and

11 e. Consider whether relationships between the applicant business enterprise
12 and non-certified business enterprises are consistent with normal industry practice.

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

15 a. Formation of the applicant business enterprise;

16 b. Commencement of sustained business activity in the trade or profession
17 described on the certification application; and

18 c. Commencement of ownership, management and control of daily business
19 operations by the identified socially and economically disadvantaged minority or woman owner(s).

20 (5) *Lawfully present in the United States.* The socially and economically
21 disadvantaged owner(s) must be a citizen of the United States or a lawfully admitted permanent
22 resident of the United States, and must not have the status of an unauthorized worker or otherwise
23 be disqualified from lawfully residing in the United States, engaging in business and seeking this
24 certification. As a condition of certification, owner(s) must comply with all reporting, submittal and
25 other requirements that may be imposed by the city, State of Colorado or United States governments
26 regarding such lawful presence.

27 (6) *Eligibility; rebuttable presumption of social disadvantage; individualized showing*
28 *of social disadvantage; evidence of discrimination.*

29 a. *Rebuttably presumed social disadvantage.* A socially and economically
30 disadvantaged minority individual or woman upon whom the certification application is based must
31 supply credible evidence, by sworn affidavit, that such individual has suffered from past race- or

1 gender-based (as applicable) discrimination in association with the conduct of business or the
2 attempted conduct of business as a business enterprise, in the construction or the professional
3 design and construction services industries in the city's marketplace; provided that, any applicant
4 business enterprise owned and controlled by, or any socially and economically disadvantaged
5 minority individual or woman upon whom certification of such applicant business enterprise is sought,
6 who is a member of the racial or ethnic minority groups referenced in section 28-35(36)(a), or is a
7 woman, is rebuttably presumed to be socially disadvantaged under the provisions of section 28-
8 35(37) and (49) and, if such minority individual or woman further demonstrates that such minority
9 individual or woman so conducted business or attempted to conduct business in the construction or
10 professional design and construction services industries in the city's marketplace prior to January 1,
11 2006, such minority individual or woman shall in addition be rebuttably presumed to have suffered
12 from discrimination within the city's marketplace and to therefore be eligible to be certified as an
13 MWBE under this article III and its divisions, subject to compliance with all other requirements of
14 sections 28-53 and 28-55.

15 b. *Individualized social disadvantage.* An individualized socially
16 disadvantaged minority individual upon whom the certification application is based pursuant to
17 section 28-35(37)(b) shall supply credible evidence, by sworn affidavit, (i) that such individual has
18 suffered from past individualized discrimination in association with the conduct of business or the
19 attempted conduct of business as a business enterprise, in the construction or the professional
20 design and construction services industries in general; (ii) that he or she has in addition suffered
21 from such individualized discrimination within the city's marketplace; and (iii) that he conducted
22 business or attempted to conduct business in the city's marketplace as set out in a., above. An
23 individual who makes such a showing shall be deemed to have suffered from individualized
24 discrimination and social disadvantage within the city's marketplace, and therefore be deemed
25 eligible to be certified as an MWBE under this article III and its divisions, subject to compliance with
26 all other requirements of sections 28-53 and 28-55.

27 (7) *Eligibility; showing of economic disadvantage.* A socially and economically
28 disadvantaged minority individual or woman upon whom the certification application is based shall
29 also supply credible evidence, by personal financial statement or as otherwise required by the
30 director, that such individual has a personal net worth equal to or less than the permissible personal
31 net worth amount determined by the U.S. Department of Transportation to be applicable to its DBE

1 programs, or as otherwise determined by the director by rule and regulation as defined in section
2 28-35(25). An individual who makes such a showing shall be deemed to have been economically
3 disadvantaged within the city's marketplace and to therefore be eligible to be certified as an MWBE
4 under this article III and its divisions, subject to compliance with all other requirements of sections
5 28-53 and 28-55.

6 (8) *Threshold size; continued eligibility and renewal of certification.* No applicant
7 business enterprise or MWBE shall be eligible for initial certification or subsequent certification
8 renewal if such business enterprise, MWBE or SBE combined with any affiliates meets the criteria
9 set forth in section 28-55 for graduation from participation in the goals program established by this
10 article III and its divisions. An MWBE will be certified for a three-year period. Following initial
11 certification, an MWBE that desires to continue its certification shall, no later than thirty (30) days
12 prior to each three-year anniversary of the certification, submit a certification renewal application,
13 which shall update and reaffirm all requirements for certification. No later than thirty (30) days prior
14 to each annual anniversary of the certification, an MWBE shall submit an affidavit certifying that there
15 has been no change in any information affecting certification eligibility, along with other required tax
16 or other financial information and documents. A certification may be terminated by the director upon
17 the failure of the MWBE to satisfy any certification requirement set forth in this article III and its
18 divisions.

19 (9) *City officials, officers, and employees ineligible.* No applicant business enterprise
20 shall be eligible to be certified as an MWBE if ownership or control of such business enterprise is
21 held by a current official, officer or employee of the city.

22 (10) *Interviews, investigation, and onsite visits.* The DSBO shall personally interview
23 all persons upon whom eligibility for certification is based, and is empowered to interview such other
24 persons and conduct such onsite visits and investigations as may be appropriate in its sole discretion
25 to verify eligibility for certification. An applicant business enterprise wishing to be certified as an
26 MWBE shall cooperate with the DSBO in supplying additional information that may be requested in
27 order to make a determination.

28 **Sec. 28-54. - Collection of fees by DSBO to defray certification costs of chapter 28 programs.**

29 DSBO shall charge a certification fee of not to exceed three hundred dollars (\$300.00) to each
30 applicant business enterprise seeking to be certified or to have certification(s) renewed under the
31 provisions of division 3 of article III and of article VII of this chapter 28.

1 **Sec. 28-55. - MWBE certification and size standards; renewal of certification; decertification;**
2 **graduation.**

3 (a) No applicant business enterprise shall be certified as an MWBE, and following
4 certification of an MWBE, no certification shall be renewed, if on the effective date of the application
5 or renewal the applicant business enterprise or MWBE (combined with all affiliates) has achieved a
6 size standard exceeding the following size standards:

7 (1) For construction, reconstruction and remodeling, and construction management
8 services, applicant business enterprises cannot exceed one hundred (100) percent of the applicable
9 size standards established by the U.S. Small Business Administration ("SBA") at C.F.R. § 121.201,
10 as amended, or successor SBA regulation or classification system, which are incorporated herein
11 by reference. The size standard is based on annual receipts averaged over the three (3) preceding
12 consecutive fiscal years; whether the applicant business has otherwise achieved a size standard
13 based upon its number of employees; or other criteria applicable to any of the work activities for
14 which the applicant business enterprise seeks certification or is certified. The director may adjust or
15 modify such MWBE graduation size standards if it appears, after further inquiry and review by the
16 director, that such standards are no longer appropriate to the purposes of this article III and its
17 divisions.

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

28 (b) No applicant business enterprise shall be certified as an MWBE, and following
29 certification of an MWBE, no certification shall be renewed, if on the effective date of the application
30 or renewal the socially and economically disadvantaged minority or woman upon which certification
31 is based is not economically disadvantaged, as defined in section 28-35(25).

1 (c) If an MWBE has been certified by the city in more than one (1) NAICS Code or has an
2 affiliate that has been certified by the city in a NAICS Code other than that of the MWBE, then the
3 annual receipt level or employee or other criterion used as the graduation criterion for such MWBE
4 shall apply separately to each NAICS Code for which the MWBE and its affiliate have been certified.
5 Such an MWBE and any affiliate that has exceeded the graduation criteria in one (1) NAICS Code
6 shall be deemed to be graduated from this article III and its divisions as to that code, and, if the
7 graduation requirements of subsections (a) or (b) above do not apply, may continue to be certified
8 in another NAICS Code having a higher monetary or employee number graduation level but shall no
9 longer be considered eligible to be or remain certified in the NAICS Code with the lower size
10 standard. Such an MWBE or any affiliate that has exceeded the graduation criteria for the largest
11 NAICS Code applicable to its activities shall be deemed to be graduated from this article III and its
12 divisions for the duration of the period in which the MWBE exceeds the graduation criteria.
13 Graduated MWBEs may reapply for certification if they meet the criteria for certification including the
14 requisite size standard. Utilization of MWBEs shall count toward a goal, if any, to the extent that an
15 MWBE is performing a commercially useful function corresponding to a NAICS Code in which it is
16 certified.

17 (d) Graduation of an MWBE shall not affect the contribution made by the MWBE toward
18 satisfaction of a participation goal if the work was bid or proposed to be performed by the MWBE
19 prior to the date of ineligibility for certification based on achievement of the graduation criterion.

20 (e) Application to affiliates. The graduation criteria set forth above shall be deemed to apply
21 to the socially and economically disadvantaged minority individual or woman upon whom eligibility
22 for certification is based and all affiliates of such minority individual or woman. No applicant business
23 enterprise shall be certified based upon one (1) or more socially and economically disadvantaged
24 minority individuals or women who owned or who was an affiliate of an MWBE that has become
25 ineligible for renewal of certification because of the achievement of graduation criteria.

26 (f) The certification status of all MWBEs shall be reviewed periodically by the DSBO. Failure
27 of a certified and eligible MWBE to seek timely renewal of certification by filing the necessary
28 documentation with the DSBO may result in decertification. An MWBE's certification may be
29 suspended for failure to comply with all certification requirements set forth in this article III and its
30 divisions and the rules and regulations.

1 (g) In accordance with the DSBO's regulations, it shall decertify an MWBE that does not
2 continuously meet the eligibility criteria for certification.

3 (1) The MWBE shall notify the DSBO of any change in its circumstances affecting
4 its continued eligibility for certification under this article III and its divisions within thirty (30) days of
5 the MWBE's actual awareness of such change of circumstances. Failure to do so may result in the
6 MWBE's decertification.

7 (2) The director may move to decertify an MWBE that repeatedly fails to respond to
8 requests for quotations from bidders or proposers who timely solicit participation on a contract, attend
9 relevant pre-bid or pre-proposal conferences, honor quotations in good faith, or otherwise comply
10 with the requirements of this article III and its divisions.

11 (h) An applicant business enterprise or MWBE that has been denied certification or renewal
12 or certification or been decertified may protest the denial of certification or decertification by the
13 procedure set out in section 28-69. An applicant business enterprise or MWBE found to be ineligible
14 for certification or renewal of certification may not apply for certification or renewal of certification for
15 one (1) year after the effective date of the final decision.

16 **Sec. 28-56. - Third party challenge to certification; renewal of certification; or presumption of**
17 **social disadvantage of minority individual or woman.**

18 Subject to the provisions in this section, a third party may challenge the eligibility of an
19 applicant business enterprise for certification, the eligibility of an MWBE for renewal of certification,
20 or the rebuttable presumption of social disadvantage of a minority individual or woman as provided
21 in section 28-35(37)(a) and (49), respectively. The burden of demonstrating to the director's
22 satisfaction the lack of such eligibility or the rebuttal of such presumption rests with such third party
23 and shall be demonstrated by a preponderance of the evidence.

24 (a) The eligibility of a challenged applicant business enterprise or MWBE for certification or
25 renewal of certification, or the presumption that a minority individual or woman is socially
26 disadvantaged, shall remain in effect unless and until the city renders a final decision otherwise.

27 (b) The challenge to such certification, renewal of certification or presumption shall be made
28 in writing to the director by the challenging third party and shall include all information relied upon by
29 such party.

30 (c) The director shall notify the challenged applicant business enterprise or MWBE or
31 minority individual or woman, in writing, of the challenge and summarize the grounds for the

1 challenge. The notice may also require the challenged applicant business enterprise, MWBE or
2 minority individual or woman to provide the director, within a reasonable time, any information
3 requested to permit the director to evaluate the eligibility of the applicant business enterprise or
4 MWBE or the validity of the presumption of social disadvantage with respect to a minority individual
5 or woman.

6 (d) Subject to the limitation in section 28-69(e), a third party putting forth a challenge under
7 this section, and an applicant business enterprise, MWBE or minority individual or woman that is the
8 subject of such challenge, may seek review from a decision of the director pursuant to section 28-
9 69.

10 **Subdivision II. Participation goals; good faith efforts.**

11 **Sec. 28-57. - Annual MWBE goal.**

12 (a) Of the total dollars spent annually for construction and for professional design and
13 construction services contracts, the director shall establish an aspirational annual goal, consistent
14 with annual reporting under section 28-78 and section 28-79, for MWBE utilization based on the
15 dollars to be spent for construction, reconstruction and remodeling contracts and such a goal for
16 MWBE utilization based on the dollars to be spent for professional design and construction services
17 contracts. For the purpose of setting such annual aspirational goal, construction management
18 services contracts shall be computed in and counted toward the construction area although
19 construction management shall be considered a professional service. The following shall count
20 toward the goal to the extent provided in sections 28-59 and 28-63; portions of work undertaken by
21 MWBEs as contractors, consultants, subcontractors, subconsultants, suppliers, manufacturers,
22 manufacturer's representatives, brokers, teaming agreements or joint venturers, including
23 appropriate portions of work undertaken by subcontractors, subconsultants, suppliers,
24 manufacturers, manufacturer's representatives, and brokers on subsidiary tiers under MWBEs.

25 (b) The director as a basis for the establishment of the aspirational annual goal shall
26 annually during the term hereof determine the present availability of all MWBEs doing business in
27 the city by profession and trade groupings and recommend the aspirational annual goal to the city
28 council for its review. The director shall conduct such inquiries, studies and hearings, and utilize
29 information and assistance from such persons, consultants, entities or organizations, within or
30 without the city, including, but not limited to, the department heads, as the director may, in the
31 exercise of sole discretion, deem necessary to make such annual recommendation.

1 (c) The city council shall review the aspirational annual goal recommended by the director,
2 may undertake such additional inquiries as it deems appropriate, and may approve, disapprove or
3 modify the recommended aspirational annual goal by ordinance in each succeeding year. Until the
4 city council approves, disapproves or modifies the aspirational annual goal in a succeeding year, the
5 initial aspirational annual goal established in this section shall continue in effect.

6 **Sec. 28-58. - Project participation goals.**

7 (a) The director shall assign for each construction, reconstruction, and remodeling contract
8 or city project as may be applicable, and for each professional design and construction services
9 contract, a unitary contract participation goal, or rather than a unitary contract goal, a goal for each
10 city project, task order or work order issued under a contract, or goal for a separate procurement
11 under a contract, for MWBE utilization based upon a percentage of the dollar value of all work on
12 such contract, project, task order, work order or separate procurement, and, as set out below, the
13 availability of MWBEs to perform the anticipated work and the city's progress toward meeting the
14 annual goal. The determination of whether to assign the goal to the contract, task order, work order
15 or separate procurement under a contract shall occur in cooperation between the DSBO and the
16 user department. If the director determines it to be in the best interests of the city, the director may
17 in consultation with the user department waive the application of a participation goal. The goal
18 percentage assigned by the director may vary from contract to contract, project to project, task order
19 to task order, or work order to work order, consistent with meeting the appropriate overall annual
20 goals, when established. The DSBO shall establish a methodology for the setting of the participation
21 goal, including through rules and regulations. Such methodology shall consider the following factors:

22 (1) To the extent applicable, the effect on the annual goal achievement of the varying
23 levels of availability of MWBEs among industry groupings associated with individual contracts,
24 projects, task orders or work orders and the effect on aspirational annual goal achievement of the
25 participation goal compliance being achieved through good faith efforts resulting in non-utilization of
26 MWBEs.

27 (2) The reasonably known availability of MWBEs in specific industry groupings which
28 are associated with individual contracts, projects, task orders or work orders.

29 (3) For public-private partnership agreements, integrated contracts, on-call
30 contracts, and other contracts that may be procured and awarded without a pre-determined specific
31 project or scope of work, the goal may be set on a per-project basis, per-task-order basis or per-

1 work-order basis, or per separate procurement, once a specific scope of work is identified, individual
2 projects are defined, or individual work orders or task orders are authorized, and the contractor can
3 proceed to complete the work for the individual project, task order or work order consistent with the
4 methodology set forth in this section 28-58 and the rules and regulations.

5 (b) The following contributions shall count toward the goal set by the director as more
6 specifically provided below: portions of work undertaken by MWBEs as contractors, consultants,
7 subcontractors, subconsultants, suppliers, manufacturers, manufacturer's representatives, brokers,
8 packagers, regular dealers, teaming agreements or joint venturers.

9 (c) The director, at the director's sole discretion, may cause a representative sample of city
10 construction, reconstruction and remodeling, and professional design and construction services
11 contracts or projects to be bid or otherwise selected without a participation goal, in order to determine
12 MWBE utilization on such contracts or projects in the absence of such a goal. Following the first full
13 year of operation of this article III and its divisions, the director shall analyze, based upon such
14 representative sample and other contracts or projects that may otherwise be let with a contract or
15 project participation goal of zero percent (0%), to what extent the originally established annual goal
16 has been met without the imposition of contract or project participation goals. To the extent
17 ascertainable, this information shall be utilized in the setting of the annual goal for the following year.

18 (d) If a project or contract is let with a zero percent (0%) goal, whether based on the
19 director's decision under 28-58(c), or established based on project information, and MWBE
20 subcontractors are later added to the project or contract, then the project or contract shall be
21 subject to the requirements of this article III and its divisions, including for violations and
22 enforcement.

23 **Sec. 28-59. - Contracts for construction, reconstruction and remodeling—Identification of**
24 **participating MWBEs.**

25 (a) At the time of bid opening or date established by the user department of proposal in the
26 case of a competitive selection process, the bidder or proposer shall provide to the city or private
27 owner DSBO required forms, which may include a letter of intent as required by the DSBO, of all
28 MWBEs to be utilized toward the satisfaction of the participation goal whether as a self-performing
29 bidder or proposer or as subcontractors, suppliers, manufacturers, manufacturer's representatives,
30 brokers or members of a joint venture or teaming agreement. The DSBO required forms shall specify:

- 31 (1) The name and contact information for the MWBE;

1 (2) The dollar value and description of the commercially useful function to be
2 performed by the MWBE, consistent with subsections (d) and (e). In the case of utilization of a
3 supplier, manufacturer, manufacturer's representative, or broker, the appropriate percentage of
4 dollar value attributable to such MWBE as a commercially useful function shall be calculated with all
5 underlying data supplied. If the proposer provides a dollar fee value amount, then both the dollar
6 value and percentage must be listed in the proposal;

7 (3) The designation of each participating MWBE's applicable scope of work,
8 including the NAICS code, intended to count toward the participation goal. The MWBE firm must be
9 certified in the applicable scope of work in order for their participation to count toward the goal;

10 (4) An adequate statement from the bidder or proposer that the dollar amount of
11 work to be performed by such MWBE on the contract, other than that self-performed by the bidder
12 or proposer, was furnished to the MWBE and agreed upon prior to bid opening or date of proposal
13 in the case of a competitive selection process; and

14 (5) An adequate statement from the bidder or proposer that it understands that a
15 letter of intent, including, but not limited to, values provided by self-performing bidders or proposers,
16 joint venturers, teaming agreement participants, subcontractors, suppliers, manufacturers,
17 manufacturer's representatives, and brokers, expressed in dollar values and as a percentage of the
18 overall work, must be submitted to the director for each MWBE listed, including a self-performing
19 bidder or proposer, at the time bids are opened by the city, or by the date of proposal in the case of
20 a competitive selection process, or bid selection made by a private owner, or some other time
21 specified by the DSBO and the user department.

22 (b) Only that level of MWBE utilization demonstrated in accordance with this section at the
23 time of such bid opening, date of proposal in the case of a competitive selection process or private
24 selection, or some other time specified by the DSBO and user department may be counted in
25 satisfaction of the participation goal, except as otherwise set out in sections 28-68 and 28-70.
26 Bidders or proposers must submit an executed letter of intent for each MWBE listed by the bidder or
27 proposer, including a self-performing bidder or proposer, and any other DSBO required forms at the
28 time bids are opened, proposals are received, in the case of a competitive selection process, or bid
29 selection is made, or some other time specified by the DSBO and the user department. The required
30 information shall be provided in a letter of intent, along with commitment forms and any other
31 document or form specified for the particular procurement by the user department, the DBSO and

1 the rules and regulations. Failure to submit completed DSBO required forms, letters of intent, and
2 other required commitment forms or any other documents or forms may render the bid or proposal
3 nonresponsive.

4 (c) For on-call construction contracts, integrated contracts, design-build contracts,
5 construction manager-general contractor contracts, public-private partnership agreements and other
6 contracts that may be procured and awarded without a pre-determined specific project or scope of
7 work, the director in consultation with the department head may require a utilization plan pursuant
8 to section 28-62(b). In such event, the proposer may not be required to demonstrate MWBE
9 utilization at the time of bid opening or date of proposal, but will be required to develop an approved
10 utilization plan to demonstrate compliance with the requirements of this article III and its divisions
11 and the rules and regulations. The utilization plan shall be required either at the time of submission
12 of a proposal or at some other time as required by the department head and the DSBO. The DSBO
13 in conjunction with the department head is responsible for the review and assessment of utilization
14 plans.

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

23 (e) All expenditures for materials, supplies, and equipment obtained from an MWBE
24 manufacturer, manufacturer's representative or supplier shall count toward the appropriate
25 participation goal as specified in section 28-35(51). Expenditures for materials, supplies, and
26 equipment paid to MWBE's that are not manufacturers, manufacturer's representatives or suppliers
27 may count toward an appropriate participation goal only to the extent offers or commissions charged
28 for providing a bona fide service, such as professional, technical, consultant, or managerial services
29 and assistance in the procurement of essential personnel, facilities, equipment, materials, or
30 supplies required for performance of the contract; provided that the fee or commission is determined

1 by the DSBO to be reasonable and not excessive as compared with fees customarily allowed for
2 similar services.

3 (f) Any agreement between a bidder or proposer and an MWBE in which the bidder or
4 proposer requires that the MWBE not provide subcontracting quotations to other bidders or
5 proposers is prohibited and shall render a bidder's bid or proposer's proposal nonresponsive.

6 **Sec. 28-60. - Contracts for construction, reconstruction and remodeling—Good faith efforts.**

7 (a) If the bidder or proposer has not fully met the participation goal as provided in section
8 28-62, then it shall demonstrate that it has made good faith efforts to meet such goal. The bidder or
9 proposer shall furnish to the director at the time of bid opening by the city or on or before the time of
10 the proposal submitted to and authorized by the city pursuant to a competitive selection process, or
11 bid selection by a private owner, or some other time specified by the DSBO and the user department
12 a detailed statement of its good faith efforts to meet the participation goal established by the director.
13 This statement shall address each of the items in subsection (b), below, and any additional criteria
14 that the director may establish by rule or regulation consistent with the purposes of this article III and
15 its divisions. Good faith efforts must be demonstrated to be meaningful and not merely for formalistic
16 compliance with this article III and its divisions. The scope and substance of the efforts will be
17 considered in determining whether the bidder or proposer has achieved a good faith effort.

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

23 (1) If pre-bid or pre-proposal meetings are scheduled by the city at which MWBEs
24 may be informed of subcontracting or joint venture opportunities under a proposed negotiated
25 construction or construction related services contract, and attendance at such pre-bid or pre-
26 proposal meetings is not deemed mandatory, bidders or proposers are nonetheless responsible for
27 the information provided at these meetings whether or not they attend.

