Memphis City Council
Summary Sheet Instructions

Please provide a brief summary of the item, in bullet form, not to exceed one page:

1. Describe item (Resolution, Ordinance, etc.)

   The proposed document is an Ordinance to repeal in its entirety previously established Ordinance 4388, codified as City Code, Chapter 2, Division 5, Section 2-325 thru Section 2-331 and replace with the attached Ordinance inserted in lieu thereof as a result of the findings of the 2010 Disparity Study as performed by Griffin & Strong, PC.

2. Identify initiating party (e.g., Public Works; at request of City Council, etc.)

   This is an Ordinance put forth by the Law Division, Office of Contract Compliance.

3. State whether this is a change to an existing ordinance or resolution, if applicable.

   This is a complete replacement of the current ordinance. The administration, by and through the Law Division has determined that such an amendment is allowable under the Code.

4. State whether this requires a new contract, or amends an existing contract, if applicable.

   This transaction requires the approval of the full City Council and proper adoption of the requisite readings.

5. State whether this requires an expenditure of funds/requires a budget amendment.

   No expenditure of funds is required under this Ordinance.

Memphis City Council
Summary Sheet

This is an Ordinance requesting to repeal and replace in its entirety the MWBE Ordinance #4388 as a result of the findings of the Disparity Study as performed by Griffin & Strong, PC.

- The proposed document is an Ordinance to **repeal** in its entirety previously established Ordinance 4388, codified as City Code, Chapter 2, Division 5, Section 2-325 thru Section 2-331 and **replace** with the attached Ordinance inserted in lieu thereof as a result of the findings of the 2010 Disparity Study as performed by Griffin & Strong, PC.

- This Ordinance is put forth by the Law Division, Office of Contract Compliance.

- This Ordinance repeals and replaces Ordinance No. 4388 codified as City Code, Chapter 2, Division 5, Section 2-325 thru Section 2-331. The Administration, by and through the Law Division, has determined that such an amendment is allowable under the Code.

- This transaction requires the approval of the full City Council and proper adoption of the requisite readings.

- No expenditure of funds is required under this Ordinance.

ORDINANCE NO: _____

AN ORDINANCE TO REPEAL PART I, ARTICLE VI, DIVISION 5 OF THE CODE OF ORDINANCES OF THE CITY OF MEMPHIS SO AS TO ENACT A NEW PART I, ARTICLE VI, DIVISION 5, KNOWN AS "THE EQUAL BUSINESS OPPORTUNITY PROGRAM"; CONSISTENT WITH CERTAIN FINDINGS BASED ON THE "MINORITY AND WOMEN BUSINESS ENTERPRISE PROCUREMENT PROGRAM" DISPARITY STUDY AND LEGAL ANALYSIS REPORT AND OTHER DATA RELATIVE TO THE BUSINESS OPPORTUNITIES AVAILABLE TO MINORITY AND WOMEN BUSINESSES IN THE MEMPHIS METROPOLITAN STATISTICAL AREA (MSA)

WHEREAS, a study of available data, including data maintained by the City of Memphis and other public agencies, data gathered from a survey of businesses in the Memphis MSA, and other commercially available data regarding the economic opportunities available to businesses in the Memphis MSA was conducted by Griffin and Strong, P.C. under the direction of Rodney K. Strong, Esq., concluding in the City of Memphis Minority and Women Business Enterprise Program Disparity Study and Legal Analysis (the "Disparity Study"); and

WHEREAS, the purpose of conducting this study was to determine whether the economic opportunities available to Minority-owned and Women-owned businesses seeking contracting opportunities in the Memphis MSA were equal to those opportunities available to white male-owned businesses in the Memphis MSA; and

WHEREAS, the Disparity Study identified statistically significant disparities in the use of Minority-owned and Women-owned businesses in the Memphis MSA when compared to similarly situated white male-owned firms, which were the result of discrimination on the basis of race, gender and ethnicity; and

WHEREAS, the Disparity Study specifically identified evidence on loan denials from the National Survey of Small Business Finance showing minorities and women continue to have higher rates of loan denials; and

WHEREAS, the Disparity Study specifically identified evidence showing minorities and women continued to be substantially underutilized in the private marketplace; and

WHEREAS, these statistical and anecdotal findings taken as a whole give rise to an inference of continued discrimination and/or the continuing effect of past discrimination against minorities and women in business transactions in the Memphis Metropolitan Statistical Area. The foregoing findings on the private sector lead us to conclude that the City of Memphis has a strong basis in evidence to take narrowly tailored measures to ensure that it is not a passive participant in a private scheme of discrimination against women and minorities as prime or subcontractors; and

WHEREAS, the Disparity Study demonstrates that a program by the City of Memphis to reinforce and support outreach efforts to open contracting opportunities to all businesses will promote equal opportunity for all businesses regardless of race, gender or ethnicity, eliminate the discrimination suffered by minority and women-owned businesses, and ensure that the City of Memphis is not a passive participant in ongoing private sector discrimination in the Memphis MSA; and

WHEREAS, the Memphis City Council, through the Personnel & Intergovernmental Committee, received the Disparity Study on **April 13, 2010**; and

WHEREAS, there was specific, recorded evidence adduced that minority and women-owned businesses experience real and verifiable discrimination by race, gender and ethnicity in the conduct of commerce in the Memphis MSA; and

WHEREAS, the City of Memphis desires to do businesses only with those contractors who offer equal business opportunities for contracting work or services, without regard to business ownership by race, gender or ethnicity, and who do not tolerate or practice discrimination in contracting or subcontracting work or services in their private and public business activities; and

WHEREAS, the City of Memphis has determined that it is necessary to use its purchasing and contracting functions to ensure equal competitive opportunities for all businesses, regardless of race, gender or ethnicity; and

WHEREAS, the City recognizes the necessity for periodic review of and reporting on the implementation and operation of this division to ensure that it continues to effectuate equal competitive opportunities for all businesses, regardless of race, gender or ethnicity;

NOW THEREFORE,

SECTION 1. BE IT ORDAINED BY THE COUNCIL OF THE CITY OF MEMPHIS, That Part I, Article 6, Division 5 of the Code of Ordinances, City of Memphis, Sections 2-325 through Section 2-331 be repealed and deleted in their entirety and the following Sections inserted in lieu thereof so as to create the following:

Chapter 2
Administration

Art. VI Equal Business Opportunity Program

ARTICLE VI – Equal Business Opportunity Program

Division 5. Equal Business Opportunity Program

Sec. 2-325. 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 of Memphis 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 of Memphis 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 of Memphis 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 Ordinance shall be known as the "City of Memphis' Equal Business Opportunity Program Ordinance."

