

Memorandum

TO: LCRA Board of Commissioners
LCRA Executive Director

FROM: Brian Engel, Rouse Frets White Goss Gentile Rhodes, P.C.

DATE: November 28, 2018

RE: Uniform Affirmative Action Policy

On October 25, 2018, the City Council adopted Ordinance No. 180535 As Further Amended establishing new guidelines and procedures for implementation of the City's affirmative action policy. A copy of the ordinance is included in the board packet for this meeting.

Major changes in the ordinance include:

- Goals on professional services and goods contracts more than \$160,000 are to be set by the Fairness in Professional Services and Goods Board as provided in Sections 3-449(a) and 3-450(a).
- Goals on construction contracts more than \$300,000 are to be set by the Fairness in Construction Board as provided in Sections 3-451(a) and 3-453(a).
- The Good Faith Effort Standards in Section 3-441 are enhanced and now include a presumption of compliance if the developer performs the standards.
- Section 3-441 provides that Good Faith Effort determinations are to be made by either the Fairness in Professional Services and Goods Board, pursuant to the process set out in Sections 3-449 and 3-450(i), or the Fairness in Construction Board pursuant to the process set out in Sections 3-451 and 3-453(j), as applicable, and not LCRA (or other agency) if HRD and LCRA fail to agree.
- Section 3-447 provides that Liquidated Damages determinations are to be made by either the Fairness in Professional Services and Goods Board, pursuant to the process set out in Sections 3-449 and 3-450(i), or the Fairness in Construction Board pursuant to the process set out in Sections 3-451 and 3-453(j), as applicable, and not LCRA (or other agency) if HRD and LCRA fail to agree.
- Large MBE contractors can get participation credit for the total contract dollar amount that they self-perform under Section 3-435(a)(1).
- The 48-hour CUP requirement in Section 3-445 now expressly applies only to City contracts. For agency contracts, the CUP process is set out in Section 3-456, which requires that the CUP be approved before any agency may grant an incentive.

- MBE/WBE firms seeking certification must demonstrate they have personal net worth equal to or less than \$1.32 million under Section 3-461(c). This does not include the value of the owner's interest in the minority company or their primary residence.
- Section 3-463(a) requires that rules and regulations established by HRD must be approved by the City Council and be published. However, any rules and regulations of the Fairness in Professional Services and Goods Board or the Fairness in Construction Board are not required to be published.

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Amending Chapter 3, Code of Ordinances, by repealing sections 3-421 through 3-500 and enacting in lieu thereof new sections of like numbers and subject matters that authorizes updates to Minority & Women's Business Enterprise Program based on the 2016 Disparity Study.

BE IT ORDAINED BY THE COUNCIL OF KANSAS CITY:

Section 1. That Chapter 3, Code of Ordinances of the City of Kansas City, Missouri, is hereby amended by repealing Division 2, Minority and Women's Business Enterprises (M/WBE), Sections 3-421 through 3-500, and enacting in lieu thereof new sections of like numbers and subject matters, to read as follows:

DIVISION 2.

MINORITY AND WOMEN'S BUSINESS ENTERPRISES (M/WBE)

Sec. 3-421. Definitions.

(a) The following definitions apply to this division 2, except where an alternate definition has specifically been made applicable:

- (1) *Affidavit of intended utilization*: An affidavit, in a form prescribed by the director, stating the bidder's intent to meet the MBE/WBE goals or to timely request a waiver of the MBE/WBE goals.
- (2) *Award of contract*: Execution of a contract and, if necessary, city council or park board authorization.
- (3) *Bid*: An offer to enter into a contract submitted pursuant to an invitation for bid.
- (4) *Bidder*: Any person who submits a bid to the city or an incentive agency in response to an invitation for bid.
- (5) *Bid opening*: The event whereby bids are opened and read aloud at the place, date and time specified in the invitation for bid and any subsequent amendment thereto.
- (6) *Bid shopping*: The practice whereby a person divulges or requires another to divulge a subcontractors bid or proposal for the purpose of securing a lower bid or proposal.
- (7) *Board or Boards*: Fairness in construction board, fairness in professional services and goods board, or both, as applicable.

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- (8) *Budget*: The total costs reflected within a contract for which MBE/WBE goals are to be set pursuant to this division.
- (9) *City*: City of Kansas City, Missouri.
- (10) *City department*: Department of the city or the division of procurement services when acting on behalf of a department director.
- (11) *Commercially useful function*: Real and actual services that are a distinct and verifiable element of the contracted work based upon private sector trade or industry standards. Determination that an enterprise performs a commercially useful function will be made based on the following considerations:
 - a. An MBE or WBE performs a commercially useful function when it is responsible for execution of the ordinary and necessary work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the MBE or WBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining the quality and quantity, ordering the material, installing (where applicable) and paying for the material itself. To determine whether an MBE or WBE is performing a commercially useful function, one must evaluate the following:
 - 1. The amount of work subcontracted; and
 - 2. Industry practices; and
 - 3. Whether the amount the enterprise is to be paid under the contract is commensurate with the work it is actually performing; and
 - 4. Whether the MBE or WBE has the skill and expertise to perform work for which it is being utilized; and
 - 5. The credit claimed for its performance of the work; and
 - 6. Other relevant factors.
 - b. An MBE or WBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of MBE or WBE participation. In

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determining whether an MBE or WBE is such an extra participant, one must examine similar transactions, particularly those in which MBEs or WBEs do not participate.

- c. An MBE or WBE firm is not performing a commercially useful function if the MBE or WBE subcontracts a greater portion of the work on a contract or purchases a greater amount of material than would be expected on the basis of normal industry practice for the type of work involved.
- d. Whether the MBE or WBE is participating in the contract as a middle person or broker in the normal course of that business or trade by purchasing the goods and/or services from another business, thereby qualifying expenditures for such goods and/or services to be counted toward utilization requirements for MBEs and WBEs.
- e. Whether the MBE or WBE is responsible for the purchase and quality of, and payment for, materials used to perform its work under the contract.

There shall be a rebuttable presumption that, when the MBE or WBE subcontracts a greater portion of the contract work than normal industry practice, the MBE or WBE is not performing a commercially useful function.

- (12) *Construction contract*: A contract for the construction, reconstruction, improvement, enlargement or alteration of any fixed work or construction site preparation, of which any amount is paid for out of city or agency funds.
- (13) *Contract*: Any contract more than \$300,000.00, and all other city or agency contracts more than \$160,000.00 the majority of either of which is paid for out of city funds or in which an incentive agency is a party, except the following:
 - a. Personal services contracts; and
 - b. Emergency contracts; and
 - c. Imprest accounts in the nature of petty cash funds.
- (14) *Contractor*: Any person who enters into a contract with the city or an incentive agency.
- (15) *Contractor utilization plan or CUP*: The statement, in a form prescribed by the director, that must be submitted by a bidder or proposer pursuant to

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section 3-433 and that states its plan to utilize qualified MBEs and/or WBEs in the performance of a contract.

- (16) *Day*: A calendar day, except as otherwise indicated.
- (17) *Department or HRD*: The human relations department or the division within the city manager's office that is assigned to perform the tasks delegated to the human relations department by this division.
- (18) *Department director*: Person appointed by the city manager to be responsible for a city department or the manager of procurement services when acting on behalf of a department director or the city.
- (19) *Developer*: Entity seeking tax increment financing or city tax abatement incentives from an incentive agency described in Section 3-425(b) or 3-425(c).
- (20) *Director*: The director of the human relations department or his authorized representative, or the person designated by the city manager to perform the tasks delegated to the director of the human relations department by this article.
- (21) *Disadvantaged business enterprise (DBE)*: A business concern that meets the federal requirements for certification as a DBE.
- (22) *Economic Disadvantage*: A diminished ability to compete in the free enterprise system due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are found to be socially disadvantaged. In determining whether an individual is economically disadvantaged, the director shall follow the guidance provided in Appendix E to 49 CFR Part 26.
- (23) *Expertise*: Experience or training in a specialized field that is critical to the firm's operations, indispensable to the firm's potential success, and specific to the type of work the firm performs.
- (24) *Goal*: A numerical objective stated as a percentage of contract dollars for participation by qualified MBEs and WBEs in contracts.
- (25) *Incentive Agency or Agency*: Each of the commissions, agencies and authorities described in Section 3-425(b) or 3-425(c), or any entity with the authority to recommend to the city tax increment financing or tax abatement.
- (26) *Incentive Agency head*: Person authorized to act on behalf of an incentive agency.

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- (27) *Incentive Project*: A project receiving tax increment financing or tax abatement or exemption from an incentive agency pursuant to contracts described in sections 3-425(b) and 3-425(c).
- (28) *Invitation for bid*: A request or invitation for submission of an offer to enter into a contract pursuant to a competitive bidding process.
- (29) *Kansas City metropolitan area*: The Missouri counties of Cass, Clay, Jackson and Platte and the Kansas counties of Johnson, Leavenworth and Wyandotte.
- (30) *Letter of intent to subcontract*: A document, in a form prescribed by the director that demonstrates the prime contractor or developer's intent to enter a contractual agreement with a selected MBE/WBE.
- (31) *M/W/DBE Kansas City Mo. Online Directory or Directory*: A source list compiled, maintained and updated by the human relations department containing (when provided) the names, mailing addresses, e-mail addresses and facsimiles of certified MBE/WBE/DBEs and the NAICS codes denoting scopes of work for which each such MBE/WBE/DBE is certified, which MBE/WBE/DBEs are in the business of providing construction, professional services and other services and goods from whom bids and proposals can be solicited. The directory is to facilitate identifying MBE/WBE/DBE subcontractors with capabilities relevant to general contracting requirements and to particular solicitations.
- (32) *Mentor/protégé*: A relationship between an MBE or WBE (protégé) and a person in the same trade or industry (mentor). The mentor/protégé relationship is to provide technical, financial, bonding, equipment and personnel assistance. The purpose of the relationship is to increase the capacity of MBE/WBEs to perform contracts.
- (33) *Minority*: A person who is a citizen or lawful permanent resident of the United States and who is:
 - a. African American, a person whose origins are in any of the Black racial groups of Africa, and who has historically and consistently identified himself or herself as being such a person; or
 - b. Hispanic American and/or Latino American, a person whose origins are in Mexico, Central or South America, or any of the Spanish speaking islands of the Caribbean, (for example Cuba and Puerto Rico) regardless of race, and who has historically and consistently identified himself or herself as being such a person; or

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- c. Asian and/or Pacific Islander American, a person whose origins are in any of the original peoples of the Far East, Southeast Asia, the islands of the Pacific or the Northern Marianas, or the Indian Subcontinent, and who has historically and consistently identified himself or herself as being such a person; or
- d. Native American, a person having origins in any of the original peoples of North America, and who maintains tribal affiliation or demonstrates at least one-quarter descent from such groups, and who has historically and consistently identified himself or herself as being such a person; or
- e. On a case-by-case basis, an individual found by the director to have been subjected to individualized prejudice or cultural bias within American society within the city's marketplace and has demonstrated economic disadvantage and social disadvantage as defined in this section.

(34) *Minority Business Enterprise* (MBE): A for-profit small business concern that:

- a. Is at least 51 percent owned, managed, and independently controlled by one or more minorities; and
- b. Has a real and substantial presence in the Kansas City metropolitan area as defined by section 3-461(c) and
- c. Meets the business size standards imposed by 13 CFR 121.201 as subsequently amended and this division; and
- d. Performs a commercially useful function; and
- e. Is certified by the human relations department.

Beginning October 1, 2019, a for-profit small business concern must meet the following additional criteria to qualify as a MBE:

- f. Whose owner's or, for businesses with multiple owners, each individual owner's personal net worth (as defined in this section) is equal to or less than the permissible personal net worth amount determined by the U.S. Department of Transportation to be applicable to its DBE program.

Only persons meeting each of the above criteria shall be deemed an MBE for purposes of this division. In order to be credited towards the goals on a

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particular solicitation for a particular scope of work, the MBE shall be certified as of or listed on the directory on the date a contractor utilization plan is submitted.

