

NOTICE OF PROPOSED RULE

POSTING DATE: January 14, 2019
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The Small & Minority Business Resources (SMBR) Department proposes to adopt the following rule for the enforcement of the City of Austin's MBE/WBE Procurement Program Ordinance City Code Chapter 2-9A-D after March 17, 2019.

Comments on the proposed rule are requested from the public. Comments should be submitted to: Edward Campos, Assistant Director, SMBR, 4201 Ed Bluestein Blvd., Austin, Texas 78721, 512-974-7206 or via email at edward.campos@austintexas.gov. To be considered, comments must be submitted before February 15, 2019, the 32nd day after the date this notice is posted. A summary of the written comments received will be included in the notice of rule adoption that must be posted for the rule to become effective.

EFFECTIVE DATE OF PROPOSED RULE

A rule proposed in this notice may not become effective before the effective date established by a separate notice of rule adoption. A notice of rule adoption may not be posted before February 15, 2019 (the 32nd day after the date of this notice) nor after March 25, 2019 (the 70th day after the date of this notice).

If a proposed rule is not adopted on or before Monday, March 25, 2019, it is automatically withdrawn and cannot be adopted without first posting a new notice of a proposed rule.

TEXT OF PROPOSED RULE

A copy of the complete text of the proposed rule is available for public inspection and copying at the following locations. Copies may be purchased at the following locations at a cost of ten cents per page:

SMBR, located at 4201 Ed Bluestein Blvd., Austin, Texas, 78721. See Edward Campos.

Office of the City Clerk, City Hall, located at 301 W. 2nd Street, Room 1120, Austin, Texas 78701.

BRIEF EXPLANATION OF PROPOSED RULE

Rule R161-17.14: The proposed rule will amend portions of Section 2: Certification Eligibility and Section 3: Procedures for Certification and Recertification of the City's Minority-Owned and Women-Owned Business Enterprise Procurement Program Rules related to the procedures related to the Certification and Recertification eligibility standards and process described in the City's MBE/WBE Procurement Program. The proposed rule sets forth the City's intent to remove the annual certification renewal requirement and to extend the certification period from 3 years to 4 years. Once adopted, this rule will be published at: <https://www.austintexas.gov/SMBR>.

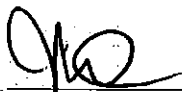
AUTHORITY FOR ADOPTION OF PROPOSED RULE

The authority and procedure for adoption of a rule to assist in the implementation, administration, enforcement of the City Code or an ordinance is provided in Chapter 1-2 of the City Code.

CERTIFICATION BY CITY ATTORNEY

By signing this Notice of Proposed Rule R161-17.14, the City Attorney certifies the City Attorney has reviewed the rule and finds that adoption of the rule is a valid exercise of administrative authority.

REVIEWED AND APPROVED



Veronica Briseño, Director
SMBR



Anne Morgan
City Attorney
Law Department

City of Austin

**Minority-Owned and Women-Owned Business
Enterprise Procurement Program Rules**

Effective March 25, 2019~~August 20, 2018~~

Table of Contents

Section 1: General Guidelines	1
1.1 Authority, Purpose, and Applicability	1
1.2 Program Exemptions	1
1.3 Sanctions	2
1.4 Effective Date	2
Section 2: Certification Eligibility	2
2.1 General Guidelines	2
2.2 Ownership and Control	3
2.3 Viability and Independence	5
2.4 Scopes of work	7
2.5 Racial and Ethnic Identity and Gender	7
2.6 Determination of Business Size	8
2.7 Business Location	8
2.8 Determination of Economic Disadvantage	8
2.9 Certification by Other Governmental Agencies	8
2.10 Certification of Joint Ventures	8
Section 3: Procedures for Certification and Recertification	9
3.1 General Guidelines for Certification and Recertification	9
3.2 Application for Certification	10
3.3 Annual Review and Application for Recertification	11
3.4 Individual Determinations of Social and Economic Disadvantage	12
Section 4: Procedures for Third Party Challenges to Certification	13
Section 5: Procedures for Appealing Certification Decisions	13
Section 6: Graduation from the Program	14
6.1 Graduation Guidelines	14
6.2 Graduation Procedure	14
Section 7: Goals for MBE and WBE Participation	14
Section 8: Solicitation Documents	15
Section 9: Pre-Award Compliance	15
9.1 Good Faith Efforts	15
9.2 Elements of Compliance Plans	17
9.3 Evaluation of Compliance Plans	17
9.4 Notification of Bidder/Proposer	18
9.5 Letters of Intent and Award of Contract	18
9.6 Procedure for Protesting Denial of Compliance Plan For Lack of Good Faith Efforts	19
Section 10: Monitoring Contract Performance	19
10.1 Verification of Compliance	19
Section 11: Requests for Changes in Compliance Plans	19
11.1 Submission and Evaluation of Requests for Changes in Compliance Plan	19
11.2 Good Faith Efforts on Substitutions, Additions or Deletions of Subcontractors	20
11.3 Change Orders	20
11.4 Procedures for Appealing Denial of Request to Substitute, Add or Delete Subcontractors/Subconsultants	21
11.5 Sanctions for Noncompliance	21
Section 12: Contract Closeout	22