28 (2) The bidder or proposer must solicit through all reasonable and available means
29 the interest of all MWBEs certified in the scopes of work of the contract. The bidder or proposer must
30 solicit the interest of such MWBEs within sufficient time, prior to the bid opening or date of proposal
31 in the case of a competitive selection process, to allow such MWBEs to respond to the solicitation.

1 The bidder or proposer must determine with certainty if the MWBEs are interested by demonstrating
2 appropriate steps in following up on initial solicitations.

3 (3) The bidder or proposer must select portions of the work of the contract to be
4 performed by MWBEs in order to increase the likelihood that the participation goal will be achieved.
5 This includes, where appropriate, breaking out contract work items into economically feasible units
6 to facilitate MWBE participation as subcontractors, teaming agreement participants or joint
7 venturers, and for bidder or proposer self-performed work, as suppliers, manufacturers,
8 manufacturer's representatives and brokers, all reasonably consistent with industry practice, even
9 when the bidder or proposer would otherwise prefer to perform these work items with its own forces.
10 The bidder or proposer must identify what portions of the contract will be self-performed and what
11 portions of the contract will be opened to solicitation of bids, proposals and quotes from MWBEs. All
12 portions of the contract not self-performed must be solicited for MWBE participation. The ability or
13 desire of a bidder or proposer to perform the work of a contract with its own forces does not relieve
14 the bidder or proposer of the responsibility to meet the participation goal or demonstrate good faith
15 efforts to do so.

16 (4) The bidder or proposer, consistent with industry practice, must provide MWBEs
17 at a clearly stated location with timely, adequate access to and information about the plans,
18 specifications, and requirements of the contract, including bonding and insurance requirements, if
19 any, to assist them in responding to a solicitation.

20 (5) The bidder or proposer must negotiate in good faith with interested MWBEs and
21 provide written documentation of such negotiation with each such MWBE.

22 (6) For each MWBE that contacted the bidder or proposer or that the bidder or
23 proposer contacted or attempted to subcontract, enter into a teaming agreement or joint venture
24 with, consistent with industry practice, the bidder or proposer must supply a statement giving the
25 reasons why the bidder or proposer and the MWBE did not succeed in negotiating a subcontracting,
26 supplier, manufacturer, manufacturer's representative, broker or joint venture agreement, as
27 applicable.

28 (7) The bidder or proposer must provide verification that it rejected each non-utilized
29 MWBE because the MWBE did not submit the lowest bid or it was not qualified. Such verification
30 shall include a verified statement of the amounts of all bids received from potential or utilized
31 subcontractors, suppliers, manufacturers, manufacturer's representatives, brokers or joint venturers

1 on the contract, whether or not they are MWBEs. In determining that an MWBE is not qualified, the
2 bidder or proposer shall be guided by the definition of qualified in section 28-35(47), but evidence of
3 lack of qualification must be based on factors other than solely the amount of the MWBE 's bid. For
4 each MWBE found not to be qualified by the bidder or proposer, the verification shall include a
5 statement giving the bidder's or proposer's reasons for its conclusion. A bidder's or proposer's
6 industry standing or group memberships may not be the cause of rejection of an MWBE. A bidder or
7 proposer may not reject an MWBE as being unqualified without sound reasons based on a
8 reasonably thorough investigation and assessment of the MWBE 's capabilities and expertise.

9 (8) If requested by a solicited MWBE, the bidder or proposer must make reasonable
10 efforts to assist interested MWBEs in obtaining bonding, lines of credit, alternative payment or
11 performance guarantees, or insurance as required by the city or by the bidder or proposer, provided
12 that the bidder or proposer need not provide financial assistance toward this effort.

13 (9) If requested by a solicited MWBE, the bidder or proposer must make reasonable
14 efforts to assist interested MWBEs in obtaining necessary and competitively priced equipment,
15 supplies, materials, or related assistance or services for performance under the contract, provided
16 that the bidder or proposer need not provide financial assistance toward this effort.

17 (10) The bidder or proposer must use the DSBO MWBE directories to identify,
18 recruit, and retain MWBEs.

19 (c) In determining whether a bidder or proposer has satisfied good faith efforts as to a
20 participation goal, the success or failure of other bidders or proposers on the contract in meeting
21 such participation goal may be considered.

22 (d) The good faith effort factors in section 28-60(b) shall also apply to conditions arising
23 under section 28-74(c). Proposers or contractors are required to make continuous good faith efforts
24 throughout the contract term and document these efforts. User departments will notify the DSBO of
25 impending contract closeout to allow the DSBO to request remaining good faith efforts and other
26 required documents from the contractor. Contractor may remain subject to the requirements
27 including potential violations of this article III and its divisions after contract closeout.

28 **Sec. 28-61. - Contracts for construction, reconstruction and remodeling—Responsive and**
29 **nonresponsive bids or proposals.**

30 (a) *Responsive; compliance with requirements.* If the low monetary bid or competitive
31 selection process proposal subject to a participation goal meets such goal or shows adequate good

1 faith efforts as set out in sections 28-60 or 28-64, then the director shall notify the department head
2 to regard the bid or proposal as responsive as to compliance with this article III and its divisions.

3 (b) *Failure to meet requirements.* If a bid or proposal subject to a participation goal does
4 not meet such goal or show good faith efforts as set out in sections 28-60 or 28-64, or provide timely
5 information as set out in section 28-59, then the director shall notify the department head to regard
6 the bid or proposal as nonresponsive, and such determination shall result in no further consideration
7 by the city or private owner of the bid or proposal.

8 (c) *Good faith efforts—Informal meeting.* If the director finds inadequacies in a bidder or
9 proposer's demonstration of good faith efforts under section 28-60 , the director will provide written
10 notice of such inadequacies to the bidder or proposer, consistent with section 28-61(b), above, and
11 the appropriate department head of bid or proposal nonresponsiveness. Within two (2) business
12 days from the date that the city notifies the bidder or proposer of the inadequacies of its
13 demonstration of good faith efforts, the bidder or proposer may request an informal meeting with the
14 director. Such informal meeting shall be scheduled by the director. All deficiencies in good faith
15 efforts shall be explained to the bidder or proposer at such informal meeting. Within twenty-four (24)
16 hours after the informal meeting, the bidder or proposer shall be allowed to submit additional
17 information or to clarify the original good faith efforts. The director will at no time, however, allow
18 additional subcontractors, joint venturers, suppliers, manufacturers, manufacturer's representatives
19 or brokers that may later be added to the contract or to the original MWBE participation submitted at
20 the time of the bid or date of proposal in the case of a competitive selection process to be counted
21 toward meeting of the participation goal. After this informal meeting, the director will:

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

26 **Sec. 28-62. - Contracts for construction, reconstruction and remodeling—Compliance with**
27 **participation goals.**

28 (a) The bid or competitive selection process specifications for each applicable contract shall
29 require that all bidders or proposers seeking to contract with the city or a private owner on such
30 project shall address the participation goal through one (1) or more of the following subsections, or
31 by demonstrating good faith efforts as set out in section 28-60:

1 (1) If the bidder or proposer is an MWBE, the value of the commercially useful
2 function to be self-performed by the MWBE shall count to the extent provided in section 28-59 toward
3 satisfaction of the participation goal. If the level of self-performed work does not satisfy the goal, the
4 MWBE bidder or proposer must utilize additional MWBE firms or submit good faith efforts .

5 (2) If the bidder or proposer utilizes MWBEs as subcontractors, suppliers,
6 manufacturers, manufacturer's representatives or brokers, the value of the commercially useful
7 function to be performed by such MWBEs shall count to the extent provided in section 28-59 toward
8 satisfaction of the participation goal; or

9 (3) If the bidder or proposer submits a joint venture agreement that includes one (1)
10 or more MWBEs, the value of the commercially useful function to be performed by the MWBEs in
11 the joint venture as the distinct, clearly defined portion of the work of the joint venture agreement
12 that the MWBE performs with its own forces or for which it is separately at risk shall count to the
13 extent provided in section 28-59 toward satisfaction of the participation goal. The joint venture
14 agreement is subject to review and approval by the director, and shall be provided to the director at
15 least ten (10) days prior to the date of bid opening or the date of proposal, in the case of a competitive
16 selection process unless otherwise set forth in the request for bids or proposals.

17 (4) If the bidder or proposer submits a teaming agreement that includes one (1) or
18 more MWBEs, the value of the commercially useful function to be performed by the MWBEs in the
19 teaming agreement as the distinct, clearly defined portion of the work of the teaming agreement that
20 the MWBE performs with its own forces or for which it is separately at risk shall count to the extent
21 provided in section 28-59 toward satisfaction of the participation goal. The teaming agreement is
22 subject to review and approval by the director, and the teaming agreement shall be provided to the
23 director at least ten (10) days prior to the date of bid opening or the date of proposal, in the case of
24 a competitive selection process unless otherwise set forth in the request for bids or proposals.
25 Teaming agreement participation will count toward the satisfaction of the participation goal upon
26 confirmation by the director of the utilization in the teaming agreement arrangement and full
27 integration of work forces by the teaming agreement parties.

28 (b) For contracts selected in accordance with sections 2.3.3(A) and 2.11.3(8) of the city
29 charter, and D.R.M.C. sections 5-19 and 20-56, including design-build contracts; construction
30 manager-general contractor contracts; on-call construction contracts; integrated contracts; or public-
31 private partnership agreements; the director in collaboration with the department head may

1 determine to address the participation goal by means of a utilization plan for utilization of MWBEs
2 on such contract, which may also include setting of goals on a per-project basis consistent with
3 section 28-58, or for alternative demonstration of good faith efforts by the proposer. In that event,
4 the department head shall request that the director approve the utilization of such a utilization plan,
5 consistent with the scope and intent of this article III and its divisions. The development, scope and
6 utilization of such utilization plans shall be addressed in rules and regulations promulgated by the
7 director.

8 (c) Notwithstanding any other provision of this article III and its divisions, in the event that
9 a department head finds with respect to a particular contract that the best interests of the city would
10 be served by the negotiation of a contract, including but not limited to a design-build or construction
11 manager-general contractor contract, through a competitive selection process based wholly on
12 quality, without reference to selection by low bid of the contractor or its subcontractors or suppliers,
13 the analysis of the MWBE utilization or good faith effort by such contractor shall be determined on
14 the basis set out in sections 28-63 through 28-66, provided that, in the event of such an analysis, all
15 references in those sections to respectively, consultant or subconsultant, shall also be deemed to
16 refer to, respectively, contractor or subcontractor.

17 **Sec. 28-62.5. - Contracts for construction, reconstruction and remodeling—Joint ventures**
18 **and teaming agreements.**

19 (a) A proposer or bidder may opt to meet the participation goal through a joint venture or
20 teaming agreement. Only the portion of the total dollar value of a joint venture contract equal to the
21 distinct, clearly defined work that the MWBE performs with its own forces as a commercially useful
22 function will count towards MWBE participation. As to each joint venture under this section, a written
23 joint venture agreement must be completed by all parties to the joint venture and executed, which
24 clearly delineates the rights and responsibilities of each member or partner, complies with any
25 requirements of the division of small business opportunity as set forth in bid documents or otherwise,
26 and provides that the joint venture shall continue for, at a minimum, the duration of the project.

27 (b) The division of small business opportunity shall review and approve all contractual
28 agreements regarding the terms and provisions of each joint venture relationship prior to the award
29 of a contract, including agreements pertaining to:

- 30 (1) The initial capital investment of each venture partner;

1 (2) The proportional allocation of profits and losses to each venture partner; no
2 MWBE venture partner's liability should ever exceed said partners percentage of revenue earned
3 while a participant in the joint venture;

4 (3) The sharing of the right to control the ownership and management of the joint
5 venture;

6 (4) Actual participation of the venture partners on the project;

7 (5) The method of and responsibility for accounting;

8 (6) The method by which disputes are resolved; and

9 (7) Any additional or further information required by the division of small business
10 opportunity as set forth in bid documents or otherwise.

11 Nothing herein shall prevent the manager of the user agency from determining appropriate contract
12 terms for a joint venture on behalf of the city when entering into the contract with the selected
13 contractor.

14 (c) As to each teaming agreement under this section, a written teaming agreement must be
15 completed by all parties to the teaming agreement and executed, which clearly delineates the rights
16 and responsibilities of each teaming party, complies with any requirements of the division of small
17 business opportunity as set forth in the bid or proposal documents or otherwise, and provides that
18 the teaming agreement shall continue for, at a minimum, the duration of the project.

19 (d) The division of small business opportunity shall review and approve all contractual
20 agreements regarding the terms and provisions of each teaming agreement prior to the award of a
21 contact, including agreements pertaining to;

22 (1) Actual participation of the teaming members on the project;

23 (2) The high value work to be performed by the teaming members;

24 (3) The method by which disputes are resolved; and

25 (4) Any additional or further information required by the division of small business
26 opportunity as set forth in the bid documents or otherwise.

27 (e) Joint ventures and teaming parties shall submit agreements for pre-approval no later
28 than ten (10) business days prior to the date set for receipt of bids or proposals on a project, but in
29 no event later than designated in the bid documents or requests for proposals. A bid or proposal
30 submitted by a joint venture or teaming relationship that does not meet the joint venture agreement

1 or teaming agreement requirements as applicable, in accordance with the requirements of this
2 section shall be deemed nonresponsive and rejected.

3 (f) The joint venture, each member of the joint venture, or the teaming parties shall provide
4 the division of small business opportunity access to review all records pertaining to joint venture
5 agreements or teaming agreements before and after the award of a contract in order to reasonably
6 assess compliance with this section.

7 (g) If, after the award of a contract to a joint venture or team, any member of the joint
8 venture or team believes that the terms and conditions of the agreement as approved by the division
9 of small business opportunity have not been complied with, then such member may seek the DSBO's
10 and the user department's assistance with review and resolution of the issue. The request for review
11 must be made in writing.

12 (h) [Reserved]

13 (i) [Reserved]

14 (j) If, after the award of a contract, a dispute arises between the prime contractor and a
15 subcontractor regarding performance of work or provision of services or supplies on the eligible
16 project, then such prime contractor or subcontractor may seek the DSBO's and the user
17 department's assistance with review and resolution of the issue. The request for review must be
18 made in writing.

19 (k) Within twenty (20) calendar days of receipt of a request for review, if the dispute has
20 not been resolved informally among the parties, the DSBO will recommend and schedule an informal
21 meeting among the parties.

22 (l) The director shall have authority to make recommendations in an attempt to resolve
23 the dispute.

24 (m) In the event that the DSBO's informal procedures do not resolve the disputes, the
25 DSBO shall have the option of referring the dispute to a qualified outside mediator, contingent upon
26 the consent of the interested parties, with the costs to be borne by the disputing parties.

27 **Sec. 28-63. - Contracts for professional design and construction services—Identification of**
28 **participating MWBEs.**

29 (a) At the time of the proposal submission to and authorized by the city or a private owner,
30 the proposer shall provide to the city or private owner the specified DSBO required forms of all
31 MWBEs that are being utilized toward the satisfaction of the participation goal whether as a self-

1 performing proposer, or as subconsultants, suppliers, manufacturers, manufacturer's
2 representatives, brokers or members of a joint venture or teaming agreement. Unless otherwise
3 specified in a request for qualifications, request for proposal or other proposal solicitation, in the
4 event that a proposal is requested for the provision of professional design and construction services
5 for a period of time, with known delineation of the dollar amount of professional design and
6 construction services projects, the proposer need list the percentage participation and dollar amount
7 of MWBEs. The DSBO required forms shall specify:

8 (1) The name and contact information for the MWBE;

9 (2) The dollar value and description of the commercially useful function to be
10 performed by the MWBE consistent with subsections (d) and (e). In the case of utilization of a
11 supplier, manufacturer, manufacturer's representative or broker, the appropriate percentage of dollar
12 value attributable to such business enterprise as a commercially useful function shall be calculated
13 with all underlying data supplied. If the proposer provides a dollar fee amount, then both the dollar
14 value and percentage must be listed in the proposal;

15 (3) The designation of each participating MWBE's applicable scope of work,
16 including the NAICS code, intended to count toward the participation goal. The MWBE firm must be
17 certified in the applicable scope of work for their participation to count toward the goal;

18 (4) An adequate statement from the proposer that the dollar amount of work or the
19 percentage of the work (whichever is applicable) to be performed by such MWBEs on the contract,
20 other than that self-performed by the proposer, was furnished to the proposer and agreed upon by
21 the MWBE prior to the time of submission of the proposal submitted to and authorized by the city or
22 a private owner; and

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

29 (b) Only that level of MWBE utilization demonstrated in accordance with this section at the
30 time of the proposal submitted to and authorized by the city or a private owner may be counted
31 toward meeting the participation goal except as otherwise set out in sections 28-68 and 28-70.

1 Proposers must submit such an executed letter of intent for each MWBE listed by the proposer,
2 including a self-performing proposer, and any other DSBO required forms at the time of the
3 submission of the proposal submitted to and authorized by the city or a private owner. Failure to
4 timely submit the required letter of intent along with any other DSBO required forms or any other
5 form or document as may be required in the procurement documents and the rules and regulations
6 may render the proposal nonresponsive.

7 (c) For on-call design or professional services, and other design or professional services
8 contracts that may be procured and awarded without a pre-determined specific project or scope of
9 work, the director in consultation with the department head may require a utilization plan for contracts
10 that do not delineate the dollar amount of specific projects, scopes of work, and work orders or task
11 orders pursuant to section 28-59. In such event, proposer shall not be required to demonstrate
12 MWBE utilization at the time the proposal is submitted, but will be required to develop an approved
13 utilization plan to demonstrate compliance with the requirements of this article III and its divisions
14 and as set forth in the rules and regulations. The utilization plan shall be required either at the time
15 of submission of a proposal or at some other time as required by the department head and DSBO.
16 DSBO in conjunction with the user department is responsible for the review and assessment of
17 utilization plans.

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

26 (e) All expenditures for materials, supplies and equipment obtained from an MWBE
27 manufacturer, manufacturer's representative or supplier shall count toward the participation goal as
28 specified in section 28-35(33) and section 28-35(51).

29 (f) Any agreement between a proposer and an MWBE in which the proposer requires that
30 the MWBE not provide subconsulting quotations to other proposers is prohibited and shall render a
31 proposer's proposal nonresponsive.

1 **Sec. 28-64. - Contracts for professional design and construction services—Good faith efforts.**

2 (a) If the proposer has not fully met the participation goal as provided in section 28-66, then
3 it shall demonstrate that it has made good faith efforts to meet such goal. The proposer shall furnish
4 to the director on or before the time of the proposal submitted to and authorized by the city or a
5 private owner, a detailed statement of its good faith efforts to meet the participation goal set by the
6 director. This statement shall address each of the items in subsection (b) and any additional criteria
7 that the director may establish by rule or regulation consistent with the purposes of this article III and
8 its divisions. Good faith efforts must be demonstrated to be meaningful and not merely for formalistic
9 compliance with this article III and its divisions. Substantive and meaningful efforts will be considered
10 in determining whether the bidder or proposer has complied with the good faith effort requirements.

11 (b) The statement of good faith efforts shall include a specific response and verification with
12 respect to each of the following good faith effort categories, which may be further defined by rule or
13 regulation. A proposer may include any additional information it believes may be relevant. Failure of
14 a proposer to show good faith efforts as to any one (1) of the following categories shall render its
15 overall good faith effort showing insufficient and its proposal nonresponsive:

16 (1) If pre-proposal meetings are scheduled by the city at which MWBEs may be
17 informed of subconsulting or joint venture opportunities under a proposed negotiated professional
18 services contract, including design, and construction services contract, attendance at such pre-
19 proposal meetings is not mandatory; however, proposers are responsible for the information
20 provided at these meetings.

21 (2) The proposer must solicit through all reasonable and available means the interest
22 of all MWBEs certified in the scopes of work of the contract. The proposer must solicit the interest of
23 such MWBEs within sufficient time, prior to the date of the proposal, to allow such MWBEs to respond
24 to the solicitation. The proposer must determine with certainty if the MWBEs are interested by
25 demonstrating appropriate in following up initial solicitations.

26 (3) The proposer must select portions of the services of the contract to be performed
27 by MWBEs in order to increase the likelihood that the participation goal will be achieved. This
28 includes, where appropriate, using best efforts to break out contract service items into economically
29 feasible units to facilitate MWBE participation as subconsultants or joint venturers, and for proposer
30 self-performed work, as suppliers, manufacturers, manufacturer's representative and brokers, all
31 reasonably consistent with industry and professional practice, even when the proposer would

1 otherwise prefer to perform these services with its own staff. The proposer must identify what
2 portions of the contract will be self-performed and what portions of the contract were selected for
3 solicitation of statements of qualification or proposals from MWBEs. All portions of the contract not
4 self-performed must be solicited for MWBE participation within the relevant certification and scopes
5 of work. The ability or desire of a proposer to perform the services of a contract with its own staff
6 does not relieve the proposer of the responsibility to meet the participation goal or demonstrate good
7 faith efforts to do so.

8 (4) The proposer, consistent with industry and professional practice, must provide
9 MWBEs at a clearly stated location with timely, adequate access to and information about the plans,
10 specifications, and requirements of the contract, including insurance requirements, if any, to assist
11 them in responding to a solicitation.

12 (5) The proposer must negotiate in good faith with interested MWBEs and provide
13 written documentation of such negotiation with each such MWBE.

14 (6) For each MWBE that contacted the proposer or that the proposer contacted or
15 attempted to subconsult or joint venture with, consistent with industry and professional practice, the
16 proposer must supply a statement giving the reasons why the proposer and the MWBE did not
17 succeed in negotiating a subconsulting, supplier, manufacturer, manufacturer's representative,
18 broker or joint venture agreement, as applicable.

19 (7) The proposer must provide verification that it rejected each non-utilized MWBE
20 because the MWBE was not qualified. Such verification shall include a verified statement of the
21 proposals received from potential or utilized subconsultants, suppliers, manufacturers,
22 manufacturer's representative or brokers on the contract, whether or not they are MWBEs. In making
23 such a determination of not being qualified, the proposer shall be guided by the definition of qualified
24 in section 28-35(47). For each MWBE found not to be qualified by the proposer, the verification shall
25 include a statement giving the proposer's reasons for its conclusion. A proposer's industry or
26 professional standing or group memberships may not be the cause of rejection of an MWBE. A
27 proposer may not reject an MWBE as being unqualified without sound reasons based on a
28 reasonably thorough investigation and assessment of the MWBE 's capabilities and expertise.

29 (8) If requested by a solicited MWBE, the proposer must make reasonable efforts to
30 assist interested MWBEs in obtaining alternative payment or performance guarantees or insurance

1 as required by the city or by the proposer, provided that the proposer need not provide financial
2 assistance toward this effort.

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

7 (10) The proposer must use the DSBO MWBE directories to identify, recruit and
8 place MWBEs.

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

12 (d) These factors shall also apply to instances where the participation goal may not be
13 met. Proposers or contractors are required to make continuous good faith efforts throughout the
14 contract term, and document these efforts. User departments will notify the DSBO of impending
15 contract closeout to allow the DSBO to request remaining good faith efforts and other required
16 documents from the contractor. Contractor may remain subject to the requirements including
17 potential violations of this article III and its divisions after contract closeout.

