

Amended 4-8-96

BY AUTHORITY

ORDINANCE NO. 305
SERIES OF 1996

COUNCIL BILL NO. 259
COMMITTEE OF REFERENCE:
PUBLIC WORKS

TRANSPORTATION

A BILL

FOR AN ORDINANCE AMENDING THE REVISED MUNICIPAL CODE BY ENACTING A NEW ARTICLE V OF CHAPTER 28 TO BE ENTITLED "NONDISCRIMINATION IN CITY CONTRACTS FOR GOODS AND SERVICES".

WHEREAS, the City has a constitutional duty to prevent racial- and gender-based discrimination in City contracting;

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

WHEREAS, the City, through the Department of General Services and the mayor's office of contract compliance, undertook various inquiries in order to determine whether discrimination existed in the City's goods and services contracting opportunities and in the private sector goods and services industries in the Denver metropolitan area;

WHEREAS, a disparity study conducted by a team of independent consultants included a quantitative analysis of the availability and utilization of minority business enterprises and woman business enterprises, and of employment, business formation rates and business revenue in the local goods and services industries;

WHEREAS, detailed interviews were conducted with minority business enterprises, woman business enterprises, government procurement officials and industry representatives;

WHEREAS, a public hearing was held concerning procurement practices in the Department of General Services and in the local goods and services industries;

WHEREAS, a telephone survey was conducted to determine the availability of minority business enterprises and woman business enterprises in the local goods and services industries;

WHEREAS, such inquiries provided evidence of racial and gender based discrimination by the City and by the private sector goods and services industries in which the City was a passive participant;

WHEREAS, a Denver Affirmative Action Community Task Force Purchasing Subcommittee, a panel of members of minority, woman and majority owned goods and services provision firms doing business in the Denver metropolitan area, met for a period of four (4) months, during which time it obtained input on various aspects of the history, findings and operation of affirmative action programs in general and of an ordinance for minority and woman business enterprises contracting in the area of goods and services procurement by the City in particular, and made recommendations for the enactment of such a minority and woman business enterprise contracting program for goods and services procurement by the City; and

WHEREAS, the scope of the identified private and public discrimination encompasses the types of contracts within the purview of Article XII of the Charter of the City and County of Denver (Department of General Services), and also certain other activities within the purview of other sections of the Charter or ordinances;

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

Section 1. That a new Article V be added to Chapter 28 of the Revised Municipal Code to read as follows:

ARTICLE V. NONDISCRIMINATION IN CITY CONTRACTS FOR GOODS AND SERVICES.

Sec. 28-117. Study by Independent Consultants; Other Input.

(a) In 1991, the City hired a team of consultants to conduct a study of the utilization and availability of minority- and woman-owned business enterprises and of the evidence of racial and gender based discrimination against such business enterprises in the goods and services industries, in both City contracting and in the Denver metropolitan area ("the 1991 Disparity Study"). This study included:

- (1) An analysis of data compiled from federal and City sources and by the consultants in a survey of goods and services procurement firms;
- (2) Over two thousand one hundred (2,100) telephone survey interviews with representatives of majority-, minority- and woman-owned business enterprises in goods and services procurement industries;
- (3) An analysis of the existence of disparities between utilization and availability of minority and woman business enterprises in the private sector marketplace in the Denver

metropolitan area controlling for factors such as industry, paid employees, and employment size;

(4) An analysis of the existence of disparities in the rate of business formation between minority and woman business enterprises and others;

(b) The 1991 Disparity Study produced evidence of race- and gender-based discrimination against such business enterprises in the goods and services industries in both City contracting and in the Denver metropolitan area. The 1991 Disparity Study concluded:

(1) There were statistical disparities between the utilization of minority- and woman-owned businesses by the City and their availability to perform such work.

(2) There were statistical disparities between private sector utilization of minority- and woman-owned businesses in the local goods and services industries and their availability to perform such work, even after controlling for sector, presence of paid employees and size of workforce.

(3) There were statistical disparities in the rates of business formation for minorities and women in the local goods and services industries.

(4) There was evidence of discrimination against African-Americans, Hispanics, Asian-Americans and Native Americans, and against women, by the City and in the private sector goods and services industries in the six-county local market area which includes the City.

(5) There was evidence that City projects had been reclassified as Department of General Services projects to avoid goals assigned under the Department of Public Works goals program.

(c) The consultants in the 1991 Disparity Study evaluated race- and gender-neutral programs, existing administrative programs, and race- and gender-based programs, and recommended the enactment of various programs for minority- and woman-owned business enterprises for all goods and services procurements by the City.

(d) In 1995 the City's data consultant performed a study intended to supplement the information contained in the 1991 Disparity Study. This supplement ("Marketplace Analysis") included an analysis of the existence of disparities between utilization and availability of minority and woman business enterprises in the private sector marketplace in the Denver metropolitan area, controlling for such factors as sector, paid employees and employment size, and an analysis of rates of business formation of minorities and women in the goods and services industries.

(e) Based upon the most recently available U.S. Census data, the Marketplace Analysis concluded that available data showed significant statistical disparities between utilization and availability of African-American, Hispanic, Asian-American and Native American owned firms and women owned firms in the goods and services industries.

(f) For four (4) months during 1995 and 1996, a Subcommittee of a 21 member Affirmative Action Community Task Force, comprised of City officials and members of majority, minority and woman-owned business enterprises in the areas of goods and services provision, conducted extensive public meetings, reviewed a variety of material including but not limited to reports of the 1991 Disparity Study and the Marketplace Analysis, compiled information and opinions, and studied the need for affirmative action programs in the City. The Task Force Subcommittee concluded, in its Final Report dated February 28, 1996, that minority and woman-owned business enterprises were underutilized in the areas of goods and services procurement in the Denver metropolitan area marketplace, and that a need existed for a program for minority and woman business enterprises in City contracting in these areas, including the utilization of project goals.

Sec. 28-118. Findings by City Council.

(a) Generally. The City, having hired independent consultants who found evidence of discrimination in 1991 and who in 1995 found continuing evidence of disparities between availability and utilization of woman and minority-owned business enterprises in the area of goods and services procurement; having received a report from the subcommittee of a broad-based community task force which identified an underutilization of woman and minority-owned businesses in such industry; and having analyzed all the evidence, data and findings before it, hereby finds that:

(1) There exists a prima facie showing that woman business enterprises, and minority business enterprises owned by African-Americans, Hispanics, Asian Americans and Native Americans, who have done business or attempted to do business in the private and public goods and services industries within the City and the Denver metropolitan area, have suffered and continue to suffer from discrimination. This discrimination has existed in the City's goods and services contracting practices; in private sector industry contracting in such work areas in which the City has been a passive participant; and in the contracting practices in the private sector goods and services industries in the Denver metropolitan area. Because of such discrimination, such woman business

enterprises and minority business enterprises have been denied equal opportunity to participate in such contracts.

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

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

(4) Such discrimination requires action to prevent discrimination and to remedy its effects, including the encouragement of partnering and mentoring relationships between City contractors and minority business enterprises and woman business enterprises, assistance in achieving insurance and bonding capability, improvement of payment procedures, improved instructional resources for inexperienced contractors and City and contractor information outreach insofar as the City may effectively and lawfully do so, and the adoption of a good faith goals program.

(5) Without the adoption of a good faith goals program, such woman business enterprises and minority business enterprises would not have an equal opportunity to participate in City contracts for goods and services procurement.