Section 1: General Guidelines

1.1 Authority, Purpose, and Applicability

1.1.1 These rules are implemented pursuant to Chapters 2-9A, 2-9B, 2-9C and 2-9D of the Austin City Code, authorizing a Minority-Owned and Women-Owned Business Enterprise Procurement Program ("Program").

1.1.2 These rules shall apply to all actions related to the City's Program, which is administered by the Small & Minority Business Resources Department ("SMBR").

1.1.3 The timelines established in Chapters 2-9A, 2-9B, 2-9C and 2-9D of the City Code are mandatory. The timelines and procedures established only in these rules are guidelines, and the failure of City staff to comply shall not be grounds for invalidating any City action.

1.1.4 These rules incorporate by reference the definitions set out in City Code §§ 2-9A-4, 2-9B-4, 2-9C-4 and 2-9D-4. Except where specifically noted otherwise, "days" refers to calendar days.

1.2 Program Exemptions

1.2.1 The MBE/WBE Procurement Program applies to all binding legal agreements between the City and the contractor/consultant with the exception of the following contracts:

- A) Awards made by the City with federal/state grants or City general fund monies to a non-profit entity where 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;
- B) Sales transactions where the City sells its personal or real property;
- C) Loan transactions where the City is acting as a debtor or a creditor;
- D) Lease and franchise agreements;
- E) Agreements to use City real property;
- F) Gifts of materials, equipment, supplies or services to the City;
- G) Interlocal or intergovernmental agreements between or among political subdivisions;
- H) Procurements of commodities or services that are sole source by virtue of intellectual property rights or other exclusive rights for which there are no other subcontracting opportunities; or
- I) Public health and safety emergency purchases or services, as described in Chapter 252 of the Texas Local Government Code.

1.2.2 The Contract Awarding Authority or the sole source vendor shall make every effort to solicit offers from MBEs and WBEs, encourage prime contractors/consultants to utilize MBE and WBE subcontractors and to obtain a Compliance Plan from the vendor on exempt contracts, where appropriate.

1.3 Sanctions

If at any time following appropriate investigation, the Director has reason to believe that any person or firm has knowingly and willfully provided incorrect information related to, or made false representations in connection with any aspect of the Program or these rules, such matter shall be immediately referred to the Purchasing Office and the City Attorney for consideration of sanctions as provided by the Program and other applicable laws.

1.4 Effective Date

These regulations shall be effective as of August 7, 2007. All items pending before the Director as of the effective date of these rules shall be handled as provided herein and in Chapters 2-9A, 2-9B, 2-9C and 2-9D of the City Code. Solicitations issued by the City on or after August 7, 2007 shall also be administered in accordance with these rules and Chapters 2-9A, 2-9B, 2-9C and 2-9D of the City Code.

Section 2: Certification Eligibility

2.1 General Guidelines

2.1.1 An applicant's eligibility for certification and recertification as a minority-owned business enterprise ("MBE") and/or women-owned business enterprise ("WBE") shall be thoroughly investigated and reviewed. Complete applications will be reviewed in the order in which they are received. The review will include some or all of the following, as appropriate:

- A) Review of the application and supporting documentation;
- B) Individual interviews of owners and principal managers of the applicant;
- C) Site visits to the applicant's facilities; and
- D) Information from individuals, organizations, and agencies having knowledge of the applicant and its management, ownership and proffered scopes of work.

2.1.2 False, erroneous or misleading statements by an applicant regarding its performance on any contracts, or involvement in contracting or certification-related irregularities with any entity, and non-compliance with reasonable requests of the City for information concerning eligibility shall be accorded substantial weight in determining the applicant's certification, recertification or decertification.

2.1.3 No determination of certification eligibility shall be made until all required documents are provided to SMBR.

2.1.4 A determination of certification eligibility does not mean or imply that the City warrants the work, experience, capabilities, or qualifications of the firm seeking to be certified.