- (35) *Person*: One or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, receivers, fiduciaries and other organizations; except "person" does not include any local, state or federal governmental entity.
- (36) *Personal Net Worth*: The net value of the assets of an individual after total liabilities is deducted. An individual's personal net worth does not include the individual's ownership interest in a certified M/WBE or applicant for such certification or the individual's equity, if any, in his or her primary place of residence. An individual's personal net worth includes only his or her share of assets held individually or jointly with the individual's spouse.
- (37) *Personal services contract*: A contract or agreement of employment with an individual who is not acting as an independent contractor and who is not part of the cities classified or unclassified service.
- (38) *Principal place of business*: The location at which the business records of the MBE/WBE applicant concern are maintained and the location at which the minority or woman individual owner who manages and controls the day-to-day operations spends the majority of his/her working hours.
- (39) *Proposal*: Any offer or list of qualifications submitted to the city in response to a request for proposal.
- (40) *Proposer*: Any person who submits a proposal to enter into a contract, either in response to a request for proposals, request for qualifications or otherwise, but not pursuant to an invitation for bid.
- (41) *Qualified*: Possessing the demonstrated ability to perform the contracted task.
- (42) *Request for proposals*: An invitation for submission of an offer to enter into a contract pursuant to a negotiated process and not a competitive bid, including requests for qualifications.
- (43) *Social Disadvantage*: A diminished ability to compete in the free enterprise system due to at least one (1) objective, distinguishing feature that has contributed to social disadvantage, such as race, ethnic origin, gender, sexual orientation, or disability. In determining whether an

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individual is socially disadvantaged, the director shall follow the guidance in Appendix E to 49 CRF Part 26.

- (44) *Supplier*: An enterprise that owns operates or maintains a store, warehouse or other establishment in which materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock and regularly sold or leased to the public in the usual course of business.
- (45) *Supply broker*: An enterprise that acts as an agent in negotiating contracts for the purchase of materials, supplies, articles or equipment but does not itself own, operate or maintain a store, warehouse or other establishment where such materials, supplies, articles or equipment are bought, kept in stock and regularly sold or leased to the public in the usual course of business.
- (46) *Woman*: A person who is a citizen or lawful permanent resident of the United States and who is a female.
- (47) *Women's business enterprise (WBE)*: A for-profit small business concern that:
 - a. Is at least 51 percent owned, managed, and independently controlled by one or more women; and
 - b. Has a real and substantial presence in the Kansas City Metropolitan Area as defined by section 3-461(c); and
 - c. Meets the business size standards imposed by 13 CFR 121.201 and as subsequently amended and this division; and
 - d. Performs a commercially useful function; and
 - e. Is certified by the human relations department; and

Beginning October 1, 2019, a for-profit small business concern must meet the following additional criteria to qualify as a WBE:

- f. The owner's or, for businesses with multiple owners, each individual owner's personal net worth is equal to or less than the permissible personal net worth amount determined by the U.S. Department of Transportation to be applicable to its DBE program.

Only persons meeting each of the above criteria shall be deemed a WBE for purposes of this division. In order to be credited towards the WBE goals on a particular solicitation for a particular scope of work, the WBE shall be certified

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as of or listed in the directory on the date a contractor utilization plan is submitted.

Sec. 3-422. Reserved.

Sec. 3-423. Application of division.

(a) The provisions of this division shall apply to all contracts, as defined in section 3-421, entered into by the city or incentive agency. Federal or state requirements for minority or women business enterprise participation or disadvantaged business enterprise participation shall supersede this division when required by law or federal or state contract.

(b) Each department director and agency head is responsible for using good faith efforts to achieve the city-wide MBE and WBE goals set forth in section 3-427.

(c) Each contractor or developer with whom the city or an incentive agency enters into a contract for which goals have been set shall either:

- (1) Meet or exceed the goals set for that contract; or
- (2) Make and provide evidence of good faith efforts to achieve the goals and request a waiver of the contract goals, which waiver shall be granted in the event the contractor or developer has demonstrated that it has made a good faith effort to meet or exceed the goals.

Sec. 3-424. Reserved.

Sec. 3-425. Application to leases, tax increment financing and tax abatement entities.

(a) *Lease of city property for development.* The provisions of this division shall apply to all projects on property leased by the city to any person for development of the property by that person or any other authorized person.

(b) *Projects under tax increment financing.* The tax increment financing commission shall adopt the city's affirmative action program and the city's minority and women's business enterprise program which shall apply to all projects financed in whole or in part by tax increment financing as that term is used in RSMo § 99.800 et seq. All redevelopment agreements between the tax increment financing commission and a developer must contain MBE/WBE goals and workforce utilization goals which are approved by the boards and which are applicable to 100 percent of all redevelopment project costs, identified within a tax increment financing plan approved by the city council. For purposes of this subsection, the "city's affirmative action program" and "minority and women's business enterprise program" shall have the same meaning as used in this division.

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(c) *Projects under tax abatement entities.* All corporations organized under RSMo § 353.010 et seq. for the purpose of redevelopment within the city limits, land clearance for redevelopment authority with an area of operation within the city, enhanced enterprise zone boards with an area of operation within the city and planned industrial expansion authority for the city shall adopt the city's affirmative action program and the city's minority and women's business enterprise program which shall apply to all projects receiving city tax abatement in whole or in part.

Sec. 3-426. Reserved.

Sec. 3-427. City-wide goals.

(a) The goals set forth in this section are city-wide annual goals to be used by city departments and incentive agencies. The city-wide goals are not goals for individual contracts. They are goals for total MBE and WBE participation in all contracts entered into each year. The city-wide goals are established as follows:

Classification	Annual Goal
MBE	14.7
WBE	14.4

(b) The MBE and WBE program will expire on December 1, 2022, unless prior to that date, the director has issued a request for proposals to undertake a comprehensive disparity study, and upon completion of the disparity study, presented the study results to the city council to consider whether to maintain, modify, or terminate the minority and women business enterprise program described by this division.

(c) Neither city-wide annual goals nor individual contract goals should be construed as a limitation on contracting opportunities for the above listed classifications. Such classifications shall be eligible to be awarded contracts consistent with bidding or other contract procedures over and above the percentages listed.

Sec. 3-428. Reserved.

Sec. 3-429. City department and incentive agency MBE/WBE utilization plan.

(a) Each city department and incentive agency shall prepare and submit to the director by April 1, unless otherwise extended by the director, an annual MBE/WBE utilization plan for the next city fiscal year. Each city department and agency MBE/WBE utilization plan shall include:

- (1) Separate city department or incentive agency goals for participation by qualified MBEs and WBEs as prime contractors and subcontractors in the procurement of goods, professional services, services and construction for the upcoming fiscal year. The goals should be expressed as a percentage

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of the city department or incentive agency's total fiscal year contract expenditures; and

- (2) Any other information that the city department or incentive agency or the director deems relevant or necessary.

(b) A city department or incentive agency may amend its MBE/WBE utilization plan during the fiscal year to reflect changes in its projected contract expenditures or other relevant circumstances, and shall inform the director of such changes.

(c) In planning its individual contracts, each city department and incentive agency shall utilize the methodologies described in this division and use its good faith efforts to encourage and attempt to obtain participation of qualified MBEs and/or WBEs and shape the scope, specifications and size of a contract to enhance such participation.

(d) City departments and incentive agencies shall encourage eligible businesses to:

- (1) Apply to the city's department, Kansas Department of Transportation (KDOT) or Missouri Department of Transportation (MODOT) for certification; and
- (2) Have their names included on departmental bidders and proposers lists in the directory; and
- (3) Seek pre-qualification when applicable; and
- (4) Compete for city business as prime contractors, subcontractors and suppliers.

(e) City departments and incentive agencies shall make reasonable efforts to:

- (1) Advertise contract opportunities in general circulation media, trade and professional association publications, small business media, and publications of minority and women's business organizations; and
- (2) Send written notice of specific contract opportunities to minority and women's business organizations and those entities on the departmental bidder's and proposer's list; and
- (3) With the assistance of the director, shape the scope, specifications and size of a contract to enhance participation opportunities for qualified MBEs and WBEs.

(f) Each city department, as part of his or her annual evaluation, shall be reviewed concerning the implementation of the city's MBE/WBE program. In the event a

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deficiency is found, the director of human relations or his or her designee will work with the city department to identify prohibiting factors and offer any assistance necessary to successfully implement this minority and women business enterprise program.

Sec. 3-430. Reserved.

Sec. 3-431. Setting goals for individual contracts.

(a) Except for goals to be established by the applicable board as provided in sections 3-450 and 3-453, goals shall be established for individual contracts by the director, as determined pursuant to this section. Goals shall be applied to the total dollar value of the contract, unless otherwise authorized by the director.

(b) Individual contract goals shall be flexible and are to be determined on a contract-by-contract basis. In determining whether goals should be established for an individual contract or in setting the specific goal for an individual contract, the following shall be considered:

- (1) The scope of work; and
- (2) The number and types of qualified MBEs and WBEs available to perform such work, or portions of it; and
- (3) Whether the contract can be structured to create potential opportunities for qualified MBEs and WBEs to participate as subcontractors, service providers and/or suppliers; and
- (4) The level of participation of certified MBEs and WBEs in similar contracts awarded by other city departments and incentive agencies, and on local projects awarded by the state and federal governments in the previous and current fiscal years; and
- (5) The city department's or incentive agency's progress toward meeting its annual MBE/WBE goals and its expectations as to how future contracts will be used toward meeting such goals; and
- (6) The potential dollar amount of the contract.

(c) When goals for individual contracts are set, they shall be set as follows:

- (1) For all city and incentive agency construction contracts with an estimated cost of more than \$300,000.00, by the fairness in construction board upon recommendation of the director as provided in section 3-453; and
- (2) For all city and incentive agency professional service and goods and services contracts with an estimated cost of more than \$160,000, by the

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fairness in professional services and goods board, upon the recommendation of the director, as provided in section 3-450.

(d) When goals are established for a contract, such goals shall be stated in any invitation for bid or request for proposals. No invitation for bid or request for proposals shall be released until goals have been requested and set in accordance with subsection (b) of this section, or until the city department or incentive agency soliciting the contract has been notified by the director that goals will not be established. If the goals are to be set by a board and such board shall have failed to meet for any reason within thirty calendar days from the date upon which such board shall have last convened, then the invitation for bid or request for proposals may be released with the goals as recommended by the director and an addendum thereto shall be issued setting forth the goals once established by the board.

(e) For contracts other than construction contracts, the director is authorized to require a bidder or proposer to make good faith efforts to achieve MBE/WBE participation without setting a numerical MBE/WBE goal on the solicitation as long as the director could have set an MBE/WBE goal based on the factors in section 3-431(b).

Sec. 3-432. Reserved.

Sec. 3-433. Contractor utilization plan.

(a) When goals have been established for a contract, each bidder, proposer, contractor, or developer shall submit a notarized contractor utilization plan to the director, or agency for incentive agency projects, which shall include the following:

- (1) Names and addresses of each qualified MBE or WBE that will participate in the contract; and
- (2) The work to be performed by each qualified MBE and/or WBE, and the amounts each is to be paid for such work.

(b) Bid shopping is prohibited.

(c) At the time of submission of the CUP, the bidder, proposer, contractor or developer, shall also provide to the director, and the incentive agency for incentive projects, a letter of intent signed by each MBE or WBE included in the CUP and by the bidder, proposer, contractor or developer. The director must approve or reject the CUP within thirty (30) calendar days of receiving the CUP.

(d) Prior to an incentive agency providing tax incentives to a developer, including the issuance of a tax abatement certificate or the payment or reimbursement of redevelopment project costs, the developer shall have provided to the incentive agency and the incentive agency shall have incorporated within the incentive agency contract a CUP for construction services and professional services that has been approved or

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deemed approved by the director or the board, as applicable, or in the event a CUP has not been approved or deemed approved by the director or the board, then the incentive agency or city department shall incorporate within the incentive agency contract a CUP which provides for goals established pursuant to Section 3-431.

Sec. 3-434. Reserved.

Sec. 3-435. Determining contract participation credit for MBEs and WBEs.

(a) The following contract amounts shall be credited toward achieving the goals:

- (1) The total contract dollar amount that a prime contractor has paid or is obligated to pay to a subcontractor that is a certified MBE or WBE, except as otherwise expressly provided for herein.
- (2) The total contract dollar amount that a prime contractor that is a certified MBE or WBE performed itself.
- (3) Sixty percent of the total dollar amount paid or to be paid by a prime contractor to obtain supplies or goods from a supplier who is a certified MBE or WBE.
- (4) Ten percent of the total dollar amount paid or to be paid by a prime contractor to obtain supplies or goods from a supply broker who is a certified MBE or WBE.
- (5) One hundred percent of the total dollar amount paid or to be paid by a prime contractor to a manufacturer of construction supplies who is a certified MBE or WBE.
- (6) Subcontractor participation with a lower tier MBE/WBE subcontractor by the subcontractor using one of the above methods of participation.

