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## Sec. 6-92-1. Equal business opportunity program.

- A. *Statement of policy.* Under all the circumstances and based on the factual predicate which has been established after careful study and review, the city has a compelling interest to fully remedy the ongoing effects of past and present discrimination against minority and women business owners in both the public and private sectors of its marketplace. The city has a compelling interest to assure that public dollars derived from tax collection and revenues are not utilized to further discriminatory practices. It is the policy of the city to promote full and equal business opportunity for all persons doing business with the city. The city must ensure that firms seeking to participate in contracting and procurement activities with the city are not prevented from doing so on the basis of the race or gender of their owners. The city is committed to ensuring that it is not a passive participant in any private scheme of discrimination. To ensure that businesses are not discriminated against with regard to prime contracting, subcontracting or other partnering opportunities with the city, the city has developed an equal business opportunity program.
- B. *Title.* This chapter shall be known as the "City of Memphis, Equal Business Opportunity Program Ordinance."
- C. *Adoption of the findings and conclusions of the Griffin and Strong, P.C. Report.* The city council adopts the findings and conclusions of the Griffin and Strong, P.C. Report dated August 2016 (referred to in this chapter as the "GSPC report").
- D. *Definitions.* The following words, terms and phrases, when used in this chapter, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

*African American* shall mean persons having origins in any black racial group of Africa.

*African American business enterprise (AABE)* shall mean a business which is an independent and continuing enterprise for profit, performing a commercially useful function, and which is owned and controlled by one or more African Americans.

*Annual participation goals* shall mean the targeted levels established by city council of relevant markets for minority and women participation in city professional contracts, goods and nonprofessional services contracts, and construction contracts calculated in accordance with this chapter and applicable only to specific gender, ethnic or ethnic minority groups for which goals have been set.

*Asian* shall mean persons having origins in any of the original people of the Far East, Southeast Asia, the Indian subcontinent or the Pacific Islands.

*Asian American business enterprise (ABE)* shall mean a business which is an independent and continuing enterprise for profit, performing a commercially useful function, and which is owned and controlled by one or more Asian individuals.

*Best bid* shall be defined as the responsive quotation, proposal, solicitation or offer that meets specifications, including, if applicable, any project participation goal as set in the bid packet specifications.

*Bid* shall mean written quotations, proposals or offers by a bidder or contractor to perform or provide labor, materials, equipment, supplies or services to the city for a price submitted in response to competitive bidding solicitation issued by the city.

*Bidder* shall mean any business enterprise that submits a bid or proposal as defined herein.

*Boards, commissions, and quasi-governmental agencies* shall mean any entity that the mayor of the city holds appointment power to effect membership.

*Business enterprise* shall mean a corporation, partnership, sole proprietorship, joint venture, joint-stock company, professional association or any other legal entity, operated for profit that is properly licensed and/or otherwise authorized to do business in the State of Tennessee.

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*Certification or recertification* shall mean the official recognition and approval by the office of business diversity and compliance (OBDC) that a business meets the qualification criteria of an AABE, HBE, ABE, NABE, or WBE, as set forth in this chapter. Certification or recertification relates to qualifications regarding ownership, control, and the applicant's economic disadvantage, not the quality of the service or product. The office of business diversity and compliance will serve as the central certification agency for all city funded projects with acceptance of certifications from third party certifying agencies as a consideration by OBDC.

*Certified AABE, HBE, ABE, NABE, or WBE* shall mean an AABE, HBE, ABE, NABE or WBE which has been certified by a city approved central certification agency and approved by the office of business diversity and compliance (OBDC).

*Commercially useful function.* For the purpose of determining whether a business enterprise is performing a commercially useful function, OBDC shall consider all of the facts in the record, viewed as a whole, including without limitation the following:

1. An MWBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved.
2. To perform a commercially useful function, the MWBE must be responsible, with respect to material and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself.
3. To determine whether an MWBE is performing a commercially useful function, OBDC will evaluate the amount of work subcontracted by the MWBE, industry practices regarding subcontracting, whether the amount the MWBE is to be paid under the contract is commensurate with the work it is actually performing, the MWBE credit claimed for its performance of the work, and other relevant factors.
4. An MWBE 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 MWBE participation. In determining whether an MWBE is such an extra participant, OBDC will examine similar transactions, particularly those in which MWBEs do not participate.