2.1.5 Certification of an applicant other than a Joint Venture shall be valid for three

~~Years~~ four years from the effective date of the certification and only as to the area(s) of specialty specified therein, contingent upon the ~~annual~~ establishment by the certified firm of continued eligibility, as provided in Section 3.3 of these Rules. Certification of a Joint Venture shall be valid for the performance of a specific contract.

2.1.6 Until an applicant has been certified, its participation in City contracts shall not be counted toward fulfillment of MBE or WBE goals or sub-goals. The absence of certification, however, shall in no way affect any applicant's right to register as a City vendor or to submit a bid or proposal for a City contract or subcontract as a non-certified vendor.

2.2 Ownership and Control

2.2.1 In order to verify ownership and control and to avoid shams, pass-throughs and fronts, it is the applicant's responsibility to establish, by preponderance of the evidence, that either collectively or individually the minority and/or woman owner(s):

- A) Possess demonstrated financial resources to acquire ownership, and past experience that verifies demonstrated capability to engage in business in the area(s) of specialty for which certification is sought. The fact that other non-majority partners/owners, spouses, or employees have these resources shall not be considered.
- B) Exercise responsibility for the critical areas of the applicant's operations and make independent and unilateral business decisions;
- C) Possess adequate assets or resources to operate self-sufficiently in areas of financing, bonding (if applicable), supervision, personnel, equipment, materials and facilities;
- D) Accept risks and profits commensurate with their ownership interests and receive at least 51 % of any dividends paid;
- E) If a corporation, exercise control of the board of directors;
- F) If a partnership, exercise control of the business enterprise as documented in a partnership agreement;
- G) If a limited liability company, exercise control of the company, as documented in the articles of organization or the regulations.

2.2.2 Ownership by minority persons and/or women shall be real, continuing and go beyond the *pro forma* ownership of the applicant as reflected in ownership documents. The minority and/or women owners shall enjoy all customary incidents of actual and beneficial ownership and shall share in all risks and profits commensurate with their ownership interests, as demonstrated by a detailed examination of the substance of their business arrangements with others. Documentation must be found in the business records of the applicant. The records must clearly show the contribution of expertise and its value to the applicant.

2.2.3 Ownership is demonstrated by verifiable assets for acquisition derived from independently owned holdings. A transfer of assets may be considered independently owned holdings only if supported by payment of fair and adequate consideration. A gift may only be acquired by demise.

- A) If the applicant is a corporation, ownership is demonstrated by the ability to transfer stock, title, and possession of securities that (1) represent ownership of the applicant by minorities and/or women and (2) are directly and physically held by those owners. Securities held in trust or by any guardian for a minor or incompetent person or, in the appropriate case, pledged as collateral to secure any principal indebtedness of the applicant, shall be excluded from the determination of whether the applicant is owned and controlled by minorities and/or women.
- B) If the applicant is a limited liability company, ownership is demonstrated by membership in the company and ownership of membership interest.

2.2.4 Contributions of capital or expertise by minority and/or women owners to acquire their ownership interests in the applicant shall be real and substantial, and be in proportion to the interest(s) acquired. Insufficient contributions shall include but are not be limited to:

- A) Promises by the minority and/or women owners to contribute capital in the future;
- B) Notes payable from minority and/or women owners to the applicant;
- C) Participation by minority and/or women owners as mere employees; or
- D) Provision by any owner of goods, services, or equipment having an actual or estimated value based upon industry standards substantially less than the value attributed in the applicant's certification application.

2.2.5 Minority and/or women owners shall, either collectively or individually, possess the power to direct or cause the direction of management, policies and objectives of the applicant and to make all substantive day-to-day decisions on the applicant's major and essential operations. Those persons who have the ultimate power to hire and fire the managers can be considered as controlling the business. No formal or informal restrictions of any kind shall exist which limit the customary discretion necessary to actually control the applicant by the minorities and/or women. Unless mandated by law, no restrictions shall exist which limit the minority and/or women owners from effective and continuous control of the applicant, or which prevent minority persons and/or women, without the cooperation of any owner who is a non-minority and/or man, from making any operational business decision for the applicant. In all cases, any business relationship between the applicant and its minority and/or women owners and non-minorities and/or men shall be given close scrutiny.

2.2.6 It shall be presumed, unless conclusively established otherwise, that the status of any minority and/or woman as an owner/manager of the applicant shall require active and substantial participation by such person in the management of the applicant's day-to-day activities. Ownership interests of minority and/or women owners not participating in the applicant's operations on an active and substantial basis shall be excluded from the determination of whether the applicant business enterprise is owned and controlled by minority persons and/or women. In addition, employment histories of all owners and managers shall be reviewed and verified to determine the expertise and involvement by such persons in activities and employment that may contradict any representation of active and substantial management participation. Absentee management or ownership by any minority and/or woman owner who does not exercise an active and substantial role in the applicant's day-to-day management shall be excluded from the determination of whether the applicant is owned and controlled by

minority persons and/or women.