18 **Sec. 28-65. - Contracts for professional design and construction services—Responsive and**
19 **nonresponsive proposals.**

20 (a) *Responsive; compliance with requirements.* If the proposal submitted to and authorized
21 by the city or a private owner subject to a participation goal meets such goal or shows adequate
22 good faith efforts as set out in sections 28-64 or 28-66, then the director shall notify the department
23 head that the proposal is responsive as to compliance with this division 3.

24 (b) *Failure to meet requirements.* If such a proposal subject to a participation goal does not
25 meet such goal or show good faith efforts as set out in sections 28-64 or 28-66, or provide timely
26 information as set out in section 28-63, then the director shall notify the department head that the
27 proposal is nonresponsive, and such determination shall result in no further consideration by the city
28 or private owner of the proposal.

29 (c) *Good faith efforts—Informal meeting.* In the event the director finds inadequacies in a
30 bidder or proposer's demonstration of good faith efforts under section 28-64, the director will provide
31 written notice of such inadequacies to the bidder or proposer prior to notifying the appropriate

1 department head of bid or proposal responsiveness. Within two (2) business days from the date that
2 the city notifies the bidder or proposer of the inadequacies of its demonstration of good faith efforts,
3 the bidder or proposer may request an informal meeting with the director. Such informal meeting
4 shall be scheduled by the director. All deficiencies in good faith efforts shall be explained to the
5 bidder or proposer at such informal meeting. Within twenty-four (24) hours after the informal meeting,
6 the bidder or proposer shall be allowed to submit additional information or to clarify the original good
7 faith efforts. The director will at no time, however, allow additional subconsultants, joint venturers,
8 suppliers, manufacturers, manufacturer's representatives or brokers that may later be added to the
9 contract or to the original participation goal participation submitted at the time of the submission of
10 the proposal submitted to and authorized by the city or a private owner to be counted toward meeting
11 of the participation goal. After this informal meeting, the director will:

- 12 (i) Determine whether the proposal will be responsive or nonresponsive;
- 13 (ii) Make the notification as stated in subsection (b) above, as applicable; and
- 14 (iii) Provide written notice to the proposer of the director's final determination.

15 **Sec. 28-66. - Contracts for professional design and construction services—Compliance with**
16 **participation goals.**

17 (a) The proposal specifications for each professional design and construction services
18 contract shall require that all proposers seeking to contract with the city or a private owner on such
19 project shall address the participation goal through one (1) or more of the following subsections, or
20 by demonstrating good faith efforts as set out in section 28-64:

21 (1) If the proposer is an MWBE, the value of the commercially useful function to be
22 self-performed by the MWBE, shall count to the extent provided in section 28-63 toward satisfaction
23 of the participation goal. If the level of self-performed work does not satisfy the requirements to meet
24 the goal, the MWBE proposer must utilize additional MWBE firms or submit good faith efforts
25 substantiating why they could not meet the goal.

26 (2) If the bidder or proposer utilizes MWBEs as subconsultants, suppliers,
27 manufacturers, manufacturer's representatives or brokers, the value of the commercially useful
28 function to be performed by such MWBEs, shall count to the extent provided in section 28-63 toward
29 satisfaction of the participation goal.

30 (3) If the proposer submits a joint venture agreement that includes one (1) or more
31 MWBEs, the value of the commercially useful function to be performed by the MWBEs in the joint

1 venture as the distinct, clearly defined portion of the work of the joint venture agreement that the
2 MWBE performs with its own forces or for which it is separately at risk shall count to the extent
3 provided in section 28-63 toward meeting the participation goal. The joint venture is subject to review
4 and approval by the director, and the joint venture agreement shall be provided to the director within
5 a time period consistent with section 28-66.5. Joint venturer participation will count toward the
6 satisfaction of the participation goal upon confirmation by the director of the utilization in the joint
7 venture of joint management and full integration of work forces by the joint venturers; or

8 (4) If the proposer utilizes MWBEs as subconsultants, suppliers, manufacturers,
9 manufacturer's representatives or brokers, the value of the commercially useful function to be
10 performed by such MWBEs shall count to the extent provided in section 28-63 toward satisfaction of
11 the participation goal.

12 **Sec. 28-66.5. - Contracts for professional design and construction services—Joint ventures**
13 **and teaming agreements.**

14 (a) A proposer may opt to meet the goal through a joint venture or teaming agreement. As
15 to each joint venture under this section, a written joint venture agreement must be completed by all
16 parties to the joint venture and executed, which clearly delineates the rights and responsibilities of
17 each member or partner, complies with any requirements of the division of small business
18 opportunity as set forth in bid documents or otherwise, and provides that the joint venture shall
19 continue for, at a minimum, the duration of the project.

20 (b) The division of small business opportunity shall review and approve all contractual
21 agreements regarding the terms and provisions of each joint venture relationship to the award of a
22 contract subject to this division, including agreements pertaining to:

- 23 (1) The initial capital investment of each venture partner;
- 24 (2) The proportional allocation of profits and losses to each venture partner; no
25 MWBE venture partner's liability should ever exceed said partners percentage of revenue earned
26 while a participant in the joint venture;
- 27 (3) The sharing of the right to control the ownership and management of the joint
28 venture;
- 29 (4) Actual participation of the venture partners on the project;
- 30 (5) The method of and responsibility for accounting;
- 31 (6) The method by which disputes are resolved; and

1 (7) Any additional or further information required by the division of small business
2 opportunity as set forth in bid documents or otherwise.

3 Nothing herein shall prevent the manager of the user agency determining appropriate contract terms
4 for a joint venture on behalf of the city when entering into the contract with the selected contractor.

5 (c) As to each teaming agreement under this section, a written teaming agreement must be
6 completed by all parties to the teaming agreement and executed, which clearly delineates the rights
7 and responsibilities of each teaming party, complies with any requirements of the division of small
8 business opportunity as set forth in the bid documents or otherwise, and provides that the teaming
9 agreement shall continue for, at a minimum, the duration of the project.

10 (d) The division of small business opportunity shall review and approve all contractual
11 agreements regarding the terms and provisions of each teaming agreement prior to the award of a
12 contract subject to this division, including agreements pertaining to:

- 13 (1) Actual participation of the teaming members on the project;
- 14 (2) The high value work to be performed by the teaming members;
- 15 (3) The method by which disputes are resolved; and
- 16 (4) Any additional or further information required by the division of small business
17 opportunity as set forth in the bid documents or otherwise.

18 (e) Joint ventures and teaming parties shall submit agreements for pre-approval no later
19 than ten (10) business days prior to the date set for receipt of bids or proposals on a project, but in
20 no event later than designated in the bid documents or requests for proposals. A bid or proposal
21 submitted by a joint venture or teaming relationship that does not meet the requirements for a joint
22 venture agreement or teaming agreement as applicable, in accordance with the requirements of this
23 section shall be deemed nonresponsive and rejected.

24 (f) The joint venture, each member of the joint venture, or the teaming parties shall provide
25 the division of small business opportunity access to review all records pertaining to joint venture
26 agreements or teaming agreements before and after the award of a contract in order to reasonably
27 assess compliance with this section.

28 (g) If, after the award of a contract to a joint venture or team, any member of the joint venture
29 or team believes that the terms and conditions of the agreement as approved by the division of small
30 business opportunity have not been complied with, then such member may seek the DSBO's and
31 the user department's assistance with review and resolution of the issue. The request for review

1 must be made in writing. If, after the award of a contract, a dispute arises between the prime
2 contractor and a subcontractor regarding performance of work or provision of services or supplies
3 on the eligible project, then such prime contractor or subcontractor may seek the DSBO's and the
4 user department's assistance with review and resolution of the issue. The request for review must
5 be made in writing.

6 (h) Within twenty (20) calendar days of receipt of a request for review, if the dispute has
7 not been resolved informally among the parties, the DSBO will recommend and schedule an informal
8 meeting among the parties.

9 (i) The director shall have authority to make recommendations in an attempt to resolve the
10 dispute.

11 (j) In the event that the DSBO's informal procedures do not resolve the disputes, the DSBO
12 shall have the option of referring the dispute to a qualified outside mediator, contingent upon the
13 consent of the interested parties, with the costs to be borne by the disputing parties.

14 **Sec. 28-67. - Time periods for DSBO required MWBE forms and documentation submitted to**
15 **the city.**

16 For construction, design, or professional services related to construction, documentation of
17 good faith efforts and all DSBO required forms including letters of intent of a bidder or proposer, and
18 as applicable, its subcontractors, subconsultants, joint venturers, suppliers, manufacturers,
19 manufacturer's representatives or brokers shall be submitted to the director at the time of bid
20 opening, date of proposal in the case of a competitive selection process or private owner selection
21 for a construction contract, or at the time of submission of the proposal submitted to and authorized
22 by the city or a private owner for a professional design and construction services contract, or at some
23 other time that may be required by the DSBO and the user department. During contract performance,
24 the prime contractor is responsible for updating or providing new DSBO required forms as applicable
25 any time a new MWBE is added to a contract or project. The prime contractor must also provide
26 copies of the MWBE certification letters to the DSBO for new MWBEs added to the contract or
27 project.

28 **Sec. 28-68. - Compliance with participation goal during contract performance.**

29 (a) Upon award of a contract by the city that includes a participation goal, the goal becomes
30 a covenant of performance by the contractor or consultant in favor of the city.

1 (b) All contracts subject to this article III and its divisions shall be reviewed by the DSBO for
2 compliance with the provisions hereof. This review shall examine, but is not be limited to, whether
3 the MWBE participation dollar amounts and percentages and achieved participation goal levels upon
4 which the contract was awarded are maintained over the term or duration of the contract.

5 (c) For any contract for which the director has set a participation goal, it shall be an ongoing,
6 affirmative obligation of the contractor or consultant on such contract to maintain compliance with all
7 applicable provisions of this article III and its divisions to include, at a minimum, compliance with the
8 originally achieved level of MWBE participation upon which the contract was awarded, for the
9 duration of the contract, unless the city initiates a material alteration to the scope of work affecting
10 MWBEs performing on the contract through change order, contract amendment, force account or as
11 otherwise described in section 28-70.

12 (d) The DSBO shall evaluate the utilization of MWBEs to determine whether such MWBEs
13 are performing a commercially useful function. The evaluation shall examine the amount of work
14 subcontracted, industry practice and other relevant factors. The amount of MWBE participation
15 credited toward a participation goal shall be based upon an analysis of the specific duties performed
16 by the MWBE, and the extent to which such duties constitute a commercially useful function. The
17 director may undertake such inquiries or studies, engage such employees or retain such consultants
18 to assist the director in rendering these determinations. In order for the DSBO to accurately track
19 utilization of MWBEs, the MWBEs shall submit regularly the information described in subsections
20 below to DSBO in a method prescribed by the DSBO. The submitted information may include but is
21 not limited to:

22 (1) Prime contractor information (name, address, contact person, telephone and
23 email address);

24 (2) MWBE subcontractor information for all tiers (name, address, contact person,
25 telephone, email address, and certification number);

26 (3) Contract information and City contract control number (report for month of,
27 contract name and date executed, original dollar amount, current dollar amount if changed, and all
28 change orders);

29 (4) Subcontract agreement information (copy of the document, original amount,
30 current amount if changed, scope of work, and change orders);

31 (5) Payment received in current month;

- 1 (6) Total payments received;
- 2 (7) Percent of work completed;
- 3 (8) Billing request rejection date and reason for rejection; and
- 4 (9) Past due invoices (invoice date, reference number, number of days past due,
- 5 and amount outstanding)

6 (e) The work performed by an MWBE not providing a commercially useful function, or
7 functioning as a conduit, shall not count toward meeting the participation goal.

8 **Subdivision III. – Compliance and enforcement.**

9 **Sec. 28-69. - Administrative review and court proceedings.**

10 (a) Any person who disputes any determination made by or on behalf of the city pursuant
11 to the authority of the director, which determination adversely affects such person, may petition the
12 executive director for a hearing concerning such determination no later than thirty (30) days after the
13 date of the determination. Compliance with the provisions of this section shall be a jurisdictional
14 prerequisite to any action brought under the provisions of this section, and failure of compliance shall
15 forever bar any such action. This section shall not be construed to create a right of standing that
16 does not otherwise exist under Colorado law.

17 (b) The executive director may hold such hearing or in the executive director's sole
18 discretion may designate and request an officer or employee of the DSBO, or an independent
19 hearing officer retained by the city, as a hearing officer with authority to hold such hearing or
20 hearings.

21 (c) Such petition shall be in writing, and the facts and figures submitted shall be submitted
22 under oath or affirmation either in writing or orally at a hearing scheduled by the executive director
23 or the hearing officer. The hearing, if any, shall take place in the city, and notice thereof and the
24 proceedings shall otherwise be in accordance with rules and regulations issued by the director. The
25 petitioner shall bear the burden of persuasion and the burden of going forward, and the standard of
26 proof shall conform to that in civil, non-jury cases in state district court, provided that the executive
27 director may provide, by rule and regulation, for either review of the record or for limited de novo
28 review of different types of questions coming before the executive director.

29 (d) Thereupon, the executive director or designee shall make a final determination. Such
30 final determination shall be considered a final order of the executive director and may be reviewed
31 under Rule 106(a)(4) of the state rules of civil procedure by the petitioner or by the city. A request

1 for reconsideration of the final determination may be made if filed with the executive director within
2 fifteen (15) days from the date of determination, in which case the executive director shall review
3 the record if the proceedings were conducted by a designated hearing officer, and the determination
4 shall be considered a final order of the director upon the date the director rules on the request for
5 reconsideration.

6 (e) Pursuant to Rule 106(a)(4) of the state rules of civil procedure, the district court of the
7 second judicial district of the state shall have original jurisdiction in proceedings to review the final
8 order.

9 **Sec. 28-70. - Project change orders, amendments and modifications.**

10 (a) Contractors and consultants on contracts hereunder shall have a continuing obligation
11 to immediately inform the DSBO in writing of any agreed-upon and user department approved
12 increase or decrease in the scope of work of such contract, upon any of the bases discussed in this
13 section 28-70, regardless of whether such increase or decrease in scope of work has been reduced
14 to writing at the time of notification.

15 (b) Any increase in the scope of work of a contract for construction, reconstruction, or
16 remodeling, whether by amendment, change order, force account or otherwise, or any increase in
17 the scope of services of a contract for professional design or construction services, whether by
18 amendment or any other addition of special, additional or other services to the contract, which
19 increases the dollar value of the contract, whether or not such change is within the scope of work
20 designated for performance by a MWBE at the time of contract award, shall be immediately
21 submitted to the DSBO. The contractor is responsible for obtaining user department approval of any
22 such change. Those amendments, change orders, force accounts or other contract modifications
23 that involve a changed scope of work that cannot be performed by existing project subcontractors,
24 subconsultants, joint venturers, suppliers, manufacturer, manufacturer's representatives or brokers,
25 or by the contractor or consultant, shall be subject to a goal for MWBEs equal to the original
26 participation goal on the contract that was included in the bid or proposal requirements. The
27 contractor or consultant shall satisfy such goal as respects such changed scope of work by soliciting
28 new MWBEs in accordance with section 28-62 or 28-66 as applicable, or the contractor or consultant
29 must show each element of good faith efforts and other applicable requirements set out in sections
30 28-60, 28-64, 28-73, or section 28-74(c) hereof. The original participation goal percentage shall be
31 applied to the new, increased dollar amount of the contract. The contractor or consultant shall supply

1 to the director and user department the documentation described in sections 28-60, 28-64, 28-73,
2 or 28-74(c) with respect to the increased dollar value of the contract.

3 **Sec. 28-71. - Payments to MWBE subcontractors, subconsultants, joint venturers, suppliers,**
4 **manufacturers, manufacturer's representatives and brokers.**

5 All contractors and consultants shall promptly render payment to all subcontractors,
6 subconsultants, joint venturers, suppliers, manufacturers, manufacturer's representatives and
7 brokers on a contract as required under this section. Consistent with user department requirements,
8 each contractor shall provide with each pay request to the city or private owner on each contract,
9 beginning with the second pay request, partial claim releases from subcontractors, joint venturers,
10 suppliers, manufacturers, manufacturer's representatives and brokers in form and content
11 satisfactory to the city, or shall provide, at the city's sole option, alternative proof of payment to
12 subcontractors, subconsultants, joint venturers, suppliers, manufacturers, manufacturer's
13 representatives and brokers, in form and content approved by the department head and the director,
14 evidencing that all subcontractors, subconsultants, suppliers, manufacturers, manufacturer's
15 representatives and brokers have been duly paid by the contractor or consultant unless a bona fide
16 dispute, documented in writing, exists between the contractor or consultant and the unpaid
17 subcontractor, subconsultant, joint venturer, supplier, manufacturer, manufacturer's representative
18 or broker. As provided by city and state law and city contracts, an agency, upon request from a
19 contractor, may authorize payments to contractors from withheld retainage for contractors who have
20 completed their work in a manner acceptable to the city.

21 **Sec. 28-72 - Contractor prompt payment; MWBE subcontractors.**

22 (a) Each contractor on a city contract with certified MWBEs as subcontractors shall pay
23 the respective subcontractors any invoiced and undisputed amounts for accepted and completed
24 work within thirty-five (35) days of the contractor's receipt of the subcontractor's invoice. Payment to
25 the subcontractor shall be timely made as required under this section regardless of whether the
26 contractor has been paid for the same work or payment period. For the purposes of the section 28-
27 72, any subcontractor, regardless of whether that subcontractor holds a city contract, may be
28 required to make payments to MWBEs as set forth in this section.

29 (b) Contractor is required to provide written notice to its subcontractor of either approval
30 or rejection of the subcontractor's invoice within ten (10) days of receipt. If the invoice is rejected,
31 the written notice to the subcontractor shall include the deficiencies or disputes regarding the invoice.

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

4 (d) The payment requirements under this section shall apply to MWBE subcontractors
5 regardless of tier.

6 (e) This section 28-72 shall apply only to city contracts in the amount of one million dollars
7 (\$1,000,000.00) or more based on the original contract amount before amendments or changes.

8 **Sec. 28-73. - Participation modification; substitution; termination of MWBE subcontractors.**

9 (a) A contractor that has been awarded a contract based upon a given level of MWBE
10 participation, or has duly added an additional or substitute MWBE subcontractor to the contract in
11 accordance with this division 3, but intends to substitute or terminate an MWBE subcontractor must
12 comply with this section 28-73, as directed by the DSBO and the user department, regarding the
13 intended substitution or termination. This includes, but is not limited to, instances in which a
14 contractor seeks to perform work with its own forces or those of an affiliate, a non-MWBE firm, or
15 with another MWBE as a substitution for an originally designated for an MWBE subcontractor.

16 (b) In the event that a contractor or consultant intends to substitute or terminate an MWBE
17 subcontractor, subconsultant, joint venturer, supplier, manufacturer, manufacturer's representative
18 or broker, or otherwise modify or eliminate all or a portion of work attributable to an MWBE, except
19 in cases where directed by the city, the following must be completed:

20 (1) The contractor must provide notice in writing to the MWBE subcontractor, with
21 a copy to the DSBO and user department, of its intent to request to terminate or substitute, and the
22 reason for the request.

23 (2) The contractor must give the MWBE subcontractor at least five (5) business
24 days to respond to the contractor's notice.

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

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

30 (i) The MWBE subcontractor fails or refuses to execute a written contract;

1 (ii) The MWBE subcontractor fails or refuses to perform the work consistent with
2 normal industry standards; provided, however, that good cause does not exist if the failure or refusal
3 of the MWBE subcontractor to perform its work results from the bad faith or discriminatory action of
4 the contractor;

5 (iii) The MWBE subcontractor fails or refuses to meet the contractor's
6 reasonable, nondiscriminatory bond requirements or insurance requirements;

7 (iv) The MWBE subcontractor becomes bankrupt, insolvent, or exhibits credit
8 unworthiness;

9 (v) The MWBE subcontractor is or has become ineligible to work on city projects
10 because of suspension or debarment;

11 (vi) The non-city owner or contractor has determined that the MWBE
12 subcontractor is not a responsible contractor;

13 (vii) The MWBE subcontractor voluntarily withdraws from the project and
14 provides written notice of its withdrawal;

15 (viii) The MWBE's work cannot be counted toward participation in accordance
16 with this article III and its divisions;

17 (ix) An MWBE owner dies or becomes disabled resulting in the MWBE's inability
18 to perform or complete its work on the contract; or

19 (x) Other documented good cause that the user department or DSBO
20 determines requires termination of the MWBE subcontractor.

21 (5) The MWBE subcontractor shall be provided the opportunity to advise the DSBO,
22 user department and the contractor of the reasons, if any, why it objects to the proposed termination,
23 and why the DSBO should not concur with the contractor's action. If required in a particular case as
24 a matter of public necessity (e.g., safety), the DSBO may provide a response period shorter than
25 five (5) business days.

26 (6) In addition to substitutions or terminations occurring during contract
27 performance, the provisions of this section may apply to reductions in scope of work or substitutions
28 of MWBE firms by bidders or proposer prior to contract execution.

29 (c) If the DSBO and the user department concurs with the contractor's request to
30 substitute, terminate or reduce the scope of work of the MWBE subcontractor, the contractor must

1 comply with good faith efforts requirements to replace the terminated MWBE subcontractor with
2 another MWBE firm certified to perform the scope of work.

3 (d) If a contractor substitutes or terminates the MWBE subcontractor, or reduces the scope
4 of work of the MWBE subcontractor, without first complying with this section 28-73, the DSBO may
5 find the contractor in violation of this division and the contractor may be subject to enforcement and
6 sanctions.

7 **Sec. 28-74. - Potential violations during contract performance.**

8 (a) A contractor or consultant that has been awarded a contract based upon a given level
9 of MWBE participation shall not, at any time before or during the performance of such contract:

10 (1) Fail to in fact utilize an MWBE that was originally listed at bid opening or proposal
11 submission in order to satisfy the participation goal, and that submitted a timely letter of intent,
12 without substituting with another MWBE performing the same commercially useful function and dollar
13 amount, or demonstrating each element of good faith efforts, as defined in subsection (c) hereof, to
14 substitute an MWBE; or

15 (2) Fail to allow an MWBE functioning as a subcontractor, subconsultant, joint
16 venturer, supplier, manufacturer, manufacturer's representative, or broker to perform the
17 commercially useful function, the value of which was originally counted for that MWBE in awarding
18 the contract; or

19 (3) Modify or eliminate all or a portion of the scope of work attributable to an MWBE
20 upon which the contract was awarded without first complying with section 28-73, unless directed by
21 the city; or

22 (4) Terminate an MWBE originally utilized as a subcontractor, subconsultant, joint
23 venturer, supplier, manufacturer, manufacturer's representative or broker in order to be awarded the
24 contract without complying with section 28-73; or

25 (5) Retaliate against any MWBE that reports issues to the DSBO or user
26 departments; or

27 (6) Participate in a conduit relationship with an MWBE scheduled to perform work
28 on the contract; or

29 (7) Otherwise fail to meet the participation goal without complying with good faith
30 efforts requirements; or

1 (8) Commit any other violation of this article III and its divisions, or rules and
2 regulations promulgated thereunder, which constitutes a material breach of the contract, not
3 mentioned above.