*Construction contracts* shall mean those written agreements between a contractor and the city for the construction, repair, rehabilitation, alteration, conversion or extension of buildings, parks, utilities, streets or other improvements or alteration to real property. Construction projects include the contracts for the labor portion of a project as well as equipment and other supplies to be incorporated in a project.

*Contract* shall mean and include any agreement between the city and a person or business enterprise to provide or procure labor, materials, equipment, supplies and services to, for or on behalf of the city. A "contract" shall include an agreement between the city and a person or business enterprise to perform professional architectural and engineering services, construction related services or fund the performance of such services, nonprofessional services and/or goods. Except as otherwise specifically defined in this section, a "contract" does not include:

1. Awards made by the city to a nonprofit entity which the city offers assistance, guidance, or supervision on a project or program and the recipient of the grant award uses the grant monies to provide services to the community;
2. Sales transactions where the city sells its personal or real property;
3. A loan transaction where the city is acting as a debtor or a creditor;
4. Lease and franchise agreements;
5. Agreements to use city real property; or
6. Gifts of materials, equipment, supplies or services to the city.

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*Contract compliance officer (CCO)* means the director of the office of business diversity and compliance, or the city official appointed by the mayor to specifically manage designated sections of the program authorized by this chapter.

*Contractor* shall mean any person or business enterprise that submits a bid or proposal to provide labor, goods or services to the city by contract for profit in the area of construction or construction-related activities; and, any person who supplies or provides labor, goods or services to the city by contract for profit; and any person who is a subcontractor under any such contract.

*Control or controlled:* For the purpose of determining whether the owner or owners of a potential MWBE (as used in this definition, "MWBE-owner", which shall denote one or more owners) controls the potential MWBE, OBDC shall consider all of the facts in the record, viewed as a whole, including without limitation the following:

1. For an MWBE-owner to be deemed to control the potential MWBE, the potential MWBE must be independent. An independent business enterprise is a business whose viability does not depend on its relationship with another firm or firms.
  - a. In determining whether a potential MWBE is independent, OBDC will scrutinize relationships with other firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.
  - b. OBDC will consider whether present or recent employer/employee relationships between the MWBE-owner and other firms or persons associated with other firms compromise the independence of the potential MWBE firm.
  - c. OBDC will examine the potential MWBE'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 MWBE firm.
  - d. In considering factors related to the independence of a potential MWBE firm, OBDC will consider the consistency of relationships between the potential MWBE and other firms with normal industry practice.
2. A potential MWBE firm must not be subject to any formal or informal restrictions which limit the customary discretion of the MWBE-owner. 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 persons other than the MWBE-owner, conditions precedent or subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights) that prevent the MWBE-owner, without the cooperation or vote of any other individual, from making any business decision of the business enterprise. This paragraph does not preclude a spousal co-signature on documents.
3. The MWBE-owner must possess the power to direct or cause the direction of the management and policies of the business enterprise and to make day-to-day as well as long-term decisions on matters of management, policy and operations.
  - a. An MWBE-owner must hold the highest officer position in the company (e.g., chief executive officer or president).
  - b. In a corporation, the MWBE-owner must control the board of directors.
  - c. In a partnership, the MWBE-owner must serve as a general partner, with control over all partnership decisions.
4. Individuals who are not the MWBE-owner may be involved in an MWBE as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not, however, possess or

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exercise the power to control the business enterprise, or be disproportionately responsible for the operation of the business enterprise.