(b) Goals program. The City, therefore, finds and declares that it has a compelling governmental interest in prohibiting, preventing and eliminating race and gender discrimination and its effects in City goods and services contracts, and for this purpose adopts the specific program of good faith goals as set forth in this Article V. This program has been carefully structured to take into consideration factors such as present availability of such woman business enterprises and minority business enterprises to perform work on such City contracts, and to take into consideration statistical and anecdotal evidence of discrimination. The program does not authorize the use of quotas, set asides, sheltered markets or bid preferences. The program is narrowly tailored to prevent and eliminate discrimination and its effects against such minority business enterprises and woman business enterprises with a minimum of burden on other contractors, including:

(1) specific goals for participation of woman business enterprises and minority business enterprises are to be established for each contract for goods and services estimated to

amount to fifty thousand dollars (\$50,000.00) or more, based on the availability of woman business enterprises or minority business enterprises for that particular contract; provided that, on contracts of one hundred thousand dollars (\$100,000.00) or more, the director shall be assisted in the setting of project goals by Goals Committees as described herein.

(2) for projects under fifty thousand dollars (\$50,000.00), a data base of goods and services vendors to the City shall be established and utilized so that inclusion of woman business enterprises and minority business enterprises in the process of review and selection of contractors in the goods and services industries will be provided on an ongoing basis; and

(3) the program does not impose a quota, set-aside, sheltered market or bid preference, never excludes any party, including non-minority and non-women owned business enterprises, from competing for any contract, and never denies contracts for failure to meet project goals, if nondiscrimination is demonstrated by a showing of a good faith attempt to comply with project goals established therein; and

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

Sec. 28-119. Purpose and Scope.

The purpose of this Article V, consistent with the legislative findings stated above, is to enable the City, through the Department of General Services and the mayor's office of contract compliance, to undertake specific activities to prevent discrimination and its effects against business enterprises who have been certified as minority business enterprises ("MBEs") or woman business enterprises ("WBEs"), in the execution by the Department of General Services of its duties pursuant to Section A12.3-1 of the Charter of the City and County of Denver. The manager of the Department of General Services and the director of the mayor's office of contract compliance are hereby expressly delegated the necessary powers to effectuate the purpose of this Article V.

Sec. 28-120. Definitions.

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

(a) Affiliate: Any business enterprise which is affiliated with the MBE or WBE or with the

minority or woman owner(s) of such MBEs or WBEs. Business enterprises are affiliates of each other when:

- (1) One either directly or indirectly controls or has the power to control the other;
- (2) A third party or parties controls or has the power to control both; or
- (3) Other relationships between or among parties exist such that affiliation may be

found. In determining whether affiliation exists, consideration shall be given to all appropriate factors, including but not limited to common ownership, common management, contractual relationships, and shared facilities.

The director may utilize, in the interpretation of this definition, the definition of affiliate set forth in 13 C.F.R. §121.103, or successor regulation, as from time to time amended.

(b) African-American: A person having origins in any of the black racial groups of Africa and encompassed within the findings of the Denver City Council.

(c) Asian-American: A person having origins in those countries or regions of Asia encompassed within the findings of the Denver City Council.

(d) Bidder: A business enterprise that submits a bid on a contract which is offered for formal competitive bidding by the City or otherwise offered by a private owner.

(e) Broker: A business enterprise that performs a commercially useful function as an intermediary, for a fee, in the acquisition of goods or services for the City or a private owner or its contractors or suppliers, but is not a manufacturer or regular dealer. A manufacturer's representative may, in a given fact situation, be deemed a broker. Only bona fide commissions earned by a broker for its activities in performing a commercially useful function on City projects shall be counted toward applicable project goals, as set out in section 28-132(b).

(f) Business enterprise: A corporation, limited liability company, partnership, individual, sole proprietorship, joint stock company, joint venture, professional association or any other legal entity operated for profit that is properly licensed, as applicable, and otherwise authorized to do business in the State of Colorado.

(g) Certification: Completion by a business enterprise of an application procedure to be developed by the mayor's office of contract compliance, and formal authorization by the director to participate as an MBE and/or WBE under this Article V. Certification neither represents nor implies that a business enterprise is qualified to perform on a contract.

(h) City project; City contract; City procurement practices: Any contract or project encompassed within the definition of contract herein, regardless of whether the project owner is the City or a private owner. All provisions of this ordinance shall apply to such contracts let by private owners, provided that the City shall not dictate means and methods of performance to such private owners. Copies of all documents required to be provided by a subcontractor, supplier, manufacturer or broker hereunder shall be sent to the director when the originals are sent to a private owner.

(i) Commercially useful function is performed by a business enterprise when it is responsible for provision of distinct goods or services of a contract and carrying out its responsibilities by actually performing, managing and supervising the goods or services provided. To determine whether an MBE or WBE is performing a commercially useful function, the amount of goods or services subcontracted, industry practices and other relevant factors shall be evaluated.

(j) Conduit: An MBE or WBE that does not perform a commercially useful function on a contract and whose participation is not counted.

(k) Contract: Any City contract or purchase order for acquisition of goods or services authorized by any provision of the Charter or ordinances of the City, including but not limited to, contracts and purchase orders awarded by competitive bidding or negotiated contracts, but excluding contracts for construction, reconstruction and remodeling, professional design and construction services or other professional services. Contract shall include contracts and purchase orders ancillary to cooperative agreements or understandings with other public and private agencies for purposes including but not limited to the development of public facilities, park and recreational facilities, programs and activities and the establishment and maintenance of museums, zoological and other gardens, collections of natural history, and observatories, if such contracts and purchase orders provide for funding in whole or in part by the City and provide for utilization of such funds for the purpose of acquiring goods or services to be utilized on any public facility or area owned by the City or situated on real property owned by the City. Notwithstanding the foregoing, contract shall also include acquisition of goods or services for maintenance or furnishing of buildings or aviation or aeronautical facilities, or improvements thereto, constructed by private owners on real property owned by the City, without regard to the utilization of City funding.

(l) Contractor: A business enterprise that enters into a competitively bid contract with the City, in privity of contract with the City, for acquisition of goods or services pursuant to sections 20-62, 20-63 or 20-68, or enters into such a contract with a private owner, in privity of contract with

such private owner, for acquisition of goods or services for operation, maintenance or furnishing of a building or aviation or aeronautical facility, or improvements thereto, on real property owned by the City.

(m) Director: The director of the mayor's office of contract compliance or the director's designee.

(n) Goals Committees: Committees of persons engaged in the goods and services industries, which may be established by the Director as set out herein, to advise the director as to project goal setting.

(o) Goods: Tangible, physical items which may or may not be fungible.

(p) Hispanic: A person of Spanish culture or origin, regardless of race, encompassed within the findings of the Denver City Council.

(q) Joint venture: An association of two (2) or more business enterprises to constitute a single business enterprise to perform a City contract for the provision of goods or services, for which purpose they combine their property, capital, efforts, skills and knowledge, and in which each joint venturer is responsible for a clearly defined portion of goods or services, performs a commercially useful function, and shares in the ownership, control, management responsibilities, risks and profits of the joint venture.

(r) Letter of Intent: A written communication from a project bidder to the City or a private owner with respect to a contract evidencing an understanding between an MBE or WBE and the bidder that such MBE or WBE has or will enter into a contractual relationship with the bidder on such contract, or that such bidder will self-perform as a MBE or WBE on such contract.

(s) Manager: The manager of the Department of General Services or the manager's designee.

(t) Manufacturer: A business enterprise that operates or maintains a factory or establishment that produces on the premises the goods, materials or supplies provided to contractors, subcontractors, suppliers or brokers. A manufacturer's representative may, in a given fact situation, be deemed a manufacturer. The percentage of the value of the commercially useful function performed by a manufacturer on a City project shall be counted toward applicable project goals in the same manner as for a supplier.

(u) Mayor's office of contract compliance: The office established by section 28-31 of this Code and abbreviated as MOCC.

(v) Minority: A person of African-American, Hispanic, Asian-American, or Native American descent.