2.2.7 Owners of the applicant who are non-minorities and/or men shall not be vested with the primary responsibility or ability to direct its day-to-day management operations. In cases where evidence indicates that major management activities (e.g., hiring and firing of management personnel, acquiring and purchasing major equipment and supplies and negotiating and approving contracts) of the applicant are performed by owners other than the minority and/or women owners, persons actually performing such duties shall be presumed to control those aspects of the applicant's business. Where business documents vest an officer of the applicant with the primary responsibility or ability to direct the applicant's day-to-day management operations, that officer must be a minority and/or woman owner.

2.2.8 The intra-family transfer of ownership in an existing firm or on-going business to a minority and/or woman except by demise shall be presumed to be invalid for purposes of eligibility for certification. Such presumption may be rebutted by evidence that the minority and/or woman owner paid adequate consideration for the ownership interests in the applicant.

2.2.9 A verification of ownership and control does not mean or imply that the City warrants the quality of work performed by the firm or the experience, capacity, and qualifications claimed by the firm's owners.

2.3 Viability and Independence

2.3.1 The applicant must be a viable business. Viability shall be determined by its capital structure as established by audited or auditable financial statements, or income projections when the applicant is a new business. Viability will also be determined by review of at least the following:

- A) Possession by the applicant of insurance, bonds, and/or licenses mandated by applicable governmental agencies to perform the work the applicant represents as its area(s) of specialty;
- B) Access to real properties and facilities from which to conduct day to-day business operations;
- C) Employment of persons in sufficient numbers and with expertise essential to satisfactory contract performance in its area(s) of specialty; and
- D) The applicant's ownership of and/or access to equipment, goods and supplies essential to its satisfactory performance in its area(s) of specialty.

2.3.2 The applicant must be an independent business.

- A) Independence shall be determined by considering the ability of the applicant to perform satisfactorily in its area(s) of specialty without substantial reliance upon finances, resources, expertise, staff, facilities, or equipment of non-minorities and/or men. Recognition of the applicant as a separate and distinct entity by governmental taxing authorities is not dispositive of the applicant's assertion of independence.
- B) Independence will be established by the degree to which financial, equipment leasing, business and other relationships with non-minorities and/or men vary from normal industry practices, and other appropriate factors.
- C) Independence will be evaluated as of the date the applicant was established.

2.3.3 In the following and other appropriate cases, the applicant shall be reviewed to determine its true abilities to operate viably and independently of non-minorities or men, or to otherwise be viable and/or independent:

- A) The applicant's status as a party to any long-term (i.e., more than three-year) contract, lease, or lease agreements other than for real property, equipment or employment with non-minorities and/or men;
- B) The applicant's status as a party to any contract, lease, or lease agreements on terms at variance with industry standards or prudent business practices;
- C) Interlocking stock ownership of the applicant and non-minority- and/or men-owned businesses in the same or a related industry;
- D) Common directors or officers between the applicant and non-minority- and/or men-owned businesses;
- E) The applicant's use of employees, equipment, expertise, or facilities shared with or obtained at less than fair market value from non-minority- and/or men-owned businesses;
- F) The receipt by the applicant's non-minority and/or men owners of financial benefits (e.g., dividends, loans, salaries, and distributions) from the applicant which exceed their proportionate ownership interests;
- G) Newly established firms and firms whose ownership and/or control has changed since the date of the advertisement of a solicitation or the date the applicant has indicated that a bid response will be submitted; and
- H) Any previous and/or continuing employer-employee relationship among or between present minority and/or women owners and non-minorities and/or men to ensure that all minority and/or women owners actually have the requisite independent ownership and management responsibilities and capabilities.

- I) A determination that a firm is viable and/or independent does not mean or imply that the City warrants the quality of work performed by the firm or the experience, capabilities, and qualifications claimed by the firm's owners.

2.4 Scopes of work

2.4.1 An applicant must seek certification in specific scopes of work. An applicant must self-report the scope(s) of work in which it is able to participate in accordance with 2.4.2 and 2.4.3 below. A scope of work certification by SMBR does not create any warranty by the City of Austin regarding the work performed by a MBE or WBE, nor is a certification a guarantee that a MBE or WBE will be able to satisfactorily perform the indicated scope of work on any particular project.