(c) *Adoption of the Findings and Conclusions of the Griffin & Strong, P.C. Report.* The City Council adopts the findings and conclusions of the Griffin & Strong, P.C. Report dated April 2010 (referred to in this division as the "GSPC Report").

(d) *Definitions.* The following words, terms and phrases, when used in this article and division, 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 non-professional services contracts, and construction contracts calculated in accordance with this

article and division 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 of Memphis 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.

Certification or Recertification shall mean the official recognition and approval by the Office of Contract Compliance that a business meets the qualification criteria of an AABE, HBE, ABE, NABE, or WBE, as set forth in this Ordinance. Certification or recertification relates to qualifications regarding ownership, control, and the applicant's economic disadvantage, not the quality of the service or product.

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 Contract Compliance (OCC).

Commercially Useful Function: For the purpose of determining whether a Business Enterprise is performing a Commercially Useful Function, OCC 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, OCC 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 its 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, OCC 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, non-professional 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 non-profit 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.

Contract compliance officer (CCO) shall mean the City official who manages specifically 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, 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, OCC 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, OCC will scrutinize relationships with other firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.

b. OCC 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. OCC 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, OCC 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 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 OCC 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, OCC will not deny certification solely on the ground that the MWBE-Owner lacks the license or credential. However, OCC 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) OCC 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. OCC 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, OCC 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, OCC must make a judgment about the control the MWBE-Owner exercises vis-à-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 OCC 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 **2-328(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 division 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-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

(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, 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.

Minority and Women business enterprise (MWBE) shall mean 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.

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 Contract Compliance shall mean the Office of Contract Compliance (OCC) in the City of Memphis.

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, OCC will consider all of the facts in the record, viewed as a whole, including without limitation the following:

(1) OCC 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 individual(s) must possess at least 51 percent of the 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.

(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 Contract Compliance.

(4) OCC 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 individual(s) 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 **2-327(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 warehouser 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 of Memphis to manage the daily administration of the provisions of this division and to assure that the intent of this division is carried out in all procurement activities and opportunities.

(1) The overall provisions of this division 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 division include the following:

a. Establishment of written procedures, informal guidelines, and forms as may be necessary to effectuate this ordinance.
b. Monitoring compliance with the requirements of this division.
c. Assist, where directed, the division of finance in establishing written procedures to implement this division;
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 division, including: (a) 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 (b) 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 2-331.

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 2-328 (g) as applicable.

l. Determination of whether any of the penalties set forth in Section 2-330 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 occur;

p. Investigation of alleged violations of this division, 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.

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

(f) Certification. For purposes of contracting with the City of Memphis 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 (TENNESSEE)) and certified as a minority or woman owned business enterprise by a City of Memphis approved central certification agency or any other certification agency deemed appropriate by the Office of Contract Compliance.

(g) *Graduation clause.* Certified AABEs, HBEs, ABEs, NABEs, or WBEs shall be deemed graduated from being certified as AABEs, HBEs, ABEs, NABEs, or WBEs when the MWBE has sales that exceed the average sales for the industry for three (3) consecutive years, as determined by the federal tax return 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 Contract Compliance 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 Contract Compliance 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 OCC 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 OCC 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 Engineer. Within 15 days of receipt of the appeal, a written decision will be issued to the firm by the committee via the OCC.

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. Upon graduation there will be no right of reentry.

(h) *Decertification.* The Office of Contract Compliance 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 one year. A business that is decertified may file an appeal with the City approved central certification agency. Any of the following reasons, which are not intended to be all-inclusive, are sufficient grounds for decertification:

(1) The business has changed to the extent that it no longer satisfies the ownership, control, and/or other requirements set forth in Section 2-325(d);

(2) The business fails to submit within a reasonable time period information requested by the Office of Contract Compliance;

(3) The business ceases to be a viable enterprise for profit because of involuntary bankruptcy, dissolution or other cessation of commerce.

(4) Information or evidence that was not available to the Office of Contract Compliance 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.

(5) Information was concealed or misrepresented by the firm in connection with the certification application or review conducted by the Office of Contract Compliance.

(6) 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 Contract Compliance 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 2-325(d).

Sec. 2-326. Equal Business Opportunity (EBO) Subcontracting Program

(a) Program Requirements.

(1) All Bidders/Proposers are required to make efforts to ensure that businesses are not discriminated against on the basis of their race, ethnicity or gender, and to demonstrate compliance with these program requirements at or prior to the time of Bid opening, or upon request by OCC. Bidders/Proposers are required to ensure that prospective subcontractors, vendors, suppliers and other potential participants are not denied opportunities to compete for work on a City contract on the basis of their race, ethnicity, or gender, and must afford all firms, including those owned by racial or ethnic minorities and women, opportunities to participate in the performance of the business of the City to the extent of their availability, capacity and willingness to compete.

(2) OCC will review information submitted by Bidders/Proposers pertaining to efforts to promote opportunities for diverse businesses, including MWBEs, to compete for business as subcontractors and/or Suppliers. A Bidder is eligible for award of a City contract upon a finding by OCC that the Bidder has engaged in, and provided with its bid submission documentation of, efforts to ensure that its process of soliciting, evaluating and awarding subcontracts, placing orders, and partnering with other companies has been

non-discriminatory. To assist prime contractors in this effort, the Office of Contract Compliance shall set forth in the solicitation documents for the Eligible Project the availability of businesses, including certified MWBEs within the relevant NAICS Codes for such Eligible Project.

(b) Incorporating EBO Chapter in Contracts.