4 (b) Any action by a contractor or consultant in violation of subsections (a)(1) through (8)
5 hereof, shall constitute a material breach of the contract that shall entitle the city or private owner to
6 exercise all of its rights at law or equity for such material breach, in addition to exercising any of the
7 other sanctions set out in section 28-76. If, following contract award, an MWBE has its certification
8 terminated for reasons other than expiration of certification, or graduation from certification under
9 section 28-55, or an MWBE fails to perform a commercially useful function, the value of which was
10 originally counted for that MWBE, as applicable, in awarding the contract, or an MWBE voluntarily
11 withdraws its MWBE participation on the contract and the contractor or consultant can demonstrate
12 that such termination or failure did not result from any action or inaction, whether direct or indirect,
13 of or by the contractor or consultant, such termination of certification or failure to perform a
14 commercially useful function shall not be deemed a breach of the contract; provided, however, that
15 the requirements of section 28-73 are satisfied.

16 (c) In the event that a contractor or consultant must add or replace an MWBE
17 subcontractor, subconsultant, joint venturer, supplier, manufacturer, manufacturer's representative
18 or broker or in the event that a new scope of work is added to the ongoing contract, and the contractor
19 or consultant in such event is in noncompliance with maintenance of the original participation goal
20 upon which the contract was awarded, due to failure to utilize additional MWBEs, the contractor or
21 consultant shall be required to demonstrate good faith efforts in compliance with section 28-60,
22 section 28-64, or section 28-73 as applicable. Failure of a contractor or consultant to show good faith
23 efforts shall render its contract performance in noncompliance with this article III and its divisions.

24 **Sec. 28-75. - Burden of proof; investigations of compliance.**

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

1 of providing complete, truthful information to the director and of otherwise proving compliance with
2 the requirements and obligations of this article III and its divisions.

3 **Sec. 28-76. - Contract sanctions for failure to comply with requirements.**

4 (a) If a contractor or consultant is found to be in violation of the provisions of article III, to
5 otherwise be in breach of a contract, to perform as or to utilize MWBEs for a non-commercially useful
6 function or as a conduit, to fail to submit information required in section 28-67, to submit false,
7 misleading or materially incomplete statements, documentation or records, including, but not limited
8 to, good faith efforts or letters of intent, or to fail to cooperate in an investigation, it shall be subject
9 to sanctions. The city may exercise any or all of its rights contained in the contract terms and
10 conditions, including but not limited to, withholding funds including retainage, imposition of monetary
11 penalty, or suspension or termination of the pertinent contract. If the contract is suspended or
12 terminated, the city reserves all its rights at law or equity, with such suspension or termination being
13 deemed a response to a contractor or consultant default, as appropriate, by applicable law.

14 (b) In the event that the director determines, in his or her sole discretion, that a contractor
15 or consultant is in noncompliance with article III or its divisions, the contractor or consultant may be
16 assessed a civil, remedial penalty, of not more than one hundred fifty (150) percent of the value of
17 MWBE underutilization demonstrated for each MWBE involved. In assessing such civil penalty:

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

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

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

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

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

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

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

20 (7) The DSBO may suspend or revoke an offending MWBE's eligibility for
21 certification, may suspend its participation from counting toward a participation goal, and, subject to
22 other city law, may suspend or debar it from participating in future city contracts, based upon such
23 MWBE's acting as a conduit, failing to comply with the provisions of article III and its divisions, failing
24 to perform a commercially useful function on a contract, failing to submit information as required by
25 section 28-67, submitting false, misleading or materially incomplete statements, documentation or
26 records, or failing to cooperate in investigations.

27 (c) The director may, in his or her sole discretion, impose any one (1) or more of the
28 sanctions set out in this section against any contractor, consultant, subcontractor, subconsultant,
29 joint venturer, supplier, manufacturer, manufacturer's representative, or broker determined to be in
30 violation of the section, provided that the director shall first advise the affected department head of
31 the proposed sanction in writing. If the department head advises the director in writing that the

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

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

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

9 **Sec. 28-77. - State or federal law and other guidelines.**

10 In making any findings required herein, the director may incorporate by reference rules,
11 procedures and powers of C.R.S. § 24-4-101 et seq. as they may exist on the date of enactment of
12 this article and its divisions or as they may be amended. In making any findings required herein or
13 in aid of definition or interpretation of any term or phrase herein, or by way of procedure or process,
14 the director may utilize as a guide, insofar as they are consistent with the purposes of this article III
15 and its divisions, provisions of federal law, including without limitation the provisions of 49 Code of
16 Federal Regulations and 13 Code of Federal Regulations, or successor regulations, as they exist on
17 the date of enactment of this article III and its divisions or as they may be amended, provided that
18 no substantive provision of such federal law that is inconsistent with or contradictory to the provisions
19 of this article III and its divisions shall be used.

20 **Sec. 28-78. - Reporting.**

21 The director shall prepare written reports no less than two (2) times each year which shall
22 describe progress in meeting the annual goal set out in section 28-57. Copies of such reports shall
23 be provided to the affected department heads, city council and the mayor.

24 In addition, the report shall encompass the implementation of this article III and its divisions
25 and discussion of setting and justification of participation goals and achievements, including, but not
26 limited to, contract change orders, amendments and modifications.

27 In calculating MWBE participation, all funds paid on city contracts with MWBE goals during
28 the year shall be counted whether or not such funds were used to accomplish participation goals
29 applicable at the time of bid opening, date of proposal in the case of a competitive selection
30 process, or other proposal receipt.

31 **Sec. 28-79. - Annual report; explanation of failure to achieve annual goal.**

1 If the annual goal in section 28-57 is not met in any year, then by March 1 of the following
2 year, the director shall submit to the mayor and city council a report comparing MWBE utilization
3 achieved in the year to the aspirational annual goal, stating the reasons why the goal was not met,
4 and advising and making recommendations as to continuing or further efforts that the city will take
5 in eliminating identified discrimination in city construction, reconstruction and remodeling, and
6 professional services, including design, and construction services contracting, and recommending
7 actions to assist in meeting such goal in the future. This annual report shall be considered one of the
8 two required reports under Section 28-78.

9 **Sec. 28-80. - Severability.**

10 If any provision of this division 3 or its application is held invalid or unenforceable, such
11 invalidity or unenforceability shall not affect other provisions or applications of this division that can
12 be given effect without the invalid provisions or applications and the remaining provisions are to be
13 severable and shall remain in full force and effect.

14 **Sec. 28-81. - Effective date of division.**

15 This division 3 shall become effective on May 2, 2020 and shall apply to all contracts within
16 the scope of the division for which bids or proposals are publicly advertised on or after May 2, 2020.

17 **Sec. 28-82. - Review and sunset.**

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

23 (b) This division 3 shall be repealed effective April 30, 2025.

24 **Secs. 28-83—28-90. – [Reserved].**

25 **Section 3.** That article V of chapter 28 of the Revised Municipal Code be and the same is
26 hereby repealed and reenacted to read as follows:

27 **ARTICLE V. - NONDISCRIMINATION IN CITY CONTRACTS AND PURCHASE ORDERS FOR**
28 **GOODS AND SERVICES AND OPPORTUNITIES FOR MINORITY AND WOMAN-OWNED**
29 **BUSINESSES AND SMALL BUSINESS ENTERPRISES IN PROCUREMENTS FOR GOODS AND**
30 **SERVICES**

31 **Sec. 28-117. - Purpose and scope of programs.**

1 (a) The purpose of this article V is to enable the city, through the department of general
2 services, user departments, and the DSBO, to undertake specific activities to prevent discrimination
3 and its effects against business enterprises that have been certified as MWBEs and SBEs in the
4 award of city contracts and purchase orders for goods and services and to increase opportunities for
5 all MWBEs and SBEs as awarded by the department of general services or user departments
6 pursuant to the provisions of the Charter, ordinances, and executive orders of the City and County
7 of Denver. The director of the division of small business opportunity and city department heads are
8 hereby expressly delegated the necessary powers to effectuate the purpose of this article V and to
9 undertake such additional studies or inquiries as they deem appropriate.

10 (b) The scope of this article V will encompass an MWBE goal program, an SBE defined
11 procurement pool program, and other outreach and education programs.

12 (c) The city, through the DSBO in conjunction with the purchasing division and user
13 departments, is authorized to develop and utilize programs and activities to provide outreach to and
14 to facilitate the participation of all business enterprises in the city's purchasing activities, including,
15 but not limited to MWBEs and SBEs. These programs and activities include, but are not limited to:

16 (1) Commencement of collection and analysis, for informational purposes only, of
17 data and information from each bidder or proposer on a city procurement contract or purchase order
18 regarding the ongoing availability and utilization of minority and women-owned business enterprises,
19 including MWBEs, on such bidder's or proposer's private contracts in the goods and services
20 industries in the city's market area.

21 (2) Development of such other programs or activities as the DSBO director in
22 conjunction with the purchasing director, manager of the department of general services or
23 department heads may from time to time recommend.

24 **Sec. 28-118. - Contracts and purchase orders excluded from article V.**

25 Article V excludes from coverage the following purchases:

26 (a) Contracts and purchase orders for which bids or proposals are sought under the minority
27 and women business enterprise ordinance for construction, reconstruction, and remodeling, and
28 professional design and construction services set forth in article III of this chapter 28 and under the
29 small business enterprise ordinance set forth in article VII of this chapter 28.

30 (b) Contracts and purchase orders paid with funds from the United States Government or
31 the State of Colorado and for which the United States Government or the State of Colorado have

1 made applicable contract requirements, terms or conditions that are inconsistent with the terms of
2 this article V in which event the provisions of this article V shall not apply to such contract or purchase
3 order to the extent of the inconsistency.

4 (c) Contracts and purchase orders excluded by the purchasing division from procurement
5 bidding procedures as identified in section 20-64 of this Code, and other sole source purchases
6 authorized by city rules, regulations, ordinances or executive order.

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

10 (e) Purchases made through the city's non-purchase order voucher or supplier invoice
11 request procedures as identified in City Fiscal Rule 8.1.

12 (f) Contracts and purchase orders for the following: (1) Real estate transactions, including
13 purchase and sale agreements, leases and licenses; (2) intergovernmental agreements; (3)
14 agreements with colleges and universities; (4) revenue agreements (except for golf and other
15 concessions); (5) legal services and related expert and consulting services in aid of legal services;
16 (6) utilities; (7) broadcasting; (8) regulated industries including railroads; (9) contracts and purchase
17 orders procured from national markets.

18 (g) The DSBO director in consultation with the purchasing division or user department is
19 authorized to exclude contracts or purchase orders for goods or services in the best interest of the
20 city.

21 **Sec. 28-119. - Procurement advisory committee.**

22 The DSBO director, in consultation with the purchasing director or user departments, may
23 establish an advisory committee to advise and recommend to the DSBO director, user departments
24 or manager, as appropriate, policy and initiatives to assist MWBEs, SBEs, and other business
25 enterprises in seeking procurement opportunities for goods and services under this article V. The
26 details of this committee will be established by rules and regulations promulgated by the DSBO
27 director, in consultation with the purchasing director and manager of the department of general
28 services or user departments.

29 **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 review
3 and court proceedings provision contained in section 28-69 of this Code.

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

6 The DSBO shall charge a certification fee, of not to exceed three hundred dollars (\$300.00)
7 to 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. - MWBE/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 guidelines
12 relating solely to internal management and procedure, establish reasonable procedures and
13 methods for the certification of applicant business enterprises as MWBEs or SBEs in order to
14 effectuate the purposes of this article V. The DSBO director may seek input and advice from
15 appropriate industry sources as to appropriate aspects of work performance, equipment and staffing
16 in these industry areas in which certification is being sought.

17 (b) *Eligibility and application procedures.* Only applicant business enterprises who meet the
18 applicable certification criteria may participate as MWBEs or SBEs in the programs established
19 under this article V. The certification criteria, requirements, and application procedures contained in
20 sections 28-35 and 28-53 through 28-56 of this Code will apply to the certification, renewal of
21 certification, decertification, and graduation of MWBEs under this article V. The certification criteria,
22 requirements, and application procedures contained in sections 28-205 and 28-206 of this Code will
23 apply to the certification, renewal of certification, decertification, and graduation of SBEs under this
24 article V.

25 (c) No applicant business enterprise shall be certified as an MWBE or SBE, and following
26 certification of an MWBE or SBE, no certification shall be renewed if on the effective date of the
27 application or renewal the applicant business enterprise, the MWBE or SBE (combined with all
28 affiliates) has achieved a size standard exceeding one hundred (100) percent of the applicable size
29 standards established by the U.S. Small Business Administration ("SBA") at C.F.R. § 121.201, as
30 amended, or successor SBA regulation or classification system, which are incorporated herein by
31 reference. The size standard is based on annual receipts averaged over the three (3) preceding

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

7 **Sec. 28-123. - Definitions.**

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

10 (1) *Affiliate*, for purposes of this article V, will have the meaning set forth in section 28-35(1)
11 and the meaning set forth in section 28-204(1), as applicable.

12 (2) *Annual goal* means the targeted level for the aspirational goal established by the city for
13 the annual aggregate participation of MWBEs in city contracts and city purchase orders.

14 (3) *Applicant business enterprise* means a business enterprise seeking to be certified as a
15 minority, woman, or small business enterprise, as appropriate, to provide goods or services under
16 this article V.

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

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

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

27 (7) *Business enterprise* means an individual, sole proprietorship, corporation, limited liability
28 company, partnership, limited partnership, limited liability limited partnership, joint stock company,
29 joint venture, professional association or any other legal entity operated for profit that is properly
30 licensed or registered, as applicable, owned, and controlled by persons who are citizens of the

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

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

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

9 (10) *City contract* or *city purchase order* means any city contract, purchase order, or master
10 purchase order for the acquisition of goods or services authorized by the Charter, Municipal Code,
11 and executive orders of the city, including, but not limited to, contracts and purchase orders awarded
12 by a formal or informal bidding procedure or competitive selection process, but will not include a
13 contract or purchase order excluded under section 28-118 of this Code or a contract or purchase
14 order for professional services that are not services. City contract or city purchase order shall include
15 the acquisition of goods or services by the city through other contracts and purchase orders ancillary
16 to cooperative agreements or understandings with other public and private agencies for the
17 maintenance, repair, management, or operation of public facilities, park and recreational facilities,
18 museums, zoological and other gardens, collections of natural history, and observatories or for the
19 provision of public services, programs, or activities by public or private agencies at public facilities,
20 park and recreational facilities, museums, zoological and other gardens, collections of natural
21 history, and observatories.

22 (11) *Commercially useful function* means responsibility for the provision of goods or a
23 distinct element of services under a contract or purchase order that is carried out by a business
24 enterprise actually performing, maintaining control, managing, and supervising the goods or services
25 provided. In determining whether a firm is performing or has performed a commercially useful
26 function, the DSBO will analyze whether the firm is performing functions set forth in this definition
27 and this ordinance including but not limited to responsibility for, with respect to materials and supplies
28 used for the contract work; negotiating price; determining quantity and quality; ordering materials,
29 supplies or equipment; performing installation where applicable; and paying for materials, supplies
30 or equipment. To determine whether a firm is performing a commercially useful function, the DSBO
31 will evaluate the amount of work contracted, industry practices, the amount paid to the firm in

1 proportion to the work actually performed, credit claimed toward goal achievement (if applicable),
2 and other relevant factors. Commercially useful function is assessed for purposes of determining
3 participation on a contract, not for determination of certification eligibility.

4 (12) *Conduit* means an MWBE or SBE that knowingly agrees to pass all or part of the goods
5 or services for which it is listed for participation, and is scheduled to perform or supply on a city
6 contract or purchase order to a business entity that is not an MWBE or SBE, or does not carry out
7 the responsibilities required for MWBE or SBE participation by actually performing, managing,
8 controlling and supervising the work involved. In this type of relationship, the MWBE or SBE has not
9 performed a commercially useful function and the arranged agreement between the two (2) parties
10 is not consistent with standard industry practice. This arrangement does not meet the commercially
11 useful function requirement, and therefore the participation of the MWBE or SBE does not count
12 toward the participation goal or annual goal, as appropriate. Conduit may also be referred to as a
13 passthrough.

14 (13) *Contractor, consultant or vendor* means a business enterprise that enters into a city
15 contract or purchase order for acquisition of goods or performance of services pursuant to the
16 Charter, Municipal Code, and executive orders of the city. The terms contractor, consultant or vendor
17 include prime contractors and general contractors.

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

19 (15) *Defined procurement pool* means city bid opportunities for goods or services for which
20 the estimated cost exceeds fifty thousand dollars (\$50,000.00) but does not exceed nine hundred
21 ninety-nine thousand nine hundred ninety-nine dollars and ninety-nine cents (\$999,999.99).

22 (16) *Department head* means the manager or director of the city department, user
23 department or agency or the elected official initiating or requesting the city enter into contract(s) for
24 goods or services utilizing MWBE or SBE participation, or such person's designee.

25 (17) *Distributor* has the same definition as the term "supplier" as set forth in section 28-
26 123(46) below.

27 (18) *DSBO* or the DSBO means the division of small business opportunity.

28 (19) *DSBO director* means the director of the division of small business opportunity or
29 successor agency, or such director's designee.

30 (20) *DSBO required forms* means the certifications, letters of intent, commitment forms and
31 other forms and documents defined by ordinance and the rules and regulations, referenced in the

1 applicable procurement documents, and required by the DSBO to confirm and evaluate a bidder's
2 or proposer's commitment to utilization of certified firms and other DSBO program requirements. No
3 authorized alteration or modification of a DSBO required form is permitted. The DSBO reserves the
4 right to reject altered or modified forms.

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

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

10 (23) [Reserved]

11 (24) *Good faith efforts* means substantive and meaningful good faith actions undertaken by
12 a contractor, consultant, or vendor to achieve the MWBE participation goal as defined in more detail
13 in section 28-128 of this article V.

14 (25) *Goods* means tangible, physical items that may or may not be fungible and that are
15 not a service. The term "goods" includes "supplies" as such term is set forth in subsection 20-61(i)
16 of the Denver Revised Municipal. Goods shall not include those good expressly excluded under
17 section 28-118. The DSBO will establish, in consultation with the purchasing division or user
18 departments, subcategories of goods corresponding to the codes set forth in the North American
19 Industrial Classification Standard (NAICS) codes system, or successor classification system.

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

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

1 conditions of the relationships between the joint venturers and their relationship and responsibility to
2 the contract or purchase order.

3 (28) *Letter of intent* means a DSBO required form which shall be a written communication
4 from a bidder or proposer to the city with respect to a contract or purchase order evidencing an
5 understanding between an MWBE and the bidder or proposer that, if the bidder or proposer is
6 selected, then such MWBE has or will enter into a contractual relationship with the bidder or proposer
7 on such contract or purchase order or that such bidder or proposer will self-perform as an MWBE on
8 such contract or purchase order.

9 (29) *Manufacturer* means a business enterprise that operates or maintains a factory or
10 establishment that produces or substantially alters on the premises the materials, supplies
11 equipment, or goods provided to a vendor, contractor, or consultant, or to subcontractors,
12 subconsultants, subvendors, suppliers, brokers, manufacturer's representatives, or distributors on a
13 city contract or purchase order in connection with a city contract or purchase order. For
14 manufacturers, one hundred (100) percent of the value the materials, supplies or equipment provided
15 by an MWBE under a contract or purchase order shall count toward MWBE participation

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

22 (31) *Manager* means the manager of the department of general services, or such
23 manager's designee.

24 (32) *Minority business enterprise* or *MBE* for purposes of this article V will have the meaning
25 set forth in section 28-35(36) of this Code. An MBE or WBE certified with the DSBO in accordance
26 with ordinance and the applicable rules and regulations shall be referred to as an "MWBE".

27 (33) *On-call procurement contracts* means contracts for goods or services that are awarded
28 in accordance with section 20-68 of this Code or that are procured and awarded without a pre-
29 determined specific quantity in the case of goods or scope of work in the case of services. Once a
30 specific quantity or scope of work is identified, individual work orders or task orders are authorized,

1 and the contractor, consultant, or vendor proceeds to provide the goods or services under the
2 individual work order or task order.

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

9 (35) *Participation goal* means the specific MWBE goal established for a particular city
10 contract or purchase order for services based upon the availability of MWBEs in the statement of
11 work to be provided in the contract.

12 (36) *Proposal* means an offer to provide goods or perform services under a city contract or
13 purchase order with the city in response a competitive selection process.

14 (37) *Proposer* means a business enterprise that submits a proposal on a city contract or
15 purchase order for goods or services that utilizes a competitive selection process.

16 (38) *Purchasing director* means the director of the division of purchasing of the department
17 of general services or successor agency, or such director's designee.

18 (39) *Purchase order* or *supplier contract* means an approved document to a bidder or
19 proposer formalizing all the terms and conditions of a proposed transaction, such as a description of
20 the requested items, delivery schedule, terms of payment, and transportation.

21 (40) *Qualified*, with respect to good faith efforts in this article V, means that a business
22 enterprise has the financial ability, expertise, skill, experience, and access to the necessary staff,
23 facilities and equipment to complete contract(s) or subcontract(s) that it may undertake on projects.
24 The city makes no representations as to the qualifications of any applicant business enterprise,
25 MWBE or SBE.

26 (41) *Request for proposal* means a written request to prospective vendors, contractors, or
27 consultants to submit a proposal to provide goods or perform services where an award is made in
28 consideration of best value and not necessarily lowest price in response to a selection procedure
29 conducted by user departments as authorized by the Charter, ordinances, or executive orders of the
30 city.

1 (42) *Services* means all work offered for public or private use that are purchased by user
2 departments under authority of the Charter, Municipal Code, and executive orders of the city and
3 that does not consist primarily of goods. This definition does not include services expressly excluded
4 under section 28-118. Services may also include work that includes goods but is primarily for
5 services or professional or technical services that are not covered services. The DSBO will establish,
6 in consultation with the purchasing division or user departments, subcategories of services
7 corresponding to the codes set forth in the North American Industrial Classification Standard
8 (NAICS) codes system, or successor classification system.

9 (43) *Small business enterprise* or *SBE* will have the meaning set forth in subsection 28-
10 204(33) of this Code.

11 (44) *Solicitation* means a written bid or selection procedure to procure goods or services.

12 (45) *Subcontractor, subconsultant, or subvendor* means a business enterprise that either:
13 (a) Directly contracts with a contractor, consultant, or vendor to provide goods pursuant to a city
14 contract or purchase order; or (b) Directly contracts with subcontractors, subconsultants, or
15 subvendors under such contractors, consultants, or vendors on a city contract or purchase order,
16 and which business enterprise will provide goods or services under agreements with the vendor,
17 contractor, or consultant, or with other subcontractors, subconsultants, or subvendors under such
18 contractor, consultant, or vendor.

19 (46) *Supplier* means a business enterprise that will provide goods, supplies or equipment
20 on a city contract or purchase order under agreements with a vendor, contractor, or consultant, or
21 with subcontractors, subconsultants, or subvendors under such a vendor, contractor, or consultant.
22 Participation goal shall be counted in accordance with the function performed by the MWBE supplier
23 under a contract and determined on a per-contract or per-project basis.