(w) Minority business enterprise or MBE: A business enterprise which is certified by the director under this Article as meeting all of the requirements for certification set forth in section 28-135, and which is found by the director to meet all of the following requirements:

(1) It shall be at least fifty-one percent (51%) owned by one (1) or more eligible minorities by whom certification is being sought; or, in the case of a corporation, at least fifty-one percent (51%) of its stock shall be owned by one (1) or more eligible minorities; or, in the case of a partnership, one (1) or more general partners shall be eligible minorities; or, in the case of a limited liability company, one or more managers and members shall be eligible minorities; and

(2) It shall be managed by and its daily business operations shall be controlled by one (1) or more eligible minorities by whom certification is being sought.

(x) Native American: A person who is a Native American, encompassed within the findings of the Denver City Council. For purposes of this definition, a person of American Indian descent will be defined as a person who is properly enrolled, registered or recognized by the specific American Indian Tribe or Nation in which membership is claimed and which Tribe or Nation is federally recognized.

(y) Packager: A business enterprise that performs a commercially useful function in the packaging of goods for the City or a private owner or its contractors, manufacturers or suppliers but is not a regular dealer or a manufacturer. A packager shall be considered as, and treated as, a broker.

(z) Peer Review Group: A committee of representatives of business enterprises currently engaged in those areas of goods and services procurement, in which minority and woman business enterprises are currently seeking certification as MBEs and WBEs, which shall be established by the Director in order for the Director to seek input and advice as to appropriate aspects of work performance, equipment and staffing in those areas in which certification is being sought, as to aspects of commercially useful function performance, and as to other aspects of contract compliance. Such Peer Review Group shall not, however, make specific recommendations to the Director with respect to particular applicant business enterprises, MBEs, or WBEs.

(aa) Private owner: A private or other non-City owner undertaking to contract for acquisition of goods or services for operation, maintenance or furnishing of buildings or aviation or aeronautical facilities, or improvements thereto, on real property owned by the City.

(bb) Proposal: An offer to provide goods or perform services pursuant to a negotiated City contract with either the City or a private owner, pursuant to section 20-64.

(cc) Proposer: A business enterprise that submits a proposal on a City contract that is negotiated with a single vendor pursuant to section 20-64 and not competitively bid, whether informally or formally.

(dd) Qualified: A business enterprise which has the financial ability, skill, experience and access to the necessary staff, facilities and equipment to complete contracts or subcontracts which it may undertake on projects. The director may develop methods and criteria for assessment of allegations of qualifications or lack thereof of a business enterprise. The City makes no representations as to the qualifications of any business enterprise.

(ee) Regular dealer: A business enterprise that owns, operates or maintains a store, warehouse, or other establishment in which the goods, materials or supplies required for the performance of the contract are bought, kept in stock and regularly sold in the usual course of business. To be a regular dealer, the business enterprise must engage in, as a substantial and material portion of its business, and in its own name, the purchase and sale of the products in question. A regular dealer in such bulk items as steel, cement, gravel, stone, and petroleum products need not keep such products in stock if it owns or operates distribution equipment. Brokers, conduits and packagers shall not be regarded as regular dealers within the meaning of this term.

(ff) Services shall include all services purchased by the City pursuant to section 20-61 and Charter Section A12.3-1, but shall exclude services expressly excluded by section 20-61 and professional services.

(gg) Subcontractor: A business enterprise which either directly contracts with a contractor or contracts with subcontractors under such contractor and which business enterprise will provide services or perform work under agreements with the contractor or with other subcontractors under such contractor.

(hh) Supplier: A business enterprise that is a regular dealer and which either directly contracts with the City or a private owner, directly contracts with a contractor or directly contracts with subcontractors under such contractor and which business enterprise will provide goods, materials, supplies or equipment under agreement with the contractor or with other subcontractors under such contractor. One hundred percent (100%) of the value of the commercially useful function performed by an MBE or WBE supplier on such contract shall be counted toward applicable project

goals.

(ii) Woman business enterprise or WBE: A business enterprise which is certified by the director under this Article as meeting all of the requirements for certification set forth in section 28-135, and which is found by the director to meet all of the following requirements:

(1) It shall be at least fifty-one percent (51%) owned by one (1) or more women by whom certification is being sought; or, in the case of a corporation, at least fifty-one percent (51%) of its stock shall be owned by one (1) or more women; or, in the case of a partnership, one (1) or more general partners shall be women; or, in the case of a limited liability company, one (1) or more managers and members shall be women; and

(2) It shall be managed by and its daily business operations shall be controlled by one (1) or more women by whom certification is being sought.

For purposes of this Article V, the director shall classify business enterprises with both minority and woman owners, and meeting the requirements herein for certification as an MBE or WBE, as MBEs if minorities own fifty-one percent (51%) or more of ownership; and as WBEs if women own fifty-one percent (51%) or more of ownership. A business enterprise owned by minority women may be certified as both an MBE and a WBE, but may not be utilized as both in a single contract.

Sec. 28-121. Annual Goals.

(a) Of the total dollars spent annually for goods and services contracts, there are hereby established annual aspirational goals of six percent (6%) of the dollars spent for goods contracts to MBEs; sixteen percent (16%) of the dollars spent for goods contracts to WBEs; twelve percent (12%) of the dollars spent for services contracts to MBEs; and sixteen percent (16%) of the dollars spent for services contracts to WBEs. The following shall count toward the goal to the extent provided in section 28-132: portions of work undertaken by WBEs and MBEs as contractors, subcontractors, suppliers, manufacturers, brokers, or joint venturers, including appropriate portions of work undertaken by subcontractors, suppliers, manufacturers, and brokers on subsidiary tiers under MBEs or WBEs, whether or not such subsidiary tier business enterprises are MBEs or WBEs.

(b) The director as a basis for the establishment of annual goals shall annually during the term hereof determine the present availability of all WBEs and MBEs doing business in the City by goods and services category groupings, and past utilization by the City of MBEs and WBEs, make

an adjustment for the effects of discrimination, and recommend annual goals to the City Council for its review. For the purpose of setting goals, availability shall mean the number of MBEs and WBEs and adjustment for the effects of discrimination shall be based on all reasonable factors, including business formation rates, business growth rates and employment of minorities and women in the goods and services industry and on that level of City contracting which would exist absent the effects of past discrimination. The director shall conduct such inquiries, studies and hearings, and utilize such information and assistance from such persons, consultants, entities, or organizations including but not limited to the manager, as the director may, in the exercise of sole discretion, deem necessary to make such annual recommendation.

(c) The City Council shall review such annual goals recommended by the director, may undertake such additional inquiries as it deems appropriate, and may approve, disapprove or modify the recommended annual goals by ordinance in each succeeding year. Until the City Council approves, disapproves or modifies the annual goals in a succeeding year, the annual goals established in this section shall continue in effect.

Sec. 28-122. Individual Project Goals -- Other Selection of Contractors.

(a) The manager shall establish and maintain a data base of potential goods and services vendors to the City, consisting of business enterprises certified as MBEs and WBEs and those not so certified. The data base shall be kept current by the manager and shall be utilized for the purposes of informal or exempt selection of contractors as set out in sections (e) and (f) below.

(b) The director shall add a requirement to the bid instructions for each project not exempt under section (c) below assigning project goals for MBE and WBE utilization based upon a percentage of the dollar value of all goods and services provision on such contract. The goal percentage assigned by the director to each such contract may vary from contract to contract consistent with meeting the appropriate overall annual goal. The mayor's office of contract compliance shall establish a methodology for the setting of project goals, including the methodology to be followed by the Goals Committees, through rules and regulations. Such methodology shall consider the following factors:

(1) The effect on annual goal achievement of the varying levels of availability of MBEs and WBEs among industry groupings which are associated with individual projects and the effect on annual goal achievement of project goal compliance by good-faith efforts to utilize MBEs

and WBEs which have not resulted in the actual utilization of MBEs and WBEs.

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

(c) The following factors shall count toward project goals as more specifically provided below: portions of goods and services procurement undertaken by MBEs and WBEs as contractors, subcontractors, suppliers, manufacturers, brokers or joint venturers.