(1) All proposals, bid specifications and contracts for projects which have participating goals, will incorporate by reference this division and all City procedures established pursuant thereto, and will contain the following clause:

"The contractor further agrees that its breach of the EBO provisions in the City's EBO ordinance shall subject it to any or all of the following penalties:

a. If the contractor is a MWBE, denial of recognition as an approved MWBE, for purposes of contracting with the City of Memphis, for a period not to exceed one year;
b. Withholding of ten percent of all future payments on the involved project until it is determined that the contractor is in compliance;
c. Exclusion from submitting a bid or proposals for a period not to exceed one year;
d. Termination by the City of the contract."

(2) All contracts for projects with participation goals will require the prime contractor to pay all MWBE subcontractors their pro-rata share of progress payments made by the City to the prime contractor. The pro-rata share will be based on all work completed and materials furnished by the subcontractors in the period for which the progress payment was made. Payments will be made within a reasonable period of time (as specified by the City's EBO procedures), unless the prime contractor has good cause for not making any such payments. The payments may be reduced by the pro-rata share of retainage withheld from the prime contractor up to a maximum of five percent. The contracts will also require the prime contractor, prior to receiving a progress payment from the City, to certify that it has paid all previous progress payments to MWBE contractors, unless the contractor demonstrates good cause for not making any such payments and furnishes written notification of any such cause to the user division, the Contract Compliance Office and the affected MWBE subcontractor.

(3) All contracts for projects with participation goals will require the prime contractor to report all payments to and utilization of MWBE subcontractors and all other subcontractors for review and approval before final payment is made by the City under the contract.

(c) Subcontractor Project Plan.

(1) Subcontractor Project Plan. Each successful Bidder shall submit with her/his executed contract a completed and signed Subcontractor Project Plan, in a form approved and provided by the Office of Contract Compliance, which lists the name, address,

telephone number and contact person of each subcontractor or other business to be used in the contract, the NAICS Code and the type of work or service each business will perform, the dollar value of the work and the scope of work, the ownership of each business by race and gender, if applicable the AABE, HBE, ABE, NABE, or WBE certification number of each business, and any other information requested by the Office of Contract Compliance. However, each Bidder shall submit with her/his bid the names, address, percent of bid allotted, dollar value of bid allotted to each MWBE. In order for the Office of Contract Compliance to officially consider a firm to be an MWBE, the MWBE firm must be approved by the Office of Contract Compliance and certified by a City approved certification agency prior to the Bidder's submission of the Bid or Proposal.

(d) OCC Review of Bidder Submissions.

The OCC shall determine whether a Bidder has satisfied all contracting requirements as requested by this Ordinance, the Subcontractor Project Plan, Good Faith Effort Documentation and its review of other relevant facts and circumstances, including complaints received as part of the bid or proposal process and other Bidders. In reviewing the documents submitted by a Bidder to determine whether the Bidder has satisfied the good faith efforts requirement of this section, the Office of Contract Compliance will consider, among other things, the total project dollars subcontracted to or expended for services performed by other businesses, including certified MWBEs, whether such businesses perform Commercially Useful Functions in the work of the contract based upon standard industry trade practices, whether any amounts paid to Supplier businesses are for goods customarily and ordinarily used based upon standard industry trade practices, and the availability of certified MWBEs within the relevant NAICS Codes for such Eligible Project.

(1) Receipt of Complaint of Discrimination in the Bid Process

The Office of Contract Compliance shall accept complaints of alleged discrimination during the Bid process regarding any participant in the Bid process. Where the complaint of discrimination is specific to the procurement which is under consideration by the City, the Office of Contract Compliance will investigate said complaint, determine its validity, and determine whether the actions complained of impact the Bidder's responsiveness on the specific procurement. The Accused will have the opportunity to review the complaint and respond in writing to the allegations of discrimination. Allegations of discrimination based on events, incidents or occurrences which are unrelated to the specific procurement may be placed in the Bidder's file maintained in the OCC. Complaints of discrimination will be one component taken under consideration when good faith efforts documentation has been filed.

(2) Determination of Violation of EBO Process

Where the Office of Contract Compliance investigates a complaint of discrimination that is related to the specific Bid process, as described in Section 2-326(4)(a) above, the

details of that investigation shall be recorded and maintained in the Office of Contract Compliance pursuant to Section 2-326(4)(a).

(e) Equal Business Opportunity Subcontracting Program Bid Process.

The Covenant of Non Discrimination, the Subcontractor Project Plan, Good Faith Efforts Documentation and any other information required by OCC in the solicitation document must be completed in their entirety by each Bidder and submitted with the other required Bid documents in order for the Bid to be considered as a responsive Bid. Failure to timely submit these forms, fully completed, will result in the Bid being considered as a non-responsive Bid, and therefore, excluded from consideration.

(f) Contract Progress.

The Office of Contract Compliance shall require contractors on Eligible Projects to complete and submit to OCC documentation regarding their utilization of MWBEs, along with all other pertinent records required by OCC. Said documentation shall be in a format that is established by the Office of Contract Compliance. These records will be submitted to OCC monthly. The Subcontractor Project Plan shall not be changed or altered after approval of the plan and award of the contract without the written approval of the OCC. A written letter to the CCO requesting approval to change the Subcontractor Project Plan must be submitted prior to any change in the plan or termination of an MWBE's contract.

(g) Database.

The City will maintain a database identifying MWBEs that will include the types of services provided by the business enterprise and contact information for the business enterprise. A list from the database will be made available to Bidders to assist them in their efforts to meet the requirements of the Equal Business Opportunity Subcontracting program. The list prepared from the database will specify which firms the City of Memphis has determined to be certified minority and women owned business enterprises, in accordance with the City of Memphis definitions for MWBEs. This list is not exhaustive.

(h) Minority and Women Business Enterprise Utilization.

To ensure that the Equal Business Opportunity Subcontracting Program achieves its purpose, the OCC will verify the MWBE certification status of each firm claiming such designation. Only certified MWBEs may be designated in reports as MWBEs for purposes of City projects. The percentage of MWBEs utilized by a Bidder will be calculated by dividing the MWBE's price for providing direct labor or a bona fide service by the Bidder's total dollars as identified in the Bid.

(i) Equal Business Opportunity Program Compliance, Monitoring and Audit.

The City of Memphis reserves the right to conduct an audit of a Bidder's work on an Eligible Project to confirm the Bidder's compliance with this Equal Business Opportunity Subcontracting Program, including without limitation compliance with the Covenant of Non Discrimination, the Good Faith Efforts Documentation, and the Subcontractor Project Plan.

