

**BY AUTHORITY**

ORDINANCE NO. \_\_\_\_\_  
SERIES OF 2014

COUNCIL BILL NO. CB14-0038  
COMMITTEE OF REFERENCE:  
Business, Workforce & Sustainability

**A B I L L**

**For an ordinance amending Articles III and VII of Chapter 28 of the Denver Revised Municipal Code by repealing and reenacting a new Division 1 of Article III pertaining to the establishment and duties of the Division of Small Business Opportunity; repealing and reenacting a new Division 3 of Article III establishing a Minority and Women Business Enterprise contracting ordinance in furtherance of nondiscrimination in City Contracts for Construction, Reconstruction and Remodeling, and Professional Design and Construction Services; and repealing and reenacting a new Article VII pertaining to the development and utilization of Small Business Enterprises in City contracting and concessions.**

**WHEREAS**, commencing in the late 1970s, the City received complaints from industry participants and from agencies of the federal government regarding discrimination against women and minorities in the construction, reconstruction and remodeling, and professional design and construction services industries in the City’s market area in which the City was both an active and passive participant; and

**WHEREAS**, the City undertook a succession of formal and informal initiatives and programs to remedy such alleged discrimination, which provided in part for both project and annual aspirational goals for the utilization of, or the showing of good faith efforts to utilize minority and women business enterprises (MBE/WBEs) on City projects in said industries; and

**WHEREAS**, in furtherance of its ongoing attempts to remediate this discrimination, the City conducted extensive public hearings prior to the enactments of Ordinance No. 246, Series of 1983; Ordinance No. 424, Series of 1988; Ordinance No. 213, Series of 1989; Ordinance No. 513, Series of 1990; and Ordinance No. 760, Series of 2006; hired independent consultants who found evidence of discrimination in 1990 and who in 1995, 1996, 2004, and 2012 found continuing evidence of disparities between the availability and utilization of woman- and minority-owned business enterprises in said industries; and received a report from a broad-based community task force that identified an underutilization of minority and woman-owned businesses in such industries; and

**WHEREAS**, commencing in 1992, the City was forced to defend the constitutionality of its minority and woman contracting ordinance for the said industries in the case of Concrete Works of

1 Colorado, Inc. v. City and County of Denver, 390 F.3d 950 (10<sup>th</sup> Cir. 2003), cert. den. 540 U.S.  
2 1027 (2003), in which the City prevailed in 2003, thus establishing the constitutionality of its goals  
3 ordinance; and

4 **WHEREAS**, having received additional complaints of discrimination, the City convened a  
5 task force to study such issues in 2011 and commissioned a study by MGT of America, Inc., which  
6 study in 2013 found continued evidence of both impediments to the development of availability and  
7 underutilization of minority and women-owned business enterprises in said industries, and such  
8 conclusions were found to be consistent with the existence of racial and gender discrimination in  
9 such industries; and

10 **WHEREAS**, in 2011, provisions of the MBE, WBE and small business enterprise (SBE)  
11 ordinances disqualifying any and all relatives of city officers and employees from participating in  
12 these programs was amended to reflect accurately the Charter and Code of Ethics of the City that  
13 prohibit conflicts of interest in the city’s contracting process; and

14 **WHEREAS**, on behalf of the City, MGT of America, Inc. held public hearings on August 28-  
15 29, 2012, which hearings elicited numerous anecdotal accounts of experiences suffered by  
16 participants in such industries and others that were also consistent with and indicative of continued  
17 racial and gender discrimination in the said industries; and

18 **WHEREAS**, the City Council reviewed the size standards established by the U.S. Small  
19 Business Administration (SBA) for SBEs participating in SBA programs, with respect to business  
20 size in the metropolitan Denver construction, reconstruction and remodeling, and professional  
21 design and construction services industries; and retail, food service, and other concession  
22 industries; and assessed whether a development program to assist such SBEs, regardless of the  
23 race or gender of the owners thereof, in contracting with the City in the areas of construction,  
24 reconstruction and remodeling, and professional design and construction services, both as general  
25 contractors, subcontractors, subconsultants, and suppliers, in the City’s retail, food services, and  
26 other concession activities would benefit City contracting by promoting competition in bidding and  
27 benefit the metropolitan area, including the City, by promoting the economic growth of such SBEs;  
28 and

29 **WHEREAS**, the City has assessed whether it would serve legitimate interests of the City  
30 and serve a public purpose to develop a comprehensive City multi-tiered program to be called the  
31 Construction Empowerment Initiative (“CEI”), to assist smaller business enterprises in the  
32 construction, reconstruction and remodeling, and professional design and construction services  
33 industries markets in which the City participates, together with concession activity at Denver

1 International Airport (DIA) through a variety of race and gender neutral components, including but  
2 not limited to, the development of a variety of outreach and development programs together with a  
3 reenacted minority and women business enterprise goals program and a defined benefit pool small  
4 business enterprise program as components of the initiative; and

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

8 (a) *History of discrimination.*

9 (1) There exists a prima facie showing that woman business enterprises and  
10 minority business enterprises owned by Black/African-Americans, Hispanic-Americans, Asian-  
11 Americans, and Native Americans, who have done business or attempted to do business in the  
12 private and public construction, reconstruction and remodeling, and professional design and  
13 construction services industries within the City and the City's market area or marketplace for these  
14 industries, which encompasses the State of Colorado, have suffered and continue to suffer from  
15 discrimination. This discrimination has existed in the City's construction, reconstruction and  
16 remodeling, and professional design and construction services contracting practices and in the  
17 private sector industry contracting in such industries in which the City has been a passive  
18 participant. Because of such discrimination, such woman business enterprises and minority  
19 business enterprises have been denied equal opportunity to participate in such contracts.

20 (2) Such denial of equal opportunity has been aggravated by impediments to the  
21 creation of minority and women-owned business enterprises in the said industries, as measured by  
22 lending discrimination affecting such industries, comparison of business formation rates of minority  
23 and women employees and majority employees in such industries, and a comparison between  
24 self-employment earnings of minorities and women as compared to majority persons in such  
25 industries.

26 (3) Such discrimination has prevented such woman business enterprises and  
27 minority business enterprises from participating both in the city's contracting opportunities in the  
28 construction, reconstruction and remodeling, and professional design and construction services  
29 areas and in the private sector construction, reconstruction and remodeling, and professional  
30 design and construction services areas at a level that would have existed absent such  
31 discrimination.

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

4           (5) Such discrimination continues to require action to prevent discrimination and  
5 to remedy its effects.

6           (6) Without the adoption of a good-faith goal program, such woman business  
7 enterprises and minority business enterprises would not have an equal opportunity to participate in  
8 city contracts for construction, reconstruction and remodeling, and for professional design and  
9 construction services.

10          (b) *Goals program.* The city has a compelling governmental interest in prohibiting,  
11 preventing and eliminating race and gender discrimination and its effects in city contracts for  
12 construction, reconstruction and remodeling, and professional design and construction services,  
13 and for this purpose adopts the specific program of good-faith goals as set forth in Division 3 of  
14 Article III of Chapter 28. This goal program has been carefully structured to take into consideration  
15 factors such as present availability of such woman business enterprises and minority business  
16 enterprises to perform work on such City contracts. The program does not authorize the use of  
17 set-asides, quotas, sheltered markets, or bid preferences. The program is narrowly tailored to  
18 prevent and eliminate discrimination and its effects against such minority business enterprises and  
19 woman business enterprises with a minimum of burden on other contractors, including:

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

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

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

33           (4) The program provides for graduation from the program of minority business

1 enterprises and woman business enterprises whose size indicates that they have had the  
2 opportunity to overcome the effects of discrimination.

3 (c) *Small Business Enterprise Program*

4 (1) One Hundred Percent (100%) of national SBA size standards is reasonably  
5 reflective of business size in the metropolitan Denver construction, reconstruction and remodeling;  
6 and professional design and construction services industries, and retail, food service, and other  
7 concession industries. Further, a development program to assist such small business enterprises,  
8 regardless of the race or gender of the owners thereof, in contracting with the City in the areas of  
9 construction, reconstruction and remodeling, and professional design and construction services,  
10 both as general contractors and as subcontractors, subconsultants, and suppliers, and in the City's  
11 retail, food services, and other concession activities would benefit the City contracting by  
12 promoting competition in bidding and benefit the metropolitan area, including the City, by  
13 promoting the economic growth of such small business enterprises, and such a development  
14 program is therefore justified as being related to a legitimate governmental interest of the City;

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

25 (d) *Construction Empowerment Initiative*

26 It would serve a legitimate governmental interest of the City to develop a comprehensive,  
27 multi-tiered program of race and gender neutral assistance to small business enterprises, to be  
28 called the Construction Empowerment Initiative ("CEI"), with the details of such programs to be  
29 developed by the agencies of the City, with the proposed MBE/WBE ordinance and the SBE  
30 defined selection pool program forming components of such construction empowerment initiative.

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

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

1 **ARTICLE III. NONDISCRIMINATION IN CITY CONTRACTS FOR CONSTRUCTION,**  
2 **RECONSTRUCTION, AND REMODELING, AND PROFESSIONAL DESIGN AND**  
3 **CONSTRUCTION SERVICES**

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

5 **Sec. 28-31. Office functions.**

6 The division of small business opportunity (DSBO) shall be responsible to the mayor for the  
7 performance of the functions, powers and duties assigned to DSBO by this Chapter 28 or as may  
8 be assigned by the mayor or the Director of the office of economic development. Such duties shall  
9 include development and enforcement of programs for enhancing minority, women and small  
10 business enterprise utilization in City construction, professional design and construction services,  
11 and DIA concession contracting, and promoting economic development of such minority, women  
12 and small business enterprises.

13 **Sec. 28-32. Powers and duties.**

14 (a) The DSBO shall perform all tasks and responsibilities established by this Chapter 28  
15 together with such other tasks and responsibilities as may be assigned to the office by ordinance,  
16 executive order or otherwise or which may devolve upon such office by operation of federal law,  
17 including but not limited to administration and oversight of such federally-established  
18 Disadvantaged Business Enterprise (DBE) or similar programs that may be made applicable to  
19 City contracting activities.

20 (b) The Director is hereby delegated the authority to promulgate such rules and  
21 regulations or informal guidelines as may be necessary to effectuate the purposes of this chapter  
22 28 and other programs within the purview of the DSBO.

23 **Sec. 28-33. Administrative review and court proceedings.**

24 (a) Any person who disputes any determination made by or on behalf of the City  
25 pursuant to the authority of the Director, which determination adversely affects such person, may  
26 petition the Director for a hearing concerning such determination no later than thirty (30) after the  
27 date of the determination. Compliance with the provisions of this Section shall be a jurisdictional  
28 prerequisite to any action brought under the provisions of this Section, and failure of compliance  
29 shall forever bar any such action. This Section shall not be construed to create a right of standing  
30 that does not otherwise exist under Colorado law.

31 (b) The Director may hold such hearing or in the Director's sole discretion may designate  
32 and request an officer or employee of the DSBO, or an independent hearing officer retained by the  
33 City, as a hearing officer with authority to hold such hearing or hearings.

1 (c) Such petition shall be in writing, and the facts and figures submitted shall be  
2 submitted under oath or affirmation either in writing or orally at a hearing scheduled by the Director  
3 or the hearing officer. The hearing, if any, shall take place in the City, and notice thereof and the  
4 proceedings shall otherwise be in accordance with rules and regulations issued by the Director.  
5 The petitioner shall bear the burden of persuasion and the burden of going forward, and the  
6 standard of proof shall conform to that in civil, non-jury cases in state district court, provided that  
7 the Director may provide, by rule and regulation, for either review of the record or for limited de  
8 novo review of different types of questions coming before the Director.

9 (d) Thereupon, the Director or designee shall make a final determination. Such final  
10 determination shall be considered a final order of the Director and may be reviewed under rule  
11 106(a)(4) of the state rules of civil procedure by the petitioner or by the City. A request for  
12 reconsideration of the final determination may be made if filed with the Director within fifteen (15)  
13 days from the date of determination, in which case the Director shall review the record if the  
14 proceedings were conducted by a designated hearing officer, and the determination shall be  
15 considered a final order of the Director upon the date the Director rules on the request for  
16 reconsideration.

17 (e) Pursuant to rule 106(a)(4) of the state rules of civil procedure, the district court of the  
18 second judicial district of the state shall have original jurisdiction in proceedings to review the final  
19 order.

20 **Sec. 28-34. Program administration.**

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

23 (1) Formulating, proposing and implementing rules and regulations for the  
24 development, implementation, administration and monitoring of the various programs established  
25 through chapter 28, by other City programs or by federal law.

26 (2) Providing information and assistance to MBEs, WBEs, SBEs and other  
27 business enterprises relating to City contracting practices and procedures, and bid specifications,  
28 requirements and prerequisites.

29 (3) Establishing uniform rules and regulations, procedures, and criteria for  
30 certification, renewal of certification, decertification and graduation, as a MBE, WBE or SBE and  
31 appeals of and challenges to all such certification decisions and maintaining certification records  
32 and Directories of such MBEs, WBEs and SBEs.

1 (4) Establishing annual and project goals for the MBE and WBE contracting  
2 program established in Division 3 of this Article III of Chapter 28.

3 (5) Evaluating contractors' and consultants' achievement of project goals or good  
4 faith efforts to meet project goals.

5 (6) Working with user departments to monitor contracts to ensure prompt  
6 payments to MBEs, WBEs and SBEs, and compliance with applicable project goals and  
7 commitments.

8 (7) Receiving, reviewing, and acting upon complaints and suggestions concerning  
9 the various programs established through Chapter 28 or by federal law.

10 (8) Collecting data to evaluate the programs and other City contracting initiatives.

11 (9) Monitoring the various programs and the City's progress towards the  
12 established annual MBE/ WBE goal. The Director shall report on a quarterly and an annual basis  
13 to the mayor and the city council on the administration and operations of the various programs.

14 (10) Developing technical assistance programs to assist MBEs, WBEs, SBEs and  
15 other businesses relating to contracting, business and professional development.

16 (11) Establishing a mentor-protégé program to encourage majority and minority  
17 trade associations to work jointly to connect MBE and WBE protégés with well established mentor  
18 firms. DSBO shall facilitate the implementation and coordination of this program. The program  
19 may include appropriate incentives to encourage firms to mentor MBE and WBE protégés.

20 (b) The user departments that receive appropriate delegation for project management,  
21 contract and concession agreement management, and/or construction and/or design contract  
22 responsibility shall have the following duties and responsibilities with regard to the programs  
23 established through chapter 28, by other City programs or by federal law:

24 (1) Assisting the DSBO with setting project goals for MBE/ WBE participation on  
25 individual contracts.

26 (2) Assisting in the identification of available MBEs and WBEs and providing other  
27 assistance in meeting the annual goal and project goals.

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

31 (4) Assuring that MBEs, WBEs, SBEs and other business enterprises are  
32 informed of City contracting and concession opportunities.



1 (5) Performing other activities to support the various programs established  
2 through this chapter 28, by other City programs or by federal law.

3 (6) Gathering and maintaining contracting, consulting, subcontracting and  
4 subconsulting data for those contracts that the user departments manage, as provided under this  
5 chapter 28.

6 (7) Submitting subcontracting and subconsulting data as required to the Director.

7 (8) Managing contracts and concession agreements in a consistent manner to  
8 assure contract and concession agreement compliance in utilization of MBEs, WBEs and SBEs.

9 **Sec. 28-35. Race- and gender-neutral measures to promote equal opportunities for all**  
10 **business enterprises.**

11 The City, through the DSBO, in cooperation with user departments, other governmental  
12 agencies and private parties and organizations, is authorized to develop and utilize discretionary  
13 programs and activities to provide outreach to and to facilitate the participation of all business  
14 enterprises in City contracting and concession activities, including but not limited to MBEs, WBEs  
15 and SBEs. These programs and activities may include, but are not limited to:

16 (a) Commencement of collection and analysis, for informational purposes only, of data  
17 and information from each bidder or proposer on a City contract regarding the ongoing availability  
18 and utilization of minority and women-owned business enterprises, including MBEs and WBEs, on  
19 such bidder's or proposer's private contracts in the construction and professional design and  
20 construction services industries in the City's marketplace. DSBO and the user departments will  
21 explore making provision of such data and information a condition precedent to or an element of  
22 prequalification for bidding or proposing on City contracts within the scope of this chapter 28.

23 (b) Development of such other programs or activities as the Director may from time to  
24 time recommend.

25 **Sec. 28-36. Collection of fees by DSBO to defray certification costs of chapter 28 programs.**

26 DSBO shall charge a certification fee of not to exceed Three Hundred Dollars (\$300.00) to each  
27 applicant business enterprise seeking to be certified or to have certification(s) renewed under the  
28 provisions of Division 3 of Article III and of Article VII of this Chapter 28.

29 **Secs. 28-37—28-51. Reserved.**

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

1 **DIVISION 3. NONDISCRIMINATION IN CITY CONTRACTS FOR CONSTRUCTION,**  
2 **RECONSTRUCTION, AND REMODELING, AND PROFESSIONAL DESIGN AND**  
3 **CONSTRUCTION SERVICES**

4 **Sec. 28-52. Purpose and Scope.**

5 The purpose of this Division 3 is to enable the City, through the departments and agencies of the  
6 City, including the departments of public works, aviation and general services and other user  
7 departments, and the DSBO, to undertake specific activities to prevent discrimination and its  
8 effects against business enterprises that have been certified as MBEs and/or WBEs in the areas of  
9 construction, reconstruction and remodeling, and professional design and construction services, in  
10 the execution by the above departments of their duties pursuant to the Charter and ordinances of  
11 the City and County of Denver. The Director and the user departments are hereby expressly  
12 delegated the necessary powers to effectuate the purpose of this Division 3 and to undertake such  
13 additional studies or inquiries as they may deem appropriate.

14 **Sec. 28-53. Contracts excluded from coverage by this Division 3.**

15 (a) Contracts and concession agreements for which bids or proposals are sought under  
16 the SBE defined selection pool contracting program established pursuant to Article VII of this  
17 chapter 28 are excluded from the coverage of this Division 3. In addition, in the case of a contract  
18 hereunder for which a part of the contract price is to be paid with funds from the United States  
19 Government or the State of Colorado and for which the United States Government or the State of  
20 Colorado has made applicable to such contract requirements, terms or conditions which are  
21 inconsistent with the provisions of this Division 3, the provisions of this Division 3 shall not apply to  
22 such contract to the extent of such inconsistency.

23 (b) Contracts authorized to be advertised by the Director in collaboration with the user  
24 departments without project goals to assist in the determination of ongoing MBE and WBE  
25 utilization on City contracts in the absence of project goals are also excluded from the coverage of  
26 this Division 3; provided, however, that this reference to contracts without project goals shall not  
27 include contracts that are advertised with a zero percent project goal after due assessment of  
28 availability.

29 **Sec. 8-54. Definitions.**

30 As used in this Division 3, the following words and phrases shall have the following  
31 meanings, unless otherwise clearly required by the context:

32 (1) *Affiliate* means any business enterprise that is affiliated with an MBE or WBE or with  
33 the owner(s) of such MBE or WBE. Business enterprises are affiliates of each other when one

1 controls or has the power to control the other, or a third party or parties controls or has the power  
2 to control both. It does not matter whether control is exercised, so long as the power to control  
3 exists.