24 (47) *Woman business enterprise* or *WBE* for purposes of this article V will have the meaning
25 set forth in subsection 28-35(55) of this Code. An MBE or WBE certified with the DSBO in
26 accordance with ordinance and the applicable rules and regulations shall be referred to as an
27 MWBE.

28 (48) *User department* means the city department, agency, board, commission, authority,
29 officer, or elected official, excluding the board of water commissioners but including without limitation
30 the county courts, library commission, civil service commission, career service authority (office of
31 human resources), auditor, city council, and clerk and recorder, initiating or requesting a city contract

1 or city purchase order for the acquisition of goods or services, utilizing MWBE or SBE participation,
2 under authority of the Charter, Municipal Code, or executive orders of the city.

3 (49) *Utilization plan* means a required plan, prepared by or on behalf of the bidder or
4 proposer as required by the DSBO and set forth in the applicable contract procurement documents
5 that describes the bidder's or proposer's approach to satisfying the small, minority, and women-
6 owned business enterprise requirements including but not limited to the participation goal.

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

8 (a) Of the total dollars spent annually for goods and services, the DSBO director, in
9 consultation with the purchasing director and user departments shall establish an aspirational annual
10 goal for MWBE utilization based on the dollars to be spent for goods and services. The DSBO will
11 establish, in consultation with the purchasing division and user departments, subcategories of goods
12 and services corresponding to the codes set forth in the North American Industrial Classification
13 Standard (NAICS) codes system, or successor classification system. The DSBO director may also
14 consult with user departments in establishing the annual goal.

15 (b) The DSBO director, in consultation with the purchasing director and user departments,
16 as a basis for the establishment of the annual goal shall annually determine the present availability
17 of all MWBEs providing goods or performing services in the relevant market area and recommend
18 the annual goal to the city council for its review. The DSBO shall conduct such inquiries, studies and
19 hearings, and utilize such information and assistance from such persons, consultants, entities or
20 organizations, within or without the city, including the purchasing director and city department heads
21 as the DSBO director at his or her sole discretion deems necessary to make such annual
22 recommendation.

23 (c) The city council shall review the annual goal recommended by the DSBO director, may
24 undertake such additional inquiries as it deems appropriate, and may approve, disapprove or modify
25 the recommended annual goal by ordinance in each succeeding year. Until the city council
26 approves, disapproves or modifies the annual goal in a succeeding year, the prior annual goal
27 established in this section shall continue in effect.

28 (d) Participation shall count toward the annual goal, to the extent provided in section 28-
29 129, concerning individual participation goals; and section 28-140 concerning defined procurement
30 pool.

1 (e) The DSBO director, in the best interests of the city, may waive a representative sample
2 of city contracts or purchase orders for goods or services to be bid or otherwise selected without a
3 goal, in order to determine MWBE utilization on such contracts in the absence of such a goal. A
4 written justification for such a waiver will be included in the DSBO's annual report. The DSBO director
5 shall analyze, based upon such representative sample and other contracts that may otherwise be
6 let with a participation goal of zero percent, to what extent the originally established annual goal has
7 been met without the imposition of participation goals. To the extent ascertainable, this information
8 shall be utilized in the setting of the annual goal.

9 **Sec. 28-125. - [Reserved].**

10 **Sec. 28-126. - City participation goals—Contracts or purchase orders of \$250,000.00 or more**
11 **for services.**

12 (a) The DSBO director, in consultation with the purchasing director or department head, as
13 appropriate, shall assign for each purchase of services with an estimated cost of two hundred fifty
14 thousand dollars (\$250,000.00) or more a unitary participation goal for MWBE utilization based upon
15 a percentage of the dollar value of all services to be provided on such contract and, as set out below,
16 the availability of MWBEs to perform the anticipated work and the city's progress toward meeting the
17 annual goal; provided that, the DSBO director may in consultation with the purchasing division or
18 user department waive the application of a participation goal for a given contract or purchase order.
19 The DSBO director will provide a written justification to the purchasing director or department head,
20 as appropriate, for each waiver granted. The goal percentage assigned by the DSBO director to
21 each such contract or purchase order may vary from contract to contract consistent with meeting the
22 appropriate overall annual goals, when established. The DSBO shall establish a methodology for
23 the setting of the participation goal through rules and regulations. Such methodology shall consider
24 the following factors:

25 (1) To the extent applicable, the effect on annual goal achievement of the varying
26 levels of availability of MWBEs among services industry groupings associated with individual
27 procurements and the effect on annual goal achievement of the participation goal compliance being
28 achieved through good faith efforts resulting in non-utilization of MWBEs.

29 (2) The reasonably known availability of MWBEs in specific industry groupings that
30 are associated with individual procurements.

1 (3) For on-call contracts, and other contracts that may be procured and awarded
2 without a pre-determined specific project or scope of work, the goal may be set on a per-project
3 basis, per-task-order basis or per-work-order basis once a specific scope of work is identified,
4 individual projects are defined, or individual work orders or task orders are authorized, and the
5 contractor can proceed to complete the work for the individual project, task order or work order
6 consistent with the methodology set forth in this section 28-126 and the rules and regulations. The
7 determination of whether the goal is set on the contract, task order or work order shall be made in
8 cooperation between the DSBO and the purchasing director or user department

9 (4) The DSBO and the purchasing department, or the DSBO and the user
10 department, will assess, in the best interest of the city, whether the service may be subject to an
11 MWBE goal under this section 28-126, or the SBE defined pool under section 28-141.

12 (b) The following contributions shall count toward the participation goal as more specifically
13 provided below: portions of services undertaken by MWBEs as vendors, contractors, consultants,
14 subcontractors, subconsultants, suppliers, manufacturers, manufacturer's representatives, brokers,
15 packagers, joint venturers, or distributors.

16 **Sec. 28-127. - Participation goals—Compliance with assigned goal – contracts or purchase**
17 **orders for services.**

18 (a) The bidding or competitive selection instructions for each procurement of services shall
19 require that all bidders or proposers seeking to contract with the city shall address the participation
20 goal through one (1) or more of the following subsections, or by demonstrating good faith efforts as
21 set out in section 28-128:

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

26 (2) If the bidder or proposer utilizes MWBEs as subcontractors, suppliers,
27 manufacturers, manufacturer's representatives, brokers, distributors, or packagers, the value of the
28 commercially useful function to be performed by such MWBEs, shall count to the extent provided in
29 section 28-129 toward satisfaction of the participation goal; or

30 (3) If the bidder or proposer submits a joint venture agreement that includes one (1)
31 or more MWBEs, the value of the commercially useful function to be performed by the MWBEs in

1 the joint venture as the distinct, clearly defined portion of the work of the joint venture agreement
2 that the MWBE performs with its own forces or for which it is separately at risk shall count to the
3 extent provided in section 28-129 toward satisfaction of the participation goal. The joint venture is
4 subject to review and approval by the DSBO director and the user department. The joint venture
5 agreement shall be provided to the DSBO director at least ten (10) days prior to the date of bid or
6 proposal opening or as set forth in the bidding or selection instructions. Joint venturer participation
7 will count toward the satisfaction of the participation goal upon confirmation by the DSBO director of
8 the utilization in the joint venture of joint management and full integration of work forces by the joint
9 venturers.

10 (b) For on-call contracts and purchase orders or other contracts or purchase orders that
11 may be procured and awarded without a pre-determined specific project or scope of work awarded
12 in accordance with section 20-68 of this Code, and for any other on-call procurement contracts
13 procured by user departments, the director in consultation with the purchasing director or department
14 head may determine to address the participation goal by means of a utilization plan for utilization of
15 MWBEs on such contract or purchase order, or for alternative demonstration of good faith efforts by
16 the bidder or proposer. In that event, the purchasing director or department head shall request the
17 DSBO director to approve the utilization of such a utilization plan, consistent with the scope and
18 intent of this article V. The development, scope and utilization of such utilization plans shall be
19 addressed in rules and regulations promulgated by the DSBO director.

20 **Sec. 28-128. - Participation goals—Good faith efforts – contracts or purchase orders for**
21 **services.**

22 (a) If the bidder or proposer has not fully met the participation goal as provided in section
23 28-127, then it shall demonstrate that it has made good faith efforts to meet such goal. The bidder
24 or proposer shall submit with its bid or proposal a detailed statement of its good faith efforts to meet
25 the participation goal set by the DSBO director. This statement shall address each of the items in
26 subsection (b) and any additional criteria that the DSBO director may establish by rule or regulation
27 consistent with the purposes of this article V. Good faith efforts must be demonstrated to be
28 meaningful and not merely for formalistic compliance with this article V. The scope and substance
29 of the efforts will be considered in determining whether the bidder or proposer has achieved a good
30 faith effort.

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

6 (1) The bidder or proposer must solicit through all reasonable and available means
7 the interest of all MWBE certified in the services category set forth in the bid or proposal instructions.
8 The bidder or proposer must solicit the interest of such MWBEs within sufficient time, prior to the
9 date bids or proposals are submitted to the purchasing division or user department, to allow such
10 MWBEs to respond to the solicitation. The bidder or proposer must determine with certainty if the
11 MWBEs are interested by demonstrating appropriate steps to follow up initial solicitations.

12 (2) The bidder or proposer must select portions of the services to be performed by
13 MWBEs in order to increase the likelihood that the participation goal will be achieved. This includes,
14 where appropriate, breaking out contract work items into economically feasible units to facilitate
15 MWBE participation as subcontractors or joint venturers, and for bidder or proposer self-performed
16 work, as suppliers, manufacturers, manufacturer's representatives, brokers, distributors, or
17 packagers, all reasonably consistent with industry practice, even when the bidder or proposer would
18 otherwise prefer to perform these work items with its own forces. The bidder or proposer must identify
19 what portions of the contract will be self-performed and what portions of the contract will be opened
20 to solicitation of bids, proposals and quotes from MWBEs. All portions of the contract not self-
21 performed must be solicited for MWBEs participation. The ability or desire of a bidder or proposer to
22 perform the work of a contract with its own forces does not relieve the bidder or proposer of the
23 responsibility to meet the participation goal or demonstrate good faith efforts to do so.

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

28 (4) The bidder or proposer must negotiate in good faith with interested MWBEs and
29 provide written documentation of such negotiation with each such MWBE.

30 (5) For each MWBE that contacted the bidder or proposer or that the bidder or
31 proposer contacted or attempted to subcontract or joint venture with, consistent with industry

1 practice, the bidder or proposer must supply a statement giving the reasons why the bidder or
2 proposer and the MWBE did not succeed in negotiating a subcontracting, supplier, manufacturer,
3 manufacturer's representative, broker, distributor, packager, or joint venture agreement, as
4 applicable.

5 (6) The bidder or proposer must provide verification that it rejected each non-utilized
6 MWBE because the MWBE did not submit the lowest bid or it was not qualified. Such verification
7 shall include a verified statement of the amounts of all bids received from potential or utilized
8 subcontractors, suppliers, manufacturers, manufacturer's representatives, brokers, distributors,
9 packagers, or joint venturers on the contract, whether or not they are MWBEs. In making such a
10 determination of not being qualified, the bidder or proposer shall be guided by the definition of
11 qualified in subsection 28-123(40). For each MWBE found not to be qualified by the bidder or
12 proposer, the verification shall include a statement giving the bidder's or proposer's reasons for its
13 conclusion. A bidder's or proposer's industry standing or group memberships may not be the cause
14 of rejection of an MWBE. A bidder or proposer may not reject an MWBE as being unqualified without
15 sound reasons based on a reasonably thorough investigation and assessment of the MWBEs
16 capabilities and expertise.

17 (7) If requested by a solicited MWBE, the bidder or proposer must make reasonable
18 efforts to assist, consistent with commercially useful function requirements, interested MWBEs in
19 obtaining bonding, lines of credit, alternative payment or performance guarantees, or insurance as
20 required by the city or by the bidder or proposer, provided that the bidder or proposer need not
21 provide financial assistance toward this effort.

22 (8) If requested by a solicited MWBE, the bidder or proposer must make
23 reasonable efforts, consistent with commercially useful function requirements, to assist interested
24 MWBEs in obtaining necessary and competitively priced equipment, supplies, materials, or related
25 assistance or services for performance under the contract or purchase order, provided that the
26 bidder or proposer need not provide financial assistance toward this effort.

27 (9) The bidder or proposer must use the DSBO MWBE directories to identify, recruit,
28 and place MWBEs.

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

1 (d) These factors shall also apply to determination of good faith efforts and any instance
2 where the participation goal is otherwise not met. Proposers or contractors are required to make
3 continuous good faith efforts throughout the contract term and document these efforts. Purchasing
4 division or user departments will notify the DSBO of impending contract closeout to allow the DSBO
5 to request remaining good faith efforts and other required documents from the contractor. Contractor
6 may remain subject to the requirements including potential violations of this article III and its divisions
7 after contract closeout.

8 **Sec. 28-129. - Participation goals—Identification of participating MWBEs – contracts or**
9 **purchase orders for services.**

10 (a) At the time a bid or proposal is submitted to the city, the bidder or proposer shall provide
11 to the city a DSBO required forms, which may include a letter of intent as prescribed by the DSBO,
12 of all MWBEs that are being utilized toward the satisfaction of the participation goal whether as a
13 self-performing bidder or proposer or as a subcontractor, supplier, manufacturer, manufacturer's
14 representative, broker, distributor, packager, or member of a joint venture. The DSBO required forms
15 shall specify:

- 16 (1) The name and contact information for the MWBE;
- 17 (2) The dollar value and description of the commercially useful function to be
18 performed by the MWBE, consistent with subsection (d). In the case of utilization of a supplier,
19 manufacturer, manufacturer's representative, broker, distributor, or packager, the appropriate
20 percentage of dollar value attributable to such MWBE as a commercially useful function shall be
21 calculated with all underlying data supplied. If the bidder or proposer provides a dollar value amount,
22 then both the dollar value and percentage must be listed in the bid or proposal;
- 23 (3) The designation of each participating MWBE's applicable scope of work intended
24 to count toward the participation goal. The MWBE firm must be certified in the applicable scope of
25 work in order for their participation to count toward the goal;
- 26 (4) An adequate statement from the bidder or proposer that the dollar amount of
27 services to be performed or provided by such MWBEs on the contract or purchase order, other than
28 that self-performed by the bidder or proposer, was furnished to the bidder or proposer and agreed
29 upon prior to bid or proposal opening; and
- 30 (5) An adequate statement from the bidder or proposer that it understands that a
31 letter of intent, including, but not limited to, values provided by self-performing bidders or proposers,

1 joint venturers, teaming agreement participants, subcontractors, suppliers, manufacturers,
2 manufacturer's representatives, and brokers, expressed in dollar values and as a percentage of the
3 overall work, must be submitted to the director for each MWBE listed, including a self-performing
4 bidder or proposer, at the time bids are opened by the city or by the date of proposal in the case of
5 a competitive selection process, or bid selection made by a private owner.

6 (b) Only that level of MWBE utilization demonstrated in accordance with this section at the
7 time of bid or proposal submission may be counted in satisfaction of the participation goal, except
8 as otherwise set out in sections 28-132 and 28-133. Bidders or proposers must submit an executed
9 letter of intent for each MWBE listed by the bidder or proposer, including a self-performing bidder or
10 proposer, with its bid or proposal. Failure to do so will render the bid or proposal nonresponsive.

11 (c) For on-call procurement contracts, and other contracts that may be procured and
12 awarded without a pre-determined specific project or scope of work, the director in consultation with
13 the purchasing director or department head may determine to use a utilization plan, pursuant to
14 section 28-127(b). In such event, the bidder or proposer shall not be required to demonstrate MWBE
15 utilization at the time of bid opening, but will be required to develop an approved utilization plan to
16 demonstrate compliance with the requirements of this article V. For on-call procurement contracts
17 that are not determined to use a utilization plan and that do not delineate the dollar amount of specific
18 on-call projects, the bidder or proposer need list only the anticipated percentage of participation of
19 MWBEs rather than specific dollar amounts, as required in subsection (a)(2), above.

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

29 (e) Any agreement between a bidder or proposer and an MWBE in which the bidder or
30 proposer requires that the MWBE not provide subcontracting quotations to other bidders or
31 proposers is prohibited and shall render a bidder's or proposer's bid or proposal nonresponsive.

1 **Sec. 28-130. - Participation goals—Responsive and nonresponsive bids – contracts or**
2 **purchase orders for services.**

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

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

13 (c) *Statement of good faith efforts—Informal meeting.* If the DSBO director finds
14 inadequacies in a bidder or proposer's demonstration of good faith efforts, as such good faith efforts
15 are described in section 28-128, the DSBO director will provide written notice of such inadequacies
16 to the bidder or proposer prior to notifying the purchasing director or department head of bid or
17 proposal responsiveness. Within two (2) business days from the date that the city notifies the bidder
18 or proposer of the inadequacies of its demonstration of good faith efforts, the bidder or proposer may
19 request an informal meeting with the DSBO director. Such informal meeting shall be scheduled by
20 the DSBO director. All deficiencies in good faith efforts shall be explained to the bidder or proposer
21 at such informal meeting. Within twenty-four (24) hours after the informal meeting, the bidder or
22 proposer shall be allowed to submit additional information or to clarify the original good faith efforts.
23 The DSBO director will at no time, however, allow additional subcontractors, joint venturers,
24 suppliers, manufacturers, manufacturer's representatives, brokers, packagers, or distributors that
25 may later be added to the contract or to the original MWBE participation submitted in the bid or
26 proposal to be counted toward meeting of the participation goal. After this informal meeting, the
27 DSBO director will:

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

1 **Sec. 28-131. - Participation goals—Time periods for documentation submitted to the city –**
2 **contracts or purchase orders for services.**

3 The documentation of good faith efforts and all DSBO required forms applicable to a project
4 including letters of intent of a bidder or proposer and, as applicable, its subcontractors,
5 subconsultants, subvendors, joint venturers, suppliers, manufacturers, manufacturer's
6 representatives, brokers, packagers, or distributors, of letters of intent to perform, shall be submitted
7 to the DSBO director at the time of submission of the bid or proposal. During the term of a contract
8 for services, the prime contractor is responsible for updating, or providing new, DSBO required forms
9 as applicable any time a new MWBE or SBE subcontractor is added to a contract or project. The
10 prime contractor must also provide copies of the MWBE or SBE certification letters to the DSBO for
11 new MWBEs or SBE subcontractors added to the contract or project.

12 **Sec. 28-132. - Participation goals—Compliance with participation goal during performance**
13 **on contracts or purchase orders for services.**

14 (a) Upon award of a city contract or purchase order for services that includes a participation
15 goal, the participation goal becomes a covenant of performance by the vendor, contractor or
16 consultant in favor of the city.

17 (b) All contracts or purchase orders subject to this article V shall be reviewed by the DSBO
18 for compliance with the provisions hereof. This review shall examine, but not be limited to, whether
19 the MWBE participation dollar amounts and percentages and achieved participation goal levels upon
20 which the contract or purchase order was awarded are maintained over the term or duration of the
21 contract or purchase order.

22 (c) For any contract or purchase order for which the DSBO director has set a participation
23 goal, it shall be an ongoing, affirmative obligation of the vendor, contractor or consultant on such
24 contract to maintain, at a minimum, compliance with provisions of this article V as well as the
25 originally achieved level of MWBE participation upon which the contract or purchase order was
26 awarded, for the duration of the contract or purchase order, unless the city initiates a material
27 alteration to the services affecting MWBEs performing on the contract or purchase order through a
28 contract amendment, or as otherwise described in section 28-133.

29 (d) The DSBO shall evaluate the utilization of MWBEs to determine whether such MWBEs
30 are performing a commercially useful function. The evaluation shall examine the amount of work
31 subcontracted, industry practice and other relevant factors. The amount of MWBE participation

1 credited toward a participation goal shall be based upon an analysis of the specific duties performed
2 by the MWBE, and the extent to which such duties constitute a commercially useful function. The
3 DSBO director may undertake such inquiries or studies, engage such employees or retain such
4 consultants as may be necessary to assist the director in rendering these determinations. In order
5 for the DSBO to accurately track utilization of MWBEs, MWBEs shall submit regularly the following
6 information in a method prescribed by the DSBO. The submitted information may include but is not
7 limited to:

8 (1) Prime contractor information (name, address, contact person, telephone and
9 email address);

10 (2) MBWBE subcontractor information for any tiers (name, address, contact person,
11 telephone, email address, and certification number);

12 (3) Contract information and City contract control number (report for month of,
13 contract name and date executed, original dollar amount, current dollar amount if changed, and all
14 change orders);

15 (4) Subcontract agreement or purchase order information (copy of the document,
16 original amount, current amount if changed, scope of work, and change orders);

17 (5) Payment received in current month;

18 (6) Total payments received;

19 (7) Percent of work completed;

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

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

23 (e) The work performed by an MWBE not providing a commercially useful function, or
24 functioning as a conduit, shall not count toward meeting the participation goal.

25 **Sec. 28-133. - Participation goals—Amendments and modifications to contracts for services**
26 **and purchase orders.**

27 (a) Vendors, contractors, and consultants on contracts and purchase orders for services
28 shall have a continuing obligation to immediately inform the DSBO in writing of any agreed upon
29 increase or decrease in services, as approved by the purchasing division or user department, to be
30 provided under such contract or purchase order, upon any of the bases discussed in this section 28-

1 133, regardless of whether such increase or decrease in services has been reduced to writing at the
2 time of notification.

3 (b) Any increase in the services to be provided under a contract or purchase order for
4 services, whether by amendment or otherwise, which increases the dollar value of the contract or
5 purchase order, whether or not such change, is within the scope of services designated to be
6 provided by an MWBE at the time of contract award, shall be immediately submitted to the DSBO.
7 The contractor is responsible for obtaining purchasing division or user department approval of any
8 such change. Those amendments or other contract modifications that involve a change in services
9 that cannot be performed by existing subcontractors, subconsultants, subvendors, joint venturers,
10 suppliers, manufacturer, manufacturer's representative, brokers, distributors, or packagers or by the
11 vendor, contractor, or consultant, shall be subject to a goal for MWBEs equal to the original goal on
12 the contract which were included in the bid or proposal requirements. The original participation goal
13 percentage shall be applied to the new, increased dollar amount of the contract. The vendor,
14 contractor or consultant shall satisfy such goal as respects such changed services by soliciting new
15 MWBEs in accordance with section 28-127 as applicable, or the vendor, contractor or consultant
16 must good faith efforts set out in sections 28-128, 28-136, or 28-137. The vendor, contractor, or
17 consultant shall supply to the DSBO director and the purchasing division or user department the
18 documentation described in sections 28-128, 28-136 or 28-137 with respect to the increased dollar
19 value of the contract or purchase order.