(j) Prohibition Against Discrimination and Reporting Allegations.

Bidders shall prohibit discrimination against any person or business on the basis of race, color, creed, religion, sex, domestic relationship status, parental status, familial status, sexual orientation, disability, age, national origin, political affiliation, gender identity, or racial profiling. Bidders shall develop a written policy statement that shall be approved by the Office of Contract Compliance and distributed to all employees. Bidders shall conduct their contracting and purchasing programs so as to prohibit any discrimination and to resolve all allegations of discrimination. Bidders shall include a clause in its subcontracts that require the subcontractor to adopt and distribute a written non-discrimination policy that is the same as that of the contractor. The Office of Contract Compliance shall review and investigate all allegations of discrimination which claim that prohibited forms of discrimination have occurred. Allegations of discrimination that are determined to have merit may be subject to penalties decided upon by the OCC in consultation with the initiating department.

(k) Penalties.

Breach of the Equal Business Opportunity Subcontracting program by a Bidder shall be subject to any or all of the penalties set forth in Section 2-330 below.

Sec. 2-327. Equal Business Opportunity Goals

(a) Overall goals. In order to provide MWBEs equal opportunity and access to participate in all City procurement of construction-related services, goods and non-professional services and professional services, the City hereby incorporates the following six factors as part of its goal setting methodology in establishing annual MWBE goals:

(1) The number of minority and women owned businesses in the relevant market area;

(2) The availability of minority and female owned businesses in the relevant market area willing to do business with the City;

(3) The general availability of minorities and females having the requisite skills to manage and/or form businesses in the relevant market area;

(4) The percentage of minority and female businesses compared to the total number of businesses in the relevant market;

(5) The availability of minority and female businesses in the relevant market area which an agency can reasonably add to its certification list; and

(6) The degree of outreach and training the City is reasonably able to undertake as a means of making opportunity available to minority and female businesses.

The initial annual MWBE goals shall be:

a. Goals for subcontracting construction:
Sixteen percent - Minority
Three percent - Women
Nineteen percent - Total Goal

b. Goals for Prime construction:
Fifteen percent - Minority
Three percent - Women
Eighteen percent - Total Goal

c. Goals for Architecture & Engineering Services:
Twenty-two percent - Minority
Seven percent - Women
Twenty-nine percent - Total Goal

d. Goals for goods and supplies:
Twelve percent - Minority
One percent - Women
Thirteen percent - Total Goal

e. Goals for non-professional services:
Twenty-three percent - Minority
Two percent - Women
Twenty-five percent - Total Goal

f. Goals for other professional services:
Thirteen percent - Minority
Two percent - Women
Fifteen percent - Total Goal

The annual goals provided above shall be reviewed annually by the EBO advisory committee. These overall MWBE participation goals are only intended to be benchmarks evaluating the overall performance of the EBO program on an annual basis. These participation goals are not and, shall not be quotas. For purposes of determining or satisfying annual participation goals,

only the participation of minority or woman owned business enterprises located within the Memphis MSA and certified by the City's contracted central certification agency will be considered.

(b) Project participation goals. On individual contracts or projects, there is no requirement that the above annual EBO goals be met. The EBO advisory committee shall have the responsibility of determining whether a project participation goal is warranted on any given project. On any individual contract or project, these annual goals may not be met, or may be exceeded, depending upon several factors, such as the availability of qualified MWBE business enterprises, the nature of the project, adverse impact on non-MWBE business enterprise, good faith efforts of contractors or vendors, or other relevant factors. For purposes of determining or satisfying project participation goals, only the participation of minority or woman owned business enterprises located within the Memphis MSA and certified by the City's contracted central certification agency will be considered.

(c) *Construction.*

(1) *Construction projects goals setting committee.*

a. There is hereby established a construction projects goals setting committee ("construction committee"). The membership of this committee will consist of the CCO, serving as chairperson; the City engineer or designee; and the City attorney or designee.

b. The construction committee shall establish specific participation goals for each construction project, the cost of which is estimated to be in excess of $100,000.00. Said goals will be individual minority and women business enterprise participation goals, the sum of the individual goals not to exceed 50 percent of the total contract amount for each project.

(2) *Outreach for construction.* For any construction project, the CCO, and, in certain instances, in conjunction with the purchasing agent and the City engineer, will make good faith efforts to promptly notify MWBEs, which are available to provide the needed construction services, of the contracting opportunities. The notification shall advise the MWBEs:

a. Of the specific work the City intends to contract;

b. That their interest in the project is being solicited; and

c. How to obtain request for proposals or invitations to bid or information or specifications on the proposed contract.

(d) *Goods, supplies and non-professional services.*

(1) *Goods, supplies and non-professional services goals setting committee.*

a. There is hereby established a construction projects goals setting committee ("Goods, supplies and non-professional services goal setting committee" or otherwise referred to as "GSNP Committee"). The membership of this committee

will consist of the CCO, serving as chairperson; the City's purchasing agent or designee; and the City attorney or designee.

b. The GSNP Committee shall establish specific participation goals for each goods, supplies and non-professional services project, the cost of which is estimated to be in excess of $50,000.00. Said goals will be individual minority and women business enterprise participation goals, the sum of the individual goals not to exceed 50 percent of the total contract amount for each project.

c. If participation goals are established for a project, the contractor shall provide to the CCO documentation of good faith efforts to achieve said goals in the same manner as provided in Section 2-328(d) if the participation MWBE goal is not met for approval.

(2) Outreach for goods, supplies and non-professional services. For all anticipated procurement of goods and non-professional services, the CCO, and, in certain instances, in conjunction with the purchasing agent or the soliciting division, will make good faith efforts to promptly identify and notify MWBEs, which are available to provide the needed goods or services, of contracting opportunities. The notification shall advise the MWBEs:

a. Of the specific work the City intends to contract;

b. That their interest in the project is being solicited; and

c. How to obtain request for proposals or invitations to bid or information or specifications on the proposed contract.