(d) Individual project goals shall not be assigned (i) for contracts estimated to amount to fifty thousand dollars (\$50,000.00) or less; (ii) for contracts for supplies indispensable to the City which are obtainable, for practical purposes, from only one source, as delineated in section 20-64; and (iii) for purchases made through the State of Colorado, the U.S. General Services Administration or other governmental entity. Notwithstanding the foregoing, the total dollar volume and value of all such goods and services purchased, from MBEs and WBEs and from other bidders or proposers, shall be included for purposes of determining whether annual goals are met.

(e) For any contract not subject to a project goal because it is estimated to amount to less than fifty thousand dollars (\$50,000.00), vendors, including MBEs and WBEs, shall be contacted by the responsible buyer or agency from the said data base in section (a) above in a fair and equitable manner, consistent with the goods and services procurement procedures set out in other sections of the Charter, ordinances and regulations of the City and the findings of City Council set out herein. The manager may determine, by rule and regulation, the format and procedure for inclusion of MBEs and WBEs in such procurement activity, and may reasonably vary such inclusion procedure based upon the size of contract and other appropriate factors. Written records of all such contacts shall be maintained, indicating the utilization of MBEs and WBEs. The responsible buyer or the responsible agency shall provide to the manager, through the established chain of command in the Purchasing Division of General Services, written memoranda explaining contract utilization of MBEs and WBEs. The manager shall evaluate such memoranda and shall periodically provide a written report to the director regarding MBE or WBE contact and utilization.

(f) For any contract not subject to a project goal because it is for supplies indispensable to the City which are obtainable, for practical purposes, from only one source, as defined in section 20-64, the responsible buyer or the responsible agency shall provide to the manager, through the established chain of command in the Purchasing Division of General Services, a written memorandum explaining that an MBE or WBE could not be utilized because equivalent goods or

services were not available from any other source. The manager shall evaluate such memorandum and shall periodically provide a written report to the director regarding MBE or WBE contact and utilization. Nothing contained in this Article shall be construed to prevent the utilization of voluntary MBE and WBE participation goals on such contracts, where opportunity for such contracting exists.

(g) Such memoranda process shall not delay or impede the selection of a bidder or proposer and execution of an agreement with the City.

(h) For projects estimated to amount to more than fifty thousand dollars (\$50,000.00) the director, in consultation with the manager and after taking into account the methodology set forth above, shall set individual project goals.

(i) For projects estimated to amount to one hundred thousand dollars (\$100,000.00) or more, the director shall appoint two (2) Goals Committees to advise and assist the director in the determination of individual project goals.

(1) The Goods Goals Committee shall advise and assist the director with respect to the setting of individual project goals for goods contracts.

(2) The Services Goals Committee shall advise and assist the director with respect to the setting of individual project goals for services contracts.

(j) The Goals Committees shall meet on a regular basis to be established by the director and when requested to do so by the director, shall consider and recommend to the director suggested individual project goals pursuant to guidelines developed by the mayor's office of contract compliance. Membership on all Goals Committees shall be equally comprised of representatives of minority business enterprises, non-minority business enterprises, and woman business enterprises, and shall include as a non-voting member(s) such buyer(s) from the Department of General Services as may be appointed by the deputy manager of General Services for purchasing, with the concurrence of the manager. Except for City employee committee members, members of the Goods Goals Committee shall be or have been directly engaged in the goods industry, and except for City employee committee members, members of the Services Goals Committee shall be or have been directly engaged in the services industry.

(k) Meetings of the Goals Committees shall be open to the public and all advisory statements or recommendations made by the Goals Committees to the director shall be publicly posted by the director prior to the director's decision as to individual project goals. The director may, in his or her

sole discretion, advertise or publish decisions as to goals prior to utilization of such goals on a project. In rendering advice as to goals for each project, the Goals Committees shall consider data as to availability of types of MBEs and WBEs doing business in the City with respect to the substantive goods and services requirements of each individual contract under consideration, and shall otherwise seek technical support from the deputy manager of general services for purchasing, or the deputy manager's designee. The director may utilize such advice and assistance from the goals committees to the extent that the director deems it to be appropriate and consistent with the purposes of this Article V. The director may acquire such other information helpful to a determination as to project goals, and shall in his or her sole discretion establish such individual goals for each contract in bid instructions or as otherwise promulgated by regulations.

Sec. 28-123. Competitive Bidding -- Compliance with Goals.

The bid specifications for each contract subject to competitive bidding shall require that all bidders seeking to become a contractor with the City or a private owner on such project shall not discriminate. If a bidder shall either demonstrate sufficient good faith efforts or shall meet the project goals through one or a combination of the following requirements, it shall be rebuttably presumed not to have discriminated:

(a) The bidder shall be an MBE or WBE, and the value of the commercially useful function to be self performed by the MBE or WBE shall count to the extent provided in section 28-132 toward satisfaction of either the MBE or WBE goal as applicable, provided that the MBE or WBE goal not met by bidder self-performance shall be addressed as otherwise set out in this section;

(b) The bidder shall be a joint venture which includes one (1) or more MBEs or WBEs, and the value of the commercially useful function to be performed by the MBEs and WBEs in the joint venture shall count to the extent provided in section 28-132 toward satisfaction of the applicable MBE or WBE goal, subject to the review and approval by the director of the joint venture agreement pertaining to the project and confirmation of the utilization in the joint venture of joint management and full integration of work forces by the joint venture partners; or

(c) The bidder shall use MBEs and WBEs as subcontractors, suppliers, manufacturers or brokers, and the value of the commercially useful function to be performed by such MBEs and WBEs shall count to the extent provided in section 28-132 toward satisfaction of the applicable MBE or WBE goals.

MBE and WBE goals hereunder are wholly separate. The bidder must separately meet or make a good faith effort to meet each such goal that may be established on a project.

If at any time during the course of a project a bidder is found to have discriminated with respect to the project, the director may take actions authorized by this Article V even though a bidder may meet project goals or show good faith efforts.

Sec. 28-124. Competitive Bidding -- Good Faith Efforts.

(a) If the bidder has not fully met the project goals as provided in section 28-123, then it shall demonstrate that it has made good faith efforts to meet such goals. The bidder shall furnish to the director, on or before the fifth (5th) working day after bid opening or on or before such other project specific date as the director may establish in the bid documents, a detailed statement of its good faith efforts to meet the project goals set by the director. This statement shall address each of the items in subsection (b) and any additional criteria that the director may establish by rule or regulation consistent with the purposes of this Article V. The scope and intensity of the efforts will be considered in determining whether the bidder has made a good faith effort.

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

(1) If prebid meetings are scheduled by the City at which MBEs and WBEs may be informed of subcontracting or joint venture opportunities under a proposed contract to be bid, attendance at such prebid meetings is mandatory. The good faith efforts statement must reflect the bidder's knowledge of the information provided at these meetings.

(2) Written verification of efforts made by the bidder to contact at least ten (10) days prior to bid opening all appropriate WBEs or MBEs within identified subcontracting, joint venture and supplier categories listed in the most current certification list of the mayor's office of contract compliance and located within the same geographic area from which the bidder selected other subcontractors, joint venturers and suppliers. The notice shall expressly describe the potential subcontracting, joint venturing, supplier or broker opportunities for all certification categories for the particular project. Notice to MBEs or WBEs that could not provide subcontracting, joint venture,

supplier or broker bids or supplies consistent with the project's scope of work and reasonably consistent with industry practice will not be considered as satisfying the purposes of this category, regardless of the bidder's past practices on similar projects. The verification of the notice stated in this subsection (2) shall expressly include but not be limited to:

- a. names, addresses, telephone numbers and facsimile transmission (FAX) numbers, if any, of all MBEs and WBEs contacted;
- b. a description of all efforts made to solicit subcontract or supplier bids or enter into a subcontract or joint venture, on the basis of good-faith, arm's length negotiations;
- c. a description of the information provided to MBEs and WBEs regarding the plans and specifications for portions of the work to be performed by subcontractors, suppliers, manufacturers, brokers and members of joint ventures;
- d. verification that the bidder attempted to recruit MBEs and WBEs listed in the most current certification list of the mayor's office of contract compliance from at least the same geographic area from which it attempted to recruit other subcontractors, suppliers, manufacturers, brokers and members of joint ventures;
- e. verification that, consistent with industry practice, the bidder gave MBEs and WBEs necessary physical access to and adequate time to fully review all necessary contract specifications and other documents as well as adequate time to prepare subcontractor, supplier or broker quotes and/or negotiate joint venture arrangements; and
- f. if attempts to solicit bids actually occurred, the dates and places of such attempts and a description of the outcome.