5. The MWBE-owners of the business enterprise may delegate various areas of the management, policymaking, or daily operations of the business enterprise to other participants in the firm, regardless of whether these participants are African American, Hispanic, Asian, Native American, or women. Such delegations of authority must be revocable, and the MWBE-owner must retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the MWBE-owner in the business enterprise's overall affairs must be such that OBDC can reasonably conclude that the MWBE-owner actually exercises control over the business enterprise's operations, management, and policy.
6. The MWBE-owner must have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the business enterprise is engaged and the business enterprise's operations. The MWBE-owner is not required to have experience or expertise in every critical area of the business enterprise's operations, or to have greater experience or expertise in a given field than managers or key employees. The MWBE-owner must have the ability to intelligently and critically evaluate information presented by other participants in the business enterprise's activities and to use this information to make independent decisions concerning the business enterprise's daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the business enterprise is insufficient to demonstrate control.
7. If state or local law requires the owner of a particular type of firm to have a particular license or other credential, then the MWBE-owner of that type of firm must possess the required license or credential in order to be deemed in control. If state or local law does not require an owner to have such a license or credential, OBDC will not deny certification solely on the ground that the MWBE-owner lacks the license or credential. However, OBDC may take into account the absence of the license or credential as one factor in determining whether the MWBE-owner actually controls the firm.
8. OBDC may consider differences in remuneration between the MWBE-owner and other participants in the business enterprise in determining whether the MWBE-owner controls the business enterprise. Such consideration shall be in the context of the duties of the persons involved, normal industry practices, the business enterprise's policy and practice concerning reinvestment of income, and any other explanations for the differences proffered by the business enterprise. OBDC may determine that a business enterprise is controlled by its MWBE-owner although the MWBE-owner's remuneration is lower than that of some other participants in the business enterprise. In a case where someone other than the MWBE-owner formerly controlled the business enterprise, and the MWBE-owner now controls it, OBDC may consider a difference between the remuneration of the former and current owner of the business enterprise as a factor in determining who controls the business enterprise, particularly when the former owner remains involved with the business enterprise and continues to receive greater compensation than the current MWBE-owner.
9. In order to be viewed as controlling a business enterprise, an MWBE-owner cannot engage in outside employment or other business interests that conflict with the management of the business enterprise or prevent the MWBE-owner from devoting sufficient time and attention to the affairs of the business enterprise 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 except for franchise ownership. However, an MWBE-owner could be viewed as controlling a part-time business that operates only on evenings and/or weekends, if the MWBE-owner controls the business enterprise when it is operating.
10. An MWBE-owner may control a business enterprise even though one or more of the MWBE-owner's immediate family members (who themselves are not African American, Hispanic, Asian, Native American, or women) participate in the business enterprise as a manager, employee, owner, or in another capacity. Except as otherwise provided in this paragraph, OBDC must make a judgment about

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the control the MWBE-owner exercises vis-a-vis other persons involved in the business enterprise as it does in other situations, without regard to whether or not the other persons are immediate family members. If OBDC cannot determine that the MWBE-owner, as distinct from the family as a whole, controls the business enterprise, then the MWBE-owner has failed to carry her/his burden of proof concerning control, even though s/he may participate significantly in the business enterprise's activities.

*Eligible projects* means those projects that have a participation MWBE goal set on it.

*Expertise* means demonstrable skills or knowledge of the field of endeavor in which certification is sought, including licensure where required.

*Front* shall mean a business which purports to be an MWBE but which is actually owned and/or controlled in a manner which is inconsistent with the requirements for certification set out in this chapter.

*Fronting activity* shall be defined as any occurrence of collusion between a MWBE and a majority business enterprise for the purpose of exploiting that MWBE's minority or female certification status to primarily benefit a majority firm without the performance of any commercially useful function by that MWBE.

*Good faith efforts* means the steps undertaken to obtain MWBE participation for subcontracting opportunities related to the bid proposal submitted. Minimum standards are set out in section 6-92-4(D).

*Hispanic* shall mean persons of Spanish or Portuguese culture with origins in Mexico, South or Central America or the Caribbean Islands, regardless of race.

*Hispanic American business enterprise (HBE)* shall mean a business which is an independent and continuing enterprise for profit, performing a commercially useful function, and which is owned and controlled by one or more Hispanic individuals. For purposes of this chapter alone, references to racial ownership of businesses shall include HBEs.