4 The Director may utilize, in the interpretation of this definition, the definition of affiliate set  
5 forth in 13 C.F.R. § 121 or successor regulation, including related SBA guidance documents, as  
6 from time to time amended.

7 (2) *Annual Goal* means the targeted level for the aspirational goal established by the City  
8 for the annual aggregate participation of MBEs and WBEs in City contracts.

9 (3) *Applicant Business Enterprise* means a business enterprise seeking to be certified as  
10 a minority and/or woman business enterprise under this Division 3.

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

13 (5) *Broker* means a business enterprise that performs a commercially useful function as  
14 an intermediary, for a fee, in the acquisition of materials, supplies or equipment, regardless of  
15 whether or not it takes title to such materials, supplies or equipment, for the City or a private owner  
16 or its contractors, consultants or suppliers, but is not a manufacturer, manufacturer's  
17 representative or regular dealer. Only bona fide commissions earned by a broker for its activities in  
18 performing a commercially useful function on a City contract shall be counted toward the project  
19 goal as set out in Sections 28-63 and 28-68. A packager shall be considered and treated as a  
20 broker.

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

27 (7) *Certification* means completion by a business enterprise of an application procedure  
28 to be developed by the DSBO, and formal authorization by the Director to participate as an MBE  
29 and/or WBE under this Division 3. Certification neither represents nor implies that a business  
30 enterprise is qualified to perform on a contract, nor that it performs a commercially useful function.

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

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

1           (10) *City project; city contract; city construction practices* mean any contract or project  
2 encompassed within the definition of contract in this Division 3, regardless of whether the project  
3 owner is the City or a private owner. All provisions of this Division 3 shall apply to such contracts  
4 let by private owners, provided that the City shall not dictate means and methods of construction to  
5 such private owners. Copies of all documents required to be provided by a subcontractor,  
6 subconsultant, supplier, manufacturer, manufacturer's representative or broker hereunder shall be  
7 sent to the Director when the originals are sent to a private owner.

8           (11) *Commercially Useful Function* means responsibility for the execution of a distinct  
9 element of the work of a contract that is carried out by a business enterprise actually performing,  
10 managing, and supervising the work involved, or fulfilling responsibilities as a joint venturer. To  
11 determine whether an MBE or WBE is performing a commercially useful function, the amount of  
12 work subcontracted, industry practices and other relevant factors shall be evaluated.  
13 Commercially useful function is measured for purposes of determining participation on a contract,  
14 not for determination of certification eligibility.

15           (12) *Competitive Selection Process* has the meaning ascribed to that phrase in Sections  
16 2.3.3(A) and 2.11.3(B) of the Denver City Charter, and in D.R.M.C. Sections 5-19 and 20-56, as  
17 that meaning may pertain to a contract(s) at issue.

18           (13) *Conduit* means an MBE or WBE that knowingly agrees to pass the scope of work for  
19 which it is listed for participation and is scheduled to perform or supply on a contract, to a non-MBE  
20 or non-WBE. In this type of relationship, the MBE or WBE has not performed a commercially  
21 useful function and the arranged agreement between the two parties is not consistent with  
22 standard industry practice. This arrangement does not meet the commercially useful function  
23 requirement, and therefore the MBE's or WBE's participation does not count toward the MBE/  
24 WBE goal on the contract.

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

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

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

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

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

21 (19) *Department Head* means the manager or Director of the City department entering  
22 into contract(s) utilizing MBE/ WBE participation, or such person's designee.

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

27 (21) *Director* means the Director of the Division of Small Business Opportunity or  
28 successor agency, or such Director's designee.

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

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

32 (24) *Economically Disadvantaged* means an individual with a personal net worth equal to  
33 or less than the permissible personal net worth amount determined by the U.S. Department of

1 Transportation to be applicable to its DBE programs, or as otherwise promulgated by the Director  
2 by rule and regulation.

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

6 (26) *Goal Committees* mean committees of persons engaged in the construction,  
7 reconstruction and remodeling, and professional design and construction services industries,  
8 which shall be established by the Director to advise the Director as to project goal setting.

9 (27) *Good Faith Efforts* means substantive and meaningful good faith actions undertaken  
10 by a contractor or consultant to achieve the MBE/WBE project goal as defined in more detail in  
11 Sections 28-62 and 28-67 of this Division 3.

12 (28) *Individual* or *Person* means a natural human being, and not a legally-created or  
13 maintained entity.

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

23 (30) *Letter of intent* means a written communication from a project bidder or proposer to  
24 the City or a private owner with respect to a contract evidencing an understanding between an  
25 MBE or WBE and the bidder or proposer that such MBE or WBE has or will enter into a contractual  
26 relationship with the bidder or proposer on such contract or that such bidder or proposer will self-  
27 perform as an MBE or WBE on such contract.

28 (31) *Manufacturer* means a business enterprise that operates or maintains a factory or  
29 establishment that produces, or substantially alters on the premises the materials, supplies or  
30 equipment provided to contractors, consultants, subcontractors, subconsultants, suppliers, brokers  
31 or manufacturer's representatives on a contract, required under the contract and of the general  
32 character described by the contract specifications. The percentage of the value of the  
33 commercially useful function performed by a manufacturer on a City contract shall be counted

1 toward the applicable project goal in the same manner as for a supplier to quantify the work  
2 performed.

3 (32) *Manufacturer's Representative* means a business enterprise that sells products for  
4 one or more manufacturers. A manufacturer's representative does not take legal title to or physical  
5 possession of the products that it sells, such products generally being sent directly from the  
6 manufacturer to the contractor or subcontractor purchasing the products. Only bona fide  
7 commissions earned by a manufacturer's representative in performing a commercially useful  
8 function on a contract shall be counted toward the project goal as set out in Sections 28-63 and  
9 28-68.

10 (33) *Mentor-Protégé* means a relationship between a subcontractor certified as a MBE or  
11 a WBE (protégé) and a more experienced contractor (mentor) approved by DSBO. In a mentor-  
12 protégé, the mentor provides guidance on technical, financial, bonding, equipment, and personnel  
13 assistance to the protégé. The purpose of the relationship is to increase the capacity of MBEs and  
14 WBEs to perform City contracts.

15 (34) *Minority Business Enterprise or MBE* means a business enterprise that is certified by  
16 the Director under this Division 3 as meeting all of the requirements for certification set forth in  
17 Sections 28-55 and 28-56 as an MBE.

18 (35) *Minority Individual* means:

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

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

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

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

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

32 (b) Alternatively, on a case-by-case basis for the purposes of this Division 3, an  
33 individual found by the City to have been subjected to individualized racial or ethnic prejudice or

1 cultural bias within American society within the City's marketplace because of his or her identity as  
2 a member of a group other than the groups referenced in subsection (a) above, without regard to  
3 individual qualities, and therefore determined by the Director to be individually socially  
4 disadvantaged under this subsection; and (b) Individual social disadvantage must stem from  
5 circumstances beyond the individual's control. Evidence of individual social disadvantage must  
6 include:

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

11 (ii) Personal experiences of substantial and chronic social disadvantage in  
12 American society within the City's marketplace.

13 (iii) Negative impact on entry into or advancement in the City's marketplace  
14 and participating on City contracts because of the disadvantage, as demonstrated by the  
15 individual's education, employment and business history.

16 (36) *On-Call Construction or Design Contracts* or *On-Call Projects* means contracts that  
17 are procured and awarded without a pre-determined specific project or scope of work. Once a  
18 specific scope of work is identified, individual work orders or task orders are authorized, and the  
19 contractor proceeds to complete the work under the individual work order or task order.

20 (37) *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,  
23 manufacturer, or manufacturer's representative. A packager shall be considered and treated as a  
24 broker.

25 (38) *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  
27 ownership interest in an applicant business enterprise or participating MBE or WBE or the  
28 individual's equity, if any, in his or her primary place of residence. An individual's personal net  
29 worth includes only his or her share of assets held individually and jointly with the individual's  
30 spouse. For the purposes of certification as an MBE or WBE under this division 3, an individual  
31 must have a personal net worth equal to or less than the permissible personal net worth amount  
32 determined by the U.S. Department of Transportation to be applicable to its DBE programs or as  
33 otherwise promulgated by the Director by rule and regulation.



1 (39) *Private Owner* means a private or other non-City owner undertaking to contract for  
2 construction work or for design or construction management services on buildings or aviation or  
3 aeronautical facilities or improvements thereto, on real property owned by the City.

4 (40) *Professional Design and Construction Services* means those areas of services  
5 ancillary to construction as encompassed within the City's contracting processes authorized by the  
6 charter and ordinances of the City, including but not limited to engineering, architectural, testing,  
7 and planning services related to construction projects.

8 (41) *Project Goal* means the specific MBE/WBE goal established for a particular contract  
9 based upon the availability of MBEs and WBEs in the scope(s) of work of the contract.

10 (42) *Proposal* means an offer to perform construction or professional design and  
11 construction services pursuant to a negotiated or otherwise competitively selected City contract  
12 with either the City or a private owner, and whether in response to a request for qualifications,  
13 request for proposals or otherwise. The department head shall designate the final project-specific  
14 proposal, and the date of receipt for each solicitation of proposers subject to this Division 3.

15 (43) *Proposer* means a business enterprise that submits a proposal on a City construction  
16 contract or professional design and construction services contract that is negotiated and not  
17 competitively bid or that utilizes a competitive selection process.

18 (44) *Qualified*, with respect to good faith efforts in this Division 3, means that a business  
19 enterprise has the financial ability, expertise, skill, experience, and access to the necessary staff,  
20 facilities and equipment to complete contract(s) or subcontract(s) that it may undertake on projects.  
21 The City makes no representations as to the qualification of any applicant business enterprise  
22 MBE or WBE.

23 (45) *Regular dealer* means a business enterprise that owns, operates or maintains a  
24 store, warehouse or other establishment in which the materials, supplies, articles or equipment of  
25 the general character described by the contract specifications and required for the performance of  
26 the contract are bought and regularly sold or leased to the public in the usual course of business.  
27 To be a regular dealer, the business enterprise must be an established, regular business engaged  
28 in, as a substantial and material portion of its business, and in its own name, the purchase and  
29 sale or lease of the products in question. A regular dealer is presumed to keep such materials,  
30 supplies, articles or equipment in stock, but must in any event bear the risk of loss of such items.  
31 A regular dealer in such bulk items as steel, cement, gravel, stone, asphalt and petroleum products  
32 need not own, operate or maintain a place of business if it both owns and operates distribution  
33 equipment for the products. Any supplementation of a regular dealer's distribution equipment shall

1 be by a long-term lease agreement and not on an *ad hoc* or contract-by-contract basis. Brokers,  
2 conduits, packagers, manufacturers and manufacturer's representatives shall not be regarded as  
3 regular dealers within the meaning of this term.

4 (46) *Socially Disadvantaged* means a minority individual or woman who has been  
5 subjected to racial, ethnic or gender prejudice or significant cultural bias within American society in  
6 the City's marketplace because of his or her identity as a member of a group and without regard to  
7 individual qualities. Social disadvantage must stem from circumstances beyond the individual's  
8 control. A socially disadvantaged individual must be a citizen or lawfully admitted permanent  
9 resident of the United States.

10 (47) *Subcontractor or Subconsultant* means a business enterprise that has entered into a  
11 contract with a general contractor or prime contractor to provide goods or services pursuant to a  
12 contract between the general contractor or prime contractor and the City. A subcontractor or  
13 subconsultant 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 services or perform work  
16 under agreements with the contractor or consultant or with other subcontractors or subconsultants  
17 under such contractor or consultant.

18 (48) *Supplier* means a business enterprise that either directly contracts with a contractor  
19 or consultant or directly contracts with subcontractors or subconsultants under such contractor or  
20 consultant on a city contract, and which business enterprise will provide materials, supplies or  
21 equipment under agreements with the contractor or consultant, or with other subcontractors or  
22 subconsultants under such contractor or consultant. A supplier may be a regular dealer,  
23 manufacturer, manufacturer's representative or broker. On City contracts of less than five million  
24 dollars (\$5,000,000.00) at the time of bid opening or proposal selection, one hundred percent  
25 (100%) of the value of the commercially useful function performed by an MBE or WBE supplier on  
26 such contract shall be counted toward the project goal. On City contracts of Five Million Dollars  
27 (\$5,000,000.00) or more at the time of bid opening or proposal selection, sixty percent (60%) of the  
28 value of the commercially useful function performed by an MBE or WBE supplier on such contract  
29 shall be counted toward the project goal.

30 (49) *Teaming Agreement* means an agreement between a prime or general contractor and  
31 an MBE or WBE subcontractor or an agreement between a consultant and an MBE or WBE  
32 subconsultant to (a) develop the capacity of the MBE or WBE under the bid or proposal to the City;

1 and (b) describes how the parties are going to share work under the bid or proposal for the primary  
2 scope of work under the bid or proposal.

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

5 (51) *Woman Business Enterprise* or *WBE* means a business enterprise that is certified by  
6 the Director under this division as meeting all of the requirements for certification set forth in  
7 Sections 28-55 and 28-56 as a WBE.

8 For purposes of this division, the Director shall classify business enterprises with both minority and  
9 women owners, and meeting the requirements for certification as an MBE or WBE, as MBEs if  
10 socially and economically disadvantaged minority individual(s) own fifty-one percent (51%) or more  
11 of ownership, and as WBEs if socially and economically disadvantaged women own fifty-one (51)  
12 percent or more of ownership. A business enterprise owned by individuals who are both socially  
13 and economically disadvantaged minority individuals and women may be certified as both an MBE  
14 and a WBE.

15 **Sec. 28-55. MBE/WBE Certification; eligibility of applicant business enterprises.**

16 (a) Procedures and methods. The Director shall, by rule and regulation or informal  
17 guidelines relating solely to internal management and procedure, establish reasonable procedures  
18 and methods for the certification of applicant business enterprises as MBEs and/or WBEs in order  
19 to effectuate the purposes of this division 3. The Director may seek input and advice from  
20 appropriate industry sources as to appropriate aspects of work performance, equipment and  
21 staffing in these industry areas in which certification is being sought.

22 (b) Only applicant business enterprises that meet the criteria for certification as an MBE  
23 or WBE may participate in the goals program established under this Division 3. The applicant  
24 business enterprise has the burden of persuasion by a preponderance of the evidence. Only an  
25 applicant business enterprise owned and managed and controlled by socially and economically  
26 disadvantaged individual(s) may be certified as an MBE or WBE, as applicable. MBEs and WBEs  
27 may be certified only for specific types of work for which they apply and in which they have had  
28 sustained business activity for a minimum of six (6) months. Certification areas shall correspond to  
29 the codes set forth in North American Industrial Classification Standard (NAICS) Codes, or  
30 successor classification system, 13 Code of Federal Regulations §121.201, as amended, or  
31 successor regulation.

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

1           (1) *Ownership*. In order for the socially and economically disadvantaged owner(s)  
2 to be found to own the applicant business enterprise for purposes of certification, as applicable, the  
3 applicant business enterprise or socially and economically disadvantaged owner(s) must meet the  
4 requirements set forth below.

5           a. To be an eligible MBE or WBE, each socially and economically  
6 disadvantaged owner must:

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

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

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

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

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

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

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

5 (2) *Management and control.* Only an applicant business enterprise that is  
6 managed and controlled by a socially and economically disadvantaged individual(s) may be  
7 certified as an MBE or WBE. The socially and economically disadvantaged minority or woman  
8 owner(s) shall direct the management, policies, and day-to-day business operations of the  
9 applicant business enterprise and shall have the power to and actually make routine and major  
10 decisions on matters of management, policy, and operations. The socially and economically  
11 disadvantaged minority or woman owner's(s') management and control must be real, substantial,  
12 and continuing and go beyond the *pro forma* ownership of the applicant business enterprise as  
13 reflected in its ownership documents. Ownership alone is not sufficient to establish management  
14 and control. To determine whether each socially and economically disadvantaged individual  
15 satisfies these requirements, the 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 to own or control a certain type of business enterprise, then  
18 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  
20 license or other credential to own or control the business enterprise, to determine whether the  
21 socially and economically disadvantaged owner(s) manage and control the business enterprise,  
22 DSBO may consider whether the socially and economically disadvantaged owner(s) hold the  
23 license or other credential required to conduct the specific type of work in which certification is  
24 sought as a factor. If there is not a legal requirement for the owner to hold the license or other  
25 credential to own or control a certain type of business enterprise, failure of the owner to hold the  
26 license or other credential does not by itself indicate lack of management and control of a business  
27 enterprise without other factors indicating to the contrary.

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

31 c. The socially and economically disadvantaged minority or woman  
32 owner(s) shall regularly make decisions, hold themselves out to the public, and sign important

1 documents and financial instruments in a manner that is indicative of primary management and  
2 control of daily business operations and responsibility for routine and major decisions.

3 d. There may not be any restriction through corporate charter provisions,  
4 by-law provisions, contracts, or any other formal or informal devices that prevent the socially and  
5 economically disadvantaged owner(s), without the cooperation or vote of any non-socially and  
6 economically disadvantaged owner, from making any business decision of the applicant business  
7 enterprise, (including the making of obligations or the dispersing of funds.

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

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

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

32 h. A socially and economically disadvantaged owner(s) may not engage in  
33 outside employment or other business interests that conflict with the management of the applicant

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

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

16 (3) *Independence.* Only an independent applicant business enterprise may be  
17 certified as a MBE or WBE. An independent applicant business enterprise is one whose viability  
18 does not depend on its relationship with another business enterprise. Recognition of an applicant  
19 business enterprise as a separate entity for tax or corporate purposes is not necessarily sufficient  
20 to demonstrate that the applicant business enterprise is independent and not an affiliate. In  
21 determining whether an applicant business enterprise is an independent business, the Director  
22 shall:

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

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

1                   c.       Consider present or recent employer/employee relationships between  
2 the socially and economically disadvantaged individuals of the applicant and non-certified business  
3 enterprises or persons associated with non-certified business enterprises .

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

7                   e.       Consider whether relationships between the applicant business  
8 enterprise and non-certified business enterprises is consistent with normal industry practice.

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

11                   a.       Formation of the applicant business enterprise;

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

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

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

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

26                   a.       *Rebuttably presumed social disadvantage.* A socially and economically  
27 disadvantaged minority individual or woman upon whom the application for certification is based  
28 must supply credible evidence, by sworn affidavit, that such individual has suffered from past race-  
29 or gender-based (as applicable) discrimination in association with the conduct of business or the  
30 attempted conduct of business as a business enterprise, in the construction or the professional  
31 design and construction services industries in the City's marketplace; provided that, any applicant  
32 business enterprise owned and controlled by, or any socially and economically disadvantaged  
33 minority individual or woman upon whom certification of such applicant business enterprise is



1 sought, who is a member of the racial or ethnic minority groups referenced in Section 28-  
2 54(34)(a), or is a woman, is rebuttably presumed to be socially disadvantaged under the provisions  
3 of Section 28-54(34)(a) and (47) and, if such minority individual or woman further demonstrates  
4 that such minority individual or woman so conducted business or attempted to conduct business in  
5 the construction or professional design and construction services industries in the City's  
6 marketplace prior to January 1, 2006, such minority individual or woman shall in addition be  
7 rebuttably presumed to have suffered from discrimination within the City's marketplace and to  
8 therefore be eligible to be certified as an MBE or WBE under this Division 3, subject to compliance  
9 with all other requirements of Sections 28-55 and 28-56.