(b) Notwithstanding any other provision of this section, no credit toward achieving the goals on an individual contract shall be given for:

- (1) Participation in a contract by any qualified MBE or WBE that does not perform a commercially useful function. The prime contractor shall have the burden of proving that an MBE or WBE is performing a commercially useful function.
- (2) Any portion of the value of the contract that an MBE or WBE subcontractor subcontracts back to the prime contractor or any other contractor who is not a qualified MBE/WBE.

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- (3) Materials and supplies used on the contract unless the MBE/WBE is responsible for negotiating price, determining quality and quantity, ordering the materials and installing (where applicable) and paying for material itself.
- (4) Work performed by an MBE or WBE in a scope of work other than that in which the MBE or WBE is currently certified.

(c) In order to be credited towards the MBE or WBE goals on a particular solicitation for a particular scope of work, the applicable MBE or WBE shall be certified by the date on which the CUP is due.

(d) All prime contractors on a city or incentive agency contract or development agreement are to report names, address, scope of work, contract value of each subcontractor retained by them or other subcontractors for the project and the amount paid to each respective subcontractor.

Sec. 3-436. Reserved.

Sec. 3-437. Waiver of MBE/WBE goals.

(a) When a request for waiver has been filed on a city contract, the director may grant a full or partial waiver of contract goals when the director has determined a bidder or proposer has not met the goals despite its good faith efforts, as defined in section 3-441. When a request for waiver been filed on an incentive agency contract, the director and incentive agency shall make a mutual determination as to whether the developer or its prime contractor has made good faith efforts, as defined in section 3-441 to meet the contract goals, and to the extent the director and incentive agency fail to mutually agree within thirty (30) calendar days, the applicable board as determined by sections 3-449 and 3-451 shall determine whether good faith efforts were exerted and its determination shall be final, and upon such determination that the developer or its prime contractor has made good faith efforts with respect to such request for waiver, the request for waiver shall be deemed approved by the director. The process for such determination shall be as described in sections 3-450 and 3-453.

(b) Notwithstanding any other provision of this division, the city council may waive the requirements of this article and award a city contract to a lowest and best bidder or a best proposer if the council determines it is in the best interests of the city.

Sec. 3-438. Reserved.

Sec. 3-439. Joint venture and mentor-protégé programs.

(a) *The joint venture relationship.* The department shall encourage voluntary establishment of joint ventures on all request for proposals (RFP) and requests for qualifications (RFQ). Joint ventures have the potential to create prime contracting opportunities for businesses that include MBE/WBEs on eligible projects.

- (1) A written joint venture agreement must be completed by all parties to the joint venture and executed before a notary public, which clearly delineates the rights and responsibilities of each member or partner, complies with any requirements of the department, as set forth in RFP or RFQ documents, and provides that the joint venture shall continue for the duration of the project. The department shall review joint venture agreements prior to the award of a contract to determine whether the partners, in fact, share a mutual interest in the operation and success or failure of the joint venture. The department may consider:
 - a. The initial capital investment of each joint venture partner; and
 - b. The proportional allocation of profits and losses to each venture partner, at least 40 percent of which must be allocated to the MBE or WBE partners; and
 - c. The partners rights to management, control, and ownership; and
 - d. Whether the partners maintain a joint checking account; and
 - e. The method of and responsibility for accounting; and
 - f. The method by which disputes are resolved; and
 - g. Any additional or further information required by the director or department as set forth in the request for qualifications or proposal documents or otherwise.
- (2) The joint venture, and each member of the joint venture, shall provide the department access to review all records pertaining to joint venture agreements before and after the award of a contract in order to reasonably assess compliance with this division.
- (3) The failure of any joint venture partner to comply with this section shall render the joint venture agreement invalid and subject the joint venture partners to any or all of the penalties contained in section 3-465.

(b) *The mentor/protégé certification.* Mentor/protégé certifications are voluntary and designed to provide MBE/WBE firms with advice, technical assistance and/or

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training. The program is not intended to remove the responsibility of the minority or women owner from the actual day-to-day management of their firm. The mentor/protégé team shall perform work as designated by the mentor within its relevant scope of work, provided however that the mentor cannot be responsible for the management of the MBE/WBE firm and the mentor and the MBE/WBE must remain separate and independent business entities.

- (1) Mentor companies shall require approval by the department to participate in the program; protégé companies must meet the certification requirements of section 3-461 to participate in the program.
- (2) The mentor/protégé relationship must be established by a written agreement, completed by both parties to the relationship, and executed before a notary public. This agreement shall clearly delineate the rights and responsibilities of the mentor/protégé.
- (3) The department shall review the mentor/protégé agreement for compliance with this section prior to certifying a mentor/protégé relationship.
- (4) The mentor/protégé relationship shall exist at least three years, but no more than five years as agreed to by the mentor/protégé team with approval by the department. Both the mentor and protégé can terminate the relationship at any time for any reason and must notify the director of the termination in writing.
- (5) A mentor may utilize multiple protégés on a city contract but may have no more than three protégés at any one time, each of which shall be mentored in different commercially useful functions.
- (6) A protégé is limited to two mentor/protégé relationships as a participant in the MBE/WBE program, and each relationship must be with a different mentor.
- (7) During the term of the mentor/protégé certification, the mentor and protégé businesses must each provide to the department a quarterly summary of the mentor skills provided to the protégé, which shall include:
 - a. The time spent between mentor and protégé business in furtherance of the mentor/protégé relationship; and
 - b. The nature and extent of managerial, technical, financial and/or bonding assistance provided; and
 - c. A summary and explanation of any projects bid on or undertaken by the mentor-protégé team in the private sector or for a governmental entity other than the city; and

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- d. Any additional or further information required by the department or incentive agency as set forth in bid documents or otherwise.
- (8) Assistance the mentor may provide the protégé includes, but is not limited to, the following:
- a. Extending financial assistance, in the forms of time notes, loans and stock purchases; and
 - b. Providing technical advice, including cost accounting, estimating, training, plan interpretation, business management, loan packaging, financial counseling, and advice relevant to the success of the particular type of business concern; and
 - c. Providing equipment and personnel for specific and limited purposes, provided that the equipment and personnel is clearly identified through lease agreements and personnel records, and the protégé exercise the necessary control of personnel and equipment within the normal course of business practice regardless of how the personnel and equipment are acquired; and
 - d. Providing bonding by either bonding or guaranteeing the bonding on a project-by-project basis, provided that the mentor and protégé create a development plan that includes provisions for ensuring that the protégé acquires the ability to independently bond its projects; and
 - e. Providing office space, clerical assistance, and other assistance at below market rates.
- (9) The following practices within the mentor/protégé relationship are prohibited:
- a. A mentor requiring, or a protégé voluntarily entering, an agreement with the mentor to have an exclusive bidding agreement; and
 - b. Subcontracting arrangements created to artificially inflate MBE/WBE participation; and
 - c. Formal or informal agreements that unreasonably limit the protégés control or management of its company; and
 - d. A mentor entering into any agreement on behalf of the protégé; and

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- e. An employer/employee relationship between the mentor and protégé at any time during the term of the mentor/protégé relationship.
- (10) *Termination of the mentor/protégé relationship.* Either party to the mentor/protégé relationship may terminate the relationship at will. The department may terminate the mentor/protégé relationship for good cause shown. At the end of the certification, the mentor shall no longer provide the protégé with any assistance and a protégés acceptance of such assistance shall result in the protégé not meeting the eligibility requirements for MBE/WBE certification.
- (11) *Mentor/protégé business thresholds.*
- a. Notwithstanding anything to the contrary herein, a mentors business with a protégé shall not exceed the following amounts:
 - 1. End of year 1: 80 percent of the protégés gross receipts;
 - 2. End of year 2: 70 percent of the protégés gross receipts;
 - 3. End of year 3: 60 percent of the protégés gross receipts;
 - 4. End of year 4: 50 percent of the protégés gross receipts;
 - 5. End of year 5: 50 percent of the protégés gross receipts; unless the director approves a waiver for good cause or the protégé does not exceed the limitation applicable to the previous year.
 - b. If the protégé is in its second mentor/protégé relationship, a mentors business with a protégé shall not exceed the following amounts:
 - 1. End of year 1: 50 percent of the protégés gross receipts;
 - 2. End of year 2: 50 percent of the protégés gross receipts;
 - 3. End of year 3: 40 percent of the protégés gross receipts;
 - 4. End of year 4: 30 percent of the protégés gross receipts;
 - 5. End of year 5: 30 percent of the protégés gross receipts.

Sec. 3-440. Reserved.

Sec. 3-441. Standards to determine good faith efforts.

(a) Good faith efforts are efforts that, given all relevant circumstances, a bidder, proposer, contractor, or developer actively and aggressively demonstrates in attempting to meet the prescribed goals. Good faith efforts must be demonstrated to be meaningful and not merely formalistic compliance. Notwithstanding the foregoing or anything in this division to the contrary, to the extent a bidder, proposer, contractor or developer, as applicable, has performed the following, the bidder, proposer, contractor or developer, as applicable, shall be presumptively determined to be in compliance with this section and only determined not to be in compliance upon a clear and convincing showing of an affirmative act or omission that is intentionally contrary to the spirit of this division:

- (1) Advertised for at least 15 calendar days prior to the bid or proposal due date opportunities to participate in the contract in general circulation media, trade and professional association publications, small and minority business media, and publications of minority and women's business organizations which are included in a list along with their contact information identified on the directory as the list of publications available to publish such advertisements, which list shall be updated by the department no less than every three (3) months, and such fifteen (15) calendar days shall be deemed sufficient time to allow MBE and WBE firms to participate effectively. Each advertisement shall contain the information required by section 3-441(1)(9); and
- (2) Sent written notices at least fifteen (15) calendar days prior to the bid or proposal due date containing the information required by section 3-441(1)(9), by certified mail, e-mail or facsimile, to at least 80% of minority and women's business organizations which are included in a list along with their contact information identified on the directory as the list of organizations available to receive such notices, which list shall be updated by the department no less than every three (3) months, and such 15 calendar days shall be deemed sufficient time to allow MBE and WBE firms to participate effectively; or
- (3) Sent written notices, containing the information required by section 3-441(1)(9), by certified mail, e-mail or facsimile, to at least 80% of MBEs and WBEs listed on the directory certified in the applicable scopes of work for the particular bid soliciting their participation in the Contract at least 15 calendar days prior to the bid or proposal due date and such 15 calendar days shall be deemed sufficient time to allow them to participate effectively; and
- (4) Attempted to identify portions of the work for qualified MBE and/or WBE participation in order to increase the likelihood of meeting the goals, including breaking down contracts into economically feasible units that

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take into consideration the capacity of available MBE/WBEs appearing on the directory; and

- (5) At any time prior to submission of the CUP or submittal of a request for modification of a CUP, requested assistance in writing in achieving the MBE/WBE goals from the director and acted on the director's recommendations; and
- (6) Conferred with certified MBEs and WBEs which inquired about or responded to the bid solicitation and explained to such MBEs and WBEs the scope and requirements of the work for which their bids or proposals were solicited, and if not all certified MBEs and WBEs in the particular scopes listed on the directory have inquired about or responded to the bid solicitation for each scope of work, then contact by certified mail, e-mail or telephone the greater of ten (10) or 80% of additional certified MBEs and WBEs in the particular scopes listed on the directory and offer to confer with such MBEs and WBEs for such particular scope of work and request such MBEs and WBEs to submit a proposal; and
- (7) Attempted to negotiate in good faith with certified MBEs and WBEs which responded to the bid solicitation or those certified MBEs and WBEs that were conferred with as contemplated by section 3-441(a)(6), and other qualified MBEs and WBEs, at the option of the bidder, proposer, contractor or developer, as applicable, to perform specific subcontracts, not rejecting them as unqualified without sound reasons based on a thorough investigation of their capabilities by the bidder, proposer, contractor or developer; in the event an MBE or WBE is the low bid, but rejected as unqualified, the bidder, proposer, contractor or developer and the director or board, as applicable, shall provide sound reasons for rejecting such MBE or WBE; and
- (8) Attended pre-bid meetings when such meetings were indicated in the solicitation of bids or otherwise by the bidder, proposer, contractor or developer, as applicable or by the director provided the director provides written direction to the bidder, proposer, contractor or developer at the time the goals are recommended by the director pursuant to section 3-431 to provide for a pre-bid meeting(s); and
- (9) Written notices and advertisements to be provided pursuant to (1), (2) and (3) above shall include the following information:
 - (i) The bid due date;
 - (ii) The name of the project;
 - (iii) The address or general location of the project;

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- (iv) The location of plans and specifications for viewing;
 - (v) Contact information of the prime contractor or developer, as applicable;
 - (vi) A general description of the scopes of work that are the subject of the solicitation;
 - (vii) The goals established for the applicable contract, and if the goals are still subject to board approval, then a statement that the goals as stated are preliminary and are subject to board approval;
 - (viii) If the project or any portion of the project is subject to prevailing wage then a statement that all or a portion of the project will be subject to prevailing wage, as applicable; and if only a portion of the scopes are subject to prevailing wage, then identification of such scopes provided that such scopes are known as of the time of bid solicitation;
 - (ix) The date and time of any pre-bid meeting(s), if any, which have been scheduled by the bidder, proposer, contractor or developer as of the bid solicitation; and
 - (x) Any other information deemed relevant by the bidder, proposer, contractor or developer, as applicable, or the director to the extent the director provides written direction to the bidder, proposer, contractor or developer of such additional information at the time the goals are recommended by the director pursuant to section 3-431.
- (2) In the event the bidder, proposer, contractor or developer amends the scopes previously bid or decides to further open bids, and determines that further notice is necessary, the time for giving notices as provided in (1), (2) and (3) above shall be deemed sufficient if given seven (7) business days in advance of the applicable updated bid due; and
- (10) For city construction contracts only, within five business days after drawing the bid specifications, sent certified letters, verifiable e-mails or proof of facsimiles to qualified MBEs and WBEs listed on the M/W/DBE Kansas City Mo. Online Directory.