*Joint venture* shall mean an association of two or more persons, partnerships, corporations, or any combination of them, established to carry on a single business activity that is limited in scope and duration. The agreement establishing the joint venture, partnership or other multi-entity relationship shall be in writing. Further, participation in a joint venture shall be based on the sharing of real economic interest in the venture and shall include proportionate control over management, interest in capital acquired by the joint venture and interest in earnings.

*Memphis Metropolitan Statistical Area (MSA)* shall mean the geographical area consisting of Shelby, Tipton, Fayette, Crittenden, Desoto, Tunica, Tate, and Marshall counties.

*Minority and diverse used interchangeably along with women business enterprise (MWBE)* means a business which is an independent and continuing operation for profit, performing a commercially useful function, and which is owned and controlled by one or more African Americans, Hispanics, Asians, Native Americans, or women, or a combination thereof.

*Minority-owned business enterprise (MBE)* means a business (including, without being limited to, a sole proprietorship, partnership, corporation, joint venture or any other business or professional entity):

1. Which is at least 51 percent owned by one or more minority persons, or, in the case of publicly-owned business, at least 51 percent of all classes of the stock of which is owned by one or more minority persons; and
2. Whose management, policies, major decisions and daily business operations are independently controlled by one or more of such minority persons; and
3. Which performs a commercially useful function; and

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4. Minority person means those persons, citizens of the United States and lawfully admitted resident aliens, who are African American, Hispanic, Asian, or Native American.

*MWBE advisory committee* means the committee, composed of the contract compliance officer/director of OBDC, the director of finance or designee, the city engineer or designee, the city attorney or designee, the purchasing agent or designee, the director of information systems or designee, responsible for recommending to the city council the annual minority and women owned business enterprise procurement participation goals.

*Native American* shall mean persons having origins in any of the original people of North America, including American Indians, Eskimos and Aleuts.

*Native American business enterprise (NABE)* shall mean a business which is an independent and continuing enterprise for profit, performing a commercially useful function and which is owned and controlled by one or more Native Americans.

*North American Industry Classification System (NAICS) Code* shall mean the standard code that classifies industries by the type of activity in which such industries are primarily engaged.

*Office of business diversity and compliance (OBDC)* shall mean the office of business diversity and compliance (OBDC) in the city.

*Owned, managed and independently controlled* means the one or more minority persons or women who own(s) the requisite interest in or assets of a business applying for certification, shall possess equivalent incidents of such ownership, including an equivalent interest in profit and loss, and shall have contributed an equivalent percentage of capital or equipment and expertise to the business. Ownership shall be measured as though not subject to the community property interest of a spouse, if both spouses certify in writing that the nonparticipating spouse relinquished control over his or her community property interest in the subject business (but by doing so is not required to transfer ownership interest or to characterize the property as the separate property of the spouse). The one or more minority or women shall have recognized ultimate control over all day-to-day operations by employees of the business, and by those with whom it does business. The ownership and control of the firm shall be real, substantial, and continuing and shall go beyond the pro forma ownership of the firm as related in its ownership documents.

*Owned or ownership:* In determining whether a potential MWBE is owned by one or more African Americans, Hispanics, Asians, Native Americans, or women, OBDC will consider all of the facts in the record, viewed as a whole, including without limitation the following:

1. OBDC shall deem the owner of a business enterprise to be whoever possesses at least 51 percent of the business enterprise. There may be more than one owner.
  - a. In the case of a corporation, such individuals must possess 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, such individual(s) must possess at least 51 percent of each class of partnership interest. Such ownership must be reflected in the business enterprise's partnership agreement.
  - c. In the case of a limited liability company, such individual(s) must possess at least 51 percent of each class of member interest.
2. All securities which constitute ownership of an entity for purposes of establishing it as an AABE, HBE, ABE, NABE or WBE must be held directly by African American, Hispanic, Asian, Native American or women individuals or by AABEs, HBEs, ABEs, NABEs or WBEs. No securities held in trust or by any guardian for a minor shall be considered held by African Americans, Hispanics, Asians, Native Americans or women in determining the ownership or control of a corporation.