(e) *Professional services.*

(1) *Professional services projects goals setting committee.*

a. There is hereby established a professional services review committee ("professional services review committee"). The committee shall consist of the CCO serving as chairperson, the director of the user division, the director of finance, and the City attorney, or the respective designee of each.

b. The professional services committee shall review a professional services project costing $50,000.00 or more to determine which, from the following, is or are the best methods for ensuring MWBE participation.

c. If participation goals are established for a project, the contractor shall provide to the CCO documentation of good faith efforts to achieve said goals in the same manner as provided in Section 2-328(d) if the participation MWBE goal is not met for approval.

(2) *Outreach for professional services.* For all anticipated procurement of professional services, the CCO, and, in certain instances, in conjunction with the purchasing agent and director of the soliciting division, will make good faith efforts to identify and notify

MWBEs, which are available to provide the needed services, of the contracting opportunities on annual basis. Said notification shall advise the MWBEs:

a. Of the specific work the City intends to contract;

b. That their interest in the project is being solicited; and

c. How to obtain request for proposals or invitations to bid or information

Sec. 2-328. Requirements for Bidders, Contractors, and Joint Ventures.

(a) General requirements.

(1) All Bidders on any construction project, or any professional services project in which the Bidders subcontract with MWBEs or enter into joint ventures with MWBEs, are required to complete and submit, as a part of their bids, the following:

a. Schedule of participating certified MWBE subcontractors or joint venturers;

b. Affidavit declaring the Bidder's intention to fully comply with the provisions of this chapter and all City procedures established pursuant hereto.

c. Letters of intent from subcontractors within ten days after notification of contract award.

(2) Proposed changes to the designated participation of women or minority business enterprises in a Bidder's bid or proposal, on any project, after submission of bids, including during performance of a contract, must be submitted to the user division and the CCO. Bidders and contractors must make a good faith effort to replace a woman or minority business enterprise subcontractor or joint venturer with another certified woman or minority business enterprise, based on said enterprises' availability. All substitutes for women or minority business enterprise subcontractors or joint venturers require prior approval by the CCO, not to be unreasonably withheld; and said approval may be granted for reasons including, but not limited to, the following:

a. Subcontractor or joint venturer requests that its subcontract or joint venture agreement with the prime contractor be voided;

b. Subcontractor or joint venturer is unable to perform the work;

c. Subcontractor or joint venturer has consistently performed unacceptable work.

(3) The apparent low and best Bidder on any project must submit copies of all executed subcontracts or joint venture agreements with MWBEs listed in the bid

documents, within ten business days after the prime contractor receives an executed contract.

(4) A Bidder's failure to submit any information required by this chapter or the City's EBO program procedures may render the bid nonresponsive and ineligible for consideration.

(b) *Regulations on brokering services.*

(1) MWBEs are required to perform a commercially useful function on contracts let or made pursuant to this chapter.

(2) Only expenditures to or contracts with MWBEs that perform a commercially useful function in the work of a contract may be counted towards the MWBE goal. A MWBE is considered to perform a commercially useful function when it is responsible for execution of a distinct element of the work of a contract and carrying out its responsibilities by actually performing, managing and supervising the work involved. To determine whether a MWBE is performing a commercially useful function, the City will evaluate all relevant factors such as, for example, the amount of work subcontracted and industry practices.

(3) Consistent with normal industry practice, a MWBE may enter into subcontracts. If a MWBE subcontracts 50 percent or more of the work, the MWBE shall be presumed not to be performing a commercially useful function unless the MWBE holds a general contracting license and holds the prime contract with the City. The MWBE may present evidence to rebut this presumption to the City.

(c) *Construction projects.*

(1) Goal achievement.

a. Contractors are responsible for achieving participation goals, as established by the construction committee, on construction projects and maintaining said goals for the duration of the project.

b. If the prime contractor or bidder on a construction project is a certified minority or woman business enterprise, then the participation goal for the MWBE classification of said prime contractor or bidder shall be deemed met.

(d) *Good faith efforts.* Any bidder, submitting a bid on a construction project, which does not meet participation goals established by this chapter, must provide in its bid, documentation of good faith efforts to achieve said goals. Documentation of good faith efforts will include, but not be limited to, the following:

(1) Attendance at pre-bid conference, if held;

(2) Copies of written notification sent to all City certified MWBEs that perform the type of work to be subcontracted, in sufficient time to allow said MWBEs to participate

effectively, soliciting said MWBEs' interest in working on the project and advising the MWBEs:

a. Of the specific work the bidder intends to subcontract;

b. That their interest in the project is being solicited; and

c. How to obtain information for the review and inspection of the plans, specifications and requirements of the bid.

(3) A written statement that economically feasible portions of work were selected to be performed by MWBEs, including, where appropriate, segmenting elements of work or combining elements of work into economically feasible units. The ability of the bidder to perform the work with its own work force will not in itself excuse the bidder from making good faith efforts to meet participation goals.

(4) A statement of the efforts made to negotiate with MWBEs, including:

a. The names, addresses and telephone numbers of MWBEs, who were contacted;

b. The date negotiations took place;

c. A description of the information provided to MWBEs regarding the plans, specifications and requirements for portions of the work to be performed.

(5) A statement of the efforts made to assist MWBEs contacted who need assistance in obtaining bonding, insurance, financing, or in reviewing the plans, specifications and requirements of the bid.

(6) A statement that the bidder submitted all quotations received from MWBEs and, for those quotations not accepted, a statement of the reasons why the MWBE will not be used to work on the project; provided, that submission of the actual quotations received from MWBEs within ten business days from bid opening shall be deemed a compliance of this subsection; provided, further, that during this ten-day period no bids shall be solicited from any MWBEs for the involved project. Receipt of a lower quotation from a non-MWBE will not in itself excuse a bidder's failure to meet participation goals.