10                   b. *Individualized social disadvantage.* An individualized socially  
11 disadvantaged minority individual upon whom the application for certification is based pursuant to  
12 Section 28-54(34)(b) shall supply credible evidence, by sworn affidavit, that such individual has  
13 suffered from past individualized discrimination in association with the conduct of business or the  
14 attempted conduct of business as a business enterprise, in the construction or the professional  
15 design and construction services industries in general, that he has in addition suffered from such  
16 individualized discrimination within the City's marketplace and that he conducted business or  
17 attempted to conduct business in the City's marketplace as set out in a. above. An individual who  
18 makes such a showing shall be deemed to have suffered from individualized discrimination and  
19 social disadvantage within the City's marketplace and to therefore be eligible to be certified as an  
20 MBE or WBE under this Division 3, subject to compliance with all other requirements of Sections  
21 28-55 and 28-56.

22                   (7) *Eligibility; showing of economic disadvantage.* A socially and economically  
23 disadvantaged minority individual or woman upon whom the application for certification is based  
24 shall also supply credible evidence, by personal financial statement or as otherwise required by the  
25 Director, that such individual has a personal net worth equal to or less than the permissible  
26 personal net worth amount determined by the U.S. Department of Transportation to be applicable  
27 to its DBE programs, or as otherwise determined by the Director by rule and regulation as defined  
28 in Section 28-54(24). An Individual who makes such a showing shall be deemed to have been  
29 economically disadvantaged within the City's marketplace and to therefore be eligible to be  
30 certified as an MBE or WBE under this Division 3, subject to compliance with all other  
31 requirements of Sections 28-55 and 28-56.

32                   (8) *Threshold size; continued eligibility and renewal of certification.* No applicant  
33 business enterprise, MBE or WBE shall be eligible for initial or subsequent renewal of certification

1 if such business enterprise, MBE or SBE combined with any affiliates meets the criteria set forth in  
2 Section 28-56 for graduation from participation in the goals program established by this Division 3.  
3 An MBE or WBE will be certified for a one (1) year period. Following initial certification, an MBE or  
4 WBE that desires to continue its certification shall, no later than thirty (30) days prior to each  
5 annual anniversary of the certification, submit a certification renewal application, which shall  
6 update and reaffirm all requirements for certification. A certification may be terminated by the  
7 Director upon the failure of the MBE or WBE to satisfy any certification requirement set forth in this  
8 Division 3.

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

12 (10) *Interviews, investigation, and onsite visits.* The DSBO shall personally  
13 interview all persons upon whom eligibility for certification is based, and is empowered to interview  
14 such other persons and conduct such onsite visits and investigations as may be appropriate in its  
15 sole discretion to verify eligibility for certification. An applicant business enterprise wishing to be  
16 certified as an MBE or WBE shall cooperate with the DSBO in supplying additional information that  
17 may be requested in order to make a determination.

18 **Sec. 28-56. MBE and WBE certification and graduation size standards; renewal of**  
19 **certification; decertification; graduation**

20 (a) No applicant business enterprise shall be certified as an MBE or WBE, and following  
21 certification of an MBE or WBE, no certification shall be renewed if on the effective date of the  
22 application or renewal the applicant business enterprise, MBE or WBE (combined with all affiliates)  
23 has achieved a size standard exceeding the following size standards:

24 (i) For construction, reconstruction and remodeling, and construction  
25 management services, applicant business enterprises cannot exceed one hundred percent  
26 (100%) of the applicable size standards established by the U.S. Small Business Administration  
27 (“SBA”) at 13 C.F.R. § 121.201, as amended, or successor SBA regulation or classification system,  
28 which are incorporated herein by reference. The size standard is based on annual receipts  
29 averaged over the three (3) preceding consecutive fiscal years; whether the applicant business  
30 has otherwise achieved a size standard based upon its number of employees; or other criteria  
31 applicable to any of the work activities for which the applicant business enterprise seeks  
32 certification or is certified. The Director may adjust or modify such MBE/WBE graduation size

1 standards if it appears, after further inquiry and review by the Director, that such standards are no  
2 longer appropriate to the purposes of this Division 3.

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

14 (b) No applicant business enterprise shall be certified as an MBE or WBE,  
15 and following certification of an MBE or WBE, no certification shall be renewed if on the effective  
16 date of the application or renewal the socially and economically disadvantaged minority or woman  
17 upon which certification is based is not economically disadvantaged, as defined in Section 28-  
18 54(24).

19 (c) If an MBE or WBE has been certified by the City in more than one (1)  
20 NAICS Code or has an affiliate that has been certified by the City in a NAICS Code other than that  
21 of the MBE or WBE, then the annual receipt level or employee or other criterion used as the  
22 graduation criterion for such MBE or WBE shall apply separately to each NAICS Code for which  
23 the MBE or WBE and its affiliate have been certified. Such an MBE or WBE and any affiliate that  
24 has exceeded the graduation criteria in one (1) NAICS Code shall be deemed to be graduated  
25 from this division 3 as to that code, and, if the graduation requirements of Subsections (a) or (b)  
26 above do not apply, may continue to be certified in another NAICS Code having a higher monetary  
27 or employee number graduation level but shall no longer be considered eligible to be or remain  
28 certified in the NAICS Code with the lower size standard. Such an MBE or WBE or any affiliate  
29 that has exceeded the graduation criteria for the largest NAICS code applicable to its activities  
30 shall be deemed to be graduated from this Division 3 for the duration of the period in which the  
31 MBE or WBE exceeds the graduation criteria. Graduated MBEs or WBEs may reapply for  
32 certification if they meet the criteria for certification. Utilization of MBEs or WBEs shall count

1 toward a goal, if any, to the extent that an MBE or WBE is performing a commercially useful  
2 function corresponding to a NAICS code in which it is certified.

3 (d) Graduation of an MBE or WBE shall not affect the contribution made by  
4 the MBE or WBE toward satisfaction of a project goal if the work was bid or proposed to be  
5 performed by the MBE or WBE prior to the date of ineligibility for certification based on  
6 achievement of the graduation criterion.

7 (e) Application to affiliates. The graduation criteria set forth above shall be  
8 deemed to apply to the socially and economically disadvantaged minority individual or woman  
9 upon whom eligibility for certification is based and all affiliates of such minority individual or  
10 woman. No applicant business enterprise shall be certified based upon one (1) or more socially  
11 and economically disadvantaged minority individuals or women who owned or who was an affiliate  
12 of an MBE or WBE that has become ineligible for renewal of certification because of the  
13 achievement of graduation criteria.

14 (f) The certification status of all MBEs and WBEs shall be reviewed  
15 periodically by the DSBO. Failure of a certified and eligible MBE or WBE to seek timely renewal of  
16 certification by filing the necessary documentation with the DSBO may result in decertification.

17 (g) In accordance with the Division's regulations, it shall decertify an MBE  
18 or WBE that does not continuously meet the eligibility criteria for certification.

19 (1) The MBE or WBE shall notify the DSBO of any change in its circumstances  
20 affecting its continued eligibility for certification under this Division 3 within thirty (30) days of the  
21 MBE's or WBE's actual awareness of such change of circumstances. Failure to do so may result  
22 in the MBE's or WBE's decertification.

23 (2) The Director may move to decertify an MBE or WBE that repeatedly fails to  
24 respond to requests for quotations from bidders or proposers who timely solicit participation on a  
25 contract, attend relevant pre-bid or pre-proposal conferences, honor quotations in good faith, or  
26 otherwise comply with the requirements of this Division 3.

27 (h) An applicant business enterprise, MBE or WBE that has been denied  
28 certification or renewal or certification or been decertified may protest the denial of certification or  
29 decertification by the procedure set out in Section 28-33. An applicant business enterprise, MBE or  
30 WBE found to be ineligible for certification or renewal of certification may not apply for certification  
31 or renewal of certification for one (1) year after the effective date of the final decision.

32 **Sec. 28-57. Third Party Challenge to certification; renewal of certification; or presumption**  
33 **of social disadvantage of minority individual or woman.**

1 Subject to the provisions in this Section, a third party may challenge the eligibility of an applicant  
2 business enterprise for certification, the eligibility of an MBE or WBE for renewal of certification, or  
3 the rebuttable presumption of social disadvantage of a minority individual or woman as provided in  
4 Section 28-54(34)(a) and (47), respectively. The burden of demonstrating to the Director's  
5 satisfaction the lack of such eligibility or the rebuttal of such presumption rests with such third  
6 party, and shall be demonstrated by a preponderance of the evidence.

7 (a) The eligibility of a challenged applicant business enterprise, MBE or WBE for  
8 certification or renewal of certification, or the presumption that a minority individual or woman is  
9 socially disadvantaged, shall remain in effect unless and until the City renders a final decision  
10 otherwise.

11 (b) The challenge to such certification, renewal of certification or presumption shall be  
12 made in writing to the Director by the challenging third party and shall include all information relied  
13 upon by such party.

14 (c) The Director shall notify the challenged applicant business enterprise, MBE or WBE  
15 or minority individual or woman in writing of the challenge, identify the challenging third party as  
16 required by law and summarize the grounds for the challenge. The notice may also require the  
17 challenged applicant business enterprise, MBE or WBE or minority individual or woman to provide  
18 the Director, within a reasonable time, any information requested to permit the Director to evaluate  
19 the eligibility of the applicant business enterprise or MBE or WBE or the validity of the presumption  
20 of social disadvantage with respect to a minority individual or woman.

21 (d) Subject to the limitation in Section 28-33 (e), a third party putting forth a challenge  
22 under this Section, and an applicant business enterprise, MBE, WBE or minority individual or  
23 woman that is the subject of such challenge, may seek review from a decision of the Director  
24 pursuant to Section 28-33.

25 **Sec. 28-58. Annual goal.**

26 (a) Of the total dollars spent annually for construction and for professional design and  
27 construction services contracts, the Director, no later than six (6) months after the enactment of  
28 this division 3, shall establish an aspirational annual goal for MBE/WBE utilization based on the  
29 dollars to be spent for construction, reconstruction and remodeling contracts and such a goal for  
30 MBE/WBE utilization based on the dollars to be spent for professional design and construction  
31 services contracts. For the purpose of setting such goal, construction management services  
32 contracts shall be computed in and counted toward the construction area although construction  
33 management shall be considered a professional service. The following shall count toward the goal

1 to the extent provided in Sections 28-63 and 28-68; portions of work undertaken by MBEs and  
2 WBEs as contractors, consultants, subcontractors, subconsultants, suppliers, manufacturers,  
3 manufacturer’s representatives, brokers, teaming agreements or joint venturers, including  
4 appropriate portions of work undertaken by subcontractors, subconsultants, suppliers,  
5 manufacturers, manufacturer’s representatives, and brokers on subsidiary tiers under MBEs and  
6 WBEs, whether or not such subsidiary tier business enterprises are MBEs or WBEs .

7 (b) The Director as a basis for the establishment of the annual goal shall annually during  
8 the term hereof determine the present availability of all MBEs and WBEs doing business in the City  
9 by profession and trade groupings and recommend the annual goal to the city council for its  
10 review. The Director shall conduct such inquiries, studies and hearings, and utilize information and  
11 assistance from such persons, consultants, entities or organizations, within or without the City,  
12 including but not limited to, the department heads, as the Director may, in the exercise of sole  
13 discretion, deem necessary to make such annual recommendation.

14 (c) The city council shall review the annual goal recommended by the Director, may  
15 undertake such additional inquiries as it deems appropriate, and may approve, disapprove or  
16 modify the recommended annual goal by ordinance in each succeeding year. Until the city council  
17 approves, disapproves or modifies the annual goal in a succeeding year, the initial annual goal  
18 established in this Section shall continue in effect.

19 **Sec. 28-59. Project goals.**

20 (a) The Director shall assign for each construction, reconstruction, and remodeling  
21 contract, and for each professional design and construction services contract, a unitary project  
22 goal for MBE/WBE utilization based upon a percentage of the dollar value of all work on such  
23 contract, and, as set out below, the availability of MBEs and WBEs to perform the anticipated work  
24 and the City’s progress toward meeting the annual goal; provided that, if the Director determines it  
25 to be in the best interests of the City, the Director may in his or her sole discretion waive the  
26 application of a project goal for a given contract. The goal percentage assigned by the Director to  
27 each such contract may vary from contract to contract consistent with meeting the appropriate  
28 overall annual goals, when established. The DSBO shall establish a methodology for the setting of  
29 the project goal, including the methodology to be followed by the goal committees, through rules  
30 and regulations. Such methodology shall consider the following factors:

31 (1) To the extent applicable, the effect on the annual goal achievement of the  
32 varying levels of availability of MBEs and WBEs among industry groupings associated with

1 individual projects and the effect on annual goal achievement of the project goal compliance being  
2 achieved through good-faith efforts resulting in non-utilization of MBEs and WBEs.

3 (2) The reasonably known availability of MBEs and WBEs in specific industry  
4 groupings which are associated with individual projects.

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

9 (c) As an aid in the establishment of such an individual project goal, the Director shall  
10 appoint goal committees to advise and assist the Director in the determination of an individual  
11 project goal.

12 (d) The goal committees shall meet on a regular basis established by the Director to  
13 consider and recommend an individual project goal pursuant to guidelines developed by the  
14 DSBO. The goal committees shall consider data as to availability of types of MBEs and WBEs  
15 doing business in the City with respect to the substantive work requirements of each individual  
16 contract under consideration. The Director may utilize such advice and assistance from the goal  
17 committees to the extent that the Director deems it to be appropriate and consistent with the  
18 purposes of this Division 3 as well as other information helpful to a determination as to a project  
19 goal. The Director shall in the Director's sole discretion establish an individual project goal for  
20 each contract in bid or proposal instructions or as otherwise promulgated by regulations.

21 (e) The Director, at the Director's sole discretion, may cause a representative sample of  
22 City construction, reconstruction and remodeling, and professional design and construction  
23 services contracts to be bid or otherwise selected without a project goal, in order to determine MBE  
24 and WBE utilization on such contracts in the absence of such a goal. Following the first full year of  
25 operation of this Division 3, the Director shall analyze, based upon such representative sample and  
26 other contracts that may otherwise be let with a project goal of zero percent (0%), to what extent  
27 the originally established annual goal has been met without the imposition of project goals. To the  
28 extent ascertainable, this information shall be utilized in the setting of the annual goal for the  
29 following year.

30 **Sec. 28-60. Contracts for construction, reconstruction and remodeling--compliance with**  
31 **project goals--exception for design-build contracts.**

32 (a) The bid or competitive selection process specifications for each construction contract  
33 shall require that all bidders or proposers seeking to contract with the City or a private owner on

1 such project shall address the project goal through one (1) or more of the following Subsections, or  
2 by demonstrating good faith efforts as set out in Section 20-62:

3 (1) If the bidder or proposer is an MBE or WBE, the value of the commercially  
4 useful function to be self-performed by the MBE or WBE shall count to the extent provided in  
5 Section 28-63 toward satisfaction of the project goal, provided that the project goal to the extent  
6 not met by bidder or proposer self-performance shall be addressed as otherwise set out in this  
7 Section;

8 (2) If the bidder or proposer submits a joint venture agreement that includes one  
9 (1) or more MBEs or WBEs, the value of the commercially useful function to be performed by the  
10 MBEs or WBEs in the joint venture as the distinct, clearly defined portion of the work of the joint  
11 venture agreement that the MBE or WBE performs with its own forces or for which it is separately  
12 at risk shall count to the extent provided in Section 28-63 toward satisfaction of the project goal.  
13 The joint venture is subject to review and approval by the Director, and the joint venture agreement  
14 shall be provided to the Director at least ten (10) days prior to the date of bid opening or the date of  
15 final project-specific proposal, in the case of a competitive selection process unless otherwise set  
16 forth in the request for bids or proposals, as required by the Director. Joint venturer participation  
17 will count toward the satisfaction of the project goal upon confirmation by the Director of the  
18 utilization in the joint venture of joint management and full integration of work forces by the joint  
19 venturers; or

20 (3) If the bidder or proposer utilizes MBEs or WBEs as subcontractors, suppliers,  
21 manufacturer, manufacturer's representatives or brokers, the value of the commercially useful  
22 function to be performed by such MBEs and WBEs, shall count to the extent provided in Section  
23 28-63 toward satisfaction of the project goal.

24 (4) If the bidder or proposer submits a teaming agreement that includes one (1) or  
25 more MBEs or WBEs, the value of the commercially useful function to be performed by the MBEs  
26 or WBEs in the teaming agreement as the distinct, clearly defined portion of the work of the  
27 teaming agreement that the MBE or WBE performs with its own forces or for which it is separately  
28 at risk shall count to the extent provided in Section 28-63 toward satisfaction of the project goal.  
29 The teaming agreement is subject to review and approval by the Director, and the teaming  
30 agreement shall be provided to the Director at least ten (10) days prior to the date of bid opening  
31 or the date of final project-specific proposal, in the case of a competitive selection process unless  
32 otherwise set forth in the request for bids or proposals, as required by the Director. Teaming  
33 agreement participation will count toward the satisfaction of the project goal upon confirmation by



1 the Director of the utilization in the teaming agreement arrangement and full integration of work  
2 forces by the teaming agreement parties.

3 (b) For contracts selected in accordance with Sections 2.3.3 (A) and 2.11.3(B) of the  
4 Denver City Charter, and D.R.M.C. Sections 5-19 and 20-56, including design-build contracts,  
5 construction management/general contractor contracts, or on-call construction contracts, the  
6 department head may determine to address the project goal by means of a compliance plan for  
7 utilization of MBEs and WBEs on such contract, or for alternative demonstration of good faith  
8 efforts by the proposer. In that event, the department head shall request the Director to approve  
9 the utilization of such a compliance plan, consistent with the scope and intent of this Division 3.  
10 The development, scope and utilization of such compliance plans shall be addressed in rules and  
11 regulations promulgated by the Director.

12 (c) Notwithstanding any other provision of this Division 3, in the event that a department  
13 head finds with respect to a particular contract that the best interests of the City would be served  
14 by the negotiation of a contract, including but not limited to a design-build or construction  
15 management/general contractor contract, through a competitive selection process based wholly on  
16 quality, without reference to selection by low bid of the contractor or its subcontractors or suppliers,  
17 the analysis of the MBE/WBE utilization or alternative good faith effort by such contractor shall be  
18 determined on the basis set out in Sections 28-65 through 28-68, provided that, in the event of  
19 such an analysis, all references in those Sections to respectively, consultant or subconsultant,  
20 shall also be deemed to refer to, respectively, contractor or subcontractor.

21 **Sec. 28-60.5. Contracts for construction, reconstruction, and remodeling – joint ventures**  
22 **and teaming agreements.**

23 (a) Based upon the scope of work and market availability, and whether permitted by law,  
24 the division of small business opportunity shall determine on a project-by-project basis, in  
25 consultation with the manager of the user agency or his or her designee, whether a joint venture  
26 with an MBE or WBE may be incentivized for a given project, or whether a teaming agreement with  
27 an MBE or WBE may be incentivized for a given project. Only projects valued at over \$10,000,000  
28 are eligible for consideration under this Section.

29 (b) On such projects in which a joint venture relationship or a teaming agreement with an  
30 MBE or WBE is incentivized, the manager of the user agency or his or her designee and the  
31 Director of the Division of Small Business Opportunity will establish prior to issuing the request for  
32 bids or the request for proposals any criteria to evaluate the use of joint ventures or teaming  
33 agreements for the project.