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3. Ownership shall be measured as though not subject to the community property interest of a spouse if both spouses certify that only one spouse owns the business and if such assertion is supported by the totality of the evidence considered by the office of business diversity and compliance (OBDC).
  4. OBDC must find that the individual's ownership is real, substantial, and continuing, going beyond pro forma ownership of the business enterprise as reflected in ownership documents. The individuals 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.

*Project participation goal* shall mean a goal established for a particular project or contract and calculated as authorized in section 6-92-3(B).

*Proposer* shall mean a person or business enterprise which responds to a contract opportunity with the city, solicited as a request for proposal and that possesses the requisite expertise to perform the professional services sought.

*Satisfactorily completed or satisfactory completion* shall mean when all of the tasks called for in the subcontract have been accomplished and documented as required by the city. When the city has made an incremental acceptance of a portion of a prime contract, the work on a subcontractor covered by the acceptance is deemed to be satisfactorily completed.

*Subcontractor* shall mean any person or business enterprise providing goods, labor or services to a contractor if such goods, labor or services are procured in fulfillment of the contractor's obligations arising from a contract with the city. Subcontractor includes every level of subcontracting required to fulfill a contract with the city.

*Supplier* shall mean a warehouse or manufacturer of materials, supplies or equipment which contracts directly with a bidder to provide such materials, supplies or equipment on an eligible project which involves a trade or service. For purposes of measuring the total contract dollars awarded or paid to suppliers on eligible projects, only amounts paid to suppliers of goods customarily and ordinarily used based upon standard industry or trade practices shall be counted.

*Women* shall mean those persons, citizens of the United States and lawfully admitted resident aliens, who are of the female gender, and not otherwise included in one of the specific ethnic minority groups.

*Women business enterprise (WBE)* shall mean a business (including, without being limited to, a sole proprietorship, partnership, corporation, joint venture or any other business or professional entity):

1. Which is at least 51 percent owned by one or more women, or, in the case of publicly-owned business, at least 51 percent of all classes of the stock of which is owned by one or more women; and
  2. Whose management, policies, major decisions and daily business operations are independently controlled by one or more of such women; and
  3. Which performs a commercially useful function; and
  4. Women means those persons, citizens of the United States and lawfully admitted resident aliens, who are of the female gender, and not otherwise included in one of the specific ethnic minority groups.
- E. *Administrative authority; powers and duties.* It is the responsibility of every officer, director, administrator, manager, and supervisor of the city to manage the daily administration of the provisions of this chapter and to assure that the intent of this chapter is carried out in all procurement activities and opportunities.
1. The overall provisions of this chapter shall be administered and enforced by the contract compliance officer ("CCO") and, in pertinent parts, in conjunction with the division of finance.
  2. The CCO's powers and duties under this chapter include the following:

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- a. Establishment of written procedures, informal guidelines, and forms as may be necessary to effectuate this chapter.
  - b. Monitoring compliance with the requirements of this chapter.
  - c. Assist, where directed, the division of finance in establishing written procedures to implement this chapter.
  - d. Development of databases to be maintained as a public record of certified AABEs, HBES, ABES, NABEs and WBES.
  - e. Maintenance of documents, forms, records or data regarding this program as provided in this chapter, including:
    1. Documents, forms, records or data regarding the dollar amounts subcontracted to or expended for services performed by subcontractors and suppliers on eligible projects, including the race and gender ownership of each subcontractor and supplier, and
    2. Documents, forms, records or data regarding certified AABEs, HBES, ABES, NABEs and WBES.
  - f. Development and implementation of outreach and assistance programs to promote equal contracting opportunities for all businesses that wish to do business with the city, in accordance with section 6-92-7.
  - g. Provide information and assistance to MWBEs to increase their ability to compete effectively for the award of city contracts.
  - h. Provision of information to potential bidders/proposers which shall include names and contact information of certified MWBEs for each eligible project, to reinforce and support outreach efforts by potential bidders/proposers.
  - i. Keep MWBEs apprised of opportunities for technical assistance and training.
  - j. In conjunction with the division of finance, monitor contracts for compliance with MWBE participation goals throughout the contract term.
  - k. Ensuring compliance with requirements for joint venture arrangements under section 6-92-4(G) as applicable.
  - l. Determination of whether any of the penalties set forth in section 6-92-6 should be applied to a business.
  - m. Monitor the city's progress toward achievement of MWBE program goals.
  - n. Attendance at pre-bid, pre-proposal, pre-construction and pre-work conferences.
  - o. Assist, where directed, the division of finance in preparing compliance guidelines for contractors which will include monitoring and reporting procedures and recommendations for actions to be taken should noncompliance OBDC.
  - p. Investigation of alleged violations of this chapter, and the issuance of written statements following any determination of such investigation stating the reasons therefore and any penalty to be imposed.
  - q. Issue an exit interview for any contract which includes MWBE prime contractor participation as a joint venture, partner. The purpose of the exit interview is to ensure that MWBEs are actually performing services on joint ventures.