(7) Outreach Efforts Documentation. A statement describing the Bidder's outreach efforts to identify, contact, contract with, or utilize businesses, including certified MWBEs, as subcontractors or Suppliers on the Eligible Project. The OCC shall set forth in the solicitation document the documents that a bidder may submit to demonstrate its outreach efforts, and such documentation may include, without limitation, evidence of the following:

a. The Bidder contacted the Office of Contract Compliance to identify available businesses to work on the Eligible Project, including certified

MWBEs, regardless of race, gender or ethnicity. The Office of Contract Compliance will supply a letter to be included in the bid of the efforts rendered by the Bidder as it relates to the OCC recommendations.

b. The Bidder placed notices of opportunities for qualified businesses to perform subcontracting work on the Eligible Project in newspapers, trade journals, and other relevant publications, including publications specifically targeted to MWBEs, or communicated such notices of opportunities via the Internet or by other available media or means.

c. The Bidder submitted invitations to bid for work on the Eligible Project to qualified businesses, including certified MWBEs, regardless of race, gender or ethnicity.

d. The Bidder included in such notices and invitations a full disclosure of the criteria upon which bids, proposals or quotes would be evaluated, and also included contact information for inquiries, submissions, or requests to review any necessary bid documents.

e. The Bidder promptly responded to inquiries, provided necessary physical access and time for interested businesses to fully review all necessary bid documents, and otherwise provided information, access and time necessary to allow all interested businesses to prepare bids and quotes, regardless of race, gender or ethnicity.

f. For each business which contacted or was contacted by the Bidder regarding subcontracting or other services on the Eligible Project, but was not contracted with or otherwise utilized on the Eligible Project, the Bidder shall provide a written statement setting forth the dates of such contacts, the nature of such contacts, and the reasons why an agreement was not reached regarding work to be performed on the project. The Bidder shall maintain all written documents reflecting such contacts, including bids, quotes and proposals.

(7) As to each MWBE contacted, which the bidder considered not to be qualified, a statement of the reasons for the bidder's conclusion based on an investigation of said MWBE's capabilities. The determination of whether a bidder has made good faith effort will be made by the CCO, the director of finance and the purchasing agent, prior to the award of the project.

(e) *Post-award contract compliance.*

(1) The contractor shall submit monthly reports in such form, manner and time as required by the CCO and, in certain instances, the director of finance and/or purchasing.

(2) The contractor shall notify the user division and the contract compliance office of any situations in which regularly scheduled payments are not made to MWBE subcontractors.

(3) At the completion of performance on the construction project, the contractor or awardee is required to submit a final schedule of participating certified MWBE subcontractors to the user division and the contract compliance office. This document will be an affidavit denoting final contract amount and payments made to MWBE subcontractors.

(f) *Exceptions and waivers.*

(1) The CCO will waive a construction project's participation goals for a bidder when reasonable good faith efforts are shown by such bidder.

(2) The CCO will waive the MWBE good faith efforts requirements of this chapter under the following circumstances:

a. Whenever the CCO finds, with the advice of the user division and purchasing agent, that any needed services or goods are available only from a single source and the prospective contractor or awardee is not currently disqualified from doing business with the City based on a failure to comply with the provisions of this chapter or City procedures established pursuant hereto; or

b. If the user division certifies in writing to the CCO that an emergency exists, and no MWBEs capable of performing the emergency work are immediately available.

(g) The Promotion of Joint Ventures

(1) The Office of Contract Compliance shall encourage, where economically feasible, establishment of joint ventures to ensure prime contracting opportunities for all businesses, including certified MWBEs, on eligible projects.

(2) Based upon the scope of work and market availability, the OCC shall determine on a project-by-project basis on all eligible projects valued over $5,000,000.00 whether good faith efforts to enter into a joint venture shall be required for such project. On such projects in which good faith efforts to enter into a joint venture relationship is required, no bid shall be accepted unless submitted by a joint venture, unless the OCC has determined that good faith efforts to enter into a joint venture have been demonstrated. The OCC shall determine whether good faith efforts to enter into a joint venture have been adequately demonstrated based on a review of relevant facts, documents and circumstances.

(3) As to each joint venture under this section, 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 OCC as set forth in bid documents or otherwise, and provides that the joint venture shall continue for, at a minimum, the duration of the project.

(4) The OCC shall review and approve all contractual agreements regarding the terms and provisions of each joint venture relationship prior to the award of a contract on an eligible project to the joint venture, including agreements pertaining to:

a. The initial capital investment of each venture partner;

b. The proportional allocation of profits and losses to each venture partner;

c. The sharing of the right to control the ownership and management of the joint venture;

d. Actual participation of the venture partners on the project;

e. The method of and responsibility for accounting;

f. The method by which disputes are resolved; and

g. Any additional or further information required by the OCC as set forth in bid documents or otherwise. Joint ventures may submit agreements for pre-approval no later than 7 calendar days prior to the date set for receipt of bids on an eligible project. Otherwise, agreements must be submitted on or before the date set for receipt of bids on an eligible project. A bid submitted by a joint venture that does not include a satisfactory written joint venture agreement in accordance with the requirements of this section shall be deemed non-responsive and rejected.

(5) The joint venture, and each member of the joint venture, shall provide the OCC 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.

(6) Penalties for noncompliance. Any responsible bidder who fails to comply with this section shall be subject to any or all of the penalties contained in Section 2-330.

Sec. 2-329. Mediation of Disputes between Joint Venture Team Members and/or Prime and Subcontractors.

(a) If, after the award of a contract to a joint venture team, any member of the joint venture team believes that the terms and conditions of the agreement as approved by the OCC have not been complied with, then such member may seek review and mediation of such agreement before the CCO. The request for review must be made in writing.

(b) If, after the award of a contract, a dispute arises between the prime contractor and a subcontractor regarding performance of work or provision of services or supplies on the Eligible Project, then such prime contractor or subcontractor may seek review and mediation of the issue before the CCO. The request for review must be made in writing. If the dispute involves an alleged violation of the City's Prompt Payment requirement, as set forth in Section 2-331 below, the contractor, subcontractor and the City shall proceed as is set forth in section 2-331.

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

(d) The CCO shall have authority to make recommendations in an attempt to resolve the dispute.

(e) In the event that the mediation with the CCO does not resolve all disputes, the CCO shall have the option of referring mediation proceedings to a qualified outside mediator, contingent upon the consent of the interested parties.

Sec. 2-330. Penalties for Noncompliance.

A contractor or MWBE who fails to comply with any portion of this division, and whose failure to comply continues for a period of 30 calendar days after the contractor or MWBE receives written notice of such noncompliance from the OCC, shall be subject to any or all of the following penalties:

(a) Withholding of ten percent of all future payments for the eligible project until the Office of Contract Compliance determines that the contractor is in compliance with this division.