1 (c) As to each joint venture under this Section, a written joint venture agreement must be  
2 completed by all parties to the joint venture and executed, which clearly delineates the rights and  
3 responsibilities of each member or partner, complies with any requirements of the Division of Small  
4 Business Opportunity as set forth in bid documents or otherwise, and provides that the joint  
5 venture shall continue for, at a minimum, the duration of the project

6 (d) The Division of Small Business Opportunity shall review and approve all contractual  
7 agreements regarding the terms and provisions of each joint venture relationship prior to the award  
8 of a contract, including agreements pertaining to:

- 9 (1) The initial capital investment of each venture partner;
- 10 (2) The proportional allocation of profits and losses to each venture partner; no  
11 MBE or WBE venture partner's liability should ever exceed said partners percentage of revenue  
12 earned while a participant in the joint venture.
- 13 (3) The sharing of the right to control the ownership and management of the joint  
14 venture;
- 15 (4) Actual participation of the venture partners on the project;
- 16 (5) The method of and responsibility for accounting;
- 17 (6) The method by which disputes are resolved; and
- 18 (7) Any additional or further information required by the division of small business  
19 opportunity as set forth in bid documents or otherwise.

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

23 (e) As to each teaming agreement under this Section, a written teaming agreement must  
24 be completed by all parties to the teaming agreement and executed, which clearly delineates the  
25 rights and responsibilities of each teaming party, complies with any requirements of the division of  
26 small business opportunity as set forth in the bid documents or otherwise, and provides that the  
27 teaming agreement shall continue for, at a minimum, the duration of the project.

28 (f) The Division of Small Business Opportunity shall review and approve all contractual  
29 agreements regarding the terms and provisions of each teaming agreement prior to the award of a  
30 contract, including agreements pertaining to:

- 31 (1) Actual participation of the teaming members on the project;
- 32 (2) The high value work to be performed by the teaming members;
- 33 (3) The method by which disputes are resolved; and

1 (4) Any additional or further information required by the Division of Small Business  
2 Opportunity as set forth in the bid documents or otherwise.

3 (g) Joint ventures and teaming parties may submit agreements for pre-approval no later  
4 than ten (10) calendar days prior to the date set for receipt of bids or proposals on a project, but in  
5 no event later than designated in the bid documents or requests for proposals. A bid or proposal  
6 submitted by a joint venture or teaming relationship that does not include a satisfactory written joint  
7 venture agreement or teaming agreement as applicable, in accordance with the requirements of  
8 this Section shall be deemed non-responsive and rejected.

9 (h) The joint venture, each member of the joint venture, or the teaming parties shall  
10 provide the Division of Small Business Opportunity access to review all records pertaining to joint  
11 venture agreements or teaming agreements before and after the award of a contract in order to  
12 reasonably assess compliance with this subdivision.

13 (i) If, after the award of a contract to a joint venture or team, any member of the joint  
14 venture or team believes that the terms and conditions of the agreement as approved by the  
15 Division of Small Business Opportunity have not been complied with, then such member may seek  
16 review and mediation of such agreement before the Director of the Division of Small Business  
17 Opportunity. The request for review must be made in writing.

18 (j) If, after the award of a contract, a dispute arises between the prime contractor and a  
19 subcontractor regarding performance of work or provision of services or supplies on the eligible  
20 project, then such prime contractor or subcontractor may seek review and mediation of the issue  
21 before the Director of the Division of Small Business Opportunity. The request for review must be  
22 made in writing.

23 (k) Within twenty (20) calendar days of receipt of a request for review, if the dispute has  
24 not already been resolved informally among the parties, the Director shall set a mediation date,  
25 and the Director shall provide written notice of the mediation date to each of the interested parties.

26 (l) The Director shall have authority to make recommendations in an attempt to resolve  
27 the dispute.

28 (m) In the event that the mediation with the Director of Small Business Opportunity does  
29 not resolve all disputes, the Director shall have the option of referring mediation proceedings to a  
30 qualified outside mediator, contingent upon the consent of the interested parties, the costs to be  
31 born by the interested parties.

32 **Sec. 28-61. Contracts for construction, reconstruction, and remodeling—Pre-bid or**  
33 **competitive selection process meetings.**

1 In order to permit bidders or proposers to inform MBEs and WBEs of teaming agreement,  
2 joint venturing, subcontracting, supplier, manufacturing, and broker opportunities, the department  
3 head in consultation with the Director may conduct prebid or preselection meetings in which  
4 representatives of the Director will explain the requirements of the DSBO pursuant to this Division  
5 3 and appropriate rules and regulations for each bid or proposal for which project goals are set.

6 If prebid or preproposal meetings are scheduled by the City at which MBEs and WBEs may  
7 be informed of subcontracting, teaming agreement or joint venture opportunities under a proposed  
8 contract to be bid, or procured pursuant to the competitive selection process, and attendance at  
9 such prebid or preproposal meetings is not mandatory, bidders and proposers remain responsible  
10 for the information provided at these meetings.

11 **Sec. 28-62. Contracts for construction, reconstruction, and remodeling—Good faith efforts.**

12 (a) If the bidder or proposer has not fully met the project goal as provided in Section 28-  
13 60, then it shall demonstrate that it has made good faith efforts to meet such goal. The bidder or  
14 proposer shall furnish to the Director, within three (3) working days after bid opening by the City or  
15 on or before the time of the final project-specific proposal submitted to and authorized by the City  
16 pursuant to a competitive selection process, or bid selection by a private owner, a detailed  
17 statement of its good faith efforts to meet the project goal set by the Director. This statement shall  
18 address each of the items in Subsection (b) and any additional criteria that the Director may  
19 establish by rule or regulation consistent with the purposes of this Division 3. Good faith efforts  
20 must be demonstrated to be meaningful and not merely for formalistic compliance with this Division  
21 3. The scope and intensity of the efforts will be considered in determining whether the bidder or  
22 proposer has achieved a good faith effort.

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

29 (1) The bidder or proposer must solicit through all reasonable and available  
30 means the interest of all MBEs and WBEs certified in the scopes of work of the contract. The  
31 bidder or proposer must solicit the interest of such MBEs and WBEs within sufficient time, prior to  
32 the bid opening or date of final project-specific proposal in the case of a competitive selection  
33 process, to allow such MBEs and WBEs to respond to the solicitation. The bidder or proposer

1 must determine with certainty if the MBEs and WBEs are interested by demonstrating appropriate  
2 steps to follow up initial solicitations.

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

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

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

22 (5) For each MBE or WBE that contacted the bidder or proposer or that the bidder  
23 or 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 MBE or WBE did not succeed in negotiating a  
26 subcontracting, supplier, manufacturer, manufacturer's representative, broker or joint venture  
27 agreement, as applicable.

28 (6) The bidder or proposer must provide verification that it rejected each non-  
29 utilized MBE and WBE because the MBE or WBE did not submit the lowest bid or it was not  
30 qualified. Such verification shall include a verified statement of the amounts of all bids received  
31 from potential or utilized subcontractors, suppliers, manufacturers, manufacturer's representatives,  
32 brokers or joint venturers on the contract, whether or not they are MBEs or WBEs. In making such  
33 a determination of not being qualified, the bidder or proposer shall be guided by the definition of

1 qualified in Section 28-54(42), but evidence of lack of qualification must be based on factors other  
2 than solely the amount of the MBE's or WBE's bid. For each MBE or WBE found not to be  
3 qualified by the bidder or proposer, the verification shall include a statement giving the bidder's or  
4 proposer's reasons for its conclusion. A bidder's or proposer's industry standing or group  
5 memberships may not be the cause of rejection of an MBE or WBE. A bidder or proposer may not  
6 reject an MBE or WBE as being unqualified without sound reasons based on a reasonably  
7 thorough investigation and assessment of the MBE's or WBE's capabilities and expertise.

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

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

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

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

23 **Sec. 28-63. Contracts for construction, reconstruction, and remodeling—Identification of**  
24 **participating MBEs and WBEs.**

25 (a) At the time of bid opening or date of final project-specific proposal in the case of a  
26 competitive selection process, the bidder or proposer shall provide to the City or private owner a  
27 list of all MBEs and WBEs that are being utilized toward the satisfaction of the project goal whether  
28 as a self-performing bidder or proposer or as subcontractors, suppliers, manufacturers,  
29 manufacturer's representatives, brokers or members of a joint venture or teaming agreement. The  
30 list shall specify:

- 31 (1) The name and contact name for the MBE or WBE;
- 32 (2) The dollar value and description of the commercially useful function to be  
33 performed by the MBE or WBE, consistent with Subsections (d) and (e). In the case of utilization

1 of a supplier, manufacturer, manufacturer's representative, or broker, the appropriate percentage  
2 of dollar value attributable to such MBE or WBE as a commercially useful function shall be  
3 calculated with all underlying data supplied. If the proposer provides a dollar fee value amount,  
4 then both the dollar value and percentage must be listed in the proposal

5 (3) If applicable, the percentage of the value of the commercially useful function to  
6 be performed by the MBE or WBE, consistent with Subsections (d) and (e), as compared to the  
7 total contract amount;

8 (4) The designation of each business enterprise as either an MBE or WBE;

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

13 (6) An adequate statement from the bidder or proposer that it understands that a  
14 letter of intent, including but not limited to values provided by self-performing bidders or proposers,  
15 joint venturers, teaming agreement participants, subcontractors, suppliers, manufacturers,  
16 manufacturer's representatives, and brokers, expressed in dollar values and as a percentage of  
17 the overall work, must be submitted to the Director for each MBE or WBE listed, including a self-  
18 performing bidder or proposer, within three (3) business days after bids are opened by the City or  
19 by the date of final project-specific proposal in the case of a competitive selection process, or bid  
20 selection made by a private owner.

21 (b) Only that level of MBE/WBE utilization demonstrated in accordance with this Section  
22 at the time of such bid opening, date of final project-specific proposal in the case of a competitive  
23 selection process or private selection may be counted in satisfaction of the project goal, except as  
24 otherwise set out in Sections 28-72 and 28-73. Bidders or proposers must submit an executed  
25 letter of intent for each MBE or WBE listed by the bidder or proposer, including a self-performing  
26 bidder or proposer, within three (3) business days after bids are opened, final project-specific  
27 proposals are received, in the case of a competitive selection process, or bid selection is made.  
28 Failure to do so will render the bid or proposal non-responsive.

29 (c) For on-call construction contracts, the department head may determine to utilize a  
30 compliance plan, pursuant to Section 28-60(b). In such event, proposer shall not be required to  
31 demonstrate MBE/WBE utilization at the time of bid opening or date of final project-specific  
32 proposal, but will be required to develop an approved compliance plan to demonstrate compliance  
33 with the requirements of Division 3. For on-call construction contracts that are not determined to

1 utilize a compliance plan and that do not delineate the dollar amount of specific on-call projects,  
2 the proposer need list only the anticipated percentage of participation of MBEs and WBEs rather  
3 than specific dollar amounts, as required in Subsection (a)(2), above.

4 (d) All MBE or WBE contractors, subcontractors, joint venturers, suppliers,  
5 manufacturers, manufacturer’s representatives, or brokers listed in a bid or proposal must actually  
6 perform a commercially useful function in the work of a contract within the area(s) for which they  
7 are certified, and must not function as a conduit. Consistent with industry or professional practice,  
8 and as permitted by rules and regulations adopted by the Director, MBEs and WBEs may enter  
9 into subcontracts, including subcontracts with non-MBEs and non-WBEs. In no case, however,  
10 shall an MBE or WBE act as a conduit, nor shall the participation of an MBE or WBE count toward  
11 a project goal to the extent it fails to perform a commercially useful function.

12 (e) All expenditures for materials, supplies, and equipment obtained from an MBE or  
13 WBE manufacturer, manufacturer’s representative or supplier shall count toward the appropriate  
14 project goal as specified in Section 28-54(48). Expenditures for materials, supplies, and  
15 equipment paid to MBEs and WBEs that are not manufacturers, manufacturer’s representatives or  
16 suppliers may count toward an appropriate project goal only to the extent of fees or commissions  
17 charged for providing a bona fide service, such as professional, technical, consultant, or  
18 managerial services and assistance in the procurement of essential personnel, facilities,  
19 equipment, materials, or supplies required for performance of the contract, provided that the fee or  
20 commission is determined by the Director to be reasonable and not excessive as compared with  
21 fees customarily allowed for similar services.

22 (f) Any agreement between a bidder or proposer and an MBE or WBE in which the  
23 bidder or proposer requires that the MBE or WBE not provide subcontracting quotations to other  
24 bidders or proposers is prohibited and shall render a bidder’s bid or proposer’s proposal non-  
25 responsive.

26 **Sec. 28-64. Contracts for construction, reconstruction, and remodeling—Responsive and**  
27 **nonresponsive bids or proposals.**

28 (a) *Responsive; compliance with requirements.* If the low monetary bid or competitive  
29 selection process final project-specific proposal subject to a project goal meets such goal or shows  
30 adequate good faith as set out in Sections 28-60 or 28-62, then the Director shall notify the  
31 department head to regard the bid or proposal as responsive as to compliance with this division 3.

32 (b) *Failure to meet requirements.* If a bid or proposal subject to a project goal does not  
33 meet such goal or show good faith as set out in Sections 28-60 or 28-62, or provide timely



1 information as set out in Section 28-63, then the Director shall notify the department head to  
2 regard the bid or proposal as non-responsive, and such determination shall result in no further  
3 consideration by the City or private owner of the bid or proposal.

4 (c) *Good Faith Efforts - Informal meeting.* If the Director finds inadequacies in a bidder  
5 or proposer’s demonstration of good faith efforts under Section 28-62, the Director will provide  
6 written notice of such inadequacies to the bidder or proposer prior to notifying the appropriate  
7 department head of bid or proposal responsiveness. Within two (2) business days from the date  
8 that the City notifies the bidder or proposer of the inadequacies of its demonstration of good faith  
9 efforts, the bidder or proposer may request an informal meeting with the Director. Such informal  
10 meeting shall be scheduled by the Director. All deficiencies in good faith efforts shall be explained  
11 to the bidder or proposer at such informal meeting. Within twenty-four (24) hours after the informal  
12 meeting, the bidder or proposer shall be allowed to submit additional information or to clarify the  
13 original good faith efforts. The Director will at no time, however, allow additional subcontractors,  
14 joint venturers, suppliers, manufacturers, manufacturer’s representatives or brokers that may later  
15 be added to the contract or to the original MBE/WBE participation submitted at the time of the bid  
16 or date of final project-specific proposal in the case of a competitive selection process to be  
17 counted toward meeting of the project goal. After this informal meeting, the Director will (i)  
18 determine whether the bidder or proposal will be responsive or non-responsive; (ii) make the  
19 notification as stated in Subsection (b) above, as applicable; and (iii) provide written notice to the  
20 bidder or proposer of the Director’s final determination.

21 **Sec. 28-65. Contracts for professional design and construction services—Compliance with**  
22 **project goals.**

23 (a) The proposal specifications for each professional design and construction services  
24 contract shall require that all proposers seeking to contract with the City or a private owner on such  
25 project shall address the project goal through one (1) or more of the following Subsections, or by  
26 demonstrating good faith efforts as set out in Section 28-67:

27 (1) If the proposer is an MBE or WBE, the value of the commercially useful  
28 function to be self-performed by the MBE or WBE, shall count to the extent provided in Section 28-  
29 68 toward satisfaction of the project goal, provided that the project goal not met by proposer self-  
30 performance shall be addressed as otherwise set out in this Section;

31 (2) If the proposer submits a joint venture agreement that includes one (1) or  
32 more MBEs or WBEs, the value of the commercially useful function to be performed by the MBEs  
33 or WBEs in the joint venture as the distinct, clearly defined portion of the work of the joint venture

1 agreement that the MBE or WBE performs with its own forces or for which it is separately at risk  
2 shall count to the extent provided in Section 28-68 toward satisfaction of the project goal. The joint  
3 venture is subject to review and approval by the Director, and the joint venture agreement shall be  
4 provided to the Director within a time period before the date of final project-specific proposal as  
5 defined by the Director. Joint venturer participation will count toward the satisfaction of the project  
6 goal upon confirmation by the Director of the utilization in the joint venture of joint management  
7 and full integration of work forces by the joint venturers; or

8 (3) If the proposer utilizes MBEs or WBEs as subconsultants, suppliers,  
9 manufacturers, manufacturer's representatives or brokers, the value of the commercially useful  
10 function to be performed by such MBEs or WBEs shall count to the extent provided in Section 28-  
11 68 toward satisfaction of the project goal.

12 **Sec. 28-65.5. Contracts for professional design and construction services – joint ventures**  
13 **and teaming agreements.**

14 (a) Based upon the scope of work and market availability, and whether permitted by law,  
15 the Division of Small Business Opportunity shall determine on a project-by-project basis, in  
16 consultation with the Manager of the user agency or his or her designee, whether a joint venture  
17 with an MBE or WBE may be incentivized for a given project, or whether a teaming agreement with  
18 an MBE or WBE may be incentivized for a given project. Only projects where the professional  
19 design and construction services are valued at over \$500,000 are eligible for consideration under  
20 this Section.

21 (b) On such projects in which a joint venture relationship or a teaming agreement with an  
22 MBE or WBE is incentivized, the manager of the user agency or his or her designee and the  
23 Director of the Division of Small Business Opportunity will establish prior to issuing the request for  
24 bids or the request for proposals any criteria to evaluate the use of joint ventures or teaming  
25 agreements for the project.

26 (c) As to each joint venture under this Section, a written joint venture agreement must be  
27 completed by all parties to the joint venture and executed, which clearly delineates the rights and  
28 responsibilities of each member or partner, complies with any requirements of the Division of Small  
29 Business Opportunity as set forth in bid documents or otherwise, and provides that the joint  
30 venture shall continue for, at a minimum, the duration of the project

31 (d) The Division of Small Business Opportunity shall review and approve all contractual  
32 agreements regarding the terms and provisions of each joint venture relationship prior to the award  
33 of a contract, including agreements pertaining to:

- 1 (1) The initial capital investment of each venture partner;
- 2 (2) The proportional allocation of profits and losses to each venture partner; no
- 3 MBE or WBE venture partner's liability should ever exceed said partners percentage of revenue
- 4 earned while a participant in the joint venture.
- 5 (3) The sharing of the right to control the ownership and management of the joint
- 6 venture;
- 7 (4) Actual participation of the venture partners on the project;
- 8 (5) The method of and responsibility for accounting;
- 9 (6) The method by which disputes are resolved; and
- 10 (7) Any additional or further information required by the Division of Small Business
- 11 Opportunity as set forth in bid documents or otherwise.

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

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

20 (f) The Division of Small Business Opportunity shall review and approve all contractual  
21 agreements regarding the terms and provisions of each teaming agreement prior to the award of a  
22 contract, including agreements pertaining to:

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

28 (g) Joint ventures and teaming parties may submit agreements for pre-approval no later  
29 than ten (10) calendar days prior to the date set for receipt of bids or proposals on a project, but in  
30 no event later than designated in the bid documents or requests for proposals. A bid or proposal  
31 submitted by a joint venture or teaming relationship that does not include a satisfactory written joint  
32 venture agreement or teaming agreement as applicable, in accordance with the requirements of  
33 this Section shall be deemed non-responsive and rejected.

1 (h) The joint venture, each member of the joint venture, or the teaming parties shall  
2 provide the Division of Small Business Opportunity access to review all records pertaining to joint  
3 venture agreements or teaming agreements before and after the award of a contract in order to  
4 reasonably assess compliance with this subdivision.