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- r. Collect data on diversity plans and outcomes from all boards, commissions and quasi-governmental agencies on a quarterly basis.

F. *Certification.*

1. For purposes of contracting with the city under this program, a minority or woman owned business enterprise must be located within the Memphis MSA (Crittenden County in Arkansas (AR), Desoto, Marshall, Tate, and Tunica Counties in Mississippi (MS), and Fayette, Shelby and Tipton Counties in Tennessee).
2. For purposes in contracting with the city under this program a minority or women owned business enterprise must be certified as such by a city-approved central certification agency or any other certification agency deemed appropriate by the office of business diversity and compliance, and/or the city. The city shall serve as the primary certifying agency for all the publicly funded city projects.
3. Reciprocal certification may be accepted by the office of business diversity and compliance as follows:
  - a. Submission of a current Shelby County LOSB certificate and sworn affidavit testifying to annual revenues no greater than \$250,000.00, for all industries except construction, engineering, architecture, or technology enterprises; and
  - b. Verification by OBDC staff of minority or woman owned status; and
  - c. Proof of registration with OBDC through B2GNow and city purchasing office.
4. Certifications by the city will include two tiers:
  - a. Tier 1 (program participants). MWBEs who meet the SBA size standards and criteria to be certified as a minority or woman owned business based on race or gender. These MWBEs may be included in subcontracting participation goals for contracts directly with the city during the contract evaluation process.
  - b. Tier 2 (directory participants). MWBEs who meet the criteria as a minority or woman owned business based on race or gender regardless of the SBA size standards. These MWBEs may be included in subcontracting participation goals that specify a tier 2 goal under the EBO Program for contracts directly with the city. However, they may also be considered an eligible MWBE for participation goals on other public projects, such as quasi-governmental agencies, and private sector projects during the contract evaluation process and be included in the reporting of performance of such projects.
  - c. Submission of a current certification certificate and sworn affidavit testifying to all criteria set forth in this chapter will be required to participate as a tier 1 or tier 2 MWBE.
5. False/misleading statements. A business found to have intentionally and willfully provided false or misleading information for the purpose of obtaining MWBE certification or re-certification, or otherwise acting as a front or engaged in fronting activity as defined herein, as determined by an investigation and review by the CCO/director of business diversity and compliance, at the discretion of the director, may be subject to any or all of the following penalties:
  - a. Denial of certification or immediate decertification;
  - b. Termination of any active contracts with the city and any obligation to make future payments otherwise due under said contracts;
  - c. Precluded from bidding on or participating in any contract with the city as a prime or subcontractor for a minimum of three years but not to exceed ten years;
  - d. Repayment of all payments made by the city during the period while operating fraudulently as a MWBE;