(b) Good faith efforts analysis may be performed (1) in the event a CUP is rejected, (2) a request for modification is rejected, or (3) as of the completion of the project, if the bidder, proposer, contractor or developer is not able to meet the goals following the approval of a CUP or request for modification. In the event of one of the foregoing events, a bidder, proposer, or developer or its prime contractor shall submit documentation of its good faith efforts when requested by the city or incentive agency.

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(c) Good faith efforts shall be made prior to submission of the contractor utilization plan to the director; provided however efforts made to increase participation of MBEs and WBEs following submission of the CUP can be considered as evidence of good faith efforts to meet the goals.

(d) For incentive projects, the director shall submit to the relevant incentive agency, his or her initial findings of good faith prior to sending the final good faith efforts finding to the developer and as soon as practicable thereafter the director and incentive agency shall mutually agree as to whether good faith efforts were exerted prior to submitting a final determination to the developer. To the extent the director and incentive agency fail to agree within thirty (30) calendar days, the applicable board as determined by sections 3-449 and 3-451 shall determine whether good faith efforts were exerted and the board's determination shall be final. The process for such determination shall be as described in sections 3-450 and 3-453.

(e) Notwithstanding anything herein to the contrary, to the extent the proposer, bidder, contractor or developer or its prime contractor has not met each of the criteria set forth in section 3-441(a) for a presumptive determination that the bidder, proposer, contractor, developer, or its prime contractor has exerted good faith efforts, the director, incentive agency or applicable board, nonetheless, may determine, given all relevant circumstances, that good faith efforts were exerted by the proposer, bidder, contractor, developer or its prime contractor. To the extent good faith efforts are determined with respect to the contractor utilization plan, modification or waiver submitted by a bidder, proposer, or developer or its prime contractor, such contractor utilization plan, modification or waiver, shall be deemed approved by the director and the applicable waiver granted.

Sec. 3-442. Reserved.

Sec. 3-443. Modification or substitution.

(a) A bidder, proposer, contractor, or developer shall not make any modification or substitution with regard to an approved contractor utilization plan unless the modification or substitution has first been requested of the director and approved. For city contracts after bid or proposal opening or after a contract is awarded, the director may approve substitutions of other qualified MBE/WBEs for those listed in the contractor utilization plan or approve modifications of the amount of participation listed in the contractor utilization plan, if the director determines or, in the case of incentive projects, the applicable incentive agency and the director mutually determine, except in the event the incentive agency and director fail to mutually agree, in which case the applicable board as determined by sections 3-449 and 3-451 determines that the bidder, proposer, contractor, or developer made and provided evidence of good faith efforts to substitute the listed MBE/WBE with other qualified MBE/WBEs for the listed scope of work or any other scope of work in the project, finds that the bidder, proposer, or contractor has not attempted intentionally to evade the requirements of this division and it is in the best

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interests of the city and the applicable incentive agency to allow a modification or substitution, and also finds one of the following:

- (1) The listed MBE/WBE is non-responsive or cannot perform; or
- (2) The listed MBE/WBE has increased its previously quoted price to the bidder, proposer, contractor, or developer without a corresponding change in the scope of the work; or
- (3) The listed MBE/WBE has committed a material default or breach of its contract with the contractor or developer; or
- (4) Requirements of the scope of work of the contract have changed and render subcontracting not feasible or not feasible at the levels required by the goals established for the contract; or
- (5) The listed MBE/WBE is unacceptable to the contracting department; or
- (6) The listed MBE/WBE thereafter had its certification revoked.

The process for such determination by the applicable board in those circumstances in which the director and applicable incentive agency fail to mutually agree on an incentive project shall be as described in sections 3-450 and 3-453.

(b) If there is an increase in the quantity of the scope of work performed by an MBE/WBE, contractor or developer shall make good faith efforts to use such MBE/WBE for the increased work. If extra work not within the general scope of the contract and in excess of \$160,000.00 is required, the director shall assign MBE/WBE goals for the extra work, if appropriate, and the contractor or director shall make good faith efforts under the circumstances to achieve the goal.

(c) Bid shopping is prohibited.

(d) For incentive projects, the director shall submit to the relevant incentive agency, his or her initial determination of whether a modification or substitution is appropriate to the developer and as soon as practicable thereafter the director and the incentive agency shall mutually agree as to whether a modification or substitution is appropriate prior to submitting final determination to the developer; provided, however, to the extent the incentive agency and director fail to agree within thirty (30) calendar days, the applicable board determined by sections 3-449 and 3-451 shall determine good faith efforts and the board's determination shall be final. The process for such determination shall be as described in sections 3-450 and 3-453.

Sec. 3-444. Reserved.

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Sec. 3-445. Contract award process.

(a) Whenever a bidder or proposer has submitted a bid or proposal that is not in material compliance with the requirements of this division, the contracting department or incentive agency shall reject the bid or proposal unless the goals are waived pursuant to section 3-437.

(b) If, after a contract is awarded, it is determined that a solicitation or award is in violation of this division, the contractor or developer may continue performance if the department director or incentive agency head makes a written determination that it is in the best interests of the city or the incentive agency, without prejudice to any other legal remedies available to it under the contract.

Sec. 3-446. Reserved.

Sec. 3-447. Liquidated damages.

(a) All city and incentive agency contracts which contain goals shall contain a provision which provides for liquidated damages in the event the contractor or developer fails to achieve the MBE/WBE participation specified in the contractor utilization plan as finally approved by the director or the goals established pursuant to 3-431, whichever is lower, and fails to exert good faith efforts, as determined by the director or, in the case of incentive projects, the mutual determination of the director and the applicable incentive agency; except in the event the director and incentive agency fail to mutually agree, in which event, the determination of the applicable board determined by sections 3-449 and 3-451. The process for such determination shall be as described in sections 3-450 and 3-453.

(b) The amount of liquidated damages for city contracts shall be in an amount as determined by the director. For incentive agency contracts, the director and incentive agency shall jointly agree on the amount of liquidated damages and may jointly agree to a remedy alternative to liquidated damages which promotes the goals of the city's MBE/WBE program. For incentive agency contracts, should the incentive agency and director fail to come to an agreement on the amount of the liquidated damages or a remedy alternative to liquidated damages, the applicable board's determination (pursuant to sections 3-449 and 3-451) of liquidated damages or other alternate remedy under the incentive agency contract shall be final. The process for such determination shall be as described in sections 3-450 and 3-453.

(c) The liquidated damages may not exceed the difference between the monetary amount of the MBE/WBE participation finally approved, and as may be modified or waived, in accordance with this division, and the amount actually paid to certified MBEs and WBEs appearing on a CUP or modification approved by the director, unless waived pursuant to section 3-437. In determining the amount actually paid to qualified MBEs and WBEs, no credit shall be given for that portion of the MBE/WBE participation that was not approved in accordance with the provisions of section 3-435, provided however that

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the director, director and incentive agency, or board, as appropriate may allow credit if they determine, in their sole discretion, that the contractor or developer acted in good faith. Notwithstanding the foregoing, in the event the CUP anticipated that the contractor or developer would exceed the goals established prior to the submission of the CUP, the liquidated damages may not exceed the difference between the monetary amount of the MBE/WBE participation pursuant to such goals established prior to the submission of the CUP and the amount actually paid to MBEs and WBEs.

Sec. 3-448. Reserved.

Sec. 3-449. Fairness in professional services and goods board.

(a) Establishment and authority. There is hereby established a fairness in professional services and goods board. The board's authority is limited to bids, proposals and contracts for professional services, other services, goods, materials and supplies, (other than construction materials and supplies) for the city or an incentive project in which the estimated cost of such professional services, other services, goods, materials and supplies is more than \$160,000. The board shall set goals to increase the utilization of MBEs/WBEs in professional services contracts, other services contracts, goods, materials and supplies contracts (other than construction materials and supplies), to make determinations as to whether good faith efforts have been made and the assessment and amount of liquidated damages on incentive agency projects when the applicable agency and the director fail to mutually agree, and has the authority to hear and investigate appeals on city contracts as set forth in section 3-450.

(b) Board composition. The board shall be composed of seven members (including a chairperson) and six alternates, all appointed by the mayor and all of whom shall be industry experts in the areas of professional services, general services and goods and materials.

(c) Term. The terms of all board members shall be for a period of four years, however, all members shall continue in office as such until the respective successors shall have been appointed.

(d) Alternates. In the event a board member is unable to attend a meeting or has a conflict of interest with regard to an issue at hand, the alternate shall temporarily serve in such member's stead. It is the board member's responsibility to notify his or her alternate that they may be needed at the meeting. The term of an alternate shall expire at the expiration of the term of the board member.

(e) Absence of chairperson. In the event the chairperson is not in attendance at any board meeting, a majority of board members shall select a member to act as chairperson for that meeting.

(f) Ineligibility. The following persons are ineligible to serve on the board:

(1) Members of the city council; and

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- (2) Employees of the city; and
- (3) Nonresidents of the city, unless the nonresident works in the city metropolitan area or is appointed to represent the interests of an organization that maintains an office in the city metropolitan area.
- (g) Conflict of interest. In the event a board member has a conflict of interest in a contract or issue that comes before the board, the member shall be temporarily replaced by the alternate. In the event an alternate has a conflict of interest in a bid, contract or issue that comes before the board, the alternate shall recuse himself.
- (h) Quorum. Four members of the board shall constitute a minimum quorum.

(i) Convening the board. The board shall be appointed and first convene no later than February 1, 2019. The goal-setting responsibilities of the board as stated in section 3-450(a) will be performed by the director or HRD until such time as the board is convened.

Sec. 3-450. Responsibilities of the fairness in professional services and goods board.

(a) Prior to solicitation, the director and appropriate city staff or, in case of an incentive project, a representative of the developer of the incentive project, shall present to the board recommended MBE/WBE goals for each proposed contract as recommended by the director and city staff or developer, as applicable. The board shall determine within fifteen (15) calendar days of being notified of the same, whether any goals are appropriate and, if so, shall set the goals in conformance with section 3-431 hereof. The goals shall be included in the invitation for bid or request for proposals. Except as otherwise provided in this division, no invitation for bid or request for proposals shall be released until goals have been requested and set, or until the city department soliciting the contract has been notified by the director that goals will not be established.

(b) Any bidder or proposer on a city project for which the board has jurisdiction pursuant to section 3-431(c) may, prior to award of the contract (except in the instance of a substitution, in which case shall necessarily occur after the award of a contract), appeal to the board any determination by the director concerning the following issues:

- (1) Waiver of the individual contract goals pursuant to section 3-437(a); or
- (2) Determination of good faith efforts pursuant to section 3-441; or
- (3) Substitution of an MBE/WBE listed on a contractor utilization plan pursuant to section 3-443; or
- (4) Modification of the percentage of the participation on a contractor utilization plan pursuant to section 3-443.

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(c) Any contractor on a city contract for which the board has jurisdiction pursuant to section 3-431(c) may appeal to the board any determination by the director concerning the following issues:

- (1) MBE/WBE contract credit towards meeting the percentage of MBE/WBE participation identified in the utilization plan; or
- (2) Substitution of an MBE/WBE listed on a contractor utilization plan pursuant to section 3-443; or
- (3) Modification of the percentage of the participation on a contractor utilization plan pursuant to section 3-443; or
- (4) The assessment or amount of liquidated damages.