5 (i) If, after the award of a contract to a joint venture or team, any member of the joint  
6 venture or team believes that the terms and conditions of the agreement as approved by the  
7 Division of Small Business Opportunity have not been complied with, then such member may seek  
8 review and mediation of such agreement before the Director of the Division of Small Business  
9 Opportunity. The request for review must be made in writing.

10 (j) If, after the award of a contract, a dispute arises between the prime contractor and a  
11 subcontractor regarding performance of work or provision of services or supplies on the eligible  
12 project, then such prime contractor or subcontractor may seek review and mediation of the issue  
13 before the Director of the Division of Small Business Opportunity. The request for review must be  
14 made in writing.

15 (k) Within twenty (20) calendar days of receipt of a request for review, if the dispute has  
16 not already been resolved informally among the parties, the Director shall set a mediation date,  
17 and the Director shall provide written notice of the mediation date to each of the interested parties.

18 (l) The Director shall have authority to make recommendations in an attempt to resolve  
19 the dispute.

20 (m) In the event that the mediation with the Director of Small Business Opportunity does  
21 not resolve all disputes, the Director shall have the option of referring mediation proceedings to a  
22 qualified outside mediator, contingent upon the consent of the interested parties, the costs to be  
23 born by the interested parties.

24 **Sec. 28-66. Contracts for professional design and construction services—Preproposal**  
25 **meetings.**

26 In order to permit proposers to inform MBEs and WBEs of subconsulting, supplier,  
27 manufacturer, manufacturer’s representative, broker and joint venture opportunities, the  
28 department head in consultation with the Director may conduct preproposal meetings in which  
29 representatives of the Director will explain the requirements of the DSBO pursuant to this Division  
30 3 and appropriate rules and regulations for each proposal for which a project goal is set.

31 **Sec. 28-67. Contracts for professional design and construction services—Good-faith**  
32 **efforts.**

1 (a) If the proposer has not fully met the project goal as provided in Section 28-65, then it  
2 shall demonstrate that it has made good faith efforts to meet such goal. The proposer shall furnish  
3 to the Director on or before the time of the final project-specific proposal submitted to and  
4 authorized by the City or a private owner, a detailed statement of its good faith efforts to meet the  
5 project goal set by the Director. This statement shall address each of the items in Subsection (b)  
6 and any additional criteria that the Director may establish by rule or regulation consistent with the  
7 purposes of this Division 3. Good faith efforts must be demonstrated to be meaningful and not  
8 merely for formalistic compliance with this Division 3.

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

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

19 (2) The proposer must solicit through all reasonable and available means the  
20 interest of all MBEs and WBEs certified in the scopes of work of the contract. The proposer must  
21 solicit the interest of such MBEs and WBEs within sufficient time, prior to the date of final project-  
22 specific proposal, to allow such MBEs and WBEs to respond to the solicitation. The proposer must  
23 determine with certainty if the MBEs and WBEs are interested by demonstrating appropriate steps  
24 to follow up initial solicitations.

25 (3) The proposer must select portions of the services of the contract to be  
26 performed by MBEs and WBEs in order to increase the likelihood that the project goal will be  
27 achieved. This includes, where appropriate, using best efforts to break out contract service items  
28 into economically feasible units to facilitate MBE and WBE participation as subconsultants or joint  
29 venturers, and for proposer self-performed work, as suppliers, manufacturers, manufacturer's  
30 representative and brokers, all reasonably consistent with industry and professional practice, even  
31 when the proposer would otherwise prefer to perform these services with its own staff. The  
32 proposer must identify what portions of the contract will be self-performed and what portions of the  
33 contract were selected for solicitation of statements of qualification or proposals from MBE and

1 WBEs. All portions of the contract not self-performed must be solicited for MBE and WBE  
2 participation. The ability or desire of a proposer to perform the services of a contract with its own  
3 staff does not relieve the proposer of the responsibility to meet the project goal or demonstrate  
4 good faith efforts to do so.

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

9 (5) The proposer must negotiate in good faith with interested MBEs or WBEs and  
10 provide written documentation of such negotiation with each such MBE or WBE.

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

16 (7) The proposer must provide verification that it rejected each non-utilized MBE  
17 and WBE because the MBE or WBE was not qualified. Such verification shall include a verified  
18 statement of the proposals received from potential or utilized subconsultants, suppliers,  
19 manufacturers, manufacturer's representative or brokers on the contract, whether or not they are  
20 MBEs or WBEs. In making such a determination of not being qualified, the proposer shall be  
21 guided by the definition of qualified in Section 28-54(42). For each MBE or WBE found not to be  
22 qualified by the proposer, the verification shall include a statement giving the proposer's reasons  
23 for its conclusion. A proposer's industry or professional standing or group memberships may not  
24 be the cause of rejection of an MBE or WBE. A proposer may not reject an MBE or WBE as being  
25 unqualified without sound reasons based on a reasonably thorough investigation and assessment  
26 of the MBE's or WBE's capabilities and expertise.

27 (8) If requested by a solicited MBE or WBE, the proposer must make reasonable  
28 efforts to assist interested MBEs and WBEs in obtaining alternative payment or performance  
29 guarantees or insurance as required by the City or by the proposer, provided that the proposer  
30 need not provide financial assistance toward this effort.

31 (9) If requested by a solicited MBE or WBE, the proposer must make reasonable  
32 efforts to assist interested MBEs and WBEs in obtaining necessary and competitively priced

1 equipment, supplies, materials, or related assistance or services for performance under the  
2 contract, provided that the proposer need not provide financial assistance toward this effort.

3 (10) The proposer must use the DSBO MBE/WBE directories to identify, recruit and  
4 place MBEs and WBEs.

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

8 **Sec. 28-68. Contracts for professional design and construction services—Identification of**  
9 **participating MBEs and WBEs.**

10 (a) At the time of the final project-specific proposal submitted to and authorized by the  
11 City or a private owner, the proposer shall provide to the City or private owner a list of all MBEs  
12 and WBEs that are being utilized toward the satisfaction of the project goal whether as a self-  
13 performing proposer, or as subconsultants, suppliers, manufacturers, manufacturer's  
14 representatives, brokers or members of a joint venture. Unless otherwise specified in a request for  
15 qualifications, request for proposal or other proposal solicitation, in the event that a proposal is  
16 requested for the provision of on-call services for a period of time, with no delineation of the dollar  
17 amount of specific on-call projects, the proposer need list only the anticipated percentage  
18 participation of MBEs and WBEs rather than specific dollar amounts. The list shall specify:

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

20 (2) The dollar value and description of the commercially useful function to be  
21 performed by the MBE/WBE consistent with Subsections (c) and (d). In the case of utilization of a  
22 supplier, manufacturer, manufacturer's representative or broker, the appropriate percentage of  
23 dollar value attributable to such business enterprise as a commercially useful function shall be  
24 calculated with all underlying data supplied. If the proposer provides a dollar fee amount, then  
25 both the dollar value and percentage must be listed in the proposal;

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

29 (4) The designation of each business enterprise as either an MBE or a WBE;

30 (5) An adequate statement from the proposer that the dollar amount of work or the  
31 percentage of the work (whichever is applicable) to be performed by such MBEs and WBEs on the  
32 contract, other than that self-performed by the proposer, was furnished to the proposer and agreed

1 upon prior to the time of submission of the final project-specific proposal submitted to and  
2 authorized by the City or a private owner; and

3 (6) An adequate statement from the proposer that it understands that a letter of  
4 intent, including but not limited to values provided by self-performing proposers, joint venturers,  
5 subconsultants, suppliers, manufacturers, manufacturer's representatives and brokers, expressed  
6 in dollar values and as a percentage of the overall work, must be submitted to the Director for each  
7 MBE and WBE listed, including a self-performing proposer, at the time of submission of the final  
8 project-specific proposal submitted to and authorized by the City or a private owner.

9 (b) Only that level of MBE/WBE utilization demonstrated in accordance with this Section  
10 at the time of the final project-specific proposal submitted to and authorized by the City or a private  
11 owner may be counted in satisfaction of the project goal except as otherwise set out in Sections  
12 28-72 and 28-73. Proposers must submit such an executed letter of intent for each MBE or WBE  
13 listed by the proposer, including a self-performing proposer, at the time of the submission of the  
14 final project-specific proposal submitted to and authorized by the City or a private owner. Failure to  
15 do so will render the proposal non-responsive.

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

24 (d) All expenditures for materials, supplies and equipment obtained from an MBE or  
25 WBE manufacturer, manufacturer's representative or supplier shall count toward the project goal  
26 as specified in Section 28-54(48). Expenditures for materials, supplies and equipment paid to  
27 MBEs or WBEs that are not manufacturers, manufacturer's representatives or suppliers may count  
28 toward the project goal only to the extent of fees or commissions charged for providing a bona fide  
29 service, such as professional, technical, consultant or managerial services and assistance in the  
30 procurement of essential personnel, facilities, equipment, materials or supplies required for  
31 performance of the contract, provided that the fee or commission is determined by the Director to  
32 be reasonable and not excessive as compared with fees customarily allowed for similar services.



1 (e) Any agreement between a proposer and an MBE or WBE in which the proposer  
2 requires that the MBE or WBE not provide subconsulting quotations to other proposers is  
3 prohibited and shall render a proposer’s proposal non-responsive.

4 **Sec. 28-69. Contracts for professional design and construction services—responsive and**  
5 **non-responsive proposals.**

6 (a) *Responsive; compliance with requirements.* If the final project-specific proposal  
7 submitted to and authorized by the City or a private owner subject to a project goal meets such  
8 goal or shows adequate good faith efforts as set out in Sections 28-65 or 28-67, then the Director  
9 shall notify the department head that the proposal is responsive as to compliance with this Division  
10 3.

11 (b) *Failure to meet requirements.* If such a proposal subject to a project goal does not  
12 meet such goal or show good faith efforts as set out in Sections 28-65 or 28-67, or provide timely  
13 information as set out in Section 28-68, then the Director shall notify the department head that the  
14 proposal is non-responsive, and such determination shall result in no further consideration by the  
15 City or private owner of the proposal.

16 (c) *Good Faith Efforts - Informal meeting.* In the event the Director finds inadequacies in  
17 a bidder or proposer’s demonstration of good faith efforts under Section 28-67, the Director will  
18 provide written notice of such inadequacies to the bidder or proposer prior to notifying the  
19 appropriate department head of bid or proposal responsiveness. Within two (2) business days  
20 from the date that the City notifies the bidder or proposer of the inadequacies of its demonstration  
21 of good faith efforts, the bidder or proposer may request an informal meeting with the Director.  
22 Such informal meeting shall be scheduled by the Director. All deficiencies in good faith efforts  
23 shall be explained to the bidder or proposer at such informal meeting. Within twenty-four (24)  
24 hours after the informal meeting, the bidder or proposer shall be allowed to submit additional  
25 information or to clarify the original good faith efforts. The Director will at no time, however, allow  
26 additional subconsultants, joint venturers, suppliers, manufacturers, manufacturer’s  
27 representatives or brokers that may later be added to the contract or to the original project goal  
28 participation submitted at the time of the submission of the final project-specific proposal submitted  
29 to and authorized by the city or a private owner to be counted toward meeting of the project goal.  
30 After this informal meeting, the Director will (i) determine whether the proposal will be responsive  
31 or non-responsive; (ii) make the notification as stated in Subsection (b) above, as applicable; and  
32 (iii) provide written notice to the proposer of the Director’s final determination.

33 **Sec. 28-70. Time periods for documentation submitted to the city.**

1 The documentation of good faith efforts of a bidder or proposer and as applicable, its  
2 subcontractors, subconsultants, joint venturers, suppliers, manufacturers, manufacturer's  
3 representatives or brokers, or of letters of intent to perform, shall be submitted to the Director  
4 within three (3) business days after bid opening, date of final project-specific proposal in the case  
5 of a competitive selection process or private owner selection for a construction contract, or at the  
6 time of submission of the final project-specific proposal submitted to and authorized by the City or  
7 a private owner for a professional design and construction services contract.

8 **Sec. 28-71. Schedule of work to be performed by MBEs and WBEs.**

9 Within five (5) business days following commencement of work on a contract, the contractor  
10 or consultant shall submit to the Director a duplicate of the project schedule, which sets forth in  
11 detail the anticipated utilization of all MBEs and WBEs on the contract. In the event of a contract  
12 performance delay of more than one-third (1/3) of the originally estimated length of time between  
13 project notice to proceed and completion, such contractor or consultant shall submit to the Director  
14 not later than the originally estimated date of project completion, a revised schedule for utilization  
15 of all MBEs and WBEs on the contract.

16 **Sec. 28-72. Compliance with achieved project goal level required throughout performance**  
17 **of contract.**

18 (a) Upon award of a contract by the City that includes a project goal, the project goal  
19 becomes a covenant of performance by the contractor or consultant in favor of the City.

20 (b) All contracts subject to this Division 3 shall be reviewed by the DSBO for compliance  
21 with the provisions hereof. This review shall examine, but not be limited to, whether the MBE and  
22 WBE participation dollar amounts and percentages and achieved project goal levels upon which  
23 the contract was awarded are maintained over the term or duration of the contract.

24 (c) For any contract for which the Director has set a project goal, it shall be an ongoing,  
25 affirmative obligation of the contractor or consultant on such contract to maintain, at a minimum,  
26 compliance with the originally achieved level of MBE and WBE participation upon which the  
27 contract was awarded, for the duration of the contract, unless the City initiates a material alteration  
28 to the scope of work affecting MBEs or WBEs performing on the contract through change order,  
29 contract amendment, force account or as otherwise described in Section 28-73.

30 (d) The DSBO shall evaluate the utilization of MBEs and WBEs to determine whether  
31 such MBEs and WBEs are performing a commercially useful function. The evaluation shall  
32 examine the amount of work subcontracted, industry practice and other relevant factors. The  
33 amount of MBE and WBE participation credited toward a project goal shall be based upon an

1 analysis of the specific duties performed by the MBE or WBE, and the extent to which such duties  
2 constitute a commercially useful function. The Director may undertake such inquiries or studies,  
3 engage such employees or retain such consultants as may be necessary to assist the Director in  
4 rendering these determinations.

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

7 **Sec. 28-73. Project change orders, amendments and modifications.**

8 (a) Contractors and consultants on contracts hereunder shall have a continuing  
9 obligation to immediately inform the DSBO in writing of any agreed-upon increase or decrease in  
10 the scope of work of such contract, upon any of the bases discussed in this Section 28-73,  
11 regardless of whether such increase or decrease in scope of work has been reduced to writing at  
12 the time of notification.

13 (b) Any increase in the scope of work of a contract for construction, reconstruction, or  
14 remodeling, whether by amendment, change order, force account or otherwise, or any increase in  
15 the scope of services of a contract for professional design or construction services, whether by  
16 amendment or any other addition of special, additional or other services to the contract, which  
17 increases the dollar value of the contract, whether or not such change is within the scope of work  
18 designated for performance by an MBE or WBE at the time of contract award, shall be  
19 contemporaneously submitted to the DSBO. Those amendments, change orders, force accounts  
20 or other contract modifications that involve a changed scope of work that cannot be performed by  
21 existing project subcontractors, subconsultants, joint venturers, suppliers, manufacturer,  
22 manufacturer's representatives or brokers, or by the contractor or consultant, shall be subject to a  
23 goal for MBEs and WBEs equal to the original project goal on the contract that was included in the  
24 bid or proposal requirements. The contractor or consultant shall satisfy such goal as respects such  
25 changed scope of work by soliciting new MBEs or WBEs in accordance with Section 28-60 or 28-  
26 65 as applicable, or the contractor or consultant must show each element of modified good faith  
27 set out in Section 28-75(c) hereof. The contractor or consultant shall supply to the Director the  
28 documentation described in Section 28-75(c) with respect to the increased dollar value of the  
29 contract.

30 **Sec. 28-74. Payments to subcontractors, subconsultants, joint venturers, suppliers,**  
31 **manufacturers, manufacturer's representatives and brokers.**

32 All contractors and consultants shall promptly render payment to all subcontractors,  
33 subconsultants, joint venturers, suppliers, manufacturers, manufacturer's representatives and

1 brokers on a contract. Each contractor and consultant shall provide with each pay request to the  
2 City or private owner on each contract, beginning with the second pay request, partial claim  
3 releases from subcontractors, subconsultants, joint venturers, suppliers, manufacturers,  
4 manufacturer's representatives and brokers in form and content satisfactory to the City, or shall  
5 provide, at the City's sole option, alternative proof of payment to subcontractors, subconsultants,  
6 joint venturers, suppliers, manufacturers, manufacturer's representatives and brokers, in form and  
7 content approved by the department head and the Director, evidencing that all subcontractors,  
8 subconsultants, suppliers, manufacturers, manufacturer's representatives and brokers have been  
9 duly paid out of the proceeds of the contractor's or consultant's payments from the City or private  
10 owner under the contract, unless a bona fide dispute, documented in writing, exists between the  
11 contractor or consultant and the unpaid subcontractor, subconsultant, joint venturer, supplier,  
12 manufacturer, manufacturer's representative or broker.

13 **Sec. 28-75. Potential violations during contract performance.**

14 (a) A contractor or consultant that has been awarded a contract based upon a given  
15 level of MBE and WBE participation shall not, at any time before or during the performance of such  
16 contract:

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

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

26 (3) Modify or eliminate all or a portion of the scope of work attributable to an MBE  
27 or WBE upon which the contract was awarded, unless directed by the City; or

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

1 (5) Participates in a conduit relationship with an MBE or WBE scheduled to  
2 perform work on the contract; or

3 (6) Commits any other violation of this Division 3, or rules and regulations  
4 promulgated thereunder, which constitutes a material breach of the contract, not mentioned above.

5 (b) Any action by a contractor or consultant in violation of Subsections (a) (1) through (4)  
6 hereof, shall constitute a material breach of the contract that shall entitle the City or private owner  
7 to exercise all of its rights at law or equity for such material breach, in addition to exercising any of  
8 the other sanctions set out in Section 28-77. If, following contract award, an MBE or WBE has its  
9 certification terminated for reasons other than expiration of certification, or graduation from  
10 certification under Section 28-56, or an MBE or WBE fails to perform a commercially useful  
11 function, the value of which was originally counted for that MBE or WBE, as applicable, in  
12 awarding the contract, or an MBE or WBE voluntarily withdraws its MBE or WBE participation on  
13 the contract and the contractor or consultant can demonstrate that such termination or failure did  
14 not result from any action or inaction, whether direct or indirect, of or by the contractor or  
15 consultant, such termination of certification or failure to perform a commercially useful function  
16 shall not be deemed to affect compliance with the project goal, and shall not be deemed a breach  
17 of the contract; provided, however, that the terminated MBE or WBE is substituted with another  
18 MBE or WBE, performing the same commercially useful function and dollar amount, or that  
19 modified good faith efforts to substitute another MBE or WBE, as defined in Subsection (c) hereof,  
20 are demonstrated.

21 (c) The following modified good faith requirements shall apply to Sections 28-72 and 28-  
22 73. In the event that a contractor or consultant must add or replace an MBE or WBE  
23 subcontractor, subconsultant, joint venturer, supplier, manufacturer, manufacturer's representative  
24 or broker or in the event that a new scope of work is added to the ongoing contract, and the  
25 contractor or consultant in such event is in non-compliance with maintenance of the original project  
26 goal upon which the contract was awarded, due to failure to utilize additional MBEs or WBEs, the  
27 following modified good faith efforts must be completed. Failure of a contractor or consultant to  
28 show good faith efforts as to any one (1) of the following categories shall render its overall good  
29 faith efforts showing insufficient; and its contract performance in non-compliance with this Division  
30 3.