(3) Verification that, reasonably consistent with industry practice and the bidder's past practices on similar projects, the bidder analyzed the needs of the project in light of such industry practice and past practice, together with the goal of facilitating MBE or WBE participation on the project, and therefore selected portions of the work to be performed by MBEs and WBEs in order to achieve the project goals, including consideration of structuring the contract into economically feasible units to facilitate meaningful MBE and WBE participation as subcontractors, joint venturers, suppliers, manufacturers or brokers.

(4) For each WBE and MBE which contacted the bidder or which the bidder contacted or attempted to subcontract or joint venture with, consistent with industry practice, a statement giving the reasons why the bidder and the WBE or MBE did not succeed in reaching a

subcontracting, supplier, manufacturer, broker or joint venture agreement, as applicable.

(5) Verification that the bidder rejected WBEs and MBEs because they did not submit the lowest bid or they were not qualified. Such verification shall include a verified statement of the amounts of all bids received from potential subcontractors, suppliers, manufacturers or brokers on the project and a verified statement that the bidder rejected MBEs and WBEs because they did not submit the lowest bid from among such bids or were not qualified. In making such a determination of not being qualified, the bidder shall be guided by the definition of qualified in section 28-120(dd), but evidence of lack of qualification must be based on factors other than the amount of the MBE's or WBE's bid. For each WBE and MBE found not to be qualified by the bidder, the verification shall include a statement giving the bidder's reasons for its conclusion.

(6) Verification that the bidder made efforts to assist WBEs and MBEs in obtaining bonds if any are required.

Sec. 28-125. Competitive Bidding -- Identification of Participating MBEs and WBEs.

(a) At the time of bid opening, the bidder shall provide to the City or private owner a list of all MBEs and WBEs which are being utilized toward the satisfaction of project goals whether as a self-performing bidder or as subcontractors, suppliers, manufacturers, brokers, or members of a joint venture. The list shall specify:

(1) the name, address, telephone number, facsimile transmission (FAX) number, if any, and contact name for the MBE or WBE, together with such additional technological communication information as the director may require by rule and regulation;

(2) the dollar value and description of the commercially useful function to be performed by the MBE or WBE, consistent with section 28-132. In the case of utilization of a supplier, manufacturer or broker, the appropriate percentage of dollar value attributable to such business enterprise as commercially useful function shall be calculated with all underlying data supplied;

(3) the percentage of the value of the commercially useful function to be performed by the MBE or WBE, consistent with section 28-132, as compared to the total contract amount;

(4) the designation of each particular business enterprise as either an MBE or WBE;

(5) a verified statement from the bidder that the dollar amount of goods or services to be performed or provided by such MBEs and WBEs on the project, other than that self-performed

or provided by the bidder, was furnished to the bidder and agreed upon prior to bid opening;

(6) a verified statement from the bidder that it understands that a Letter of Intent, including but not limited to values provided by self performing bidders, subcontractors, joint venturers, suppliers, manufacturers and brokers, expressed in dollar values and as a percentage of the overall goods and services provided, must be submitted to the director for each MBE and WBE listed, including any self-performing bidder, within five (5) working days after bids are opened by the City or bid selection is made by a private owner.

(b) Only that level of MBE/WBE utilization demonstrated in accordance with this section at the time of such bid opening or private selection may be counted in satisfaction of project goals, except as otherwise set out in section 28-128 and 28-129. Bidders must submit an executed letter of intent for each MBE or WBE listed by the bidder, including any self-performing bidder, within five (5) working days after bids are opened or bid selection is made; failure to do so will render the bid non-responsive.

Sec. 28-126. Competitive Bidding -- Responsive and Non-responsive Bids.

(a) Responsive; compliance with requirements. If the low monetary bid subject to project goals meets such goals or shows adequate good faith as set out in sections 28-123 or 28-124, then the director shall request the manager to regard the bid as responsive as to compliance with this Article V.

(b) Failure to meet requirements. If a bid subject to project goals does not meet such goals or show adequate good faith as set out in sections 28-123 or 28-124 or provide timely information as set out in section 28-125, then the director shall request the manager to regard the bid as non-responsive, and such determination shall result in no further consideration by the City of the bid.

(c) Informal meeting. If the director finds the bid nonresponsive in accordance with paragraph (b) above, for failure of the bidder to show adequate good faith efforts, the nonresponsive bidder may request an informal meeting with the director within two (2) working days from the date that the City notifies the bidder of the inadequacy of good faith, which shall be scheduled by the director. All deficiencies in the good faith effort shall be explained to the bidder at such meeting after which the bidder shall be allowed an additional twenty-four (24) hours in which to submit additional information or to clarify the original good faith effort. The director will at no time, however, allow additional subcontractors, joint venturers, suppliers, manufacturers or brokers that

may later be added to the contract, or to the original MBE or WBE participation submitted at the time of the bid to be counted toward meeting of project goals. If after this informal meeting the director still finds the bid to be non-responsive, the director shall make the request as stated in paragraph (b) above.

Sec. 28-127. Time Periods for Documentation Submitted to the City.

The documentation of good faith efforts of a bidder and, as applicable, its subcontractors, joint venturers, suppliers, manufacturers or brokers, or of Letters of Intent to perform, shall be submitted to the director within five (5) working days after bid opening or private owner selection for a bid contract.

Sec. 28-128. Compliance with Achieved Goal Level a Requirement of Contract.

(a) All contracts subject to this Article V shall be reviewed by the mayor's office of contract compliance for compliance with the provisions hereof. This review shall examine, but not be limited to, whether the MBE and WBE participation dollar amounts and percentages and achieved goal level upon which the contract was awarded are maintained over the term or duration of the contract.

(b) For any contract for which the director has set a project goal, it shall be an ongoing, affirmative obligation of the contractor on such contract to maintain, at a minimum, compliance with the originally achieved level of MBE and WBE participation upon which the contract was awarded, for the duration of the contract, unless the City initiates a material alteration to the scope of work affecting MBEs or WBEs performing on the contract through contract amendment or as otherwise described in section 28-129. A breach of contract shall not result, however, where a failure to achieve participation is related solely to the failure of the City to purchase the estimated amount in a "requirements" contract, and where such item was to be provided by an MBE or WBE.

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

(1) fail to in fact utilize an MBE and/or WBE which was originally listed at bid opening in order to satisfy project goals, and which submitted a timely letter of intent, without substituting another MBE or WBE (as appropriate) performing the same commercially useful function and dollar amount, or demonstrating each element of modified good faith efforts as defined in subsection (e) hereof, to substitute another MBE or WBE (as appropriate); or

(2) fail to perform as an MBE or WBE or fail to allow an MBE or WBE functioning as a subcontractor, joint venturer, supplier, manufacturer or broker to perform the commercially useful function, the value of which was originally counted for that MBE or WBE in awarding the contract; or

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

(4) terminate an MBE or WBE originally utilized as a subcontractor, joint venturer, supplier, manufacturer or broker in order to be awarded the contract without replacing such MBE or WBE with another MBE or WBE (as appropriate), performing the same commercially useful function and dollar amount, or demonstrating each element of modified good faith efforts, as defined in subsection (e) hereof, to substitute another MBE or WBE (as appropriate).