20 **Sec. 28-134. - Participation goals—Payments to subcontractors, subconsultants, joint**
21 **venturers, suppliers, manufacturers, manufacturer's representatives and brokers – contracts**
22 **for services.**

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

26 **Sec. 28-135 - Participation goals — Contractor prompt payment – contracts for services.**

27 (a) Each contractor on a city contract with certified MWBEs as subcontractors shall pay
28 the respective subcontractors any invoiced and undisputed amounts for accepted and completed
29 work within thirty-five (35) days of the contractor's receipt of the subcontractor's invoice. Payment to
30 the subcontractor shall be timely made as required under this section regardless of whether the
31 contractor has been paid for the same work or payment period. For the purposes of the section 28-

1 135, any subcontractor, regardless of whether that subcontractor holds a city contract, may be
2 required to make payments to MWBEs as set forth in this section.

3 (b) Contractor is required to provide written notice to its subcontractor of either approval
4 or rejection of the subcontractor's invoice within ten (10) days of receipt. If the invoice is rejected,
5 the written notice to the subcontractor shall include the deficiencies or disputes regarding the invoice.

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

9 (d) The payment requirements under this section shall apply to MWBEs utilized for
10 satisfaction of the goal regardless of tier.

11 (e) This section 28-135 shall apply only to contracts in the amount of one million dollars
12 (\$1,000,000.00) or more based on the original contract amount before amendments or changes.

13 **Sec. 28-136. - Participation goals — Participation modification; substitution; termination of**
14 **MWBE subcontractors – contracts for services.**

15 (a) A contractor that has been awarded a contract based upon a given level of MWBE
16 participation or has duly added an additional or substitute MWBE subcontractor to the contract in
17 accordance with this division, may not substitute or terminate an MWBE subcontractor without the
18 DSBO's and purchasing division's or user department's prior written concurrence as set forth herein.
19 This includes, but is not limited to, instances in which a contractor seeks to perform work with its own
20 forces or those of an affiliate, a non-MWBE firm, or with another MWBE as a substitute for an
21 originally designated for an MWBE subcontractor.

22 (b) In the event that a contractor or consultant must substitute or terminate an MWBE
23 subcontractor, subconsultant, joint venturer, supplier, manufacturer, manufacturer's representative
24 or broker, except in cases where directed by the city, the following must be completed:

25 (1) The contractor must provide notice in writing to the MWBE subcontractor, with
26 a copy to the DSBO and the purchasing division or user department, of its intent to request to
27 terminate or substitute, and the reason for the request.

28 (2) The contractor must give the MWBE subcontractor at least five (5) business
29 days to respond to the contractor's notice.

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

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

6 (i) The MWBE subcontractor fails or refuses to execute a written contract;

7 (ii) The MWBE subcontractor fails or refuses to perform the work consistent with
8 normal industry standards; provided, however, that good cause does not exist where the failure or
9 refusal of the MWBE subcontractor to perform its work results from the bad faith or discriminatory
10 action of the contractor;

11 (iii) The MWBE subcontractor fails or refuses to meet the contractor's
12 reasonable, nondiscriminatory bond requirements or insurance requirements;

13 (iv) The MWBE subcontractor becomes bankrupt, insolvent, or exhibits credit
14 unworthiness;

15 (v) The MWBE subcontractor is or becomes ineligible to work on city projects
16 because of suspension and debarment;

17 (vi) The non-city owner or contractor has determined that the MWBE
18 subcontractor is not a responsible contractor;

19 (vii) The MWBE subcontractor voluntarily withdraws from the project and
20 provides written notice of its withdrawal;

21 (viii) The MWBE's work cannot be counted toward participation in accordance
22 with applicable requirements;

23 (ix) An MWBE owner dies or becomes disabled resulting in inability of the
24 MWBE to perform or complete its work on the contract; or

25 (x) Other documented good cause that DSBO determines requires termination
26 of the MWBE subcontractor.

27 (5) The MWBE subcontractor shall be provided the opportunity to advise the DSBO,
28 purchasing division, user department and the contractor of the reasons, if any, why it objects to the
29 proposed termination, and why the DSBO should not concur with the contractor's action. If required
30 in a particular case as a matter of public necessity (e.g., safety), the DSBO may provide a response
31 period shorter than five (5) business days.

1 (6) In addition to substitutions or terminations occurring during contract
2 performance, the provisions of this section may apply to reductions in scope of work or substitutions
3 of MWBE firms by bidders or proposer prior to contract execution.

4 (c) If the DSBO and the purchasing division or user department concurs with the
5 contractor's request to substitute, terminate or reduce the scope of work of the MWBE subcontractor,
6 the contractor must comply with good faith efforts requirements to replace the terminated SBE
7 subcontractor with another MWBE firm certified to perform the same scope of work.

8 (d) If a contractor substitutes or terminates the MWBE subcontractor or reduces the scope
9 of work of the MWBE subcontractor, without first complying with this section 28-136, the DSBO may
10 find the contractor in violation of this ordinance and the contractor may be subject to enforcement
11 and sanctions.

12 **Sec. 28-137. - Participation goals—Potential violations – contracts for services.**

13 (a) A vendor, contractor or consultant that has been awarded a city contract or purchase
14 order based upon a given level of MWBE participation shall not, at any time before or during the
15 performance of such contract or purchase order:

16 (1) Fail to in fact utilize an MWBE that was originally listed at bid or proposal opening
17 in order to satisfy the participation goal, and that submitted a timely letter of intent, without
18 substituting another MWBE performing the same commercially useful function and dollar amount, or
19 demonstrating good faith efforts, as defined in subsection (d) hereof, to substitute another MWBE;
20 or

21 (2) Fail to allow an MWBE functioning as a subcontractor, subconsultant, joint
22 venturer, supplier, manufacturer, manufacturer's representative, or broker to perform the
23 commercially useful function, the value of which was originally counted for that MWBE in awarding
24 the contract or purchase order; or

25 (3) Modify or eliminate all or a portion of the services attributable to an MWBE upon
26 which the contract was awarded, unless directed by the city; or

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

1 (5) Retaliate against any MWBE that reports issues to the DSBO or purchasing
2 division or user department;

3 (6) Participate in a conduit relationship with an MWBE scheduled to perform work
4 on the contract or purchase order;

5 (7) Otherwise fail to meet the participation goal without complying with good faith
6 efforts or other requirements; or

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

9 (b) Any action by a vendor, contractor or consultant in violation of subsections (a)(1) through
10 (8) hereof, shall constitute a material breach of the city contract or purchase order that shall entitle
11 the city to exercise all of its rights at law or equity for such material breach, in addition to exercising
12 any of the other sanctions set out in subsection 28-139(c).

13 (c) If, following award of a contract or purchase order, an MWBE has its certification
14 terminated for reasons other than:

15 (1) Expiration from certification;

16 (2) Graduation from certification;

17 (3) Nonperformance of a commercially useful function, the value of which was
18 originally counted for that MWBE, as applicable, when the contract or purchase order was awarded;
19 or

20 (4) The voluntary withdrawal of MWBE participation on the contract or purchase
21 order, such termination of certification or failure to perform a commercially useful function shall not
22 be deemed to affect compliance with the participation goal, and shall not be deemed a breach of the
23 contract or purchase order as long as the vendor, contractor or consultant can demonstrate that
24 such termination or failure did not result from any action or inaction, whether direct or indirect, of or
25 by the vendor, contractor or consultant. In such event, the vendor, contractor, or consultant will
26 substitute another MWBE, performing the same commercially useful function and dollar amount, or
27 will demonstrate good faith efforts to substitute another MWBE, as defined in subsection (d) below.

28 (d) In the event that a vendor, contractor or consultant must add or replace an MWBE
29 subcontractor, subconsultant, joint venturer, supplier, manufacturer, manufacturer's representative,
30 broker or distributor or in the event that a new services are added to the ongoing contract or purchase
31 order, and the vendor, contractor or consultant in such event is in noncompliance with maintenance

1 of the original participation goal upon which the contract or purchase order was awarded, due to
2 failure to utilize additional MWBEs, the vendor, contractor or consultant shall be required to
3 demonstrate good faith efforts in compliance with section 28-128 or 28-136 as applicable. Failure of
4 a vendor, contractor or consultant to show good faith efforts shall render its contract performance in
5 noncompliance with this article V.

6 **Sec. 28-138. - Participation goals—Burden of proof; investigations of compliance.**

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

16 **Sec. 28-139. - Participation goals—Sanctions for failure to comply with article V requirements.**

17 (a) If a vendor, contractor or consultant is found to be in violation of the provisions of article
18 V, to otherwise be in breach of a contract, to perform as or to, utilize MWBEs for a non-commercially
19 useful function or as a conduit, to fail to submit information required in section 28-131, to submit
20 false, misleading, or materially incomplete statements, documentation or records, including, but not
21 limited to, good faith efforts or letters of intent, or to fail to cooperate in an investigation, it shall be
22 subject to sanctions. The city may exercise any or all of its rights contained in the terms and
23 conditions of the contract or purchase order, including, but not limited to, withholding funds,
24 imposition of monetary penalty, suspension or termination. If the contract or purchase order is
25 suspended or terminated, the city reserves all its rights at law or equity.

26 (b) In the event that the DSBO director determines, in his or her sole discretion, that a
27 vendor, contractor or consultant is in noncompliance with article V, the vendor, contractor or
28 consultant may be assessed a civil, remedial penalty of not more than one hundred fifty (150) percent
29 of the value of MWBE underutilization demonstrated each MWBE involved. In assessing such civil
30 penalty:

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

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

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

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

16 (4) The city contract or purchase order may be suspended or terminated with the city
17 reserving all its rights at law or equity.

18 (5) The debarment board, established under section 20-77 of this Code, upon
19 request of the DSBO director, may suspend or debar the vendor, contractor or consultant from
20 participation in city or private contracting covered hereunder for a period as may be determined by
21 the debarment board, in its sole discretion, based upon the grounds of violating this article V,
22 pursuant to such suspension and debarment procedures as may be established by the city, as set
23 forth in section 20-77. The DSBO director in that event shall regard as nonresponsive any bid or
24 proposal received during this time period that includes the vendor, contractor or consultant as a
25 vendor, contractor, consultant, subcontractor, subconsultant, joint venturer, supplier, manufacturer,
26 manufacturer's representative, broker or distributor.

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

30 (7) The DSBO may either suspend or revoke an offending MWBE's eligibility for
31 certification as an MWBE or may suspend its participation from counting toward a participation goal,

1 and, the city subject to other city law, may suspend or debar MWBEs from participating in future city
2 contracts, based upon such MWBE's acting as a conduit, failing to comply with the provisions of
3 article V, failing to perform a commercially useful function on a contract or purchase order, failing to
4 submit information as required by section 28-131, submitting false, misleading or materially
5 incomplete statements, documentation or records, or failing to cooperate in investigations.

6 (c) The DSBO director may, in his or her sole discretion, impose any one (1) or more of the
7 sanctions set out in this section against any vendor, contractor, consultant, subcontractor,
8 subconsultant, joint venturer, supplier, manufacturer, manufacturer's representative, broker, or
9 distributor determined to be in violation of the section, provided that the DSBO director shall first
10 advise the manager and purchasing director or department head, as appropriate, of the proposed
11 sanction in writing. If the manager, purchasing director, or department head advises the DSBO
12 director in writing that the imposition of such sanction would not be in the best interests of the city,
13 the DSBO director shall consult with the appropriate official to make a final decision as to whether
14 to impose such sanctions.

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

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

20 **Sec. 28-140. - SBE defined procurement pool for contracts or purchase orders for services or**
21 **goods between \$50,000.00 and \$999,999.99.**

22 The purpose of the defined procurement pool is to enable the city, through the DSBO, the
23 purchasing division of the department of general services, and other user departments to undertake
24 specific activities to promote the use of SBEs, that are not brokers, packagers, or manufacturer's
25 representatives, in contracts and purchase orders for goods and services awarded by the purchasing
26 division and user departments pursuant to the Charter, revised Municipal Code, and executive orders
27 of the City and County of Denver. The scope of the procurement pool will be limited to procurement
28 opportunities for goods or services for which the estimated cost is at least fifty thousand dollars
29 (\$50,000.00) but not more than nine hundred ninety-nine thousand nine hundred ninety-nine dollars
30 and ninety-nine cents (\$999,999.99).

31 **Sec. 28-141. - Defined procurement pool—Administration of defined pool.**

1 (a) When the purchasing division or user department seeks to acquire services or to acquire
2 goods with an estimated cost of at least fifty thousand dollars (\$50,000.00) but no more than nine
3 hundred ninety-nine thousand nine hundred ninety-nine dollars and ninety-nine cents
4 (\$999,999.99) pursuant to the Charter, revised Municipal Code, and executive orders of the City and
5 County of Denver, it will notify the DSBO of the proposed procurement. The DSBO director will
6 determine if there is a requisite number of SBEs in accordance with section 28-141(b), below, that
7 are not brokers, packagers, or manufacturer's representatives, listed in the most current DSBO
8 certification directory for the goods or services to be acquired. The DSBO director in consultation
9 with the purchasing division and user departments will adopt rules and regulations or informal
10 guidelines to timely notify the purchasing director or department head of such determinations. For
11 services under this section 28-141, DSBO and the purchasing division or user department will assess
12 in the best interest of the project and the city whether to apply a participation goal in accordance with
13 section 28-126 or to follow the procedures under this section 28-141.

14 (b) For procurements under sections 28-140 and 28-141, the defined pool shall require at
15 least six SBE certified (6) companies. If there is the required number of SBEs in accordance with
16 this section 28-141(b), that are not brokers, packagers, or manufacturer's representatives, on the
17 most current DSBO certification list, the purchasing division or user department will provide the
18 procurement opportunity to such SBEs through bidding or selection procedures authorized by the
19 charter, municipal code, or executive orders for that specific contract or purchase order. The bidding
20 or proposal instructions will require that such SBEs self-perform no less than thirty (30) percent of
21 the total amount of the contract or purchase order with their own forces.

22 (c) If there is not the required number of SBE certified companies, that are not brokers,
23 packagers, or manufacturer's representatives, on the most current DSBO certification list, or if the
24 purchasing division or user department does not receive a bid or proposal from such an SBE offering
25 to self-perform no less than thirty (30) percent of the total amount of the contract or purchase order
26 with its own forces, the purchasing division or user department will obtain the goods or services
27 through procurement methods required or authorized by the Charter, Municipal Code, or executive
28 orders for that specific contract or purchase order.

29 (d) Certification by the DSBO as an SBE shall thereupon be established as a condition of
30 responsiveness to a bid or proposal on such selected contracts and purchase orders. Defined
31 procurement pool contracts and purchase orders shall be evaluated and awarded in accordance

1 with sections 28-142 and 28-143 below and any other procedure and method required or authorized
2 by the Charter, Municipal Code, or executive orders for that specific contract or purchase order.

3 (e) User departments will not split, combine, revise, restructure, or modify purchases of
4 goods or services with other goods or one (1) or more other services to avoid the dollar thresholds
5 for inclusion in the defined procurement pool or perform other actions with the intent of avoiding the
6 requirements of this article V.

7 **Sec. 28-142. - Defined procurement pool—Commercially useful function.**

8 (a) An SBE awarded a contract or purchase order through the defined procurement pool
9 will self-perform no less than thirty (30) percent of the total amount of the contract or purchase order
10 with its own forces. All SBE contractors, consultants, or vendors listed in a bid or proposal; must
11 actually perform a commercially useful function on a defined procurement pool contract or purchase
12 order within the area(s) for which they are certified, and must not function as a conduit. The bidding
13 or proposal instructions for each defined procurement pool contract or purchase order shall require
14 that all bidders and proposers seeking to provide goods or services under a city contract or purchase
15 order shall provide a commercially useful function on such contract or purchase order.

16 (b) All expenditures for goods or services obtained from such an SBE who is also an MWBE
17 manufacturer, supplier, or distributor will be counted toward the annual goal set forth in section 28-
18 124 based upon an analysis by the DSBO of the specific duties performed by the MWBE and the
19 extent to which such duties constitute a commercially useful function for each defined procurement
20 pool contract or purchase order. All expenditures for goods or services obtained from an SBE who
21 is not an MWBE manufacturer, supplier, or distributor will be calculated separately by the DSBO
22 based upon an analysis of the specific duties performed by the SBE and the extent to which such
23 duties constitute a commercially useful function for each defined procurement pool contract or
24 purchase order.

25 (c) The DSBO director in conjunction with the manager or department head may undertake
26 such inquiries or studies, engage such employees or retain such consultants as may be necessary
27 to assist the director in rendering these determinations.

28 **Sec. 28-143. - Defined procurement pool—Review of bid or proposal responses.**

29 (a) *Review of bids or proposals; compliance with requirements.* The DSBO director shall
30 review bid or proposals submitted for defined procurement pool opportunities and will notify the
31 purchasing director or department head to regard the submission as responsive to the requirements

1 of this article V if such bid or proposal establishes that the bidder or proposer will perform a
2 commercially useful function on the defined procurement pool contract or purchase order.

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

8 (c) *Commercially useful function—Informal meeting.* In the event the DSBO director finds
9 inadequacies in a bidder's or proposer's demonstration of commercially useful function under section
10 28-142, the DSBO director will provide written notice of such inadequacies to the bidder or proposer.
11 Within two (2) business days from the date that the city notifies the bidder or proposer of such
12 inadequacies, the bidder or proposer may request an informal meeting with the DSBO director. Such
13 informal meeting shall be scheduled by the DSBO director or the director's designee. All deficiencies
14 shall be explained to the bidder or proposer at such informal meeting. Within twenty-four (24) hours
15 after the informal meeting, the bidder or proposer shall be allowed to submit additional information
16 or to clarify its performance of a commercially useful function. After this informal meeting, the DSBO
17 director will:

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

22 **Sec. 28-144—28-145. – [Reserved].**

23 **Sec. 28-146. - SBE defined procurement pool—Compliance by SBEs required throughout**
24 **performance of city contract or purchase order.**

25 (a) Upon award of a city contract or city purchase order, compliance with the commercially
26 useful function requirement and other performance requirements required under this article V by the
27 SBE becomes a covenant of performance by the SBE vendor, contractor or consultant in favor of
28 the city. It shall be an ongoing, affirmative obligation of the SBE on such contract or purchase order
29 to perform all requirements, including, but not limited to, the provision of a commercially useful
30 function, for the duration of the city contract or purchase order, unless the city initiates a material

1 alteration to the goods to be provided or services to be performed affecting the SBE's performance
2 of a commercially useful function on the contract or purchase order through a written amendment.

3 (b) The DSBO shall review all contracts and purchase orders to determine compliance by
4 SBEs with the provisions contained in sections 28-140 through 28-150. The review shall include, but
5 not be limited to:

6 (1) An examination of the goods provided, work performed, industry practice, and
7 other relevant factors to determine whether the commercially useful function on the contract or
8 purchase order was has been maintained over the term or duration of the contract or purchase order;
9 and

10 (2) A determination of whether the SBE has performed its other contract
11 performance obligations over the term or duration of the contract or purchase order.

12 The purchasing division or user department, as appropriate, will provide bid
13 documentation for each specific procurement opportunity to the DSBO director at the time of bid
14 opening.

15 (c) All participation by SBEs who are also MWBEs will be credited toward the annual goal
16 based upon an analysis by the DSBO of the specific duties performed by the MWBE and the extent
17 to which such duties constitute a commercially useful function for each contract or purchase order.
18 SBE participation on contracts or purchase orders that does not include utilization of or by MWBEs
19 shall be calculated separately by the DSBO based upon an analysis of the specific duties performed
20 by the SBE and the extent to which such duties constitute a commercially useful function for each
21 contract or purchase order. The DSBO director or manager or department head may undertake such
22 inquiries or studies, engage such employees or retain such consultants as may be necessary to
23 assist the director in rendering these determinations.

24 **Sec. 28-147. - Defined procurement pool—Amendments and modifications.**

25 (a) Contractors shall have a continuing obligation to immediately inform the DSBO in writing
26 of any agreed upon increase or decrease to the dollar value of a contract or purchase order, as
27 appropriate, whether by amendment or any other modification to the contract or purchase order
28 regardless of whether such increase or decrease concerning the goods or services to be provided
29 has been reduced to writing at the time of notification.

30 (b) The SBE shall provide a commercially useful function as respects the changed goods
31 or services by providing such goods or services itself, by retaining additional SBEs listed in the most

1 current DSBO certification list for the additional goods or services to be acquired, or showing each
2 element of good faith efforts set out in subsection 28-148(c). The SBE shall supply to the DSBO
3 director all documentation establishing the revised dollar value of the contract or purchase order as
4 well as the SBE's maintenance of the commercially useful function requirement.

5 **Sec. 28-148. - Defined procurement pool—Potential violations during contract performance.**

6 (a) An SBE that has been awarded a city contract or purchase order through the defined
7 procurement pool shall not, at any time before or during the performance of such contract or
8 purchase order:

9 (1) Fail to in fact self-perform, as a certified vendor, contractor, or consultant, no less
10 than thirty (30) percent of the total amount of the contract or purchase order for goods or services
11 with its own forces as originally listed at bid or proposal opening, as appropriate; or

12 (2) Modify or eliminate all or a portion of the goods or services to be provided and
13 attributable to the certified vendor, contractor, or consultant, unless directed by the city in writing.

14 (b) Any action by an SBE in violation of subsections (a)(1) or (2) hereof, shall constitute a
15 material breach of the contract or purchase order that shall entitle the city to exercise all of its rights
16 at law or equity for such material breach, in addition to exercising any of the other sanctions set out
17 in section 28-150 below. If, following award of a contract or purchase order, an SBE has its
18 certification terminated for reasons other than expiration or graduation from certification, such
19 termination of certification shall not be deemed to affect compliance with the contract or purchase
20 order and shall not be deemed a breach of the contract or purchase order as long as the vendor,
21 contractor or consultant can demonstrate that such termination or failure did not result from any
22 action or inaction, whether direct or indirect, of or by the vendor, contractor or consultant.

23 (c) The following good faith requirements shall apply to sections 28-146 and 28-147. In the
24 event that additional goods or services are added to an on-going contract or purchase order and the
25 SBE in such event is in noncompliance with either the requirement to self-perform no less than thirty
26 (30) percent of the total amount of the contract or purchase order with its own forces or to perform a
27 commercially useful function for the provision of the additional goods or services, the following good
28 faith efforts must be completed. Failure of a vendor, contractor or consultant to show good faith
29 efforts as to any one (1) of the following categories shall render its overall good faith efforts showing
30 insufficient; and its contract performance in noncompliance with this article V:

1 (1) Verification that the vendor, contractor or consultant used the most current SBE
2 directory from the DSBO in order to contact SBEs that are certified in the identified goods at the
3 time of the modified good faith effort.

4 (2) Verification of efforts to contact appropriate SBEs within the same identified
5 goods must be documented. The DSBO director may verify such contacts as he or she deems
6 appropriate.

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

10 **Sec. 28-149. - Defined procurement pool—Burden of proof; investigations of compliance.**

11 Any business enterprise affected by the operation of sections 28-140 through 28-150, shall
12 have the burden of proving its compliance with the requirements and obligations herein. The DSBO
13 is empowered to receive and investigate complaints and allegations by SBEs, third parties, or city
14 personnel, or to initiate its own investigations regarding compliance with the requirements and
15 obligations of this article V. If the DSBO determines in its sole discretion that an investigation is
16 warranted, upon written notice of such investigation the affected party shall be obligated to cooperate
17 fully with the investigation and shall have a continuing burden of providing complete, truthful
18 information to the DSBO director and of otherwise proving compliance with the requirements and
19 obligations of this article V.