31 (1) Verification in writing to the DSBO of the contractor's or consultant's intention  
32 to terminate or replace an MBE or WBE originally identified for participation in the bid, proposal or

1 competitive selection process proposal upon which the contract was awarded. The reason for the  
2 termination or replacement must be stated and the type of work or services must be identified.

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

6 (3) Verification of efforts to contact appropriate MBEs and WBEs within the same  
7 identified subcontractor, subconsultant, joint venturer, supplier, manufacturer, manufacturer's  
8 representative or broker area must be documented. Facsimile transmission, e-mail and telephone  
9 communication will be acceptable. The Director may verify such contacts as he deems  
10 appropriate.

11 (4) Documentation of the modified good faith efforts must be submitted to the  
12 DSBO prior to the payment to the contractor or consultant of the next progress or other partial  
13 payment or fund release under the contract.

14 **Sec. 28-76. Burden of proof; investigations of compliance.**

15 Any business enterprise affected by the operation of this Division 3 shall have the burden of  
16 proving its compliance with the requirements and obligations of the Division. The DSBO is  
17 empowered to receive and investigate complaints and allegations by MBEs, WBEs, third parties or  
18 City personnel, or to initiate its own investigations regarding compliance with the requirements and  
19 obligations of this Division 3. If the DSBO determines in its sole discretion that an investigation is  
20 warranted, upon written notice of such investigation the affected party shall be obligated to  
21 cooperate fully with the investigation and shall have a continuing burden of providing complete,  
22 truthful information to the Director and of otherwise proving compliance with the requirements and  
23 obligations of this Division 3.

24 **Sec. 28-77. Contract sanctions for failure to comply with division 3 requirements.**

25 (a) If a contractor or consultant is found to be in violation of the provisions of Division 3,  
26 to otherwise be in breach of a contract, to perform as or to utilize MBEs or WBEs for a non-  
27 commercially useful function or as a conduit, to fail to submit information required in Section 28-70,  
28 to submit false, misleading or materially incomplete statements, documentation or records,  
29 including but not limited to good faith efforts or letters of intent, or to fail to cooperate in an  
30 investigation, it shall be subject to sanctions. The City may exercise any or all of its rights,  
31 including but not limited to withholding funds, imposition of monetary penalty, suspension or  
32 termination, contained in the contract terms and conditions. If the contract is suspended or

1 terminated, the City reserves all its rights at law or equity, with such suspension or termination  
2 being deemed a response to a contractor or consultant default, as appropriate, by applicable law.

3 (b) In the event that the Director determines, in his or her sole discretion, that a  
4 contractor or consultant is in noncompliance with Division 3, the contractor or consultant may be  
5 assessed a civil, remedial penalty, of not more than one hundred fifty percent (150%) of the  
6 contract amount for each MBE or WBE involved. In assessing such civil penalty:

7 (1) The Director shall calculate the applicable amount of civil penalty, and may  
8 reduce or waive all or part of such penalty, in his or her sole discretion, in consideration of the  
9 following factors:

- 10 a. The length of the period of noncompliance;
- 11 b. The history of previous noncompliance with any provision of this  
12 Division 3;
- 13 c. The monetary impact of the civil penalty on the contractor or consultant  
14 in correcting such noncompliance; or
- 15 d. The other facts and circumstances relevant to the noncompliance of the  
16 contractor or consultant;

17 (2) The Director shall collect assessed and unpaid civil penalties under this  
18 subsection by action initiated in state district court for collection of such penalty. A stay of any  
19 order of the Director pending judicial review shall not relieve any contractor or consultant from any  
20 civil penalty obligation imposed under this Section.

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

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

27 (5) The debarment board established under Denver Revised Municipal Code  
28 Section 20-77, upon request of the Director, may suspend or debar the contractor or consultant  
29 from participation in City or private contracting covered hereunder for a period as may be  
30 determined by the debarment board, in its sole discretion, based upon the grounds of violating this  
31 division 3, pursuant to such suspension and debarment procedures as may be established by the  
32 City, as set forth in Denver Revised Municipal Code Section 20-77. The Director in that event shall  
33 regard as non-responsive any bid, proposal or competitive selection process proposal received

1 during this time period that includes the contractor or consultant as a contractor, consultant,  
2 subcontractor, subconsultant, joint venturer, supplier, manufacturer, manufacturer's representative,  
3 or broker.

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

7 (7) The DSBO may suspend or revoke an offending MBE's or WBE's eligibility for  
8 certification, may suspend its participation from counting toward a project goal, and, subject to  
9 other City law, may suspend or debar it from participating in future City contracts, based upon such  
10 MBE's or WBE's acting as a conduit, failing to comply with the provisions of Division 3, failing to  
11 perform a commercially useful function on a contract, failing to submit information as required by  
12 Section 28-70, submitting false, misleading or materially incomplete statements, documentation or  
13 records, or failing to cooperate in investigations.

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

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

25 **Sec. 28-78. State or federal law and other guidelines.**

26 In making any findings required herein, the Director may incorporate by reference rules,  
27 procedures and powers of C.R.S. § 24-4-101 et seq. as they may exist on the date of enactment of  
28 this division 3 or as they may be amended. In making any findings required herein or in aid of  
29 definition or interpretation of any term or phrase herein, or by way of procedure or process, the  
30 Director may utilize as a guide, insofar as they are consistent with the purposes of this division 3,  
31 provisions of federal law, including without limitation the provisions of 49 Code of Federal  
32 Regulations and 13 Code of Federal Regulations, or successor regulations, as they exist on the  
33 date of enactment of this division or as they may be amended, provided that no substantive



1 provision of such federal law that is inconsistent with or contradictory to the provisions of this  
2 division 3 shall be used.

3 **Sec. 28-79. Quarterly reports.**

4 The Director shall prepare written reports four (4) times each year which shall describe  
5 progress in meeting the annual goal set out in Section 28-58. Copies of such reports shall be  
6 provided to the affected department heads, city council and the mayor according to the following  
7 schedule:

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

8  
9 In addition, the quarterly report shall encompass the implementation of this Division 3 as well as a  
10 project by project report and justification of individual project goals by contract including all change  
11 orders, amendments and modifications.

12 In calculating MBE/WBE participation, all funds paid on City contracts during the year shall  
13 be counted whether or not such funds were used to accomplish project goals applicable at the time  
14 of bid opening, date of final project-specific proposal in the case of a competitive selection process,  
15 or other proposal receipt.

16 **Sec. 28-80. Annual report; explanation of failure to achieve annual goal.**

17 If the annual goal in Section 28-58 is not met in any year, then by March 1st of the following  
18 year, the Director shall submit to the Mayor and city council a report comparing MBE and WBE  
19 utilization achieved in the year to the aspirational annual goal, stating the reasons why the goal  
20 was not met, and advising and making recommendations as to continuing or further efforts that the  
21 City should make in remedying the effects of discrimination in City construction, reconstruction and  
22 remodeling, and professional design and construction services contracting, and recommending  
23 what should be done to assist in meeting such goal in the future.

24 **Sec. 28-81. Severability.**

25 If any provision of this Division 3 or its application is held invalid or unenforceable, such  
26 invalidity or unenforceability shall not affect other provisions or applications of this ordinance that

1 can be given effect without the invalid provisions or applications and the remaining provisions are  
2 to be severable and shall remain in full force and effect.

3 **Sec. 28-82. Effective date of ordinance.**

4 This Division 3 shall become effective on April 1, 2014, and shall apply to all contracts within  
5 the scope of the Division for which bids or proposals are publicly advertised on or after April 1,  
6 2014.

7 **Sec. 28-83. Review and Sunset.**

8 (a) This Division 3 shall be reviewed by the Mayor, Director and department heads on  
9 the third (3<sup>rd</sup>) anniversary of its enactment, in order to determine whether adjustments or revisions  
10 to Division 3 or additional studies or inquiries in furtherance of Division 3 are deemed appropriate  
11 and should be undertaken or recommended, in order to further and maintain the purpose and  
12 intent of Division 3.

13 (b) This Division 3 shall be repealed effective April 1, 2019.

14 **Sec. 28-84—28-90. Reserved.**

15 **Section 3.** That Article VII of Chapter 28 of the revised municipal code be and the same  
16 are hereby repealed and reenacted as a new Article VII to read as follows:

17 **ARTICLE VII. OPPORTUNITIES FOR SMALL BUSINESS ENTERPRISES IN CITY**  
18 **CONTRACTS FOR CONSTRUCTION, RECONSTRUCTION, AND REMODELING, AND**  
19 **PROFESSIONAL DESIGN AND CONSTRUCTION SERVICES, AND IN CONCESSION**  
20 **AGREEMENTS, THROUGH DEFINED SELECTION POOL CONTRACTS AND CONCESSION**  
21 **AGREEMENTS.**

22 **Sec. 28-201. Reserved.**

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

24 The purpose of this Article VII is to enable the City, through the Department of Public Works,  
25 Aviation and General Services, and the Division of Small Business Opportunity (“DSBO”), to  
26 undertake specific activities to promote use of Small Business Enterprises (“SBEs”) and Emerging  
27 Business Enterprises (“EBEs”), in construction and professional design and construction services  
28 contracts and in concession agreements, in the execution by the above user departments of their  
29 duties pursuant to the Charter of the City and County of Denver. The Director of the DSBO and  
30 the department heads of the user departments are expressly delegated the necessary powers and  
31 rulemaking authority to effectuate the purpose of this Article VII, and to undertake such additional  
32 studies or inquiries as they may deem appropriate.

33 **Sec. 28-203. Contracts excluded from this Article VII.**

1 Contracts for which bids or proposals are sought under the minority and women business  
2 enterprise (MBE/WBE) ordinance established pursuant to Division 3 of Article III of this Chapter 28  
3 are excluded from the coverage of this reenacted Article VII. In addition, in the case of a contract  
4 for which a part of the contract price is to be paid with funds from the United States Government or  
5 the State of Colorado and for which the United States Government or the State of Colorado have  
6 made applicable to such contract requirements, terms or conditions that are inconsistent with the  
7 terms of this Article VII, the provisions of this Article VII shall not apply to such contract to the  
8 extent of such inconsistency.

9 **Sec. 28-204. Definitions.**

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

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

18 (2) *Applicant Business Enterprise* means a business enterprise seeking to be certified as  
19 a small business enterprise under this Article VII

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

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

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

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

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

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

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

16 (9) *Commercially Useful Function* means responsibility for the execution of a distinct  
17 element of the work of a contract or concession agreement that is carried out by a business  
18 enterprise actually performing, managing, and supervising the work involved, or fulfilling  
19 responsibilities as a joint venturer. To determine whether an SBE is performing a commercially  
20 useful function, the amount of work subcontracted, industry practices and other relevant factors  
21 shall be evaluated. Commercially useful function is measured for purposes of determining  
22 participation on a contract or concession agreement, not for determination of certification eligibility.

23 (10) *Competitive Selection Process* has the meaning ascribed to that phrase in Sections  
24 2.3.3 (A) and 2.11.3(B) of the Denver City Charter, and in D.R.M.C. Sections 5-19 and 20-56, as  
25 that meaning may pertain to a contract(s) at issue.

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

30 (12) *Concession Agreement* means any City agreement for the operation of a retail, food  
31 service or other concession authorized by any provision of the Charter or ordinances of the City,  
32 including but not limited to agreements awarded by competitive selection procedures or negotiated

1 contracts, in a building, or aviation or aeronautical facility, or improvements thereto, situated on  
2 real property owned or operated by the City.

3 (13) *Conduit* means an SBE that knowingly agrees to pass the scope of work for which it  
4 is listed for participation and is scheduled to perform or supply on a contract or concession  
5 agreement, to a non-SBE. In this type of relationship, the SBE has not performed a commercially  
6 useful function and the arranged agreement between the two parties is not consistent with  
7 standard industry practice. This arrangement does not meet the commercially useful function  
8 requirement, and therefore the SBE's participation is not considered to be a legitimate portion of  
9 the work on the contract or concession agreement.

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

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

18 (16) *Contract* means any City contract for construction or for professional design and  
19 construction services authorized by any provision of the Charter or ordinances of the City,  
20 excepting only those contracts subject to division 3 of Article III of this chapter 28, or to federal  
21 DBE requirements. Contract shall also include other contracts ancillary to cooperative agreements  
22 or understandings with other public and private agencies for purposes including the development  
23 of public facilities, park and recreational facilities, museums, zoological and other gardens,  
24 collections of natural history, and observatories, if such contracts provide for funding in whole or in  
25 part by the City and provide for utilization of such funds for the purpose of construction or  
26 professional design and construction services for any public facility or area owned or leased by the  
27 City or situated on real property owned or leased by the City. Notwithstanding the foregoing,  
28 contract shall also include construction or professional design and construction services for  
29 buildings or aviation or aeronautical facilities or improvements thereto, constructed by private  
30 owners on real property owned by the City, without regard to the utilization of City funding.

31 (17) *Contractor* means a business enterprise that enters into a competitively bid,  
32 otherwise competitively selected or negotiated construction contract with the City, in privity of  
33 contract with the City, or enters into such a construction contract with a private owner, whether or

1 not bid, in privity of contract with such private owner for such work on a building or aviation or  
2 aeronautical facility, or improvements thereto, situated on real property owned by the City.  
3 Contractor includes general contractors and prime contractors.

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

5 (19) *Defined Selection Pool contract or concession agreement* means a contract or  
6 concession agreement which is determined by the Director to be appropriate for restriction of the  
7 selection of the contractor, consultant or concessionaire and, as applicable, subcontractors,  
8 subconsultants and suppliers on such contract or concession agreement to the pool of certified  
9 SBEs or EPBs, as determined by the Director.

10 (20) *Department Head* means the Manager or Director of the City department entering  
11 into contract(s) or concession agreement(s) with SBE(s), or such person's designee.

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

16 (22) *Director* means the Director of the Division of Small Business Opportunity or  
17 successor agency, or such Director's designee.

18 (23) *DSBO* means the Division of Small Business Opportunity.

19 (24) *Emerging Business Enterprise or EBE* means a business enterprise that is certified  
20 by the Director under this Article VII as meeting all of the requirements for certification set forth in  
21 Sections 28-205 and 28-206.

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

25 (26) *Joint venture* means an association of two (2) or more business enterprises to  
26 constitute a single business enterprise to perform a City construction or professional design or  
27 construction services contract, or concession agreement for which purpose they combine their  
28 property, capital, efforts, skills and knowledge and in which endeavor each joint venturer is  
29 responsible for a distinct, clearly defined portion of the work of the contract or concession  
30 agreement, performs a commercially useful function, and whose share in the capital contribution,  
31 control, management responsibilities, risks and profits of the joint venture are equal to its  
32 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  
2 to the contract or concession agreement.

3 (27) *Manufacturer* means a business enterprise that operates or maintains a factory or  
4 establishment that produces, or substantially alters on the premises the materials, supplies or  
5 equipment provided to contractors, consultants, subcontractors, subconsultants, suppliers, brokers  
6 or manufacturer's representatives on a contract, required under the contract and of the general  
7 character described by the contract specifications. The percentage of the value of the  
8 commercially useful function performed by a manufacturer on a City contract shall be counted in  
9 the same manner as for a supplier to quantify the work performed.

10 (28) *Manufacturer's Representative* means a business enterprise that sells products for  
11 one or more manufacturers. A manufacturer's representative does not take legal title to or physical  
12 possession of the products that it sells, such products generally being sent directly from the  
13 manufacturer to the contractor or subcontractor purchasing such products. Only bona fide  
14 commissions earned by a manufacturer's representative in performing a commercially useful  
15 function on a contract shall be counted toward legitimate participation by an SBE on such contract  
16 as set out in this Article VII.

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

22 (30) *Personal Net Worth* means the net value of the assets of an individual after total  
23 liabilities are deducted. An individual's personal net worth does not include the individual's  
24 ownership interest in an applicant business enterprise or participating SBE or the individual's  
25 equity, if any, in his or her primary place of residence. An individual's personal net worth includes  
26 only his or her share of assets held individually and jointly with the individual's spouse. For the  
27 purposes of certification as an SBE or an EBE under this Article VII, an individual must have a  
28 personal net worth equal to or less than the permissible personal net worth amount determined by  
29 the U.S. Department of Transportation to be applicable to its DBE programs, or as otherwise  
30 promulgated by the Director by rule and regulation. This requirement shall not apply to SBEs  
31 certified under this Article VII solely as concessionaires.

1 (31) *Private Owner* means a private or other non-City owner undertaking to contract for  
2 construction work or for professional design and construction services on buildings or aviation or  
3 aeronautical facilities or improvements thereto, on real property owned by the City.

4 (32) *Professional Design and Construction Services* means those areas of services  
5 ancillary to construction as encompassed within the City's contracting processes authorized by the  
6 Charter and ordinances of the City, including engineering, architectural, testing, construction  
7 management services and planning services related to a construction project.

8 (33) *Proposal* means an offer to perform construction or professional design and  
9 construction services or to operate a concession pursuant to a negotiated or otherwise  
10 competitively selected City contract or concession agreement with either the City or a private  
11 owner, and whether in response to a request for qualifications, request for proposals or otherwise.  
12 The department head shall designate the final project-specific proposal, and the date of receipt for  
13 each solicitation of proposers subject to this Article VII.

14 (34) *Proposer* means a business enterprise that submits a proposal on a City construction  
15 contract or professional design and construction services contract, or for a concession agreement,  
16 that is negotiated and not competitively bid or that utilizes a competitive selection process.

17 (35) *Regular dealer* means a business enterprise that owns, operates or maintains a  
18 store, warehouse or other establishment in which the materials, supplies, articles or equipment of  
19 the general character described by the contract specifications and required for the performance of  
20 the contract are bought and regularly sold or leased to the public in the usual course of business.  
21 To be a regular dealer, the business enterprise must be an established, regular business engaged  
22 in, as a substantial and material portion of its business, and in its own name, the purchase and  
23 sale or lease of the products in question. A regular dealer is presumed to keep such materials,  
24 supplies, articles or equipment in stock, but must in any event bear the risk of loss of such items.  
25 A regular dealer in such bulk items as steel, cement, gravel, stone, asphalt and petroleum products  
26 need not own, operate or maintain a place of business if it both owns and operates distribution  
27 equipment for the products. Any supplementation of a regular dealer's distribution equipment shall  
28 be by a long-term lease agreement and not on an *ad hoc* or contract-by-contract basis. Brokers,  
29 conduits, packagers, manufacturers and manufacturer's representatives shall not be regarded as  
30 regular dealers within the meaning of this term.

31 (36) *Small Business Enterprise* or *SBE* means a business enterprise that is certified by  
32 the Director under this Article VII as meeting all of the requirements for certification set forth in  
33 Sections 28-205 and 28-206.



1 (37) *Subcontractor* or *Subconsultant* means a business enterprise that either directly  
2 contracts with a contractor or consultant or directly contracts with subcontractors or subconsultants  
3 under such contractor or consultant on a City contract or concession agreement, and which  
4 business enterprise will provide services or perform work under agreements with the contractor or  
5 consultant or with other subcontractors or subconsultants under such contractor or consultant.