(d) Any action by a contractor in violation of subsections (b) or (c) above shall constitute a material breach of the contract which shall entitle the City or private owner to exercise all of its rights at law or equity for such material breach, in addition to exercising any of the other sanctions set out in section 28-134. If, following contract award, either an MBE or WBE has its certification terminated for reasons other than expiration of certification or graduation from certification under section 28-136, or an MBE or WBE fails to perform a commercially useful function, the value of which was originally counted for that MBE or WBE in awarding the contract, and the contractor can demonstrate that such termination or failure did not result from any action or inaction, whether direct or indirect, of or by the contractor, such termination of certification or failure to perform a commercially useful function shall not be deemed to affect compliance with the project goals, and shall not be deemed a breach of the contract; provided, however, that the terminated MBE or WBE is substituted with another MBE or WBE, as appropriate, performing the same commercially useful function and dollar amount, or that modified good faith efforts as defined in subsection (e) hereof, to substitute another MBE or WBE (as appropriate) are demonstrated.

(e) The following modified good faith requirements shall apply to sections 28-128 and 28-129. In the event that a contractor must add or replace an MBE or WBE subcontractor or supplier or in the event that a new scope of work is added to the ongoing project, and the contractor in such events is in non-compliance with maintenance of the original MBE/WBE contract goals upon which the contract was awarded, due to failure to utilize additional MBEs or WBEs, as applicable, the following modified good faith efforts must be completed. Failure of a contractor to show good faith

efforts as to any one (1) of the following categories shall render its overall good faith showing insufficient; and its contract performance in non-compliance with this Article V.

(1) Verification in writing to the mayor's office of contract compliance of the contractor's intention to terminate or replace an MBE or WBE originally identified for participation in the bid upon which the contract was awarded. The reason for the termination or replacement must be stated and the type of work or services must be identified.

(2) Verification that the contractor used the most current MBE/WBE Directory from the mayor's office of contract compliance in order to contact MBEs or WBEs that are certified in the applicable area of work or supply at the time of the good faith effort.

(3) Verification of efforts to contact appropriate MBEs or WBEs within the same identified subcontractor, supplier or broker area must be documented. Phone calls to MBEs and WBEs will be an acceptable form of contact.

(4) Documentation of the modified good faith effort must be submitted to the mayor's office of contract compliance prior to the payment to the contractor or consultant of the next progress or other partial payment or fund release under the project contract.

Sec. 28-129. Project Amendments and Modifications.

Contractors on contracts hereunder shall have a continuing obligation to immediately inform the mayor's office of contract compliance in writing of any agreed upon increase or decrease in the scope of work of such contract, upon any of the bases discussed in this section, regardless of whether such increase or decrease in scope of work has been reduced to writing at the time of notification.

Any increase in the scope of a contract, whether by amendment or otherwise, which increases the dollar value of the contract, whether or not such change is within the scope of work designated for performance by an MBE or WBE at the time of contract award, shall be contemporaneously submitted to the mayor's office of contract compliance. Those amendments or other contract modifications that involve a changed scope of work that cannot be performed by existing project subcontractors or joint venturers or by the contractor, shall be subject to goals for MBEs and WBEs equal to the original goals on the contract which were included in the bid requirements. The contractor shall satisfy such goals as respects such changed scope of work by soliciting new MBEs or WBEs in accordance with section 28-123, or the contractor must show each element of good faith set out in section 28-128(e) hereof. The contractor shall supply to the director the documentation

described in section 128(e) with respect to the increased dollar value of the contract.

Sec. 28-130. Schedule of Work to be Performed by MBEs and WBEs.

On or before the fifth (5th) working day following the award of a contract, the contractor shall submit to the director a duplicate of the project schedule which sets forth in detail the anticipated utilization of all MBEs and WBEs on the project. In the event of a contract performance delay of more than one-third (1/3) of the originally estimated length of time between project award and completion, such contractor shall submit to the director, not later than the originally estimated date of project completion, a revised schedule for utilization of all MBEs and WBEs on the project.

Sec. 28-131. Payments to Subcontractors, Joint Venturers, Suppliers, Manufacturers and Brokers.

All contractors shall promptly render payment to all subcontractors, suppliers, manufacturers and brokers on a contract. Each contractor shall provide with each pay request to the City or private owner on each contract, beginning with the second pay request, partial claim released from subcontractors, suppliers, manufacturers and brokers in form and content satisfactory to the City, or shall provide, at the city's sole option, alternative payment check lists or proof of payment to subcontractors, suppliers, manufacturers and brokers, in form and content approved by the manager and the director, evidencing that all subcontractors, suppliers, manufacturers and brokers have been duly paid out of the proceeds of the contractor's payments from the City or private owner under the contract, unless a bona fide dispute, documented in writing, exists between the contractor and the unpaid subcontractor, supplier, manufacturer or broker.

Sec. 28-132. MBEs and WBEs to Perform Commercially Useful Function; not to Function as Conduits.

(a) All WBE and MBE contractors, subcontractors, joint venturers, suppliers, manufacturers or brokers listed in a bid must actually perform a commercially useful function in the provision of goods or services of a contract within the area(s) for which they are certified, and must not function as a conduit. Consistent with industry or professional practice, and as permitted by rules and regulations adopted by the director, WBEs and MBEs may enter into subcontracts, including subcontracts with non-WBEs and non-MBEs. In no case, however, shall a WBE or MBE act as a conduit, nor shall the participation of a WBE or MBE count toward project goals to the extent it fails to perform a commercially useful function.

(b) All expenditures for materials and supplies obtained from an MBE or WBE manufacturer or supplier shall count toward MBE or WBE goals as specified in section 28-120(hh). Expenditures for materials and supplies paid to MBEs or WBEs that are not manufacturers or suppliers may count towards goals only to the extent of fees or commissions charged for providing a bona fide service, such as professional, technical, consultant or managerial services and assistance in the procurement of essential personnel, facilities, equipment, materials or supplies required for performance of the contract, provided that the fee or commission is determined by the director to be reasonable and not excessive as compared with fees customarily allowed for similar services.

(c) The mayor's office of contract compliance shall evaluate the utilization of MBEs and WBEs to determine whether such MBEs and WBEs are performing a commercially useful function. This evaluation shall examine the amount of work subcontracted, industry practices and other relevant factors. The amount of MBE and WBE participation credited toward a goal shall be based upon an analysis of the specific duties performed by the MBE or WBE, and the extent to which such duties constitute a commercially useful function. The director may undertake such inquiries or studies, engage such employees, or retain such consultants as may be necessary to assist the director in rendering these determinations.

Sec. 28-133. Burden of Proof; Investigations of Compliance.

Any business enterprise affected by the operation of this Article V shall have the burden of proving its compliance with the requirements and obligations of the Article, as applicable. The mayor's office of contract compliance is empowered to receive and investigate complaints and allegations by MBEs, WBEs, third parties, and/or City personnel, and/or to initiate its own investigations regarding compliance with the requirements and obligations of this Article V. In the event the mayor's office of contract compliance determines in its sole discretion that an investigation is warranted, upon written notice of such investigation the affected party shall be obligated to cooperate fully with the investigation and shall have a continuing burden of providing complete, truthful information to the director and of otherwise proving compliance with the requirements and obligations of this Article V.

Sec. 28-134. Contract Sanctions -- Failure to Perform a Commercially Useful Function; Acting as a Conduit; Failing to Comply with Provisions of Article V; Failing to Submit Information Required in Section 28-127; Submitting False, Misleading or Materially Incomplete Statements, Documentation or Records; Failure to Cooperate in Investigations.