(d) Appeals shall be made to the board by the bidder, proposer, or contractor, as applicable, by filing a written notice of an appeal with the director within fifteen (15) calendar days after receipt of written notice of the director's determination through a written request submitted to the director for review by the board, stating the grounds of such appeal with specificity. The director shall promptly forward a copy of any appeal to the chairperson and members of the board.

(e) To the extent a bidder, proposer, or contractor is notified in writing that any determination made by the director is final and appealable to the board, and such bidder, proposer, or contractor fails to file an appeal of such final determination within fifteen (15) calendar days of receipt of such final determination, such failure to file a timely appeal shall constitute a waiver of the right of a bidder, proposer, or contractor to appeal such final determination, and such person shall be estopped to deny the validity of any determination which could have been timely appealed.

(f) Authority of board.

- (1) The board shall have authority to decide appeals, and may reverse, affirm or modify determinations of the director set forth in subsections (b) and (c) hereof. The board shall have the power to inquire into all the facts and circumstances of appeals within its jurisdiction and may hold hearings for such purpose. The board shall not hold hearings to inquire into those matters which the board, upon recommendation by the city attorney or her designee, deems to be frivolous and without merit and whose determination shall be final.
- (2) Except for those appeals which are found to be frivolous in accordance with section 3-350(f)(1), the board shall hold a hearing within thirty (30) calendar days of the date of filing of a timely appeal. The failure to hold a hearing within the prescribed time shall result in the determination of the director being overturned without further action, unless the delay was requested or caused by the party filing the appeal.

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- (3) The board shall issue a written report of its decision within the later of thirty (30) calendar days of the filing of a timely appeal or fifteen (15) calendar days from the conclusion of the hearing and its decision shall be final for all purposes. Notwithstanding the foregoing, the city council shall retain the right to waive any provision of this division in accordance with section 3-437(b).

(g) Any bidder, proposer, or contractor whose interests will be affected by any appeal may be permitted by the board to intervene in the appeal.

(h) In the event an appeal is pending before the board and the project is presented to the city council for consideration prior to the board's issuance of its decision, the city council shall be notified by including in the fact sheet notification that there is an appeal pending before the board. The city council may elect to delay award of the project until after the board issues its decision.

(i) For incentive agency projects, when the applicable incentive agency and the director are unable to reach a mutual determination within thirty (30) days, the board shall have the authority to make determinations as to whether good faith efforts have been made and on the assessments and amount of liquidated damages, pursuant to sections 3-437, 3-441, 3-443, and 3-447. The board shall have the power to inquire into all the facts and circumstances and hold hearings for such purpose. When agreement cannot be reached after the requisite thirty (30) days, the director or applicable agency shall notify the board of such disagreement within five (5) days. Upon notification by the director or applicable agency, the board shall hold a hearing within thirty (30) calendar days. The board shall issue its determination as to whether good faith efforts have been made within fifteen (15) calendar days from the conclusion of the hearing and its decision shall be final for all purposes. Notwithstanding the foregoing, the city council shall retain the right to waive any provision of this section.

Sec. 3-451. Fairness in construction board.

(a) Establishment and authority. There is hereby established the fairness in construction board. The board's authority is limited to city construction bids, proposals and contracts, and those incentive projects, in which the estimated cost thereof is more than \$300,000.00. The board's authority is limited to setting goals for each such contract, to make determinations as to whether good faith have been made and the assessment and amount of liquidated damages on incentive agency projects when the applicable agency and the director fail to mutually agree, and hearing and investigating appeals set forth in section 3-453 hereof arising from city bids, proposals and contracts under its jurisdiction.

(b) Board composition. The board shall be composed of seven members and six alternates appointed by the mayor, each of whom is experienced in construction management, as follows:

- (1) One member and one alternate recommended by the Builders' Association;
and

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- (2) One member and one alternate recommended by the Heavy Constructors' Association; and
- (3) One member and one alternate recommended by the Minority Contractors' Association of Kansas City; and
- (4) One member and one alternate recommended by the Kansas City Hispanic Association Contractors Enterprise, Inc.; and
- (5) One member and one alternate recommended jointly by the Women Construction Owners and Executives and National Association of Women in Construction; and
- (6) One member and one alternate jointly recommended by the specialty contractors associations; and
- (7) Chairperson appointed by the mayor and submitted to the entities named in section 3-451(b) (1)—(6) for approval. Any one of the named entities can veto the mayor's submission and require another submission.

(c) Term. The terms of all board members shall be for a period of four years, however, all members shall continue in office as such until the respective successors shall have been appointed. Board members serving as of the effective date of this division shall retain their seats for the remainder of their unexpired terms.

(d) Alternates. In the event a board member is unable to attend a meeting of the board or has a conflict of interest with regard to a particular contract or issue, the alternate shall temporarily serve in such member's stead. The term of an alternate shall expire at the expiration of the term of the board member.

(e) Ineligibility. The following persons are ineligible to serve on the board:

- (1) Members of the city council; and
- (2) Employees of the city; and
- (3) Nonresidents of the city, unless the nonresident works in the city metropolitan area or is appointed to represent the interests of an organization that maintains an office in the city metropolitan area.

(f) Conflict of interest. In the event a board member has a conflict of interest in a contract or issue that comes before the board, the member shall be temporarily replaced by the alternate. In the event an alternate has a conflict of interest in a bid, contract or issue that comes before the board, the alternate shall recuse himself.

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(g) Absence of chairperson. In the event the chairperson is not in attendance at any board meeting, a majority of board members shall select a member to act as chairman for that meeting.

(h) Quorum. Four members of the board shall constitute a minimum quorum unless otherwise increased by board rules.

Sec. 3-452. Reserved.

Sec. 3-453. Responsibilities of the fairness in construction board.

(a) Goal setting. Prior to solicitation, the director and appropriate city staff or, in case of an incentive project, the director and a representative of the developer of the incentive project shall present to the board MBE/WBE goals for each proposed construction contract as recommended by the director and city staff or developer, as applicable. The board shall determine within fifteen (15) calendar days of being notified of the same, whether any goals are appropriate and, if so, shall set the goals in conformance with section 3-431 hereof. The goals shall be included in the invitation for bid or request for proposals. Except as otherwise provided in this division, no invitation for bid or request for proposals shall be released until goals have been requested and set, or until the city department soliciting the contract has been notified by the director that goals will not be established.

(b) Any bidder or proposer on a city construction project having a construction contract for which the board has jurisdiction pursuant to section 3-431(c) may, prior to award of the construction contract (except in the case of a substitution, in which case shall necessarily occur after the award of a contract) may, prior to award of the construction contract, appeal to the board any determination by the director concerning the following issues:

- (1) Waiver of the individual contract goals pursuant to section 3-437(a); or
- (2) Substitution of an MBE/WBE listed on a contractor utilization plan pursuant to section 3-441; or
- (3) Substitution of an MBE/WBE listed on a contractor utilization plan pursuant to section 3-443; or
- (4) Modification of the percentage of the participation on a contractor utilization plan pursuant to section 3-443.

(c) Any contractor having a contract for which the board has jurisdiction pursuant to section 3-431(e), may prior to the award of a construction contract (except in the case of a substitution, in which case shall necessarily occur after the award of a contract) appeal to the board any determination by the director concerning the following issues:

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- (1) MBE/WBE contract credit towards meeting the percentage of MBE/WBE participation identified in the contractor utilization plan; or
- (2) Substitution of an MBE/WBE listed on a contractor utilization plan pursuant to section 3-443; or
- (3) Modification of the percentage of the participation on a contractor utilization plan pursuant to section 3-443.
- (4) The assessment or amount of liquidated damages.

(d) Appeals shall be made to the board by filing with the director within fifteen (15) calendar days after notice of the director's determination through a written request for review by the board, stating the grounds of such appeal with specificity. The director shall promptly forward a copy of any appeal to the chairperson and members of the board.

(e) To the extent a bidder, proposer, or contractor is notified that any determination made by the director is final and appealable to the board, and such bidder, proposer, or contractor fails to file an appeal of such final determination within fifteen (15) calendar days of such final determination, such failure to file a timely appeal shall constitute a waiver of the right of a bidder, proposer, or contractor to appeal the director's determination and such person shall be estopped to deny the validity of any determination which could have been timely appealed.

(f) Authority of board.

- (1) The board shall have authority to decide appeals, and may reverse, affirm or modify determinations of the director, as applicable set forth in subsections (b) and (c) hereof. The board shall have the power to inquire into all the facts and circumstances of appeals within its jurisdiction and may hold hearings for such purpose. The board shall not hold hearings to inquire into those matters which the board, upon recommendation by the city attorney or her designee, deems to be frivolous and without merit and whose determination shall be final.
- (2) Except for those appeals which are found to be frivolous in accordance with section 3-353(f)(1), the board shall hold a hearing within thirty (30) calendar days of the date of filing of a timely appeal. The failure to hold a hearing or determine an appeal frivolous within the prescribed time shall result in the director's determination being overturned without further action, unless the delay was requested or caused by the party filing the appeal.
- (3) The board shall issue a written report of its decision within the later of thirty (30) calendar days of the filing of a timely appeal or fourteen (14)

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calendar days from the conclusion of the hearing and its decision shall be final for all purposes. Notwithstanding the foregoing, the city council shall retain the right to waive any provision of this article in accordance with section 3-437(b).

(g) Any bidder, proposer or contractor whose interests will be affected by any appeal may be permitted by the board to intervene in the appeal.

(h) In the event an appeal is pending before the board and the project is presented to the city council for consideration prior to the board's issuance of its decision, the city council shall be notified by including in the fact sheet notification that there is an appeal pending before the board. The city council may elect to delay award of the project until after the board issues its decision.

(j) For incentive agency projects, when the applicable incentive agency and the director are unable to reach a mutual determination within thirty (30) days, the board shall have the authority to make determinations as to whether good faith efforts have been made and on the assessments and amount of liquidated damages, pursuant to sections 3-437, 3-441, 3-443, and 3-447. The board shall have the power to inquire into all the facts and circumstances and hold hearings for such purpose. When agreement cannot be reached after the requisite thirty (30) days, the director or applicable agency shall notify the board of such disagreement within five (5) days. Upon notification by the director or applicable agency, the board shall hold a hearing within thirty (30) calendar days. The board shall issue its determination as to whether good faith efforts have been made within fifteen (15) calendar days from the conclusion of the hearing and its decision shall be final for all purposes. Notwithstanding the foregoing, the city council shall retain the right to waive any provision of this section.

Sec. 3-454. Reserved.

Sec. 3-455. Procedures for construction contracts.

The following shall apply to construction contracts in which the estimated cost thereof is more than \$300,000.00:

- (1) Bid submissions. Bidders shall submit an affidavit of intended utilization with their bids.
- (2) Forty-eight hour submissions. Bidders on city contracts shall submit the following within 48 hours after bid opening:
 - a. A notarized contractor utilization plan in conformance with section 3-433 hereof; and
 - b. Letters of intent to subcontract; and

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- c. A request for waiver of the contract goals pursuant to section 3-437(a) if the bidder failed to meet or exceed the goals.
- (3) Timely submission of the contractor utilization plan is a material element of the submission. The director is authorized to extend the 48 hour deadline for the letters of intent to subcontract but not the deadline for submission of the contractor utilization plan.
- (4) The apparent successful bidder shall submit documentation of good faith efforts made prior to 48 hours after bid opening when requested by the city or the incentive agency.
- (5) A notarized affidavit certifying actual MBE/WBE participation in the contract, including the names of such MBE/WBEs and the participation amount, and a certification that all MBE/WBE subcontractors and other subcontractor have been paid must be submitted by the contractor prior to the city's release of retainage under the contract.
- (6) Any increase in the amount of MBE/WBE participation after submission of the contractor utilization plan shall not count toward meeting the contract goals, unless otherwise permitted under section 3-443 hereof.
- (7) Bid shopping is prohibited.

Sec. 3-456. Procedures for incentive agency agreements.

For incentive projects, the incentive agency shall require that the CUP be approved prior to granting the applicable incentive. If the incentive project is bid in phases, the developer(s) shall submit an estimated time table for additional phases. The director shall approve or reject the CUP within fifteen (15) calendar days of receiving the same and, if rejected, provide a written explanation for such rejection. If the director fails to reach a decision within fifteen (15) calendar days of receiving the CUP, the CUP will be deemed approved by the director or in the event a CUP has not been approved or deemed approved by the director then the incentive agency shall incorporate within the incentive agency contract a contractor utilization plan which provides for goals established pursuant to Section 3-431.

Sec. 3-457. Procedures for all other contracts.