(b) Withholding of all future payments under the eligible project until it is determined that the contractor is in compliance with this division.

(c) Cancellation of the eligible project.

(d) A determination by the CCO that a MWBE has failed to comply with section **2-328(b)**, regulations on brokering services, shall subject the offending party to revocation of the City certification as a MWBE for a period not to exceed one year.

(e) If the contractor is a MWBE, denial or revocation of the City certification as a MWBE for a period not to exceed one year;

(f) Refusal of all future contracts or subcontracts with the City for a minimum of one year and a maximum of five years from the date upon which this penalty is imposed.

(g) An appeal by a nonresponsive bidder, contractor, or MWBE under this chapter will be resolved pursuant to City of Memphis appeals procedures as adopted.

(h) The CCO may require such reports, information and documentation from bidders, contractors, MWBEs, user division and the head of any division or office of the City as are reasonably necessary to determine compliance with the requirements of this chapter.

(i) Criminal sanction for fraud. If the CCO determines that substantial evidence is available indicating that fraud or other unlawful activity has been committed:

(1) By a MWBE certification or re-certification applicant;

(2) By a certified MWBE or majority prime contractor falsely reporting the utilization of MWBE subcontractors; or

(3) By an individual or firm attempting to benefit from or participate in the EBO program, through fronting activity, false representation of a commercially useful function, or other fraudulent or unlawful activity, the matter shall be referred to the appropriate legal authorities and the City of Memphis Legal Division for criminal prosecution; and, in the event a conviction or guilty plea is obtained stemming from such criminal prosecution, the business entity and principals shall be barred from participation in City contracts for a minimum of one year and a maximum of five years to be determined by the MWBE Advisory Committee.

(j) Notification of noncompliance, denial or revocation of certification. Upon a determination of non-compliance with the provisions of this chapter or any City procedures established pursuant hereto, the CCO shall notify the affected party in writing by certified mail, return receipt requested, setting forth the reasons for the determination of non-compliance. Any appeal on the basis of non-compliance shall be conducted in conformity with procedures established by the City of Memphis as adopted.

The City of Memphis has contracted with a central certification agency to review, investigate, certify and re-certify MWBE business enterprises. The City of Memphis through the Office of Contract Compliance maintains the right to review, reject and/or accept reciprocal certification by other agencies based upon Administrative recommendation. Upon a denial or revocation of certification as a MWBE by the central certification agency, the City of Memphis hereby adopts and recognizes the policies, procedures and appeals process of the certification agency as controlling.

Sec. 2-331. Outreach and Assistance to Subcontractors by the Office of Contract Compliance.

To ensure that opportunities to participate on City contracts are available to the widest feasible universe of interested, available and qualified businesses, the Office of Contract Compliance shall develop and implement a written comprehensive outreach program aimed at increasing business participation in the City's contracting and procurement process. This program may include, without limitation, any or all of the following:

(a) The Office of Contract Compliance may disseminate at community events, trade shows, and other appropriate business functions, and publish at regular intervals, in print and in

electronic media (including publications or electronic media targeted to MWBEs and small businesses) information describing the equal business opportunity program, the small business opportunity program, and the functions of the Office of Contract Compliance. In addition, the Office of Contract Compliance may disseminate information in print and/or electronic form, may provide individualized counseling, and/or may conduct seminars regarding the certification process.

(b) The Office of Contract Compliance may establish a procedure to engage in continuous recruitment and outreach efforts directed at business assistance organizations to increase the pool of businesses available to do business with the City. The Office of Contract Compliance may identify suppliers through business development organizations and participation at various trade shows, supplier diversity groups and work with various national and local supplier development counsels and organizations.

(c) The Office of Contract Compliance may disseminate at community events, trade shows, and other appropriate business functions, and publish at regular intervals, in print and in electronic media information identifying ongoing contracting opportunities with the City, and providing contact information by which businesses may obtain additional information from the Office of Contract Compliance. OCC will provide this information in languages other than English, where appropriate. To the extent feasible, the Office of Contract Compliance may enter into arrangements to share data regarding upcoming City projects, and subcontracting opportunities on the projects, with other businesses and agencies or jurisdictions in the Memphis MSA.

(d) The Office of Contract Compliance may assist businesses in submitting bids for eligible projects by disseminating information in print or electronic form, by providing individualized counseling, and/or by conducting seminars regarding the process for submitting a bid on a City project. The Office of Contract Compliance may sponsor "How to Do Business with the City of Memphis" seminars and invite a wide array of businesses.

(e) The Office of Contract Compliance may actively encourage businesses to attend the pre-bid conferences, providing face-to-face and one-on-one meeting opportunities with employees of the City within the divisions and departments that are involved with the contracting and procurement process. OCC may establish and implement training and awareness programs with the employees of the City's user departments to educate them with regard to increasing utilization of a wide array of businesses.

(f) The Office of Contract Compliance may provide information and advice to the Purchasing Department regarding the effectiveness of current bidding procedures in facilitating bidding on eligible projects by the widest feasible universe of interested businesses. This information may include suggestions regarding how to arrange solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate the participation of all interested businesses. In this regard, the Office of Contract Compliance may provide and encourage feedback from contractors and subcontractors regarding every aspect of the City's procurement process and may establish a system to allow for anonymous comments to be sent through the mail.

(g) The Office of Contract Compliance may create workshops for businesses located within the City on how to compete in the private sector, including advice on marketing, soliciting, and preparing a bid. OCC may establish a program which will incorporate business and entrepreneurial training and assistance mentoring, matchmaking, individual consulting and regular training workshops and seminars. To accomplish the same, OCC may reach out to and collaborate with MSA higher educational institutions.

(h) The Office of Contract Compliance may develop communications and other written materials that are meant to encourage and provide information to contractors to increase their utilization of subcontractors. In addition, OCC may sponsor networking events that allow businesses to meet each other and that create an opportunity for contractors to discuss with subcontractors upcoming needs.

(i) The Office of Contract Compliance may develop a resource directory to be provided to interested businesses, with information regarding assistance in bonding and financing, financial management, accounting, construction management and technical assistance.