6 (38) *Supplier* means a business enterprise that either directly contracts with a contractor  
7 or consultant or directly contracts with subcontractors or subconsultants under such contractor or  
8 consultant on a City contract, and which business enterprise will provide materials, supplies or  
9 equipment under agreements with the contractor or consultant, or with other subcontractors or  
10 subconsultants under such contractor or consultant. A supplier may be a regular dealer,  
11 manufacturer, manufacturer's representative or broker. On City contracts of less than Five Million  
12 Dollars (\$5,000,000.00) at the time of bid opening or proposal selection, one hundred percent  
13 (100%) of the value of the commercially useful function performed by an SBE supplier on such  
14 contract shall be counted toward compliance with this Article VII. On City contracts of Five Million  
15 Dollars (\$5,000,000.00) or more at the time of bid opening or proposal selection, sixty percent  
16 (60%) of the value of the commercially useful function performed by an SBE supplier on such  
17 contract shall be counted toward compliance with this Article VII.

18 **Sec. 28-205. SBE and EBE certification; eligibility of applicant business enterprises.**

19 (a) Procedures and methods. The Director shall, by rule and regulation or informal  
20 guidelines relating solely to internal management and procedure, establish reasonable procedures  
21 and methods for the certification of applicant business enterprises as SBEs and EBEs in order to  
22 effectuate the purposes of this Article VII. The Director may seek input and advice from  
23 appropriate industry sources as to appropriate aspects of work performance, equipment and  
24 staffing in these industry areas in which certification is being sought.

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

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

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

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

8 b. Have acquired the interest in a real and substantial arms-length  
9 transaction utilizing real, substantial, and continuing consideration, going beyond *pro forma*  
10 ownership of the applicant business enterprise as reflected in ownership documents;

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

14 d. Have acquired the interest with a contribution of his or her own capital  
15 resources, by having put his or her own financial resources at risk in the operation of the applicant  
16 business enterprise, or subject to requirements below, with a contribution of expertise. All  
17 contributions by the owner(s) to acquire the ownership interest in the applicant business enterprise  
18 must be real, substantial, and continuing, which in part, means that it be commensurate with the  
19 ownership interest acquired.

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

28 (2) *Management and control*. The owner(s) shall manage and control the daily  
29 business operations of the applicant business enterprise. The owner(s) management and control  
30 must be real, substantial, and continuing and go beyond the *pro forma* ownership of the applicant  
31 business enterprise as reflected in its ownership documents. Ownership alone is not sufficient to  
32 establish management and control. To determine whether the owner(s) satisfy these  
33 requirements, DSBO shall consider the criteria below.

1                   a.       If federal or state law or City ordinance requires the owner(s) to have a  
2 particular license or other credential to own or control a certain type of business enterprise, then  
3 the owner(s) must possess the required license or other credential. If federal or state law or City  
4 ordinance does not require that the owner possess the license or other credential to own or control  
5 the business enterprise, including control, direction, or supervision of the work performed under the  
6 license, to determine whether the owner(s) manage and control the business enterprise, DSBO  
7 may consider whether the owner(s) holds the license or other credential as a factor. If there is not a  
8 legal requirement for the owner to hold the license or other credential to own or control a certain  
9 type of business enterprise, failure of the owner to hold the license or other credential does not by  
10 itself indicate lack of management and control of a business enterprise without other factors  
11 indicating to the contrary.

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

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

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

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

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

30                   g.       The owner(s) must have an overall understanding of, and managerial  
31 and technical competence, experience and expertise, directly related to the type of business in  
32 which the applicant business enterprise is engaged and its operations. The owner(s) is not  
33 required to have experience or expertise in every critical area of the applicant business enterprise's

1 operations or have greater experience or expertise in a given field than managers or key  
2 employees. The owner(s) must have the ability to intelligently and critically evaluate information  
3 presented by other participants in the applicant business enterprise's activities and to make  
4 independent decisions concerning the applicant business enterprise's daily operations,  
5 management, and policymaking. Generally, expertise or responsibilities primarily in office  
6 management, administration, bookkeeping, or other functions unrelated to the principal business  
7 activities of the applicant business enterprise are insufficient to demonstrate management and  
8 control.

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

17 (3) *Independence.* Only an independent applicant business enterprise may be  
18 certified as an SBE or an EBE. An independent applicant business enterprise is one whose  
19 viability does not depend on its relationship with another business enterprise. Recognition of an  
20 applicant business enterprise as a separate entity for tax or corporate purposes is not necessarily  
21 sufficient to demonstrate that the applicant business enterprise is independent and not an affiliate.  
22 In determining whether an applicant business enterprise is an independent business, the Director  
23 shall:

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

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

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

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

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

10 (4) *Other ownership criteria.* The Director may establish by rule and regulation  
11 other appropriate criteria of ownership, including but not limited to conditions of personal net worth  
12 of SBEs owners, other than those certified solely as concessionaires. Personal net worth shall be  
13 the amount of personal net worth described in Section 28-204(29).

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

- 16 a. Formation of the applicant business enterprise;
- 17 b. Commencement of sustained business activity in the trade or  
18 profession described on the certification application; and
- 19 c. Commencement of ownership, management and control of daily  
20 business operations by the identified owner(s).

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

27 (7) *Threshold size; continued eligibility and renewal of certification.* No applicant  
28 business enterprise or SBE or EBE shall be eligible for initial or subsequent renewal of certification  
29 if such applicant business enterprise or SBE or EBE combined with any affiliates meets the criteria  
30 set forth in Section 28-206 for graduation from this Article VII. An SBE or EBE will be certified for a  
31 one (1) year period. Following initial certification, an SBE or EBE that desires to continue its  
32 certification shall, no later than thirty (30) days prior to each annual anniversary of the certification,  
33 submit a certification renewal application that shall update and reaffirm all requirements for

1 certification. A certification may be terminated by the Director upon the failure of the SBE to satisfy  
2 any certification requirement set forth in this Article VII.

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

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

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

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

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

21 (a) No applicant business enterprise shall be certified as an SBE, and following  
22 certification of an SBE, no certification shall be renewed if on the effective date of the application or  
23 renewal the applicant business enterprise, SBE (combined with all affiliates) has achieved a size  
24 standard exceeding the following size standards:

25 (i) For construction, reconstruction and remodeling, and construction  
26 management services, applicant business enterprises cannot exceed one hundred percent  
27 (100%) of the applicable size standards established by the U.S. Small Business Administration  
28 ("SBA") at 13 C.F.R. § 121.201, as amended, or successor SBA regulation or classification system,  
29 which are incorporated herein by reference. The size standard is based on annual receipts  
30 averaged over the three (3) preceding consecutive fiscal years; whether the applicant business  
31 has otherwise achieved a size standard based upon its number of employees; or other criteria  
32 applicable to any of the work activities for which the applicant business enterprise seeks  
33 certification or is certified. The Director may adjust or modify such SBE graduation size standards

1 if it appears, after further inquiry and review by the Director, that such standards are no longer  
2 appropriate to the purposes of this Division 3.

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

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

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

1 certification if they meet the criteria for certification. Utilization of SBE contractors, consultants and  
2 concessionaires shall be counted under defined selection pool contracts to the extent that an SBE  
3 is performing a commercially useful function corresponding to a NAICS Code in which it is certified.

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

8 (e) Application to affiliates. The graduation criteria set forth above shall be deemed to  
9 apply to the owner(s) upon whom eligibility for certification is based and all affiliates of such  
10 owner(s). No applicant business enterprise shall be certified based upon one (1) or more owner(s)  
11 who owned or who was an affiliate of an SBE or EBE that has become ineligible for renewal of  
12 certification because of the achievement of graduation criteria.

13 (f) The certification status of all SBEs and EBEs shall be reviewed periodically by the  
14 DSBO. Failure of a certified and eligible SBE or EBE to seek timely renewal of certification by filing  
15 the necessary documentation with the DSBO may result in decertification.

16 (g) The DSBO shall decertify an SBE or EBE that does not continuously meet the  
17 eligibility criteria for certification.

18 (1) The SBE shall notify the DSBO of any change in its circumstances affecting its  
19 continued eligibility for certification under this Article VII within thirty (30) days of the SBE's or  
20 EBE's actual awareness of such change of circumstances. Failure to do so may result in the  
21 SBE's or EBE's decertification.

22 (2) The Director may move to decertify an SBE or EBE that repeatedly fails to  
23 submit bids or proposals on City contracts, attend relevant pre-bid or pre-proposal conferences, or  
24 otherwise comply with the requirements of this Article VII.

25 (h) An applicant business enterprise or SBE or EBE that has been denied certification or  
26 renewal of certification or been decertified may protest the denial of certification or decertification  
27 by the procedure set out in Section 28-33. An applicant business enterprise or SBE or EBE found  
28 to be ineligible for certification or renewal of certification may not apply for certification or  
29 recertification for one (1) year after the effective date of the final decision.

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

32 The Director, in his or her sole discretion, in collaboration with the department heads, may  
33 on the basis of contract or concession agreement categories, types, size standards or other



1 consistent criteria for selection, identify and determine those contracts and concession agreements  
2 proposed to be restricted by the Director for award to SBEs or EBEs under this Article VII. The  
3 stated selection criteria may differ among agencies of the City. Certification as an SBE or EBE  
4 shall thereupon be established as a condition of responsiveness to a bid or proposal on such  
5 selected contracts and concession agreements. Such selected contracts and concession  
6 agreements, referred to as defined selection pool contracts and concession agreements, shall be  
7 awarded only to responsive low-bidder SBE or EBE (as applicable) bidders on bid contracts and to  
8 responsive final project-specific SBE or EBE proposers (as applicable) on non-bid contracts and  
9 concession agreements. Such bidders and proposers may also function as brokers, joint  
10 venturers, manufacturers, manufacturer's representatives, packagers, regular dealers or suppliers,  
11 to the extent consistent with the definitions of those terms contained in Section 28-204, so long as  
12 the SBE or EBE bidder or proposer, also performs a commercially useful function as a contractor,  
13 consultant, or concessionaire, as applicable, on the contract or concession agreement, and does  
14 not function as a conduit.

15 **Sec. 28-208. Contracts for construction, reconstruction and remodeling— defined selection**  
16 **pool contracts-compliance with defined selection pool requirements.**

17 (a) The bid or competitive selection process specifications for each defined selection  
18 pool construction contract shall require that all bidders or proposers seeking to contract with the  
19 City or a private owner on such project shall address the project defined selection pool  
20 requirements through one or both of the following Subsections:

21 (1) The value of the commercially useful function to be self-performed by the SBE  
22 or EBE bidder or proposer shall count to the extent provided in Section 28-212 toward satisfaction  
23 of the SBE or EBE defined selection pool performance requirements; or

24 (2) If the bidder or proposer submits a joint venture agreement that includes one  
25 (1) or more SBEs or EBEs, the value of the commercially useful function to be performed by the  
26 SBE or EBE in the joint venture shall count to the extent provided in Section 28-212 toward  
27 satisfaction of the SBE or EBE defined selection pool requirements. The joint venture is subject to  
28 the review and approval by the Director and the joint venture agreement shall be provided to the  
29 Director within a time period before the date of bid opening or the date of final project-specific  
30 proposal in the case of a competitive selection process defined by the Director. Joint venturer  
31 participation will count toward the satisfaction of the SBE or EBE defined selection pool  
32 requirements upon confirmation by the Director of the utilization in the joint venture of joint  
33 management and full integration of work forces by the joint venturers.

1 (b) Notwithstanding any other provision of this Article VII, if a department head finds, with  
2 respect to a particular contract, that the best interests of the City would be served by the  
3 negotiation of a contract, including but not limited to a design-build or construction  
4 management/general contractor contract, through a competitive selection process based wholly on  
5 quality, without reference to selection by low bid of the contractor or its subcontractors or suppliers,  
6 the analysis of the SBE or EBE defined selection pool requirements by such contractor shall be  
7 determined on the basis set out in Sections 28-214 through 28-218, provided that, in the event of  
8 such an analysis, all references in those Sections to consultant shall also be deemed to refer to  
9 contractor.

10 **Sec. 28-209. Contracts for construction, reconstruction, and remodeling—SBE**  
11 **subcontractor and supplier minimum utilization requirements.**

12 (a) In addition to determining that a contract should be subject to the defined selection  
13 pool requirements set out in Section 28-207, the Director may, in his or her sole discretion, in  
14 collaboration with the department heads, also add a requirement to the bid or competitive selection  
15 process instructions for each defined selection pool construction contract assigning a minimum  
16 utilization requirement on such contract for SBE utilization as subcontractors or suppliers, based  
17 upon a percentage of the dollar value of all work on such contract; provided that, if the Director  
18 determines it to be in the best interests of the City, the Director may in his or her sole discretion  
19 waive the application of minimum SBE subcontractor or supplier utilization for a given contract.  
20 The minimum utilization requirement assigned by the Director to each such contract may vary from  
21 contract to contract consistent with the availability of SBEs with respect to such contract. Such  
22 minimum utilization requirement, if established, is not a goal, but a mandatory requirement of the  
23 contract. The DSBO shall establish a methodology for the establishment of minimum utilization  
24 requirements through rules and regulations. Such methodology shall consider the reasonably  
25 known availability of SBEs in specific industry groupings that are associated with individual  
26 projects.

27 (b) The following factors shall count toward SBE utilization requirements as more  
28 specifically provided below: portions of work undertaken by SBEs as subcontractors, suppliers,  
29 manufacturers, manufacturer’s representatives or brokers.

30 **Sec. 28-210. Contracts for construction, reconstruction, and remodeling—Pre-bid or**  
31 **competitive selection process meetings.**

32 In order to permit bidders or proposers to inform SBEs and EBEs of joint venturing,  
33 subcontracting, supplier, manufacturing, manufacturer’s representative and broker opportunities,

1 the department head in consultation with the Director may conduct prebid or preselection meetings  
2 in which representatives of the Director will explain the requirements of the DSBO pursuant to this  
3 Article VII and appropriate rules and regulations for each bid or proposal for a defined selection  
4 pool contract, including minimum utilization requirements for SBE subcontractors and suppliers.

5 **Sec. 28-211. Defined selection pool contracts for construction, reconstruction and**  
6 **remodeling--compliance with SBE minimum utilization.**

7 (a) The bid or competitive selection process specifications for each defined selection  
8 pool construction contract shall require that all bidders or proposers seeking to contract with the  
9 City on such project shall address any project SBE minimum utilization requirements as follows. If  
10 the bidder or proposer utilizes SBEs as subcontractors, suppliers, manufacturers, manufacturer's  
11 representatives or brokers, the value of the commercially useful function to be performed by such  
12 SBEs, including the cost of supplies and materials obtained by the SBE for the work of the  
13 contract, and supplies purchased or equipment leased by the SBE, except supplies and equipment  
14 the SBE purchases or leases from the bidder or proposer or its affiliate, shall count to the extent  
15 provided in Section 28-212 toward satisfaction of the SBE minimum utilization requirements.

16 (b) In order for its bid or proposal to be deemed responsive, a bidder or proposer must  
17 meet the minimum utilization requirements for SBEs on a particular contract as well as the bidder's  
18 or proposer's self-performance or joint venture obligations set out in Section 28-208 above.

19 (c) For contracts selected in accordance with Sections 2.3.3(A) and 2.11.3(B) of the  
20 Denver City Charter, and D.R.M.C. Sections 5-19 and 20-56, including on-call construction  
21 contracts, the department head may determine to address the minimum utilization requirements by  
22 means of a compliance plan for utilization of SBEs on such contract. In that event, the department  
23 head shall request the Director to approve the utilization of such a compliance plan, consistent with  
24 the scope and intent of this Article VII. The development, scope and utilization of such compliance  
25 plans shall be addressed in rules and regulations promulgated by the Director.

26 **Sec. 28-212. Defined selection pool contracts for construction, reconstruction, and**  
27 **remodeling—Identification of work scope of performing SBE and of other participating**  
28 **SBEs.**

29 (a) At the time of bid opening, or date of final project-specific proposal in the case of a  
30 competitive selection process, the bidder or proposer shall provide to the City or private owner a  
31 list of all SBEs that are being utilized on the contract whether as a self-performing bidder or  
32 proposer or as subcontractors, suppliers, manufacturers, manufacturer's representatives, brokers  
33 or members of a joint venture. The list shall specify:

- 1           (1)    The name and contact name for each SBE;
- 2           (2)    The dollar value and description of the commercially useful function to be  
3 performed by the SBE, consistent with Subsections (c) and (d). In the case of utilization of a  
4 supplier, manufacturer, manufacturer's representative, or broker, the appropriate percentage of  
5 dollar value attributable to such SBE as a commercially useful function shall be calculated with all  
6 underlying data supplied;
- 7           (3)    The percentage of the value of the commercially useful function to be  
8 performed by the SBE, consistent with Subsections (c) and (d), as compared to the total contract  
9 amount;
- 10          (4)    An adequate statement from the bidder or proposer that the dollar amount of  
11 work to be performed by such SBE on the contract, other than that self-performed by the bidder or  
12 proposer, was furnished to the bidder or proposer and agreed upon prior to bid opening or date of  
13 final project-specific proposal 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, subcontractors, suppliers, manufacturers, manufacturer's representatives and  
17 brokers, expressed in dollar values and as a percentage of the overall work, must be submitted to  
18 the Director for each SBE listed, including a self-performing bidder or proposer, within three (3)  
19 business days after bids are opened by the City or by the date of final project-specific proposal in  
20 the case of a competitive selection process, or bid selection made by a private owner.
- 21          (b)    Only that level of SBE utilization demonstrated in accordance with this Section at the  
22 time of such bid opening, date of final project-specific proposal in the case of a competitive  
23 selection process or private selection may be counted in satisfaction of the requirements of this  
24 Article VII. Bidders or proposers must submit an executed letter of intent for each SBE listed by  
25 the bidder or proposer, including a self-performing bidder or proposer, within three (3) business  
26 days after bids are opened, final project-specific proposals are received, in the case of a  
27 competitive selection process, or bid selection is made. Failure to do so will render the bid or  
28 proposal non-responsive.
- 29          (c)    All SBE contractors, subcontractors, joint venturers, suppliers, manufacturers,  
30 manufacturer's representatives or brokers listed in a bid or proposal must actually perform a  
31 commercially useful function in the work of a contract within the area(s) for which they are certified,  
32 and must not function as a conduit. Consistent with industry or professional practice, and as  
33 permitted by rules and regulations adopted by the Director, SBEs may enter into subcontracts,

1 including subcontracts with non-SBEs. In no case, however, shall an SBE act as a conduit, nor  
2 shall the participation of an SBE count toward satisfaction of the requirements of this Article VII to  
3 the extent it fails to perform a commercially useful function.

4 (d) All expenditures for materials, supplies and equipment obtained from an SBE  
5 manufacturer, manufacturer’s representative or supplier shall count toward SBE self-performance  
6 or utilization as specified in Section 28-204(38). Expenditures for materials, supplies and  
7 equipment paid to SBEs that are not manufacturers, manufacturer’s representatives or suppliers  
8 may count toward compliance with the requirements of this Article VII only to the extent of fees or  
9 commissions charged for providing a bona fide service, such as professional, technical, consultant  
10 or managerial services and assistance in the procurement of essential personnel, facilities,  
11 equipment, materials or supplies required for performance of the contract, provided that the fee or  
12 commission is determined by the Director to be reasonable and not excessive as compared with  
13 fees customarily allowed for similar services.