20 **Sec. 28-150. - Defined procurement pool—Sanctions for failure to comply with requirements.**

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

29 (b) If the DSBO director determines, in his or her sole discretion, that an SBE is in
30 noncompliance with the defined procurement pool requirements contained in sections 28-140
31 through 28-150, the SBE may be assessed a civil, remedial penalty of not more than one hundred

1 fifty (150) percent of the value of underutilization of the minimum participation required. In assessing
2 such civil penalty:

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

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

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

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

19 (4) The contract or purchase order may be suspended or terminated with the city
20 reserving all its rights at law or equity.

21 (5) The debarment board established under section 20-77 of this Code, upon request
22 of the DSBO director, may suspend or debar the vendor, contractor, or consultant from participation
23 in city contracting covered hereunder for a period as may be determined by the debarment board, in
24 its sole discretion, based upon the grounds of violating this article V, pursuant to such suspension
25 and debarment procedures as may be established by the city, as set forth in section 20-77. The
26 DSBO director, in that event, shall regard as nonresponsive any bid or proposal received during this
27 time period that includes the vendor, contractor, or consultant as a vendor, contractor, consultant,
28 subcontractor, subconsultant, supplier, manufacturer, or distributor.

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

1 (7) The DSBO may suspend or revoke an offending SBE's eligibility for certification,
2 as an SBE, may suspend its participation in a city contract or purchase order from the calculation of
3 annual goals, and, subject to other city law, may suspend or debar the SBE from participating in
4 future city contract's, based upon the SBEs acting as a conduit, failing to comply with the provisions
5 of article V, failing to perform a commercially useful function on a contract or purchase order, failing
6 to submit information as required by section 28-147, or submitting false, misleading, or materially
7 incomplete statements, documentation, or records, or failing to cooperate in investigations.

8 (c) The DSBO director may, in his or her sole discretion, impose any one (1) or more of the
9 sanctions set out in this section against any vendor, contractor, or consultant determined to be in
10 violation of the section, provided that the director shall first advise the affected department head of
11 the proposed sanction in writing. If the department head advises the DSBO director in writing that
12 the department head believes that imposition of such sanction would not be in the best interests of
13 the city, the DSBO director shall consult with the department head prior to making a final decision
14 as to whether to impose such sanctions.

15 (d) Consistent with article V and the rules and regulations, the DSBO is authorized to
16 prescribe corrective actions in the case of potential violations or in lieu of potential enforcement.

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

20 **Sec. 28-151. - [Reserved].**

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

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

30 **Sec. 28-153. - Reporting.**

1 The DSBO director shall prepare written reports no less than two (2) times each year which
2 shall describe progress in meeting the annual goals set out in section 28-124, as well as progress
3 under defined procurement pool as applied to city contracts and purchase orders for goods and
4 services under this article V. Copies of quarterly reports shall be provided to the manager,
5 purchasing director, affected department heads, city council, and the mayor.

6 In addition, the reports shall describe the implementation of this article V and provide an
7 evaluation of individual contracts and purchase orders, including all change orders, amendments,
8 and modifications awarded for goods and services through the participation goal and defined
9 procurement pool provisions of this article V.

10 In calculating MWBE participation under this article V, all funds paid to such firms on city
11 contracts and purchase orders for goods and services during the year shall be counted independent
12 of whether or not such funds were (1) used to accomplish participation goal applicable at the time of
13 bid opening or other proposal receipt; or (2) used to compensate SBEs who are MWBEs for the
14 performance of a commercially useful function under defined procurement pool contract or purchase
15 order.

16 **Sec. 28-154. - Annual report.**

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

25 (b) *SBE utilization.* The DSBO director will include in the report under Section 28-154 the
26 following:

- 27 (1) Description of utilization levels achieved for SBEs in the preceding year through
28 the defined procurement pool;
- 29 (2) Recommendations as to further efforts that the city should make to assist in the
30 development and utilization of such firms in the acquisition of goods and services; and

1 (3) Recommendation regarding assistance in achieving such participation by SBEs
2 in the future.

3 (c) This annual report under Section 28-154 shall be considered one of the two required
4 reports under Section 28-153.

5 **Sec. 28-155. - Rules and regulations.**

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

11 **Sec. 28-156. - Severability.**

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

16 **Sec. 28-157. - Effective date of article.**

17 This article V shall become effective on May 2, 2020 and shall apply to all contracts and
18 purchase orders within the scope of the article for which bids or proposals are made available for
19 bidding or competitive selection on or after May 2, 2020.

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

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

26 (b) This article V shall be repealed effective April 30, 2025.

27 **Section 4.** That article VII of chapter 28 of the Revised Municipal Code be and the same
28 are hereby repealed and reenacted as a new article VII to read as follows:

29 **ARTICLE VII. OPPORTUNITIES FOR SMALL BUSINESS ENTERPRISES IN CITY**
30 **CONTRACTS FOR CONSTRUCTION, RECONSTRUCTION, AND REMODELING, AND**
31 **PROFESSIONAL DESIGN AND CONSTRUCTION SERVICES, AND IN CONCESSION**

1 **AGREEMENTS, THROUGH DEFINED SELECTION POOL CONTRACTS AND CONCESSION**
2 **AGREEMENTS**

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

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

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

14 **Sec. 28-203. - Contracts excluded from this article VII.**

15 Contracts for which bids or proposals are sought under the minority and women business
16 enterprise (MWBE) ordinance established pursuant to article III of this chapter 28, and its divisions,
17 are excluded from the coverage of this article VII. In addition, in the case of a contract for which a
18 part of the contract price is to be paid with funds from the United States Government or the State of
19 Colorado and for which the United States Government or the State of Colorado have made
20 applicable to such contract requirements, terms or conditions that are inconsistent with the terms of
21 this article VII, the provisions of this article VII shall not apply to such contract to the extent of such
22 inconsistency.

23 **Sec. 28-204. - Definitions.**

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

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

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

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

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

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

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

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

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

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

15 (10) *Competitive selection process* has the meaning ascribed to that phrase in sections
16 2.3.(A) and 2.11.3(B) of the Denver City Charter, and in D.R.M.C. sections 5-19 and 20-56, as that
17 meaning may pertain to a contract(s) at issue.

18 (11) *Concessionaire* means a business enterprise that enters into a competitively selected
19 or negotiated concession agreement with the city, in privity of contract with the city, for the operation
20 of a retail, food service or other concession in a building, or aviation or aeronautical facility, or
21 improvements thereto, situated on real property owned or operated by the city.

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

27 (13) *Conduit* means an SBE that knowingly agrees to pass the scope of work for which it is
28 listed for participation and is scheduled to perform or supply on a contract or concession agreement,
29 to a non-SBE, or does not carry out the responsibilities required by actually performing, managing,
30 controlling and supervising the work involved. In this type of relationship, the SBE has not performed
31 a commercially useful function and the arranged agreement between the two (2) parties is not

1 consistent with standard industry practice. This arrangement does not meet the commercially useful
2 function requirement, and therefore the SBE's participation is not considered to be a legitimate
3 portion of the work on the contract or concession agreement. Conduit is also referred to as a
4 passthrough.

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

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

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

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

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

2 (19) *Defined selection pool contract or concession agreement* means a contract or
3 concession agreement which is determined by the director to be appropriate for restriction of the
4 selection of the contractor, consultant or concessionaire and, as applicable, subcontractors,
5 subconsultants and suppliers on such contract or concession agreement to the pool of certified SBEs
6 or PBEs, as determined by the director.

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

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

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

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

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

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

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

28 (27) *Joint venture* means an association of two (2) or more business enterprises to
29 constitute a single business enterprise to perform a city construction or professional design or
30 construction services contract, or concession agreement for which purpose they combine their
31 property, capital, efforts, skills and knowledge and in which venture each joint venturer is responsible

1 for a distinct, clearly defined portion of the work of the contract or concession agreement, performs
2 a commercially useful function, and whose share in the capital contribution, control, management
3 responsibilities, risks and profits of the joint venture are equal to its ownership interest. Joint ventures
4 must have an agreement in writing specifying the terms and conditions of the relationships between
5 the joint venturers and their relationship and responsibility to the contract or concession agreement.

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

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

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

25 (31) *Personal net worth* means the net value of the assets of an individual after total
26 liabilities are deducted. An individual's personal net worth does not include the individual's ownership
27 interest in an applicant business enterprise or participating SBE or the individual's equity, if any, in
28 his or her primary place of residence. An individual's personal net worth includes only his or her
29 share of assets held individually and jointly with the individual's spouse. For the purposes of
30 certification as an SBE or an EBE under this article VII, an individual must have a personal net worth
31 equal to or less than the permissible personal net worth amount determined by the U.S. Department

1 of Transportation to be applicable to its DBE programs, or as otherwise promulgated by the director
2 by rule and regulation. This requirement shall not apply to SBEs certified under this article VII solely
3 as concessionaires.

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

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

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

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

21 (36) *Regular dealer* means a business enterprise that owns, operates or maintains a store,
22 warehouse or other establishment in which the materials, supplies, articles or equipment of the
23 general character described by the contract specifications and required for the performance of the
24 contract are bought and regularly sold or leased to the public in the usual course of business. To be
25 a regular dealer, the business enterprise must be an established, regular business engaged in, as a
26 substantial and material portion of its business, and in its own name, the purchase and sale or lease
27 of the products in question. A regular dealer is presumed to keep such materials, supplies, articles
28 or equipment in stock, but must in any event bear the risk of loss of such items. A regular dealer in
29 such bulk items as steel, cement, gravel, stone, asphalt and petroleum products need not own,
30 operate or maintain a place of business if it both owns and operates distribution equipment for the
31 products. Any supplementation of a regular dealer's distribution equipment shall be by a long-term

1 lease agreement and not on an ad hoc or contract-by-contract basis. For regular dealers, sixty (60)
2 percent of the value of the commercially useful function performed by the SBE shall be counted
3 toward the participation goal. Brokers, conduits, packagers, manufacturers and manufacturer's
4 representatives shall not be regarded as regular dealers within the meaning of this term.

5 (37) *Small business enterprise* or *SBE* means a business enterprise that is certified by the
6 director under this article VII as meeting all of the requirements for certification set forth in sections
7 28-205 and 28-206.

8 (38) *Subcontractor* or *subconsultant* means a business enterprise that either directly
9 contracts with a contractor or consultant or directly contracts with subcontractors or subconsultants
10 under such contractor or consultant on a city contract or concession agreement, and which business
11 enterprise will provide services or perform work under agreements with the contractor or consultant
12 or with other subcontractors or subconsultants under such contractor or consultant.

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

21 **Sec. 28-205. - SBE and EBE certification; eligibility of applicant business enterprises.**

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

28 (b) Only applicant business enterprises that meet the criteria for certification as an SBE or
29 EBE may participate in the program established under this article VII. The applicant business
30 enterprise has the burden of persuasion by a preponderance of the evidence. SBEs and EBEs shall
31 be certified only for the certification area(s) for which they apply and in which they have had sustained

1 business activity for a minimum of six (6) months. Certification areas shall correspond to the codes
2 set forth in North American Industrial Classification Standard (NAICS) Codes, or successor
3 classification system, Code of Federal Regulations § 121.201, as amended, or successor regulation.

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

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

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

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

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

17 d. Have acquired the interest with a contribution of his or her own capital
18 resources, by having put his or her own financial resources at risk in the operation of the applicant
19 business enterprise, or subject to requirements below, with a contribution of expertise. All
20 contributions by the owner(s) to acquire the ownership interest in the applicant business enterprise
21 must be verifiable, substantial, and continuing, which in part, means that it be commensurate with
22 the ownership interest acquired.

23 (A) If expertise is relied upon as part of an owner's contribution to
24 acquire ownership, the expertise must be of the requisite quality generally recognized in a
25 specialized field, in areas critical to the operations of the applicant business enterprise, indispensable
26 to the applicant business enterprise's potential success, specific to the type of work the applicant
27 business enterprise performs and documented in the applicant business enterprise's records. These
28 records must clearly show the contribution of expertise, including its equivalent monetary value. The
29 individual(s) whose expertise is relied upon must have a commensurate capital investment in the
30 applicant business enterprise.

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

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

13 a. If federal or state law or city ordinance requires the owner(s) to have a
14 particular license or other credential to own or control a certain type of business enterprise, then the
15 owner(s) must possess the required license or other credential. If federal or state law or city
16 ordinance does not require that the owner possess the license or other credential to own or control
17 the business enterprise, including control, direction, or supervision of the work performed under the
18 license, to determine whether the owner(s) manage and control the business enterprise, the DSBO
19 may consider whether the owner(s) holds the license or other credential as a factor. If there is not a
20 legal requirement for the owner to hold the license or other credential to own or control a certain type
21 of business enterprise, failure of the owner to hold the license or other credential does not by itself
22 indicate lack of management and control of a business enterprise without other factors indicating to
23 the contrary.

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

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

30 d. There may not be any restriction through corporate charter provisions, by
31 law provisions, contracts or any other formal or informal devices that prevent the owner(s), without

1 the cooperation or vote of any other individual, from making any business decision of the applicant
2 business enterprise, including the making of obligations or the dispersing of funds.

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

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

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

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

30 (4) *Independence*. Only an independent applicant business enterprise may be
31 certified as an SBE or an EBE. An independent applicant business enterprise is one whose viability

1 does not depend on its relationship with another business enterprise. Recognition of an applicant
2 business enterprise as a separate entity for tax or corporate purposes is not necessarily sufficient to
3 demonstrate that the applicant business enterprise is independent and not an affiliate. In determining
4 whether an applicant business enterprise is an independent business, the director shall:

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

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

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

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

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

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

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

- 29 a. Formation of the applicant business enterprise;
- 30 b. Commencement of sustained business activity in the trade or profession
31 described on the certification application; and

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

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

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

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

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

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

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

8 **Sec. 28-206. - SBE and EBE certification and graduation size standards; renewal of**
9 **certification; decertification; graduation.**

10 (a) No applicant business enterprise shall be certified as an SBE, and following certification
11 of an SBE, no certification shall be renewed if on the effective date of the application or renewal the
12 applicant business enterprise, SBE (combined with all affiliates) has achieved a size standard
13 exceeding the following size standards:

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

24 (2) For professional design and construction services (excluding construction
25 management), applicant business enterprises cannot exceed fifty (50) percent of the applicable size
26 standards established by the U.S. Small Business Administration ("SBA") at C.F.R. § 121.201, as
27 amended, or successor SBA regulation or classification system, which are incorporated herein by
28 reference. The size standard is based on annual receipts averaged over the three (3) preceding
29 consecutive fiscal years; whether the applicant business has otherwise achieved a size standard
30 based upon its number of employees; or other criteria applicable to any of the work activities for
31 which the applicant business enterprise seeks certification or is certified. The director may adjust or

1 modify such SBE graduation size standards if it appears, after further inquiry and review by the
2 director, that such standards are no longer appropriate to the purposes of this article VII.

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

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

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

30 (e) Application to affiliates. The graduation criteria set forth above shall be deemed to apply
31 to the owner(s) upon whom eligibility for certification is based and all affiliates of such owner(s). No

1 applicant business enterprise shall be certified based upon one (1) or more owner(s) who owned or
2 who was an affiliate of an SBE or EBE that has become ineligible for renewal of certification because
3 of the achievement of graduation criteria.

4 (f) The certification status of all SBEs and EBEs shall be reviewed periodically by the DSBO.
5 Failure of a certified and eligible SBE or EBE to seek timely renewal of certification by filing the
6 necessary documentation with the DSBO may result in decertification.

7 (g) The DSBO shall decertify an SBE or EBE that does not continuously meet the eligibility
8 criteria for certification.

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

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

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

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

23 The director, in collaboration with the department heads, may on the basis of contract or
24 concession agreement categories, types, size standards or other consistent criteria for selection,
25 identify and determine those contracts and concession agreements proposed to be restricted by the
26 director for award to SBEs or EBEs under this article VII. The stated selection criteria may differ
27 among agencies of the city. Certification as an SBE or EBE shall thereupon be established as a
28 condition of responsiveness to a bid or proposal on such selected contracts and concession
29 agreements. Such selected contracts and concession agreements, referred to as defined selection
30 pool contracts and concession agreements, shall be awarded only to responsive low-bidder SBE or
31 EBE (as applicable) bidders on bid contracts and to responsive SBE or EBE proposers (as

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

7 **Sec. 28-208. - Contracts for construction, reconstruction and remodeling—Defined selection**
8 **pool contracts—Compliance with defined selection pool requirements.**

9 (a) The bid or competitive selection process specifications for each defined selection pool
10 construction contract shall require that all bidders or proposers seeking to contract with the city or a
11 private owner on such project shall address the project defined selection pool requirements through
12 one (1) or both of the following subsections:

13 (1) The value of the commercially useful function to be self-performed by the SBE or
14 EBE bidder or proposer shall count to the extent provided in section 28-212 toward satisfaction of
15 the SBE or EBE defined selection pool performance requirements; or

16 (2) If the bidder or proposer submits a joint venture agreement that includes one (1)
17 or more SBEs or EBEs, the value of the commercially useful function to be performed by the SBE or
18 EBE in the joint venture shall count to the extent provided in section 28-212 toward satisfaction of
19 the SBE or EBE defined selection pool requirements. The joint venture is subject to the review and
20 approval by the director and the joint venture agreement shall be provided to the director within a
21 time period before the date of bid opening or the date of proposal in the case of a competitive
22 selection process defined by the director. Joint venturer participation will count toward the
23 satisfaction of the SBE or EBE defined selection pool requirements upon confirmation by the director
24 of the utilization in the joint venture of joint management and full integration of work forces by the
25 joint venturers.

26 (b) Notwithstanding any other provision of this article VII, if a department head finds, with
27 respect to a particular contract, that the best interests of the city would be served by the negotiation
28 of a contract, including but not limited to a design-build or construction manager-general contractor
29 contract, through a competitive selection process based wholly on quality, without reference to
30 selection by low bid of the contractor or its subcontractors or suppliers, the analysis of the SBE or
31 EBE defined selection pool requirements by such contractor shall be determined on the basis set

1 out in sections 28-214 through 28-218, provided that, in the event of such an analysis, all references
2 in those sections to consultant shall also be deemed to refer to contractor.

3 **Sec. 28-209. - Contracts for construction, reconstruction and remodeling—Defined selection**
4 **pool contracts—SBE subcontractor and supplier minimum utilization requirements.**

5 (a) In addition to determining that a contract should be subject to the defined selection pool
6 requirements set out in section 28-207, the director may, in collaboration with the department heads,
7 also add a requirement to the bid or competitive selection process instructions for each defined
8 selection pool construction contract assigning a minimum utilization requirement on such contract
9 for SBE utilization as subcontractors or suppliers, based upon a percentage of the dollar value of all
10 work on such contract; provided that, if the director determines it to be in the best interests of the
11 city, the director may in consultation with the user department waive the application of minimum SBE
12 subcontractor or supplier utilization for a given contract. The minimum utilization requirement
13 assigned by the director to each such contract may vary from contract to contract consistent with the
14 availability of SBEs with respect to such contract. Such minimum utilization requirement, if
15 established, is not a goal, but a mandatory requirement of the contract. The DSBO shall establish a
16 methodology for the establishment of minimum utilization requirements through rules and
17 regulations. Such methodology shall consider the reasonably known availability of SBEs in specific
18 industry groupings that are associated with individual projects.

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

22 **Sec. 28-210. - [Reserved].**

23 **Sec. 28-211. - Defined selection pool contracts for construction, reconstruction and**
24 **remodeling—Compliance with SBE minimum utilization.**

25 (a) The bid or competitive selection process specifications for each defined selection pool
26 construction contract shall require that all bidders or proposers seeking to contract with the city on
27 such project shall address any project SBE minimum utilization requirements as follows. If the bidder
28 or proposer utilizes SBEs as subcontractors, suppliers, manufacturers, manufacturer's
29 representatives or brokers, the value of the commercially useful function to be performed by such
30 SBEs, including the cost of supplies and materials obtained by the SBE for the work of the contract,
31 and supplies purchased or equipment leased by the SBE, except supplies and equipment the SBE

1 purchases or leases from the bidder or proposer or its affiliate, shall count to the extent provided in
2 section 28-212 toward satisfaction of the SBE minimum utilization requirements.

3 (b) In order for its bid or proposal to be deemed responsive, a bidder or proposer must meet
4 the minimum utilization requirements for SBEs on a particular contract as well as the bidder's or
5 proposer's self-performance or joint venture obligations set out in section 28-208 above.

6 (c) For contracts selected in accordance with sections 2.3.3(A) and 2.11.3(B) of the Denver
7 City Charter, and D.R.M.C. Sections 5-19 and 20-56, including on call construction contracts, the
8 department head may determine to address the minimum utilization requirements by means of a
9 small business utilization plan for utilization of SBEs on such contract. In that event, the department
10 head shall request the director to approve the utilization of such a utilization plan, consistent with the
11 scope and intent of this article VII. The development, scope and utilization of such utilization plans
12 shall be addressed in rules and regulations promulgated by the director.

13 **Sec. 28-212. - Defined selection pool contracts for construction, reconstruction and**
14 **remodeling—Identification of work scope of performing SBE and of other participating SBEs.**

15 (a) At the time of bid opening, or date of proposal in the case of a competitive selection
16 process, the bidder or proposer shall provide to the city or private owner a list of all SBEs that are
17 being utilized on the contract whether as a self-performing bidder or proposer or as subcontractors,
18 suppliers, manufacturers, manufacturer's representatives, brokers or members of a joint venture.
19 The list shall specify:

- 20 (1) The name and contact name for each SBE;
- 21 (2) The dollar value and description of the commercially useful function to be
22 performed by the SBE, consistent with subsections (c) and (d). In the case of utilization of a supplier,
23 manufacturer, manufacturer's representative, or broker, the appropriate percentage of dollar value
24 attributable to such SBE as a commercially useful function shall be calculated with all underlying
25 data supplied;
- 26 (3) The percentage of the value of the commercially useful function to be performed
27 by the SBE, consistent with subsections (c) and (d), as compared to the total contract amount;
- 28 (4) An adequate statement from the bidder or proposer that the dollar amount of
29 work to be performed by such SBE on the contract, other than that self-performed by the bidder or
30 proposer, was furnished to the bidder or proposer and agreed upon prior to bid opening or date of
31 proposal in the case of a competitive selection process; and

1 (5) An adequate statement from the bidder or proposer that it understands that a
2 letter of intent, including, but not limited to, values provided by self-performing bidders or proposers,
3 joint venturers, subcontractors, suppliers, manufacturers, manufacturer's representatives and
4 brokers, expressed in dollar values and as a percentage of the overall work, must be submitted to
5 the user department or director for each SBE listed, including a self-performing bidder or proposer,
6 at the time bids are opened by the city or by the date of proposal in the case of a competitive selection
7 process, or bid selection made by a private owner.

8 (b) Only that level of SBE utilization demonstrated in accordance with this section at the
9 time of such bid opening, date of proposal in the case of a competitive selection process or private
10 selection may be counted in satisfaction of the requirements of this article VII. Bidders or proposers
11 must submit an executed letter of intent for each SBE listed by the bidder or proposer, including a
12 self-performing bidder or proposer, at the time bids are opened, proposals are received, in the case
13 of a competitive selection process, or bid selection is made. Failure to do so will render the bid or
14 proposal nonresponsive.