(j) The Office of Contract Compliance may establish policies to prohibit discrimination in the provision of credit or bonding regarding City of Memphis contracts.

(k) The OCC may: a) Develop a technical assistance program to prepare small businesses to compete for specific contracts; b) Implement and monitor a supportive services program to develop and improve immediate and long term business management, record keeping and financial and accounting capability for businesses; c) Develop and provide services to help businesses improve their long term development, increase their opportunities to participate in a variety of kinds of work, handle increasingly significant projects, and achieve self sufficiency; d) Establish a program to assist new, start-up or emerging businesses; and e) Assist businesses in developing their capability to utilize emerging technology and conduct business through electronic media.

(l) The Office of Contract Compliance may create and maintain records on all subcontractor participation on City projects. The office may perform investigations regarding the actual utilization of subcontractors during the term of the contract as compared with the anticipated use of subcontractors at the time of Bid submittal. Subcontractors shall report the amount of work they anticipate performing on the contract and will report the actual work performed and the amount billed. The Office of Contract Compliance will allow subcontractors to confirm the status of their subcontracts and the payments received thereunder.

(m) The Office of Contract Compliance may continue to develop its website to provide general information on doing business with the City, on the bid process, on how to get certified, to provide a calendar of events, bid lists, bid status reports, to post solicitation notices, and to provide downloadable forms and other appropriate information. In addition, contractors that have been awarded City contracts may be posted on the website to allow businesses to target their marketing efforts to contractors that have worked or are working with the City.

(n) The Office of Contract Compliance shall establish a mechanism by which a business can file an administrative complaint with the City if it believes a prime contractor or the City is discriminating in the award of contracts or subcontracts.

(o) The Office of Contract Compliance is authorized to develop and implement such other and further outreach activities and programs as the Officer may from time to time recommend. From time to time an overall evaluation of the effectiveness of the program with regard to non-discrimination in contracting shall be conducted. Appropriate changes to the measures and programs based on the results of the evaluations will be implemented.

(p) Prompt Payment of Subcontractors. Contractors awarded City of Memphis contracts shall ensure the prompt and full payment of any subcontractors working on the contract within five (5) business days of the subcontractor's satisfactory completion of the work assigned to the subcontractor.

(1) Contractors shall not withhold payment from subcontractors who have satisfactorily completed work until such time as the contractor receives payment from the City of Memphis.

(2) A Contractor who fails to ensure the prompt and full payment of subcontractors shall be subject to the penalties set forth under Section 2-330.

(3) In the event of a good faith dispute regarding the amount of payment due to a subcontractor, contractor and subcontractor shall attend a binding arbitration within seven (7) days of notice by the Office of Contract Compliance in order to resolve any payment disputes. If the arbitrator determines that the subcontractor is entitled to payment under the subcontract, Contractor shall be required to pay the subcontractor within forty eight (48) hours of the arbitrator's decision. In the alternative, the contractor and subcontractor may utilize the mediation mechanism set forth in Section 2-329, but only if such alternative is agreed to by the contractor, subcontractor, and the Contract Compliance Officer.

(4) The CCO is authorized to make a determination that the interests of the City are best served by issuing joint checks to resolve a dispute between vendors and suppliers, prime and subcontractors or sub consultants, or joint venture partners. In such circumstances, the CCO will issue a written request to the Director of Finance to issue two checks, in amounts deemed by the CCO to be equitable upon agreement by all parties involved. The Division of Finance will issue these checks exclusively to the CCO.

(q) Reporting by the Office of Contract Compliance.

(1) The CCO shall cause to be issued periodically, but no later than thirty (30) months after the effective date of this division, reports on the operation of this ordinance. The CCO shall be authorized to contract with or retain outside consultants or experts in connection with preparing a report and to assist in assembly, review and analysis of data necessary to prepare such report.

(2) The Office of Contract Compliance shall provide to such consultants or experts such records in its custody as may be necessary to evaluate the operation of this division and the extent to which the purposes of this division are accomplished. A report shall include any findings or recommendations regarding the economic opportunities available to AABEs, HBEs, ABEs, NABEs and WBEs in the Memphis MSA and any recommendations regarding changes to this division or the enactment of any additional programs, procedures or strategies to better effectuate the purposes of this division.

(3) Reports issued under this section shall be delivered to the Mayor and to the City Council, a copy of any report(s) shall be maintained at the OCC for review, and copies shall be made available to the general public upon written request.

(4) City of Memphis' divisions, boards, commissions and quasi-governmental agencies as well as joint City/County agencies shall submit to the OCC their respective diversity plans, reports, and accomplishments on a quarterly basis. Any agency or business concerns receiving any City or City/County PILOTs, TDZs, TIFFs, grants or benefits shall be required to submit to the OCC thru the relevant governing agency, board or commission their respective diversity plans, reports and accomplishments on a quarterly basis. Boards, commissions or quasi-governmental agencies in need of diversity plans will have the opportunity to work in conjunction with the OCC to develop an appropriate and suitable diversity plan.

(r) Miscellaneous

(1) City's Role in Dispute Resolution

All actions taken by the Office of Contract Compliance to ensure the fair and equitable treatment of subcontractors or joint venture partners working on City of Memphis projects or seeking work on City of Memphis projects are done pursuant to the City's Non-Discrimination Policy and shall not be construed as the City taking a position as to the merits of the dispute nor creating any privity of contract between the City and any contractor or subcontractor. Further, no contractor working on a City of Memphis project or seeking work from the City of Memphis shall have any claim against the City for any actions taken to ensure the fair and equitable treatment of subcontractors working on City of Memphis projects or seeking work on City of Memphis projects.

(2) Severability

If any provision of this division or any application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this division which can be given effect without the invalid provisions or applications, and are to this end declared to be severable.

(3) Sunset clause

This ordinance shall sunset on **June 30, 2015**, unless prior to such date the City Council, after conducting public hearings, finds that the purposes of this division have not yet been achieved, in which case it may extend the effective period of this division for an additional five (5) years.

(4) Bid preferences.

If upon review of the results of the annual program goals, the City determines that it has not achieved the individual MWBE program goals based on contracts let or awards made during the preceding fiscal year for women or minority business enterprises, then the City may consider amending said ordinance to include bid preferences as maybe permitted by law.