Contractors in violation of the provisions of Article V, otherwise in breach of a contract, performing as or utilizing MBEs or WBEs for a non-commercially useful function or as conduits, failing to submit information required in section 28-127, submitting false, misleading, or materially incomplete statements, documentation or records, including but not limited to good faith efforts or Letters of Intent, or failing to cooperate in an investigation, shall be subject to sanctions, including but not limited to the following:

(a) The work performed by a WBE or MBE not providing a commercially useful function or functioning as a conduit shall not count toward meeting the project goals.

(b) The contractor's bid may be found non-responsive.

(c) The City may exercise any or all of its rights contained in the contract terms and conditions short of termination of the contract.

(d) In the event that the director determines in his or her sole discretion that a contractor is in non-compliance with section 28-128, the contractor may be assessed, as liquidated damages and not as a penalty, sums in the amount of ten percent (10%) of the dollar value of work on the contract assigned to an MBE or WBE and not performed by such MBE or WBE, unless otherwise excused pursuant to section 28-128. The mayor's office of contract compliance will document its review and recommendation to the manager at the level of eighty percent (80%) project completion, as determined by the director in his or her sole discretion, and will continue to monitor contractor compliance, as appropriate, until project completion. Any such assessed liquidated damages may be offset against any amounts, including but not limited to contract retainage, otherwise due and owing to the contractor on the project, or may be otherwise assessed by the City against the contractor.

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

(f) The manager, upon request of the director, may suspend or debar the contractor from participation in City or private contracting covered hereunder for a period as may be determined by

the manager, in the manager's sole discretion, pursuant to such suspension and debarment procedures as may be established by rule or regulation. The director in that event shall regard as nonresponsive any bid received during this time period which includes the contractor as a contractor, subcontractor, joint venturer, supplier, manufacturer, or broker.

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

(h) The mayor's office of contract compliance may suspend or revoke an offending MBE's or WBE's eligibility for certification based upon such MBE's or WBE's acting as a conduit, failing to comply with the provisions of Article V, failing to perform a commercially useful function on a project, failing to submit information as required by section 28-127, submitting false, misleading or materially incomplete statements, documentation or records; or failing to cooperate in investigations.

(i) The director shall present recommendations for appropriate sanctions against the contractor, subcontractor, joint venturer, manufacturer, supplier or broker to the manager or private owners and request that appropriate action be taken. The manager or private owner shall take one or more of the actions, as appropriate, delineated in this section, if a factual basis exists for such action, unless, as to a City contractor or project, the manager otherwise determines in writing that such action would not be in the best interests of the City.

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

(k) It shall be unlawful for any contractor, subcontractor, supplier, manufacturer, or broker, whether or not certified as an MBE or WBE, to knowingly:

(1) act as a conduit on a City project.

(2) fail to submit to the director, after bidding on a City contract, the information required by section 28-127.

(3) submit to the director a false, misleading or materially incomplete statement, documentation or record.

(4) fail to cooperate in an investigation undertaken by an officer or agency of the City, including but not limited to the director and the MOCC.

Sec. 28-135. MBE/WBE certification; eligibility of applicant business enterprises.

(a) Procedures and methods. The director shall, by rule and regulation or informal guidelines relating solely to internal management and procedure, establish reasonable procedures and methods for the certification of applicant business enterprises as MBEs and WBEs in order to effectuate the purposes of this Article V. The director shall establish a "peer review group" of representatives of business enterprises currently engaged in those areas of provision of goods and services, in which minority and woman business enterprises are currently seeking certification as MBEs and WBEs, in order for the director to seek input and advice as to appropriate aspects of work performance, equipment and staffing in these industry areas in which certification is being sought. Such peer review group shall not, however, make specific recommendations to the director with respect to a particular applicant business enterprise.

(b) MBEs and WBEs shall be certified only for the certification area(s) for which they apply and in which they have had sustained business activity for a minimum of three (3) months. Certification areas shall correspond to the Major Groups set forth in Standard Industrial Classification (SIC) Codes, 13 Code of Federal Regulations §121.201, or successor regulation, provided that the manager and director may also utilize, to the extent that they deem appropriate for internal agency purposes, and to the extent that they are readily able to be cross referenced to the said SIC Codes, the work codes and related data generated and maintained by the National Institute of Governmental Purchasers (NIGP), as promulgated from time to time.

(c) A business enterprise shall be eligible for certification as an MBE or WBE only if it meets each of the following requirements:

(1) Ownership. a minority or a woman shall own in his or her own name the legal and equitable title to the interest in the business enterprise. A minority individual or a woman shall be deemed to be an owner of all or a portion of a business enterprise if such person:

- a. Owns in his or her own name the legal and equitable interest in the business enterprise; and
- b. Acquired the interest in a real and substantial arms-length transaction utilizing real and substantial consideration; and
- c. Acquired the interest with his or her own financial or equivalent resources or has put his or her own financial resources at risk in the operation of the business enterprise.

(2) Management and control. An applicant business enterprise shall be an independent business. A minority or a woman shall manage and control the daily business operations of the business enterprise. A minority or woman shall be deemed to manage and control such daily business operations only if such management and control is specifically demonstrated to be real, substantial and continuing and goes beyond the pro forma ownership of the business enterprise as reflected in its ownership documents. A minority or woman shall possess the power to and shall direct the management and policies of the business enterprise and shall make both routine and major decisions on matters of management, policy and operations. Ownership alone is not sufficient to establish management and control. There shall be no formal or informal restrictions limiting the customary discretion of the minority or woman owners. In addition to the foregoing, management and control of routine daily business operations must be specifically demonstrated by a showing of at least one (1) of the following factors:

- a. The minority or woman shall hold any professional license or contractor license necessary for operation of the business enterprise;
- b. The minority or woman shall have substantial experience in the trade or industry which would be necessary to make routine and major decisions for the business enterprise;
- c. The minority or woman shall regularly make decisions, hold themselves out to the public and sign important documents and financial instruments in a manner which is indicative of primary management and control of daily business operations and responsibility for routine and major decisions.

(3) Actively in business for three (3) months. The business enterprise may not be certified until three (3) months after the satisfaction of each of the following:

- a. Formation of the business enterprise;
- b. Commencement of sustained business activity in the trade or profession described on the certification application; and
- c. Commencement of ownership, management and control of daily business operations by a minority or woman.

(4) Eligibility; Evidence of discrimination. The minority or woman upon whom the application for certification is based shall supply credible evidence, by either written document or affidavit, that such person has suffered from past race- or gender-based (as applicable) discrimination in association with the conduct of business or the attempted conduct of business as a business

enterprise, in the goods or services industries in the City. Any applicant business enterprise, or any woman or minority individual upon whom certification of such business enterprise is sought, who demonstrates that they so conducted business or attempted to conduct business in the goods or services industry in the City prior to March 31, 1996, shall be rebuttably presumed, based on the findings summarized in section 28-118, to have suffered from past discrimination.

(5) Threshold size: continued eligibility and renewal of certification. No business enterprise, MBE or WBE shall be eligible for initial or subsequent continued certification if such business enterprise, MBE or WBE combined with any affiliates meets the criteria set forth in section 28-136 for graduation from the program or if such a business enterprise or any minority or woman upon who certification of such business enterprise is sought, previously graduated from any City MBE/WBE contracting program in effect prior to the effective date of this Article V. Following initial certification, an MBE or WBE which desires to renew its certification shall, no later than thirty (30) working days prior to each annual anniversary of the certification, submit a renewal application which shall update and reaffirm all requirements for certification. Such timely renewal application, if and when approved, shall be effective on the date of the annual anniversary of the certification. A certification shall terminate automatically without notice upon the failure of the business enterprise to satisfy any requirement set forth in this section.