15 (c) All SBE contractors, subcontractors, joint venturers, suppliers, manufacturers,
16 manufacturer's representatives or brokers listed in a bid or proposal must actually perform a
17 commercially useful function in the work of a contract within the area(s) for which they are certified,
18 and must not function as a conduit. Consistent with industry or professional practice, and as
19 permitted by rules and regulations adopted by the director, SBEs may enter into subcontracts,
20 including subcontracts with non-SBEs. In no case, however, shall an SBE act as a conduit, nor shall
21 the participation of an SBE count toward satisfaction of the requirements of this article VII to the
22 extent it fails to perform a commercially useful function.

23 (d) All expenditures for materials, supplies and equipment obtained from an SBE
24 manufacturer, manufacturer's representative or supplier shall count toward SBE self-performance or
25 utilization as specified in subsection 28-204(39). Expenditures for materials, supplies and equipment
26 paid to SBEs that are not manufacturers, manufacturer's representatives or suppliers may count
27 toward compliance with the requirements of this article VII only to the extent of fees or commissions
28 charged for providing a bona fide service, such as professional, technical, consultant or managerial
29 services and assistance in the procurement of essential personnel, facilities, equipment, materials
30 or supplies required for performance of the contract, provided that the fee or commission is

1 determined by the director to be reasonable and not excessive as compared with fees customarily
2 allowed for similar services.

3 (e) Any agreement between a bidder or proposer and an SBE in which the bidder or
4 proposer requires that the SBE not provide subcontracting quotations to other bidders or proposers
5 is prohibited and shall render a bidder's bid or proposer's proposal nonresponsive.

6 **Sec. 28-213. - Defined selection pool contracts for construction, reconstruction and**
7 **remodeling—Responsive and nonresponsive bids or proposals.**

8 (a) *Responsive; compliance with requirements.* If the low monetary bid or competitive
9 selection process proposal subject to the defined selection pool requirements indicates that the SBE
10 or EBE bidder or proposer is appropriately performing a commercially useful function on the contract,
11 and is otherwise responsive to the requirements of the contract and this article VII, then the director
12 shall notify the department head to regard the bid or proposal as responsive to this article VII.

13 (b) *Failure to meet requirements.* If a bid or proposal subject to the defined selection pool
14 requirements does not demonstrate performance by the SBE or EBE bidder or proposer of a
15 commercially useful function, as set out in section 28-208, minimum utilization of SBE subcontractors
16 or suppliers as set out in section 28-211 or provide timely information as set out in section 28-212,
17 then the director shall notify the department head to regard the bid or proposal as nonresponsive,
18 and such determination shall result in no further consideration by the city or private owner of the bid
19 or proposal.

20 (c) *Commercially useful function or minimum utilization of SBE subcontractors—Informal*
21 *meeting.* In the event the director finds inadequacies in a bidder or proposer's demonstration of
22 commercially useful function under section 28-208 or minimum utilization of SBE subcontractors or
23 suppliers under section 28-211, the director will provide written notice of such inadequacies to the
24 bidder or proposer prior to notifying the appropriate department head of bid or proposal
25 responsiveness. Within two (2) business days from the date that the city notifies the bidder or
26 proposer of such inadequacies, the bidder or proposer may request an informal meeting with the
27 director. Such informal meeting shall be scheduled by the director. All deficiencies shall be explained
28 to the bidder or proposer at such informal meeting. Within twenty-four (24) hours after the informal
29 meeting, the bidder or proposer shall be allowed to submit additional information or to clarify its
30 performance of a commercially useful function. At no time, however, will the director count toward
31 the minimum utilization the addition of subconsultants, joint venturers, suppliers, manufacturers,

1 manufacturer's representatives, or brokers that may later be added to the contract or to the original
2 SBE participation submitted at either the time of the bid or the date of proposal, in the case of a
3 competitive selection process. After this informal meeting, the director will:

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

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

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

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

17 (2) If the proposer submits a joint venture agreement that includes one (1) or more SBEs
18 or EBEs, the value of the commercially useful function to be performed by the SBEs or EBEs (as
19 applicable) in the joint venture shall count to the extent provided in section 28-218 toward satisfaction
20 of the SBE or EBE defined selection pool requirements. The joint venture is subject to the review
21 and approval by the director and the joint venture agreement shall be provided to the director within
22 a time period before the date of proposal defined by the director. Joint venturer participation will
23 count toward the satisfaction of the SBE or EBE defined selection pool requirements upon
24 confirmation by the director of the utilization in the joint venture of joint management and full
25 integration of work forces by the joint venturers.

26 **Sec. 28-215. - Contracts for professional design and construction services and concession**
27 **agreements—SBE subconsultant and supplier minimum utilization requirements.**

28 (a) In addition to determining that a contract should be subject to the defined selection pool
29 requirements set out in section 28-214, the director may, in collaboration with the department heads,
30 also add a requirement to the proposal instructions for each defined selection pool professional
31 design and construction services contract assigning a minimum utilization requirement on such

1 contract for SBE utilization as subconsultants and/or suppliers, based upon a percentage of the
2 dollar value of all work on such contract; provided that, if the director determines it to be in the best
3 interests of the city, the director may in consultation with the user department waive the application
4 of minimum SBE subconsultant or supplier utilization for a given contract. The minimum utilization
5 requirement assigned by the director to each such contract may vary from contract to contract
6 consistent with the availability of SBEs with respect to such contract. Such minimum utilization
7 requirement, if established, is not a goal, but a mandatory requirement of the contract. The DSBO
8 shall establish a methodology for the establishment of minimum utilization requirements through
9 rules and regulations. Such methodology shall consider the reasonably known availability of SBEs
10 in specific industry groupings that are associated with individual projects.

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

14 (c) The SBE minimum utilization requirements shall not be applied to concession
15 agreements under this article VII.

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

17 **Sec. 28-217. - Defined selection pool contracts for professional design and construction**
18 **services—Compliance with SBE minimum utilization.**

19 (a) The competitive selection process specifications for each defined selection pool
20 professional design and construction services contract shall require that all proposers seeking to
21 contract with the city on such project shall address any project SBE minimum utilization requirements
22 as follows. If the proposer utilizes SBEs as subconsultants, suppliers, manufacturers, manufacturer's
23 representatives or brokers, the value of the commercially useful function to be performed by such
24 SBEs, including the cost of supplies and materials obtained by the SBE for the work of the contract,
25 and supplies purchased or equipment leased by the SBE, except supplies and equipment the SBE:
26 purchases or leases from the proposer or its affiliate, shall count to the extent provided in section
27 28-218 toward satisfaction of the SBE minimum utilization requirements.

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

1 **Sec. 28-218. - Defined selection pool contracts for professional design and construction**
2 **services—Identification of work scope of performing SBE and of other participating SBEs.**

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

12 (1) The name and contact information for each SBE;
13 (2) The description and percentage of the value of the commercially useful function
14 to be performed by the SBE or the percentage of the revenues expected to be generated by the
15 concession agreement, consistent with subsections (b) and (c), as compared to the total contract
16 amount or the total revenues expected to be generated by the concession agreement. In the case
17 of utilization of a supplier, manufacturer, manufacturer's representative, or broker, the appropriate
18 percentage of dollar value attributable to such SBE as a commercially useful function shall be
19 calculated with all underlying data supplied. If the proposer provides a dollar fee amount, then both
20 the dollar value and percentage must be listed in the proposal.

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

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

29 (5) An adequate statement from the proposer that it understands that a letter of
30 intent, including, but not limited to, values provided by self-performing proposers, joint venturers,
31 subconsultants, suppliers, manufacturers, manufacturer's representatives and brokers, expressed

1 in dollar values and as a percentage of the overall work, must be submitted to the director for each
2 SBE listed, including a self-performing proposer, at the time of submission of the proposal submitted
3 to and authorized by the city or a private owner.

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

10 (c) All SBE consultants, subconsultants, joint venturers, suppliers, manufacturers,
11 manufacturer's representatives or brokers listed in a proposal must actually perform a commercially
12 useful function in the work of a contract or the operation of a concession agreement within the area(s)
13 for which they are certified, and must not function as a conduit. Consistent with industry or
14 professional practice, and as permitted by rules and regulations adopted by the director, SBEs may
15 enter into subcontracts, including subcontracts with non-SBEs. In no case, however, shall an SBE
16 act as a conduit, nor shall the participation of an SBE count toward satisfaction of the requirements
17 of this article VII to the extent it fails to perform a commercially useful function.

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

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

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

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

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

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

- 31 (1) Determine whether the bid or proposal will be responsive or nonresponsive;

- 1 (2) Make the notification as stated in subsection (b) above, as applicable; and
2 (3) Provide written notice to the bidder or proposer of the director's final
3 determination.

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

5 The documentation of achievement of defined selection pool and minimum SBE utilization
6 performance requirements of a bidder or proposer, as applicable, shall be submitted to the director
7 at the time of the bid opening date or proposal in the case of a competitive selection process or
8 private owner selection for a construction contract, or at the time of submission of the proposal
9 submitted to and authorized by the city or a private owner for a professional design and construction
10 services contract or a concession agreement.

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

12 **Sec. 28-222. - Compliance with committed SBE contractor, consultant or concessionaire**
13 **performance and minimum SBE utilization required throughout performance of contract or**
14 **concession agreement.**

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

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

26 (c) For any defined selection pool contract or concession agreement, it shall be an ongoing,
27 affirmative obligation of the contractor, consultant or concessionaire on such contract or concession
28 agreement to maintain, at a minimum, compliance with such defined selection pool requirements
29 and with the minimum utilization, if applicable, of SBE subcontractors, subconsultants and suppliers
30 upon which the contract or concession agreement was awarded, for the duration of the contract or
31 concession agreement, unless the city initiates a material alteration to the scope of work affecting

1 SBE performance of a commercially useful function on the contract or concession agreement
2 through change order, contract or concession agreement amendment, force account or as otherwise
3 described in section 28-223. SBE performance of such material alteration of the contract or
4 concession agreement scope shall be documented in writing to the director by the SBE.

5 (d) The DSBO shall evaluate the performance of the SBE contractor, consultant or
6 concessionaire to determine whether such contractor, consultant or concessionaire, and any utilized
7 SBE subcontractor, subconsultant or supplier, is performing a commercially useful function on the
8 contract or concession agreement. The evaluation shall examine the amount of work subcontracted,
9 industry practice and other relevant factors. The amount of SBE participation credited toward defined
10 selection pool requirements and minimum SBE utilization requirements shall be based upon an
11 analysis of the specific duties performed by the SBE contractor, consultant or concessionaire, and
12 any utilized SBE subcontractor, subconsultant or supplier, and the extent to which such duties
13 constitute a commercially useful function. The director may undertake such inquiries or studies,
14 engage such employees or retain such consultants as may be necessary to assist the director in
15 rendering these determinations. In order for the DSBO to accurately track the amount of SBE
16 participation credited toward defined selection pool requirements and minimum SBE utilization
17 requirements, SBE contractors, consultants and concessionaires, as well as any utilized SBE
18 subcontractors, subconsultants or suppliers, shall submit regularly the following information on a
19 form prescribed by the DSBO:

20 (1) Prime contractor information (name, address, contact person, telephone, and
21 email address);

22 (2) SBE subcontractor information (name, address, contact person, telephone, email
23 address, and certification number);

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

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

29 (5) Payment received in current month;

30 (6) Total payments received;

31 (7) Percent of work completed;

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

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

4 (e) Work performed by an SBE contractor, consultant or concessionaire, or utilized SBE
5 subcontractor, subconsultant or supplier not providing a commercially useful function, or functioning
6 as a conduit, shall not count toward achieving ongoing defined selection pool and, if applicable,
7 minimum SBE utilization requirements on contracts and concession agreements under this article
8 VII.

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

10 (a) Contractors and consultants on contracts and concessionaires on concession
11 agreements hereunder shall have a continuing obligation to immediately inform the DSBO in writing
12 of any agreed upon and user department approved increase or decrease in the scope of work of
13 such contract or concession agreement, upon any of the bases discussed in this section, regardless
14 of whether such increase or decrease in scope of work has been reduced to writing at the time of
15 notification.

16 (b) Any increase in the scope of work of a contract for construction, reconstruction, or
17 remodeling, whether by amendment, change order, force account or otherwise, or any increase in
18 the scope of services of a contract for professional design or construction services or of a concession
19 agreement, whether by amendment or any other addition of special, additional or other services to
20 the contract or concession agreement, which increases the dollar value of the contract or concession
21 agreement, if such change is within the scope of work designated for performance by the SBE or
22 EBE or any utilized SBE subcontractor, subconsultant or supplier at the time of contract or
23 concession agreement award, shall be immediately submitted to the DSBO. The contractor is
24 responsible for obtaining user department approval of any such change. The contractor, consultant
25 or concessionaire shall achieve defined selection pool requirements and, if applicable, minimum
26 SBE subcontractor, subconsultant and supplier utilization requirements as respects such changed
27 scope of work by performing such work or by retaining additional SBE subcontractor(s),
28 subconsultant(s) or supplier(s).

29 **Sec. 28-224. - Payments to SBE subcontractors, subconsultants, joint venturers, suppliers,**
30 **manufacturers, manufacturer's representatives and brokers.**

1 All contractors and consultants shall promptly render payment to all subcontractors,
2 subconsultants, joint venturers, suppliers, manufacturers, manufacturer's representatives and
3 brokers on a contract. Each contractor and consultant shall provide with each pay request to the city
4 or private owner on each contract, beginning with the second pay request, partial claim releases
5 from subcontractors, subconsultants, joint venturers, suppliers, manufacturers, manufacturer's
6 representatives and brokers in form and content satisfactory to the city, or shall provide, at the city's
7 sole option, alternative proof of payment to subcontractors, subconsultants, joint venturers,
8 suppliers, manufacturers, manufacturer's representatives and brokers, in form and content approved
9 by the department head and the director, evidencing that all subcontractors, subconsultants,
10 suppliers, manufacturers, manufacturer's representatives and brokers have been duly paid out of
11 the proceeds of the contractor's or consultant's payments from the city or private owner under the
12 contract; unless a bona fide dispute, documented in writing, exists between the contractor or
13 consultant and the unpaid subcontractor, subconsultant, joint venturer, supplier, manufacturers,
14 manufacturer's representatives or broker. As provided by city and state law and city contracts, an
15 agency, upon request from a contractor, may authorize payments to contractors from withheld
16 retainage for contractors who have completed their work in a manner acceptable to the city.

17 **Sec. 28-225. - Prompt Payment to SBE subcontractors.**

18 (a) Each contractor on a city contract with certified SBEs as subcontractors shall pay the
19 respective subcontractors any invoiced and undisputed amounts for accepted and completed work
20 within thirty-five (35) days of the contractor's receipt of the subcontractor's invoice. Payment to the
21 subcontractor shall be timely made as required under this section regardless of whether the
22 contractor has been paid for the same work or payment period. For the purposes of the section 28-
23 225, any subcontractor, regardless of whether that subcontractor holds a city contract, may be
24 required to make payments to MWBEs as set forth in this section.

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

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

1 (d) The payment requirements under this section shall apply to SBEs utilized for
2 satisfaction of the goal regardless of tier.

3 (e) SBEs performing as prime contractors shall be subject to the requirements under this
4 section 28-225 regarding payment to MWBE or SBE subcontractors.

5 (f) This section 28-225 shall apply only to contracts in the amount of one million dollars
6 (\$1,000,000.00) or more based on the original contract amount before amendments or changes.

7 **Sec. 28-226. – Participation modification; substitution; termination of SBE subcontractors.**

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

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

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

20 (2) The contractor must give the SBE subcontractor at least five (5) business days
21 to respond to the contractor's notice.

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

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

27 (i) The SBE subcontractor fails or refuses to execute a written contract;

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

1 (iii) The SBE subcontractor fails or refuses to meet the contractor's reasonable,
2 nondiscriminatory bond requirements or insurance requirements;

3 (iv) The SBE subcontractor becomes bankrupt, insolvent, or exhibits credit
4 unworthiness;

5 (v) The SBE subcontractor is or becomes ineligible to work on city projects
6 because of suspension and debarment;

7 (vi) The non-city owner or contractor has determined that the SBE subcontractor
8 is not a responsible contractor;

9 (vii) The SBE subcontractor voluntarily withdraws from the project and provides
10 to you written notice of its withdrawal;

11 (viii) The SBE subcontractor's cannot be counted toward the minimum
12 participation requirement;

13 (ix) A SBE subcontractor owner dies or becomes disabled resulting in the SBE
14 subcontractor's inability to perform or complete its work on the contract; or

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

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

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

25 (c) If the DSBO and the user department concurs with the contractor's request to
26 substitute, terminate or reduce the scope of work of the SBE subcontractor, the contractor must
27 replace the terminated SBE subcontractor with another SBE firm certified to perform the same scope
28 of work unless the contractor can demonstrate that it cannot replace the subcontractor to the DSBO's
29 satisfaction.

30 (d) If a contractor substitutes or terminates the SBE subcontractor, or reduces the scope
31 of work of the SBE subcontractor, without first complying with this section 28-226, the DSBO may

1 find the contractor in violation of this ordinance and the contractor may be subject to enforcement
2 and sanctions.

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

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

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

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

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

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

21 (5) Retaliate against any SBE subcontractor that reports issues to the DSBO or user
22 department;

23 (6) Participate in a conduit relationship with an SBE subcontractor scheduled to
24 perform work on the contract;

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

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

28 (b) Any action by a contractor, consultant or concessionaire in violation of subsections (a)(1)
29 through (8) hereof, shall constitute a material breach of the contract or concession agreement that
30 shall entitle the city or private owner to exercise all of its rights at law or equity for such material
31 breach, in addition to exercising any of the other sanctions set out in section 28-229. If, following

1 contract or concession agreement award, an SBE or EBE has its certification terminated for reasons
2 other than expiration of certification, or graduation from certification under section 28-206, or an SBE
3 or EBE fails to perform a commercially useful function, the participation of which was originally
4 counted for that SBE or EBE in awarding the contract or concession agreement, or an SBE
5 voluntarily withdraws its SBE participation on the contract or concession agreement and the
6 contractor, consultant or concessionaire can demonstrate that such termination or failure did not
7 result from any action or inaction, whether direct or indirect, of or by the contractor, consultant or
8 concessionaire, such termination of certification or failure to perform a commercially useful function
9 shall not be deemed to affect compliance with the contract or concession agreement defined
10 selection pool requirements or minimum SBE utilization requirements, and shall not be deemed a
11 breach of the contract or concession agreement.

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

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

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

23 (a) If a contractor, consultant or concessionaire is found to be in violation of the provisions
24 of article VII, to otherwise be in breach of a contract or concession agreement, to perform as an SBE
25 or EBE for a non-commercially useful function or as a conduit, to fail to achieve required minimum
26 SBE subcontractor, subconsultant and/or supplier utilization, if applicable, to fail to submit
27 information required in section 28-220, to submit false, misleading or materially incomplete
28 statements, documentation or records, or to fail to cooperate in an investigation, it shall be subject
29 to sanctions. The city may exercise any or all of its rights, including, but not limited to, withholding
30 funds including retentions, imposition of monetary penalty, suspension or termination, contained in
31 the contract or concession agreement terms and conditions. If the contract or concession agreement

1 is suspended or terminated, the city reserves all its rights at law or equity, with such suspension or
2 termination being deemed a response to a contractor, consultant or concessionaire default, as
3 appropriate, by applicable law.

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

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

- 13 a. The length of the period of noncompliance;
- 14 b. The history of previous noncompliance with this article VII;
- 15 c. The monetary impact of the civil penalty on the contractor, consultant or
16 concessionaire in correcting such noncompliance; or
- 17 d. The other facts and circumstances relevant to the noncompliance of the
18 contractor, consultant or concessionaire.

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

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

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

29 (5) The debarment board established under Denver Revised Municipal Code Section
30 20-77, upon request of the director, may suspend or debar the contractor, consultant or
31 concessionaire from participation in city or private contracting covered hereunder for a period as

1 may be determined by the debarment board, in its sole discretion, based upon the grounds of
2 violating this article VII, pursuant to such suspension and debarment procedures as may be
3 established by the city, as set forth in Denver Revised Municipal Code Section 20-77. The director
4 in that event shall regard as nonresponsive any bid, proposal or competitive selection process
5 proposal received during this time period that includes the contractor, consultant or concessionaire
6 as a contractor, consultant, concessionaire, subcontractor, subconsultant, joint venturer, supplier,
7 manufacturer, manufacturer's representative, or broker.

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

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

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

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

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

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

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

10 **Sec. 28-231. - Reporting.**

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

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

19 In calculating SBE or EBE participation, all funds paid to SBEs and EBEs on city defined
20 selection pool contracts and all revenues received by SBEs from city concession agreements during
21 the year shall be counted whether or not such funds were used to compensate SBEs and EBEs or
22 such concession revenues were received by SBEs for the performance of a commercially useful
23 function.

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

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

1 **Sec. 28-233. - Rules and regulations; guidelines.**

2 The director shall have the power and authority to adopt rules and regulations or guidelines
3 to effectuate the purpose, procedures and operations of this article VII.

4 **Sec. 28-234. - Severability.**

5 If any provision of this article VII or its application is held invalid or unenforceable, such
6 invalidity or unenforceability shall not affect other provisions or applications of this article VII that can
7 be given effect without the invalid provisions or applications and the remaining provisions are to be
8 severable and shall remain in full force and effect.

9 **Sec. 28-235. - Effective date of ordinance.**

10 This article VII shall become effective on May 2, 2020 and shall apply to all contracts and
11 concession agreements within the scope of the article for which bids or proposals are publicly
12 advertised on or after May 2, 2020.

13 **Sec. 28-236. - Review and sunset.**

14 (a) This article VII shall be reviewed by the mayor, director and department heads on the
15 third anniversary of its enactment, in order to determine whether adjustments or revisions to article
16 VII or additional studies or inquiries in furtherance of article VII are deemed appropriate and should
17 be undertaken or recommended, in order to further and maintain the purpose and intent of article
18 VII.

19 (b) This article VII shall be repealed effective April 30, 2025.

20 **BALANCE OF PAGE INTENTIONALLY LEFT BLANK**

22

1 COMMITTEE APPROVAL DATE: March 25, 2020 by Consent
2 MAYOR-COUNCIL DATE: March 31, 2020 by Consent
3 PASSED BY THE COUNCIL: _____ April 13, 2020
4 _____ - PRESIDENT
5 APPROVED: _____ - MAYOR _____ Apr 15, 2020
6 ATTEST: _____ - CLERK AND RECORDER,
7 EX-OFFICIO CLERK OF THE
8 CITY AND COUNTY OF DENVER
9 NOTICE PUBLISHED IN THE DAILY JOURNAL: _____;
10 PREPARED BY: Jason D. Moore, Assistant City Attorney DATE: April 2, 2020
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 Kristin M. Bronson, Denver City Attorney
17 BY: _____, Assistant City Attorney DATE: Apr 2, 2020
18