14 (e) Any agreement between a bidder or proposer and an SBE in which the bidder or  
15 proposer requires that the SBE not provide subcontracting quotations to other bidders or proposers  
16 is prohibited and shall render a bidder’s bid or proposer’s proposal non-responsive.

17 **Sec. 28-213. Defined selection pool contracts for construction, reconstruction, and**  
18 **remodeling—responsive and nonresponsive bids or proposals.**

19 (a) *Responsive; compliance with requirements.* If the low monetary bid or competitive  
20 selection process final project-specific proposal subject to the defined selection pool requirements  
21 indicates that the SBE or EBE bidder or proposer is appropriately performing a commercially useful  
22 function on the contract, and is otherwise responsive to the requirements of the contract and this  
23 Article VII, then the Director shall notify the department head to regard the bid or proposal as  
24 responsive to this Article VII.

25 (b) *Failure to meet requirements.* If a bid or proposal subject to the defined selection  
26 pool requirements does not demonstrate performance by the SBE or EBE bidder or proposer of a  
27 commercially useful function, as set out in Section 28-208, minimum utilization of SBE  
28 subcontractors or suppliers as set out in Section 28-211 or provide timely information as set out in  
29 Section 28-212, then the Director shall notify the department head to regard the bid or proposal as  
30 non-responsive, and such determination shall result in no further consideration by the City or  
31 private owner of the bid or proposal.

32 (c) *Commercially useful function or minimum utilization of SBE subcontractors - Informal*  
33 *meeting.* In the event the Director finds inadequacies in a bidder or proposer’s demonstration of

1 commercially useful function under Section 28-208 or minimum utilization of SBE subcontractors or  
2 suppliers under Section 28-211, the Director will provide written notice of such inadequacies to the  
3 bidder or proposer prior to notifying the appropriate department head of bid or proposal  
4 responsiveness. Within two (2) business days from the date that the City notifies the bidder or  
5 proposer of such inadequacies, the bidder or proposer may request an informal meeting with the  
6 Director. Such informal meeting shall be scheduled by the Director. All deficiencies shall be  
7 explained to the bidder or proposer at such informal meeting. Within twenty-four (24) hours after  
8 the informal meeting, the bidder or proposer shall be allowed to submit additional information or to  
9 clarify its performance of a commercially useful function. At no time, however, will the Director  
10 count toward the project goal the addition of subconsultants, joint venturers, suppliers,  
11 manufacturers, manufacturer's representatives, or brokers that may later be added to the contract  
12 or to the original SBE participation submitted at either the time of the bid or the date of final project-  
13 specific proposal, in the case of a competitive selection process. After this informal meeting, the  
14 Director will (i) determine whether the bid or proposal will be responsive or non-responsive; (ii)  
15 make the notification as stated in subsection (b) above, as applicable; and (iii) provide written  
16 notice to the bidder or proposer of the Director's final determination.

17 **Sec. 28-214. Contracts for professional design and construction services and concession**  
18 **agreements-compliance with defined selection pool requirements.**

19 The proposal specifications for each defined selection pool professional design and construction  
20 services contract and concession agreement shall require that all proposers seeking to contract  
21 with the City or a private owner on such contract or concession agreement shall address the SBE  
22 or EBE defined selection pool requirements through one or both of the following Subsections:

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

26 (2) If the proposer submits a joint venture agreement that includes one (1) or more SBEs  
27 or EBEs, the value of the commercially useful function to be performed by the SBEs or EBEs (as  
28 applicable) in the joint venture shall count to the extent provided in Section 28-218 toward  
29 satisfaction of the SBE or EBE defined selection pool requirements. The joint venture is subject to  
30 the review and approval by the Director and the joint venture agreement shall be provided to the  
31 Director within a time period before the date of final project-specific proposal defined by the  
32 Director. Joint venturer participation will count toward the satisfaction of the SBE or EBE defined

1 selection pool requirements upon confirmation by the Director of the utilization in the joint venture  
2 of joint management and full integration of work forces by the joint venturers.

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

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

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

23 (c) The SBE minimum utilization requirements shall not be applied to concession  
24 agreements under this Article VII.

25 **Sec. 28-216. Contracts for professional design and construction services and concession**  
26 **agreements—Pre-competitive selection process meetings.**

27 In order to permit proposers to inform SBEs and EBEs of joint venturing, subconsulting,  
28 supplier, manufacturing, manufacturer’s representative and broker opportunities, the department  
29 head in consultation with the Director may conduct preselection meetings in which representatives  
30 of the Director will explain the requirements of the DSBO pursuant to this Article VII and  
31 appropriate rules and regulations for each proposal for a defined selection pool contract or  
32 concession agreement, including, as applicable, minimum utilization requirements for SBE  
33 subconsultants and suppliers.

1 **Sec. 28-217. Defined selection pool contracts for professional design and construction**  
2 **services--compliance with SBE minimum utilization.**

3 (a) The competitive selection process specifications for each defined selection pool  
4 professional design and construction services contract shall require that all proposers seeking to  
5 contract with the City on such project shall address any project SBE minimum utilization  
6 requirements as follows. If the proposer utilizes SBEs as subconsultants, suppliers,  
7 manufacturers, manufacturer's representatives or brokers, the value of the commercially useful  
8 function to be performed by such SBEs, including the cost of supplies and materials obtained by  
9 the SBE for the work of the contract, and supplies purchased or equipment leased by the SBE,  
10 except supplies and equipment the SBE purchases or leases from the proposer or its affiliate, shall  
11 count to the extent provided in Section 28-218 toward satisfaction of the SBE minimum utilization  
12 requirements.

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

16 **Sec. 28-218. Defined selection pool contracts for professional design and construction**  
17 **services—Identification of work scope of performing SBE and of other participating SBEs.**

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

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



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

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

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

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

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

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

32 (d) All expenditures for materials, supplies and equipment obtained from an SBE  
33 manufacturer, manufacturer's representative or supplier shall count toward SBE self-performance

1 or utilization as specified in Section 28-204(38). Expenditures for materials, supplies and  
2 equipment paid to SBEs that are not manufacturers, manufacturer’s representatives or suppliers  
3 may count toward compliance with the requirements of this Article VII only to the extent of fees or  
4 commissions charged for providing a bona fide service, such as professional, technical, consultant  
5 or managerial services and assistance in the procurement of essential personnel, facilities,  
6 equipment, materials or supplies required for performance of the contract or concession  
7 agreement, provided that the fee or commission is determined by the Director to be reasonable  
8 and not excessive as compared with fees customarily allowed for similar services.

9 (e) Any agreement between a proposer and an SBE in which the proposer requires that  
10 the SBE not provide subconsulting quotations to other proposers is prohibited and shall render a  
11 proposer’s proposal non-responsive.

12 **Sec. 28-219. Defined selection pool contracts for professional design and construction**  
13 **services—responsive and non-responsive proposals.**

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

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

27 (c) *Commercially useful function or minimum utilization of SBE subcontractors or*  
28 *suppliers - Informal meeting.* In the event the Director finds inadequacies in a bidder or proposer’s  
29 demonstration of commercially useful function under Section 28-214 or minimum utilization of SBE  
30 subcontractors or suppliers under Section 28-217, the Director will provide written notice of such  
31 inadequacies to the bidder or proposer prior to notifying the appropriate department head of bid or  
32 proposal responsiveness. Within two (2) business days from the date that the City notifies the  
33 bidder or proposer of such inadequacies, the bidder or proposer may request an informal meeting

1 with the Director. Such informal meeting shall be scheduled by the Director. All deficiencies shall  
2 be explained to the bidder or proposer at such informal meeting. Within twenty-four (24) hours  
3 after the informal meeting, the bidder or proposer shall be allowed to submit additional information  
4 or to clarify its performance of a commercially useful function. At no time, however, will the  
5 Director count toward the project goal the addition of subconsultants, joint venturers, suppliers,  
6 manufacturers, manufacturer's representatives, or brokers that may later be added to the contract  
7 or to the original SBE participation submitted at either the time of the bid or the date of final project-  
8 specific proposal, in the case of a competitive selection process. After this informal meeting, the  
9 Director will (i) determine whether the bid or proposal will be responsive or non-responsive; (ii)  
10 make the notification as stated in subsection (b) above, as applicable; and (iii) provide written  
11 notice to the bidder or proposer of the Director's final determination.

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

13 The documentation of achievement of defined selection pool and minimum SBE utilization  
14 performance requirements of a bidder or proposer, as applicable, shall be submitted to the Director  
15 within three (3) business days after bid opening, date of final project-specific proposal in the case  
16 of a competitive selection process or private owner selection for a construction contract, or at the  
17 time of submission of the final project-specific proposal submitted to and authorized by the City or  
18 a private owner for a professional design and construction services contract or a concession  
19 agreement.

20 **Sec. 28-221. Schedule of work to be performed by SBE or EBE contractor or consultant.**

21 Within five (5) business days following commencement of work on a contract, the contractor or  
22 consultant shall submit to the Director a duplicate of the contract schedule, which sets forth in  
23 detail the anticipated work scope to be performed by the SBE or EBE contractor or consultant on  
24 the contract. In the event of a contract performance delay of more than one-third (1/3) of the  
25 originally estimated length of time between project notice to proceed and completion, such  
26 contractor or consultant shall submit to the Director not later than the originally estimated date of  
27 contract or project completion, a revised schedule for performance by the SBE or EBE contractor  
28 or consultant of a commercially useful function on the contract.

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

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

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

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

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

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

32 (e) Work performed by an SBE contractor, consultant or concessionaire, or utilized SBE  
33 subcontractor, subconsultant or supplier not providing a commercially useful function, or

1 functioning as a conduit, shall not count toward achieving ongoing defined selection pool and, if  
2 applicable, minimum SBE utilization requirements on contracts and concession agreements under  
3 this Article VII.

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

5 (a) Contractors and consultants on contracts and concessionaires on concession  
6 agreements hereunder shall have a continuing obligation to immediately inform the DSBO in  
7 writing of any agreed upon increase or decrease in the scope of work of such contract or  
8 concession agreement, upon any of the bases discussed in this Section, regardless of whether  
9 such increase or decrease in scope of work has been reduced to writing at the time of notification.

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

22 **Sec. 28-224. Payments to subcontractors, subconsultants, joint venturers, suppliers,**  
23 **manufacturers, manufacturer’s representatives and brokers.**

24 All contractors and consultants shall promptly render payment to all subcontractors,  
25 subconsultants, joint venturers, suppliers, manufacturers, manufacturer’s representatives and  
26 brokers on a contract. Each contractor and consultant shall provide with each pay request to the  
27 City or private owner on each contract, beginning with the second pay request, partial claim  
28 releases from subcontractors, subconsultants, joint venturers, suppliers, manufacturers,  
29 manufacturer’s representatives and brokers in form and content satisfactory to the City, or shall  
30 provide, at the City's sole option, alternative proof of payment to subcontractors, subconsultants,  
31 joint venturers, suppliers, manufacturers, manufacturer’s representatives and brokers, in form and  
32 content approved by the department head and the Director, evidencing that all subcontractors,  
33 subconsultants, suppliers, manufacturers, manufacturer’s representatives and brokers have been

1 duly paid out of the proceeds of the contractor's or consultant's payments from the City or private  
2 owner under the contract, unless a bona fide dispute, documented in writing, exists between the  
3 contractor or consultant and the unpaid subcontractor, subconsultant, joint venturer, supplier,  
4 manufacturers, manufacturer's representatives or broker.

5 **Sec. 28-225. Potential violations during contract or concession agreement performance.**

6 (a) A Contractor, consultant or concessionaire that has been awarded a contract or  
7 concession agreement based upon a given level of SBE or EBE participation shall not, at any time  
8 before or during the performance of such contract or concession agreement:

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

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

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

19 (b) Any action by a contractor, consultant or concessionaire in violation of Subsections  
20 (a) (1), (2) or (3) hereof, shall constitute a material breach of the contract or concession agreement  
21 that shall entitle the City or private owner to exercise all of its rights at law or equity for such  
22 material breach, in addition to exercising any of the other sanctions set out in Section 28-227. If,  
23 following contract or concession agreement award, an SBE or EBE has its certification terminated  
24 for reasons other than expiration of certification, or graduation from certification under Section 28-  
25 206, or an SBE or EBE fails to perform a commercially useful function, the value of which was  
26 originally counted for that SBE or EBE in awarding the contract or concession agreement, or an  
27 SBE voluntarily withdraws its SBE participation on the contract or concession agreement and the  
28 contractor, consultant or concessionaire can demonstrate that such termination or failure did not  
29 result from any action or inaction, whether direct or indirect, of or by the contractor, consultant or  
30 concessionaire, such termination of certification or failure to perform a commercially useful function  
31 shall not be deemed to affect compliance with the contract or concession agreement defined  
32 selection pool requirements or minimum SBE utilization requirements, and shall not be deemed a  
33 breach of the contract or concession agreement.

1 **Sec. 28-226. Burden of proof; investigations of compliance.**

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

11 **Sec. 28-227. Sanctions for failure to comply with Article VII requirements.**

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

24 (b) If the Director determines, in his or her sole discretion, that a contractor, consultant or  
25 concessionaire is in noncompliance with Article VII, the contractor, consultant or concessionaire  
26 may be assessed a civil, remedial penalty of not more than one hundred fifty percent (150%) of the  
27 contract amount, or in the case of a concession agreement, of not more than the revenues  
28 accruing to the concessionaire from its concession operations over the past three (3)-month  
29 period. In assessing such civil penalty:

30 (1) The Director shall calculate the applicable amount of civil penalty, and may  
31 reduce or waive all or part of such penalty, in his or her sole discretion, in consideration of the  
32 following factors:

33 a. The length of the period of noncompliance;

- b. The history of previous noncompliance with this Article VII;
- c. The monetary impact of the civil penalty on the contractor, consultant or concessionaire in correcting such noncompliance; or
- d. The other facts and circumstances relevant to the noncompliance of the contractor, consultant or concessionaire.

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

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

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

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

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

(7) The DSBO may suspend or revoke an offending SBE's or EBE's eligibility for certification, may suspend its participation from counting toward achieving defined selection pool and/or SBE minimum utilization requirements if applicable, and, subject to other City law, may refer to the debarment board to suspend or debar it from participating in future City contracts or



1 concession agreements, based upon such SBE's or EBE's acting as a conduit, failing to comply  
2 with the provisions of Article VII, failing to perform a commercially useful function on a project,  
3 failing to achieve required SBE minimum subcontractor, subconsultant and/or supplier utilization if  
4 applicable, failing to submit information as required by Section 28-220, submitting false, misleading  
5 or materially incomplete statements, documentation or records, or failing to cooperate in  
6 investigations.

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

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

17 **Sec. 28-228. State or federal law and other guidelines.**

18 In making any findings required herein, the Director may incorporate by reference rules,  
19 procedures and powers of C.R.S. § 24-4-101 et seq. as they may exist on the date of repeal and  
20 reenactment of this Article VII or as they may be amended. In making any findings required herein  
21 or in aid of definition or interpretation of any term or phrase herein, the Director may utilize as a  
22 guide or adopt by rule and regulation, insofar as they are consistent with the purposes of this  
23 Article VII, provisions of federal law, including without limitation the provisions of 49 Code of  
24 Federal Regulations and 13 Code of Federal Regulations, or successor regulations, as they exist  
25 on the date of repeal and reenactment of this Article VII or as they may be amended.

26 **Sec. 28-229. Quarterly reports.**

27 The Director shall prepare written reports four (4) times each year that this Article VII is in  
28 effect that shall describe defined selection pool requirements applied to contracts and concession  
29 agreements under this Article VII. Copies of such reports shall be provided to the affected  
30 department heads, city council and the mayor according to the following schedule:

31 TABLE INSET:

32

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

1 In addition, the quarterly report shall encompass the implementation of this Article VII as well as a  
2 report and justification of SBE and EBE defined selection pool requirements and minimum SBE  
3 utilization requirements by contract or concession agreement including all change orders,  
4 amendments and modifications.

5 In calculating SBE or EBE participation, all funds paid to SBEs and EBEs on City defined  
6 selection pool contracts and all revenues received by SBEs from City concession agreements  
7 during the year shall be counted whether or not such funds were used to compensate SBEs and  
8 EBEs or such concession revenues were received by SBEs for the performance of a commercially  
9 useful function.

10 **Sec. 28-230. Annual report.**

11 For each year that this Article VII is in effect, by March 1st of the following year, the Director  
12 shall submit to the Mayor and Council a report describing SBE and EBE defined selection pool  
13 levels achieved in the preceding year and making recommendations as to continuing or further  
14 efforts that the City should make in efforts to assist in the development and utilization of SBEs in  
15 City construction and professional design and construction services contracting, and in City  
16 concession opportunities, and recommending what should be done to assist in achieving such  
17 SBE and EBE participation in the future.

18 **Sec. 28-231. Rules and regulations; informal guidelines.**

19 The Director shall have the power and authority to adopt rules and regulations or informal  
20 guidelines to effectuate the purpose, procedures and operations of this Article VII.

21 **Sec. 28-232. Severability.**

22 If any provision of this Article VII or its application is held invalid or unenforceable, such invalidity  
23 or unenforceability shall not affect other provisions or applications of this Article VII that can be  
24 given effect without the invalid provisions or applications and the remaining provisions are to be  
25 severable and shall remain in full force and effect.

26 **Sec. 28-233. Effective date of ordinance.**

1 This Article VII shall become effective on April 1, 2014, and shall apply to all contracts and  
2 concession agreements within the scope of the Article for which bids or proposals are publicly  
3 advertised on or after April 1, 2014.

4 **Sec. 28-234. Review and Sunset.**

5 (a) This Article VII shall be reviewed by the mayor, Director and department heads on  
6 the third (3rd) anniversary of its enactment, in order to determine whether adjustments or revisions  
7 to Article VII or additional studies or inquiries in furtherance of Article VII are deemed appropriate  
8 and should be undertaken or recommended, in order to further and maintain the purpose and  
9 intent of Article VII.

10 (b) This Article VII shall be repealed effective April 1, 2019.

11 **Sections. 28-235—28-238. Reserved.**

12  
13 COMMITTEE APPROVAL: January 29, 2014

14 MAYOR-COUNCIL DATE: February 4, 2014

15 PASSED BY THE COUNCIL \_\_\_\_\_ 2014

16 \_\_\_\_\_ - PRESIDENT

17 APPROVED: \_\_\_\_\_ - MAYOR \_\_\_\_\_ 2014

18 ATTEST: \_\_\_\_\_ - CLERK AND RECORDER,  
19 EX-OFFICIO CLERK OF THE  
20 CITY AND COUNTY OF DENVER

21 NOTICE PUBLISHED IN THE DAILY JOURNAL \_\_\_\_\_ 2014; \_\_\_\_\_ 2014

22 PREPARED BY: Deanne R. Durfee, Assistant City Attorney DATE: February 6, 2014

23 Pursuant to Section 13-12, D.R.M.C., this proposed ordinance has been reviewed by the office of  
24 the City Attorney. We find no irregularity as to form, and have no legal objection to the proposed  
25 ordinance. The proposed ordinance is not submitted to the City Council for approval pursuant to  
26 §3.2.6 of the Charter.

27  
28 D. Scott Martinez, Denver City Attorney

29  
30 BY: \_\_\_\_\_, Assistant City Attorney DATE: \_\_\_\_\_, 2014