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- e. Reporting of the findings to the chair of the city council and any other agency or private business known to be doing business with the fraudulent MWBE.
- G. *Graduation clause.* Certified AABEs, HBEs, ABEs, NABEs, or WBEs shall be deemed graduated from being certified as a tier 1 for the purposes of the EBO program as AABEs, HBEs, ABEs, NABEs, or WBEs when the MWBE has sales that exceed the average sales for the industry for eight consecutive years, as determined by the federal tax returns for that firm and the NAICS Codes designated by the small business administrations. Small business size standards are as outlined in Title 13 CFR Part 121. If an MWBE is engaged in more than one industry, then its graduation level shall be determined by a weighted average of sales for all industries in which the MWBE is engaged. The office of business diversity and compliance (OBDC) will continue to ensure that African Americans, Hispanics, Asians, Native Americans and women are not discriminated against in the procurement process, whether or not such companies are eligible for certification as MWBEs.
- 1. Graduation procedures. Any interested party may request an evaluation of an M/WBE firm. That evaluation will be performed at the time of the recertification for the MWBE. Upon recertification, a firm will be evaluated for graduation from the program. Once the office of business diversity and compliance (OBDC) has been notified by the certifying agency that the firm has exceeded the size standards established by the NAICS, the following steps will be followed:
    - a. Notification. The OBDC shall issue a letter of notification to the firm detailing its intent to graduate the firm from the program. The letter of notification shall set forth findings, based on the facts and in accordance with law and regulations, for every material issue relating to the basis of the program graduation with specific reasons for each finding.
    - b. Appeal. The firm will be allowed 45 days from the date of the letter to appeal the decision. To appeal the decision, the firm must submit in writing to the OBDC information which would explain why the proposed basis of graduation is not warranted. Upon receipt of the appeal, the office of contract compliance will notify the firm in writing of the receipt of the appeal.
    - c. Review. If the firm appeals its graduation from the program within the requisite 45 days, the appeal will be reviewed by a committee composed of the director of finance, purchasing agent, and city attorney or designee. Within 15 days of receipt of the appeal, a written decision will be issued to the firm by the committee via the OBDC.
    - d. Post graduation. After the effective date of firm's graduation from the program as provided for herein, a firm is no longer eligible to participate in or receive assistance from the MWBE program. However, such firm is obligated to complete previously awarded contracts and/or subcontracts, including any priced bids that may be exercised.
    - e. Firms that graduate will be eligible for a one-time re-entry upon demonstration that the firm can meet the revenue requirements for three consecutive years following the date of its notification of graduation from OBDC. If the firm subsequently again meets the graduation criteria, no further re-entry will be permitted.
- H. *Decertification.* The office of business diversity and compliance (OBDC) may decertify a business that it finds is not or is no longer a bona fide AABE, HBE, ABE, NABE or WBE. Businesses decertified for reasons other than by voluntary request may not apply for recertification for such time as may be specified, up to two years. A business that is decertified may file an appeal within 30 days to the director of OBDC.
- 1. Any of the following reasons, which are not intended to be all-inclusive, are sufficient grounds for decertification:
    - a. The business has changed to the extent that it no longer satisfies the ownership, control, and/or other requirements set forth in section 6-92-1(D);

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- b. The business fails to submit within a reasonable time period information requested by the office of business diversity and compliance (OBDC);
  - c. The business ceases to be a viable enterprise for profit because of involuntary bankruptcy, dissolution or other cessation of commerce;
  - d. Information or evidence that was not available to the office of business diversity and compliance (OBDC) at the time the firm was certified is now available and said information, if known at the time of certification review would have resulted in a denial of certification;
  - e. Information was concealed or misrepresented by the firm in connection with the certification application or review conducted by the office of business diversity and compliance (OBDC);
  - f. A change in the certification standard or requirements of the city has occurred since the certification of the firm;
- I. *Continuing duty.* Certified AABEs, HBEs, ABEs, NABEs and WBEs shall be under a continuing duty to inform the office of business diversity and compliance (OBDC) in writing of any changes in the AABE's, HBE's, ABE's, NABE's or WBE's business if, as a result of such changes, the AABE, HBE, ABE, NABE or WBE no longer satisfies the requirements of section 6-92-1(D).

(Ord. No. 5662, § 1(2-325), 11-7-2017)