The following procedures shall apply to all contracts not covered by Section 3-455 and 3-456, and for which goals have been established:

- (1) For contracts awarded pursuant to competitive bidding, bidders shall submit an affidavit of intended utilization with their bid. Within 48 hours after bid opening, they shall submit the following additional documentation:

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- a. A notarized contractor utilization plan in conformance with section 3-433 hereof; and
 - b. Letters of intent to subcontract; and
 - c. A request for waiver of contract goals pursuant to section 3-437(a) if the bidder failed to meet or exceed the goals.
- (2) For contracts awarded pursuant to requests for proposals, proposers shall submit an affidavit of intended utilization with their proposal. Prior to the award of any contract, they shall submit the following additional documentation:
 - a. A notarized contractor utilization plan in conformance with section 3-433 hereof; and
 - b. Letters of intent to subcontract; and
 - c. A request for waiver of the contract goals pursuant to section 3-437(a) if the proposer fails to meet or exceed the goals.
- (3) Timely submission of the contractor utilization plan is a material element of the bid submission. The director is authorized to extend the 48-hour deadline for the letters of intent to subcontract but not the deadline for submission of the contractor utilization plan.
- (4) Documentation of good faith efforts shall be submitted when requested by the city or the incentive agency.
- (5) Any increase in the amount of MBE/WBE participation after submission of the contractor utilization plan shall not count toward meeting the contract goals, unless otherwise permitted under section 3-443 hereof.

Sec. 3-458. Reserved.

Sec. 3-459. Required reporting for contractors and developers.

All contractors and developers with a contractor utilization plan shall provide any and all information required by the director in a format prescribed by the director in such intervals as the director may determine.

Sec. 3-460. Reserved.

Sec. 3-461. Certification and appeals.

(a) To ensure that this article benefits only MBEs and WBEs that are owned and controlled by bona fide minorities and women, the director shall certify MBEs and WBEs and mentor/protégés who wish to participate in the program. Any person not certified by the human relations department shall not be regarded as an MBE, WBE, or mentor/protégé program under this division.

(b) Each person that seeks certification as an MBE/WBE must demonstrate by written documentation or affidavit that it has suffered from past race or gender discrimination in the city and in the applicable trade or industry. A unified certification process (UCP) certificate, a Missouri Highway and Transportation Department certification or a Kansas Department of Transportation certification along with the documentation stated in this subsection, is sufficient for certification as a DBE so long as the firm has never been denied certification by any federal, state or local authority at any time and meets the definition of section 3-421(a) (20) and the requirements of this section.

(c) Each entity seeking certification as an MBE/WBE must demonstrate by written documentation or affidavit that it's owner or individual owner's personal net worth (as defined in this section) is equal to or less than the permissible personal net worth amount determined by the U.S. Department of Transportation to be applicable to its DBE programs. Entities seeking certification as an MBE/WBE shall submit all information or documentation requested by the city's human relations department in determining whether the entity complies with this subsection.

(c) Each person that seeks certification as an MBE/WBE in the Kansas City metropolitan area must demonstrate the business enterprise has a real and substantial presence. After the effective date of this provision, any business enterprise shall be deemed to have a real and substantial presence in the Kansas City metropolitan area if:

- (1) The firm's principal office or place of business is in the Kansas City metropolitan area; and
- (2) The firm maintains full-time employees in one or more of the firm's offices within the Kansas City metropolitan area to conduct or solicit business in the Kansas City metropolitan Area the majority of their working time; and
- (3) The firm has transacted business more than once in the Kansas City metropolitan area within the last three years; and
- (4) The firm's principal office or place of business has been in existence in the Kansas City metropolitan area at least six months prior to application for participation in the MBE/WBE program.

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If an MBE/WBE does not have a real and substantial presence in the Kansas City metropolitan area as specified under subsection (c)(1) through (c)(4), the firm shall remain certified until their certification expires. After the firm's certification expires, the firm must meet the requirements of subsection (c) (1) through (c) (4) to be recertified.

(e) All applicants and certified businesses shall be subject to an audit by the director at any time. An applicant's or certified business' refusal to facilitate an audit shall be grounds for denial of its certification application or revocation of its certification.

(f) All applicants and certified businesses shall be required to demonstrate and prove that the business has the skill and expertise to perform as a subcontractor in the particular area of work for which it is requesting listing or is listed on the M/W/DBE Kansas City, Mo. Online Directory.

(g) All applicants and certified businesses shall submit such information or documentation as may be required by the director in connection with its certification as an MBE or WBE, including, but not limited to current licenses and federal, state and local tax returns and schedules (business and personal), and all other forms that are required to be included with or attached to the return at the time of filing. Failure to submit such information or documentation shall result in the denial of its certification application or revocation of its certification.

(h) A certification application may be withdrawn by an applicant without prejudice at any time prior to an on-site audit. All applications and documentation submitted to support an application will not be returned to the applicant. Following the withdrawal of a certification application, the applicant may not reapply for certification for a period of one year from the date of withdrawal of the application.

(i) Burden of proof in the certification process. The firm seeking certification has the burden of demonstrating to the director, by a preponderance of the evidence, that it meets all the requirements for certification. The director shall make determinations concerning whether individuals and firms have met their burden of demonstrating minority and woman status, business size, expertise, commercially useful function, ownership, management, independence and control by considering all the facts in the record, viewed as a whole.

(j) Determination of minority and woman status. If the director has reason to question whether an individual is a minority or woman, the director shall require the individual to demonstrate, by a preponderance of the evidence, that he or she is a minority or woman. In making such a determination, the director must consider whether the person has held himself or herself out to be a minority or woman over a long period of time prior to application for certification and whether the person is regarded as such by the relevant community. Evidence of active participation in relevant community organizations will be considered in such determinations. The director may require the

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applicant to produce appropriate documentation. An entity may be simultaneously certified as an MBE or WBE if it meets all criteria for both MBE and WBE certification

(k) Business size determinations. To be an MBE/WBE, a firm (including its affiliates) must be an existing and currently functioning small business. The director shall apply the SBA business size standard(s) found in 13 CFR part 121.201 and as amended as of the date of application and appropriate to the type(s) of work the firm seeks to perform.

(l) Determination of ownership. In determining whether the minority or women participants in a firm own the firm, the director shall consider all the facts in the record, viewed as a whole.

- (1) To be an MBE/WBE, a firm must be at least 51 percent owned by one or more minority and women individuals, reflected as follows:
 - a. In the case of a corporation, such individuals must own at least 51 percent of each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding.
 - b. In the case of a partnership, 51 percent of each class of partnership interest must be owned by minority and women. Such ownership must be reflected in the firm's partnership agreement.
 - c. In the case of a limited liability company, at least 51 percent of each class of member interest must be owned by the minority and women individuals.
- (2) The firm's ownership by minority or women must be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. The minority or women owners must enjoy the customary incidents of ownership, and share in the risks and profits commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements.
- (3) All securities that constitute ownership of a firm shall be held directly by the minorities or women. Except as provided in this subsection (3), no securities or assets held in trust, or by any guardian for a minor, are considered as held by minority or women individuals in determining the ownership of a firm. However, securities or assets held in trust are regarded as held by a minority or woman for purposes of determining ownership of the firm, if:
 - a. The beneficial owner of securities or assets held in trust is a minority or woman, and the trustee is the same or another such individual; or

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- b. The beneficial owner of a trust is a minority or woman who, rather than the trustee, exercises effective control over the management, policy-making, and daily operational activities of the firm. Assets held in a revocable living trust may be counted only in the situation where the same minority or woman is the sole grantor, beneficiary, and trustee.
- (4) The contributions of capital or expertise by the minority or women owners to acquire their ownership interests must be real and substantial. Examples of insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, or mere participation in a firm's activities as an employee. Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.
- (5) In situations where expertise is relied upon as part of a minority or woman owner's contribution to acquire ownership:
 - a. The owner's expertise must be:
 - 1. In a specialized field; and
 - 2. In areas critical to the firm's operations; and
 - 3. Indispensable to the firm's potential success; and
 - 4. Specific to the type of work the firm performs; and
 - 5. Documented in the records of the firm. These records must clearly show the contribution of expertise and its value to the firm.
 - b. The individual whose expertise is relied upon must have a significant financial investment in the firm.
- (6) The director shall always deem as held by a minority or woman individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual:
 - a. As the result of a final property settlement or court order in a divorce or legal separation, provided that no term or condition of the agreement or divorce decree is inconsistent with this section; or

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- b. Through inheritance, or otherwise because of the death of the former owner.
- (7) Presumptions regarding interests obtained without consideration:
 - a. The director shall presume as not being held by a minority or woman individuals, for purposes of determining ownership, all interests in a business or other assets obtained by the individual as the result of a gift, or transfer without adequate consideration, from any non-minority or male individual or non-MBE/WBE firm who is:
 - 1. Involved in the same firm for which the individual is seeking certification, or an affiliate of that firm; or
 - 2. Involved in the same or a similar line of business; or
 - 3. Engaged in an ongoing business relationship with the firm, or an affiliate of the firm, for which the individual is seeking certification.
 - b. To overcome this presumption and permit the interests or assets to be counted, the minority or woman individual must demonstrate to the director, by clear and convincing evidence, that:
 - 1. The gift or transfer to the disadvantaged individual was made for reasons other than obtaining certification as an MBE/WBE; and
 - 2. The minority or woman individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of non-minority or male individual or non-MBE/WBE firm who provided the gift or transfer.
- (8) The director shall apply the following rules in situations in which marital assets form a basis for ownership of a firm:
 - a. When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by one spouse, the director shall deem the ownership interest in the firm to have been acquired by that spouse with his or her own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the

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firm is domiciled. The director shall not count a greater portion of joint or community property assets toward ownership than state law would recognize as belonging to the minority or woman owner of the applicant firm.

- b. A copy of the document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the firm must be included as part of the firm's application for MBE/WBE certification.
- (9) The director may consider the following factors in determining the ownership of a firm. However, the director must not regard a contribution of capital as failing to be real and substantial, or find a firm ineligible, solely because:
 - a. A minority or woman individual acquired his or her ownership interest as the result of a gift, or transfer without adequate consideration, other than the types set forth in subsection (7) of this section; or
 - b. There is a provision for the co-signature of a spouse who is not a minority or woman individual on financing agreements, contracts for the purchase or sale of real or personal property, bank signature cards, or other documents; or
 - c. Ownership of the firm in question or its assets is transferred for adequate consideration from a spouse who is not a minority or woman to a spouse who is such an individual. In this case, the director must give particularly close and careful scrutiny to the ownership and control of a firm to ensure that it is owned and controlled, in substance as well as in form, by a minority or woman individual.
- (m) Determinations concerning control. In determining whether the minority or women owners control a firm, the director must consider all the facts in the record, viewed as a whole.
- (1) Only an independent business may be certified as an MBE/WBE. An independent business is one the viability of which does not depend on its relationship with another firm or firms.
 - a. In determining whether a potential MBE/WBE is an independent business, the director must scrutinize relationships with non-MBE/WBE firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.

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- b. The director must consider whether present or recent employer/employee relationships between the minority and woman owner(s) of the potential MBE/WBE and non-MBE/WBE firms or persons associated with non-MBE/WBE firms compromise the independence of the potential MBE/WBE firm.
 - c. The director must examine the firm's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential MBE/WBE firm.
 - d. In considering factors related to the independence of a potential MBE/WBE firm, the director must consider the consistency of relationships between the potential MBE/WBE and non-MBE/WBE firms with normal industry practice.
- (2) An MBE/WBE firm must not be subject to any formal or informal restrictions which limit the customary discretion of the minority or women owners. There can be no restrictions through corporate charter provisions, by-law provisions, contracts or any other formal or informal devices (e.g., cumulative voting rights, voting powers attached to different classes of stock, employment contracts, requirements for concurrence by non-disadvantaged partners, conditions precedent or subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights) that prevent the minority or women owners, without the cooperation or vote of any non-minority or male, from making any business decision of the firm. This paragraph does not preclude a spousal co-signature on documents.
- (3) The minority and women owners must possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long-term decisions on matters of management, policy and operations.
 - a. A minority or women owner must hold the highest officer position in the company (e.g., chief executive officer or president).
 - b. In a corporation, minority or women owners must control the board of directors.
 - c. In a partnership, one or more minorities or women owners must serve as general partners, with control over all partnership decisions.
- (4) Individuals who are not minorities or women may be involved in an MBE/WBE firm as owners, managers, employees, stockholders, officers,

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and/or directors. Such individuals must not, however, possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm.