(6) City officials, officers and employees and relatives ineligible. No business enterprise shall be eligible to be certified as an MBE or WBE if ownership or control of such business enterprise is held by a current official, officer or employee of the City or such relatives of such persons as set out in section 2-54 of this code.

(7) Interviews, investigation and onsite visits. The mayor's office of contract compliance shall personally interview all persons upon whom eligibility for certification is based, and is empowered to interview such other persons and conduct such on-site visits and investigations as may be appropriate in its sole discretion to verify eligibility for certification. A business enterprise wishing to be certified as an MBE or WBE shall cooperate with the mayor's office of contract compliance in supplying additional information which may be requested in order to make a determination.

Sec. 28-136. Program Certification and Graduation Size Standards.

(a) No applicant business enterprise shall be certified as an MBE or WBE, and following

certification of an MBE or WBE, no certification shall be renewed if on the effective date of the application or renewal the applicant business enterprise or MBE or WBE (combined with all affiliates) has achieved a size standard based on annual receipts averaged over the three (3) preceding fiscal years applicable to any of the work activities for which the applicant business enterprise is certified or seeks certification, which exceeds the following size standards:

SIC Categories or successors	MBE/WBE	ANNUAL RECEIPTS
17	Construction-Special trade contractors...	\$5 million
	Suppliers...	\$7 million

With respect to suppliers, SBA employee number graduation standards shall not be utilized, and such suppliers shall be treated as if they were certified as subcontractors or subconsultants in the same area of activity as set out above, subject to the maximum monetary amount stated for suppliers. The director shall compile such information and shall develop by rule or regulation such monetary graduation size standards as are appropriate for each such work activity having SBA employee number graduation standards. The U.S. Government SBA size standard classifications (SIC Codes) as they may be modified or amended from time to time, are incorporated herein by reference."

(b) If an MBE or WBE has been certified by the City in more than one (1) SIC major group or has an affiliate which has been certified by the City in a SIC major group other than that of the MBE or WBE, then the annual receipt level used as the graduation criterion for such MBE or WBE shall apply separately to each SIC major group for which the MBE or WBE and its affiliate have been certified. Such an MBE or WBE and any affiliate that has exceeded the graduation criteria in one (1) SIC major group shall be deemed to be graduated from the MBE/WBE contracting program as to that major group, and may continue to be certified in another SIC major group having a higher monetary graduation level but shall not longer be considered eligible to be or remain certified in the SIC major group with the lower size standard. Such an MBE or WBE or any affiliate that has exceeded the graduation criteria for the largest SIC major group applicable to its activities shall be deemed to be permanently graduated from the MBE/WBE contracting program for all purposes. Utilization of MBEs or WBEs shall count

toward goals, if any, to the extent that an MBE or WBE is performing a commercially useful function corresponding to a SIC major group in which it is certified.

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

(d) Application to affiliates. The graduation criteria set forth above shall be deemed to apply to the minorities or women upon whom eligibility for certification is based and all affiliates to such minorities and women. No business enterprise shall be certified based upon one (1) or more minorities or women who owned or who was an affiliate of an MBE or WBE which has become ineligible for renewed certification because of the achievement of graduation criteria.

Sec. 28-137. State or Federal Law and Other Guidelines.

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

Sec. 28-138. Pre-bid Meetings.

In order to permit bidders to inform MBEs and WBEs of subcontracting, supplier, manufacturer, broker and joint venture opportunities, the manager in consultation with the director may conduct pre-bid meetings in which representatives of the director will explain the requirements of MOCC pursuant to this Article V and appropriate rules and regulations for all bids for which contract goals are set.

Sec. 28-139. Quarterly Reports.

The director shall prepare written reports four (4) times each year during the term hereof which

shall describe progress in meeting the annual goals set out in section 28-121. Copies of such reports shall be provided to the manager, City Council, and the Mayor according to the following schedule:

<u>Period Covered</u>	<u>Date Due</u>
January 1 - March 31	June 1
April 1 - June 30	September 1
July 1 - September 30	December 1
October 1 - December 31	March 1

In addition, the Quarterly Report shall encompass the implementation of this ordinance as well as a project-by-project report and justification for contracts estimated to exceed Fifty Thousand Dollars (\$50,000.00). In calculating MBE and WBE participation, all funds paid to MBEs and WBEs on City contracts during the year shall be counted whether or not such funds were used to accomplish contract goals applicable at the time of bid opening.

Sec. 28-139. Annual Report; Explanation of Failure to Achieve Annual Goal.

If the annual goal in section 28-121 is not met in any year during the term hereof, then, by February 28 of the following year, the director shall submit to the Mayor and City Council a report comparing MBE and WBE utilization achieved in the previous year to the annual goals, stating the reasons why the goals were not met, and advising and making recommendations as to continuing or further efforts that the City should make in remedying discrimination and its effects in City goods and services procurement contracting, and recommending what should be done to assist in meeting such goals in the future.

Sec. 28-140. Contracts Excepted from this Article.

In the case of a contract hereunder for which a part of the contract price is to be paid with funds from the United States Government or the State of Colorado and for which the United States Government or the State of Colorado has made applicable to such contract requirements, terms, or conditions which are inconsistent with the terms of this Article V, the provisions of this Article V shall not apply to such contract to the extent of such inconsistency.

Sec. 28-141. Rules and Regulations; Informal Guidelines.

The director, and to the limited extent pertaining to setting of certain contract goals, the

manager, shall have the power and authority and may each adopt rules and regulations and/or informal guidelines to effectuate the purpose and operation of this Article V, including by way of example but not by way of limitation, the determination of qualification of a business enterprise; the composition of the Goals Committees and/or the procedure for inquiries, studies or hearings with respect to the establishment of annual and individual project goals hereunder; the determination of good faith criteria and efforts with respect to the meeting of contract goals, including the provisions of sections 28-123 through 28-126; the determination of informal procurement procedures involving notification of MBEs and WBEs, the establishment and function of Peer Review Groups; the definition of aspects of commercially useful function and/or conduit activity, including but not limited to supervision and control, regular employment, augmentation of workforce, equipment, materials, suppliers, manufacturers and brokers, and the sanctions therefor, including but not limited to debarment, as set out in sections 28-132 through 28-134; the procedures, methods, and criteria of certification and decertification of MBEs and WBEs, as set out in sections 28-135 and 28-136, including but not limited to: questions of procedures and methods of certification, questions of ownership, management and control, affiliation, independence, evidence of discrimination, continued eligibility and renewal of certification, interviews, complaints, investigations and on-site visits, burden of proof, length of period of certification, denial or granting of certification, suspension and/or revocation of certification; and graduation size standards and other criteria.

Sec. 28-142. Review.

Any person or entity who is the subject of and is directly and adversely affected by a determination of the director on behalf of the City under this Article V, pursuant to and by authority of the director, may seek review of such decision pursuant to the procedures set out in section 28-33. This section shall not be construed to create a right of standing that does not otherwise exist under Colorado law.

Sec. 28-143. Severability.

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

Sec. 28-144. Effective Date.

This Article V shall become effective as of May 1, 1996, and shall apply to all contracts within the scope of this Article V advertised, bid or executed after May 1, 1996.

Sec. 28-145. Sunset Provision.

This Article V shall expire on April 30, 2001.

Sec. 28-146 -- 28-199. Reserved.

PASSED BY THE COUNCIL April 15 1996
Deborah L. Ortega - PRESIDENT
 APPROVED: Willie E. Smith - MAYOR April 16 1996
 ATTEST: Elma Wedgeworth - CLERK AND RECORDER,
 EX-OFFICIO CLERK OF THE
 CITY AND COUNTY OF DENVER
 PUBLISHED IN THE DENVER POST April 12 + April 19 1996
 PREPARED BY: Norman R. Bangeman - Assistant City Attorney - 1996
 REVIEWED BY: _____ - CITY ATTORNEY - _____ 1996
 SPONSORED BY COUNCIL MEMBER(S) _____