- (5) The minority and women owners of the firm may delegate various areas of the management, policymaking, or daily operations of the firm to other participants in the firm, regardless of whether these participants are minority or women. Such delegations of authority must be revocable, and the minority and women owners must retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the minority and women owners in the firm's overall affairs must be such that the recipient can reasonably conclude that the minority and women owners actually exercise control over the firm's operations, management, and policy.
- (6) The minority and women owners must have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm's operations. The minority and women owners are not required to have experience or expertise in every critical area of the firm's operations, or to have greater experience or expertise in a given field than managers or key employees. The minority and women owners must have the expertise, technical competence, and ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to use this information to make independent decisions concerning the firm's daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.
- (7) If state or local law requires the persons to have a particular license or other credential in order to own and/or control a certain type of firm, then the minority or women persons who own and control a potential MBE/WBE firm of that type must possess the required license or credential. If state or local law does not require such a person to have such a license or credential to own and/or control a firm, the director must not deny certification solely on the ground that the person lacks the license or credential. However, the director may take into account the absence of the license or credential as one factor in determining whether the minority or women owners actually control the firm.
- (8) The director may consider differences in remuneration between the minority and women owners and other participants in the firm in determining whether to certify a firm as an MBE/WBE. Such consideration shall be in the context of the duties of the persons involved, normal industry practices, the firm's policy and practice concerning

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reinvestment of income, and any other explanations for the differences proffered by the firm. The director may determine that a firm is controlled by its minority or woman owner although that owner's remuneration is lower than that of some other participants in the firm. In a case where a non-minority or non-woman individual formerly controlled the firm, and a minority or women individual now controls it, the director may consider a difference between the remuneration of the former and current controller of the firm as a factor in determining who controls the firm, particularly when the non-minority or non-woman individual remains involved with the firm and continues to receive greater compensation than the minority or woman individual.

- (9) In order to be viewed as controlling a firm, a minority or woman owner cannot engage in outside employment or other business interests that conflict with the management of the firm or prevent the individual from devoting sufficient time and attention to the affairs of the firm to control its activities. For example, absentee ownership of a business and part-time work in a full-time firm are not viewed as constituting control. However, an individual could be viewed as controlling a part-time business that operates only on evenings and/or weekends, if the individual controls it all the time it is operating.
- (10) A minority or woman individual may control a firm even though one or more of the individual's immediate family members (who themselves are not minorities or women) participate in the firm as a manager, employee, owner, or in another capacity. Except as otherwise provided in this paragraph, the director must make a judgment about the control the minority or woman owner exercises vis-à-vis other persons involved in the business as in other situations, without regard to whether or not the other persons are immediate family members. If the director cannot determine that the minority or woman owners, as distinct from the family as a whole, control the firm, then the minority or woman owners have failed to carry their burden of proof concerning control, even though they may participate significantly in the firm's activities.
- (11) Where a firm was formerly owned and/or controlled by a non-minority or non-woman individual (whether or not an immediate family member), ownership and/or control were transferred to a minority or woman individual, and the non-minority or non-woman individual remains involved with the firm in any capacity, the minority or woman individual now owning the firm must demonstrate to the director, by clear and convincing evidence, that:
 - a. The transfer of ownership and/or control to the minority or woman individual was made for reasons other than obtaining certification as an MBE/WBE; and

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- b. The minority or woman individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-minority or non-woman individual who formerly owned and/or controlled the firm.
- (12) In determining whether a firm is controlled by its minority or women owners, the director shall consider whether the firm owns equipment necessary to perform its work. However, the director must not determine that a firm is not controlled by minority or women individuals solely because the firm leases, rather than owns, such equipment, where leasing equipment is a normal industry practice and the lease does not involve a relationship with a prime contractor or other party that compromises the independence of the firm.
 - (13) The director shall grant certification to a firm only for specific types of work in which they are currently functioning and in which the minority or women owners have the ability to control the firm. To become certified in an additional type of work, the firm needs to demonstrate to the director that its minority or women owners are able to control the firm with respect to that type of work. The director may not, in this situation, require that the firm be recertified or submit a new application for certification, but must verify the minority or women owner's control of the firm in the additional type of work.
 - (14) A business operating under a franchise or license agreement may be certified if it meets the standards in this subpart and the franchiser or licensor is not affiliated with the franchisee or licensee. In determining whether affiliation exists, the director should generally not consider the restraints relating to standardized quality, advertising, accounting format, and other provisions imposed on the franchisee or licensee by the franchise agreement or license, provided that the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Alternatively, even though a franchisee or licensee may not be controlled by virtue of such provisions in the franchise agreement or license, affiliation could arise through other means, such as common management or excessive restrictions on the sale or transfer of the franchise interest or license.
 - (15) In order for a partnership to be controlled by minority or women individuals, any non-minority or non-women partners must not have the power, without the specific written concurrence of the minority or women partner(s), to contractually bind the partnership or subject the partnership to contract or tort liability.

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- (16) The minority or women individuals controlling a firm may use a professional and commercial employee leasing company. The use of such a company does not preclude the minority or woman individuals from controlling their firm if they continue to maintain an employer-employee relationship with the leased employees. This includes being responsible for hiring, firing, training, assigning, and otherwise controlling the on-the-job activities of the employees, as well as ultimate responsibility for wage and tax obligations related to the employees.
- (17) The director may consider, in making certification decisions, whether a firm has exhibited a pattern of conduct indicating its involvement in attempts to evade or subvert the intent or requirements of the MBE/WBE program.
- (18) The director shall evaluate the eligibility of a firm on the basis of present circumstances. The director shall not refuse to certify a firm based solely on historical information indicating a lack of ownership or control of the firm by the minorities or women at some time in the past, if the firm currently meets the ownership and control standards of this part.
- (19) MBE/WBE firms and firms seeking MBE/WBE certification shall cooperate fully with the director's requests (and DOT requests) for information relevant to the certification process. Failure or refusal to provide such information is a ground for a denial or removal of certification.
- (20) An eligible MBE/WBE firm must be owned by individuals who are minorities and women. Except as provided in this paragraph, a firm that is not owned by such individuals, but instead is owned by another firm—even an MBE/WBE firm—cannot be an eligible MBE/WBE.
 - a. If the minorities or women own and control a firm through a parent or holding company, established for tax, capitalization or other purposes consistent with industry practice, and the parent or holding company in turn owns and controls an operating subsidiary, the director may certify the subsidiary if it otherwise meets all requirements of this section. In this situation, the individual owners and controllers of the parent or holding company are deemed to control the subsidiary through the parent or holding company.
 - b. The director may certify such a subsidiary only if there is cumulatively 51 percent ownership of the subsidiary by the minority and women individuals. The following examples illustrate how this cumulative ownership provision works:

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Example 1: Minority and women individuals own 100 percent of a holding company, which has a wholly-owned subsidiary. The subsidiary may be certified, if it meets all other requirements.

Example 2: Minority and women individuals own 100 percent of the holding company, which owns 51 percent of a subsidiary. The subsidiary may be certified, if all other requirements are met.

Example 3: Minority and women individuals own 80 percent of the holding company, which in turn owns 70 percent of a subsidiary. In this case, the cumulative ownership of the subsidiary by minority and women individuals is 56 percent (80 percent of the 70 percent). This is more than 51 percent, so the director may certify the subsidiary, if all other requirements are met.

Example 4: Same as example 2 or 3, but someone other than minorities or women owners of the parent or holding company controls the subsidiary. Even though the subsidiary is owned by minority or women individuals, through the holding or parent company, the director cannot certify it because it fails to meet control requirements.

Example 5: Minority or women individuals own 60 percent of the holding company, which in turn owns 51 percent of a subsidiary. In this case, the cumulative ownership of the subsidiary by minority or women individuals is about 31 percent. This is less than 51 percent, so the director cannot certify the subsidiary.

Example 6: The holding company, in addition to the subsidiary seeking certification, owns several other companies. The combined gross receipts of the holding companies and its subsidiaries are greater than the size standard for the subsidiary seeking certification and/or the gross receipts cap. Under the rules concerning affiliation, the subsidiary fails to meet the size standard and cannot be certified.

- (21) Recognition of a business as a separate entity for tax or corporate purposes is not necessarily sufficient to demonstrate that a firm is an independent business, owned and controlled by minority and women individuals.

(n) An MBE/WBE's certification shall expire three years from the date of certification effective immediately. An application for renewal shall be submitted on forms provided by the director. The director is authorized to require MBE/WBE's firms to submit yearly updates of information including, but not limited to, current licenses and federal, state and local tax returns and schedules (business and personal), and all other forms that are required to be included with or attached to the return at the time of filing.

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(o) Once certified, an MBE/WBE must notify the department in writing within 30 calendar days of any change(s) in circumstances affecting the firm's ability to meet ownership, control, or size requirements or any material change(s) in the information provided in the certification application process. The statement must include supporting documentation describing in detail the nature of such changes. Change(s) in management responsibility among members of a limited liability company are also covered by this requirement. If the MBE/WBE fails to make timely notification of such change(s), it will be deemed to have failed to cooperate and certification may be revoked.

(p) The director shall safeguard information that reasonably may be regarded as confidential business information from disclosure to unauthorized persons consistent with federal, state and local law.

(q) If the United States Department of Transportation changes the requirements for certifications, the city council shall re-examine the certification requirements imposed by this section.

(r) Appeals of denials of certification.

- (1) If the city denies a request for MBE/WBE certification from a firm which is not currently certified by the city, then the firm shall be ineligible to reapply for MBE/WBE certification for one year from the later of the date of the denial of certification or the final date of any decision on an appeal.
- (2) Persons who have applied for DBE certification in conjunction with MBE/WBE certification and have been denied MBE/WBE certification may be certified if the reason(s) for denial is solely for MBE/WBE certification criteria equivalent to the DBE certification criteria and they successfully appeal their DBE certification and otherwise fulfill the requirements for MBE/WBE certification.
- (3) Persons who have applied for MBE/WBE certification and who have not applied for DBE status may appeal the denial of certification to the same extent and subject to the same provisions applicable to appeals of revocation of certification, except as provided in (4) of this subsection.
- (4) In circumstances where a firm has failed to submit required documentation, failed to demonstrate real and substantial presence, or exceeded business size standards, there will be no administrative reconsideration of a denial of MBE/WBE certification.

(s) *Appeals of revocations of certification.*

- (1) Persons who have who have had their MBE/WBE certification revoked by the department may be reinstated if the reason(s) for revocation is solely

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for MBE/WBE certification criteria equivalent to the DBE certification criteria and they successfully appeal their DBE certification, and they otherwise fulfill the requirements for MBE/WBE certification. If a person was certified as a DBE, the person must follow the UCP appeal procedures and there is no city appeal.

- (2) In circumstances where a certified firm has failed to submit required documentation, failed to demonstrate real and substantial presence, or exceeded business size standards, there will be no administrative reconsideration of a revocation of MBE/WBE certification.
- (3) Upon the revocation of certification as an MBE/WBE/DBE or mentor/protégé by the department, the director shall notify the affected party in writing by certified mail, setting forth the reason(s) for the revocation of certification. Except as provided in (1) and (2) of this subsection, any firm who has had certification as an MBE/WBE or mentor/protégé revoked by the department may appeal the decision by filing a written notice of appeal as designated by the director within 20 business days of receipt of the notice of the revocation of certification. The procedures applicable to any appeal shall be as follows:
 - a. The written notice of appeal must state the reason(s) for the appeal and include all supporting documentation to be considered for the appeal. The information or documentation submitted is limited to the issue(s) raised in the written notice of appeal. No new or additional documentation or information shall be considered for the appeal without a showing by the firm that it was not available or, through due diligence, could not have been made available. The written notice must specify whether the firm wishes to appeal in writing and/or appear personally for a hearing and if they intend to be accompanied by counsel.
 - b. Within ten business days of receipt of the notice of appeal from the aggrieved party, the director shall forward the notice to a neutral hearing officer selected through the city's standard procurement process.
 - c. Within ten business days from the date of receipt of the notice from the director, the hearing officer shall set a hearing date. The hearing officer shall cause notice of the hearing to be served upon all parties by certified mail. Such notice shall set forth with particularity the charges filed by the aggrieved business and shall include the hearing date, time, and place.
 - d. At the hearing, all parties shall be provided a fair and impartial hearing and shall be allowed to make a presentation concerning the

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determination of noncompliance with the requirements of this article or the revocation of certification as an MBE/WBE or mentor/protégé. Legal counsel may accompany the firm during the hearing, speak on behalf of the firm, respond to questions, and otherwise make a presentation. Each owner will be limited to a period of 15 minutes to address the hearing officer, unless extended by the hearing officer for good cause. Reasonable accommodations will be made for those with disabilities and/or limited language proficiency. For the appeal, the burden of proof rests on the MBE/WBE or mentor/protégé to show that the revocation of certification was improper.

- e. The hearing officer shall, within 15 business days of the hearing or within 15 days of the deadline set by the hearing officer for the submission of any additional documentation, if applicable, make a written decision on the appeal, which decision shall affirm, alter, or reverse the revocation of certification by the department. Written notice of the decision on the appeal shall be sent to all parties by mail setting forth the reasons for the decision.
- f. If the hearing officer finds for the aggrieved party, as appropriate, the business shall be reinstated as an MBE/WBE or mentor/protégé and added to the certification database maintained by the department. The decision of the hearing officer shall be binding on all parties, subject to the right of appeal as provided by law.
- g. The firm that receives a decision from the hearing officer upholding the revocation of certification is ineligible to reapply for MBE/WBE certification for two years from the later of the date of the revocation of certification, or the final date of any court decision.

(t) The city manager is authorized to revoke MBE and WBE certification for cause. The certification of a person who has been debarred by the city in a debarment proceeding shall be automatically terminated or modified in a manner provided by the debarment ordinance. If an MBE/WBE has its DBE or MBE/WBE certification revoked by another governmental entity after a hearing, its MBE/WBE certification shall automatically be terminated with the city unless the MBE/WBE's certification was revoked for violating a certification requirement that is not a violation of the city's MBE/WBE certification requirements. No individual, corporation, partnership, limited liability company or any other business entity whatsoever shall be certified as an MBE or WBE if the minority or female whose ownership interest would serve as the basis for obtaining certification, or who would control the entity seeking certification, presently owns or previously owned a majority interest in or controlled an MBE or WBE whose certification has been revoked for cause within the five year period immediately preceding the submittal of the certification application. No individual, corporation,

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partnership, limited liability company or any other business entity whatsoever shall be certified as an MBE or WBE if the minority or female whose ownership interest would serve as the basis for obtaining certification, or who would control the entity seeking certification, presently owns or previously owned a majority interest in or controlled an MBE or WBE whose certification has been suspended for cause, provided however that this restriction shall last no longer than the term of the suspension.

(u) MBE/WBE program graduation.

- (1) If an MBE or WBE has been certified by the city in more than one North American Industry Classification System (NAICS) code or has an affiliate which has been certified by the city in a NAICS code 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 NAICS code for which the MBE or WBE and its affiliate have been certified subject to the business size standards in this division. Such an MBE or WBE and any affiliate that has exceeded the graduation criteria in one NAICS code 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 NAICS code having a higher monetary graduation level but shall no longer be considered eligible to be or remain certified in the NAICS code with the lower size standard. An MBE or WBE that has exceeded the graduation criteria for the largest NAICS code applicable to its activities shall be deemed to be graduated from the MBE/WBE program for all purposes.
- (2) The department shall send a graduation determination letter which shall serve to notify the MBE or WBE that it has graduated from the MBE/WBE program. The mailing of the graduation determination letter shall trigger a three-year termination period. During the termination period, an MBE or WBE may bid and perform work to the same extent it was able to do so before graduation, and its utilization may be applied towards satisfaction of contract goals, if any, to the extent it is performing a commercially useful function corresponding to a NAICS code in which it was certified prior to graduation.
- (3) The termination period shall expire three years from the date of mailing of the graduation determination letter. Any work bid by the graduated MBE or WBE after expiration of the termination period shall not be applied towards satisfaction of contract goals, if any. Any work performed by the graduated MBE or WBE after expiration of the termination period shall not be applied towards satisfaction of contract goals, if any, unless the work was commenced or is scheduled to commence pursuant to solicitation made prior to the expiration of the termination period.

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- (4) During the termination period, the MBE or WBE shall comply with the requirements of this article to the same extent it was required to comply prior to graduation. A failure to do so may result in the reduction or elimination of the termination period.
- (5) 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 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. 3-462. Reserved.

Sec. 3-463. Duties and authority of director.

(a) The director is hereby authorized to establish rules and regulations to implement this division which rules and regulations shall be submitted to the city council for its approval and shall be in writing and published.

(b) Notwithstanding any other section to the contrary, the director is hereby authorized to establish rules and regulations to implement the city's MBE/WBE program requirements into contracts that utilize alternative construction delivery methods pursuant to chapter 3, Code of Ordinances, or other alternative procurement or contracting methods if the contract would be subject to MBE/WBE goals under this division. Except for cooperative agreements that involve construction, the fairness in construction board shall set the MBE/WBE goals for construction contracts.

(c) The director shall, in addition to any other duties specified herein:

- (1) Administer and enforce this article to ensure that MBE/WBEs have equal opportunity to participate in city contracts and subcontracts and work with all city department directors and agency heads to implement the city's MBE/WBE program; and
- (2) Coordinate the establishment of MBE/WBE methodologies with all city departments and incentive agencies including establishment of goals, except goals to be established by the applicable Board, as may be appropriate to remedy underutilization of MBE/WBEs; and
- (3) Update the M/W/DBE Kansas City Mo. Online Directory available to all bidders, proposers, the general public, city departments and incentive agencies no less frequently than every three (3) months; and

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- (4) Assist city departments incentive agencies, bidders, proposers, contractors and developers in finding qualified MBEs and WBEs to participate in contracts; and
- (5) Identify appropriate participation opportunities for qualified MBEs and WBEs in contracts; and
- (6) Publish an annual report for the city's fiscal year which states for each city department and agency:
 - a. The number of contracts awarded and the total contract dollars awarded pursuant to such contracts; and
 - b. The number of prime contracts awarded to WBEs and MBEs as identified by race and/or ethnicity and the total dollars awarded and paid pursuant to such contracts; and
 - c. The number of subcontracts awarded to WBEs and MBEs as identified by race and/or ethnicity and the total contract dollars awarded and paid pursuant to such contracts; and
 - d. A summary of total waiver requests submitted that are granted or denied and the reasons for the grant or denial; and
 - e. The number of MBE/WBE firms certified by race and/or ethnicity; and
- (7) Provide a compliance report to the city manager within 30 days after the end of each quarter which shall include:
 - a. The total number of contracts awarded and the total contract dollar amount awarded pursuant to such contracts; and
 - b. The number of contracts awarded to qualified MBEs as identified by race and/or ethnicity and WBEs and the total contract dollar amount awarded and paid pursuant to such contracts; and
 - c. The director of human relations evaluation of the city's progress toward meeting MBE/WBE utilization plans and any actions he or she intends to take to address any shortfall in meeting the goals established in such plans; and
 - d. Any other information as may be required by the city manager; and
- (8) Provide monthly compliance reports to the applicable incentive agency for contracts entered into in connection with sections 3-425(b) and 3-425(c)

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updating the incentive agency as to the project developer's compliance with the M/WBE goals and work with the applicable incentive agency to assist developers who are not compliant. Failure of the director to furnish these reports does not absolve incentive agency or developer from complying with the processes outlined by agreement with the incentive agency; and

- (9) Provide the city council a report outlining the effects of any revisions to this division within 18 months of their effective date. The purpose of this report is to ensure that such revisions promote increased opportunities for minority or women business enterprise participation on contracts.
- (10) Develop and maintain relationships with organizations representing contractors, including minorities and women organizations, and solicit their support for the city's program; and
- (10) Furnish staff assistance to the boards established in this division. This shall include but not be limited to providing to the boards within thirty days following the end of each quarter interim reports containing the information described in subsection (6) and such other reports and information as the board, from time to time, may request; and
- (11) Implement any federal or state minority business enterprise program required by law or federal or state contract; and
- (12) Appoint a designated neutral hearing examiner for certification revocation hearings.

Sec. 3-464. Reserved.

Sec. 3-465. Penalties for noncompliance; no retaliation.

(a) Whenever a bidder, proposer or contractor has submitted a bid that is not in material compliance with the requirements of Division, the contracting department or agency shall reject the bid or proposal unless the goals are waived pursuant to section 3-437.

(b) The director is authorized to recommend suspension, revocation, sanction or debarment of any contract or contractor, as appropriate, for providing false or misleading information to the department, purposefully omitting or refusing to provide information requested by the department, or otherwise violating any provision of this division.

(c) The director is authorized to suspend or revoke the certification of an MBE/WBE or mentor/protégé, as appropriate, for providing false or misleading information to the department, purposefully omitting or refusing to provide information

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requested by the department, or otherwise violating any provision of this division, without having to make a recommendation to any other person or department.

(d) Sanctions shall be imposed in conformity with any applicable federal, state or local laws. In determining whether to suspend or revoke the certification an MBE/WBE or mentor/protégé, the director shall consider the following factors:

- (1) Whether the failure to comply with applicable requirements involved intentional conduct or, alternatively, may be reasonably concluded to have resulted from a misunderstanding on the part of the MBE/WBE or mentor/protégé; and
- (2) The number of specific incidents of failure by the MBE/WBE or mentor/protégé to comply; and
- (3) Whether the MBE/WBE or mentor/protégé has been previously suspended; and
- (4) Whether the MBE/WBE or mentor/protégé has failed or refused to provide the director with any information requested by the director or required to be submitted to the director pursuant to law or these procedures; and
- (5) Whether the MBE/WBE or mentor/protégé has materially misrepresented any applicable facts in any filing or communication to the director; and
- (6) Whether any subsequent restructuring of the subject business or other action has been undertaken to cure the deficiencies in meeting applicable requirements.

(e) Suspensions may be for any length of time not to exceed five years. Suspensions in excess of one year and revocations of certification shall be reserved for cases involving intentional or fraudulent misrepresentation or concealment of material facts, multiple acts in contravention of applicable requirements, cases where the MBE/WBE or mentor/protégé has been previously suspended, or other similarly egregious conduct.

(f) The making of any false or misleading statements shall be grounds for application of any applicable criminal and or civil penalties in addition to the grounds for sanction.

(g) No person shall intimidate, threaten, coerce or discriminate against any individual or business for the purpose of interfering with the implementation or enforcement of any provision of this article because such individual or business filed a complaint or cooperated in the investigation of a complaint.

Sec. 3-466. Reserved.

Sec. 3-467. Mediation of disputes.

(a) Any claim or dispute between a contractor, subcontractor or supplier that remains unresolved after 30 calendar days shall be subject to mandatory mediation conducted in accordance with the rules of the Uniform Mediation Act. The mediation shall be conducted by an impartial mediator appointed by the department, who shall render his or her services with full regard for each party's interests. If the subject matters of the dispute or the parties to the dispute are such that the assigned mediator would have a conflict of interest or personal interest in the outcome of the mediation, he or she shall immediately be recused and another mediator shall be appointed.

(b) The procedures for the mediation shall be established by the appointed mediator in conjunction with the parties, who shall attempt to resolve their dispute in good faith.

(c) Except to the extent disclosure is otherwise required by law, the mediation and the terms of any settlement reached by the parties shall remain confidential.

(d) The mediation provided for by this section shall be a condition precedent to the initiation or pursuit of any other lawful means of resolving the dispute, including arbitration and other legal proceedings.

(e) The contractors shall share equally the expense of the mediator's fee. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

(f) Every contractor entering into a contract as defined by section 3-421(a) (13) shall incorporate the provisions of this section into each related agreement with a subcontractor or supplier, but the failure to do so shall not alleviate the obligation of the parties to utilize the mediation provided for herein as a condition precedent to the initiation or pursuit of any other lawful means of resolving the dispute, including arbitration and other legal proceedings. The requirements of this section shall be deemed incorporated into each related agreement by operation of law and shall supplant any term or provision, written or oral, to the contrary.

(g) Notwithstanding the foregoing, for incentive projects any arbitration or mediation between the prime contractor or developer and the M/WBE firm shall be in accordance with the arbitration or mediation provisions, as applicable, contained in the contract between the prime contractor or developer and the M/WBE firm. The provision shall not serve to inhibit the director's ability to assist the prime contractor or developer and the MBE/WBE firm in reaching a compromise in matters of dispute.

Sec. 3-468. Reserved.

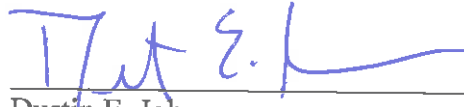
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Sec. 3-469. Severability.

The provisions of this division are severable. If any provision or its application to any person or circumstance is held invalid by a court of competent jurisdiction, the remaining provisions, including the application of such provisions to other persons or circumstances, shall continue in full force and effect.

Secs. 3-470—3-500. Reserved.

Approved as to form and legality:



Dustin E. Johnson
Assistant City Attorney



Authenticated as Passed



St. James, Mayor

Marilyn Sanders, City Clerk

OCT 25 2018

Date Passed