2.4.2 MBEs and WBEs may be certified in more than one scope of work, as long as the eligibility criteria are met. Certification in a scope of work qualifies a MBE or WBE to participate in all closely related areas of the specialty.

2.4.3 Possession by minority and/or woman owners of individual licenses or other relevant certifications shall be required for certification of the applicant, according to standard industry practices or if otherwise required by law.

2.4.4 A firm desiring to be certified in additional scopes of work may submit a request in writing. Until certification is awarded, participation on a contract in an uncertified area shall not be counted toward fulfillment of MBE or WBE goals or sub-goals. The request shall contain information sufficient to establish that certification in the additional area(s) of specialty is warranted.

2.4.5 MBEs and WBEs must inform SMBR in writing within 30 days of any scopes of work in which they are certified but in which they are no longer active or are no longer authorized to conduct business or any change that should result in a deletion of one or more of the firm's scopes of work. Failure to do so may result in decertification or denial of recertification of the firm.

2.5 Racial and Ethnic Identity and Gender

2.5.1 Bona fide minority group membership by the proposed minority owner shall be established on the basis of the individual's claim that he or she is a member of a minority group, has held himself or herself out to be a member of the group over a long time prior to applying for certification and is so regarded by that particular minority community. If an individual has not maintained identification with the minority group to the extent that he or she is commonly recognized as a member of that minority group, it is unlikely that he or she has in fact suffered the social disadvantage that a member of the minority group is presumed to have suffered.

2.5.2 The presumption that a member of a minority group has suffered social and economic disadvantage may be challenged and rebutted pursuant to the procedures contained in these rules.

2.5.3 The owner who is a woman shall so establish by birth certificate, driver's

license or other appropriate document.

2.5.4 A firm owned by a minority woman may be certified as both a MBE and a WBE upon demonstration that the certification criteria have been independently met for both MBE and WBE certification, but a dually-certified firm may be counted on a single solicitation only toward either the MBE or the WBE goal but not both.

2.6 Determination of Business Size

2.6.1 Only a firm that is a small business is eligible for certification and program participation, even if the firm meets all other eligibility criteria.

2.6.2 In determining whether an applicant is a small business, the City will apply the standards established by the United States Small Business Administration, in 13 C.F.R. Part 121.

2.7 Business Location

A firm must have a facility located in the state of Texas from which it maintains adequate personnel, equipment, materials and facilities to perform its area(s) of specialty for at least three months before the date of its application to be eligible for certification.

2.8 Determination of Economic Disadvantage

Only a firm owned by a socially and economically disadvantaged person(s) may be certified as a MBE/WBE. Economic disadvantage shall be established by submitting a sworn Personal Net Worth Statement on a form provided by the City or submitting alternative sworn documentation as determined by the Director.

2.9 Certification by Other Governmental Agencies

Evidence of an applicant's certification as a MBE, WBE or Disadvantaged Business Enterprise ("DBE"), pursuant to 49 C.F.R. Part 26 or 49 C.F.R. Part 23, by another governmental agency shall be a factor, but is not conclusive, in the determination of the applicant's eligibility for certification by the City as a MBE or WBE.

2.10 Certification of Joint Ventures

2.10.1 Joint Ventures shall only be certified for participation in a specific contract. To be counted toward achieving a participation goal, a Joint Venture must be certified before the bid submission deadline for the specific contract.

2.10.2 The following factors, and any others deemed relevant by the City, shall be considered in evaluating Joint Ventures for certification:

- A) The ownership of the Joint Venture, including profit, loss and risk sharing; initial and on-going capital contributions; contributions of equipment; indemnification; dissolution; and other ownership interests and procedures;
- B) Control and participation in the Joint Venture, including check-signing authority; authority to contract on behalf of the Joint Venture; signing, cosigning or collateralizing loans; acquisition of lines of credit; acquisition and indemnification of bid, performance, and payment bonds; negotiating and signing labor contracts; management of contract performance, including supervision of all aspects of operations, major purchases, estimating, etc; acquisition of insurance; hiring, supervision and firing of employees and contractors; preparation of payroll; and keeping books of account;
- C) The identity of the Joint Venture's managing partner, the decision-making roles and authority of each Joint Venturer and the method for determining disputes between the Joint Venturers;
- D) The capacity of each Joint Venturer to perform its share of the work of the contract, including the commercial usefulness of the function of each Joint Venturer, in accordance with industry standards; and
- E) Any administrative or management fees or costs to be paid to each Joint Venturer.

Section 3: Procedures for Certification and Recertification

3.1 General Guidelines for Certification and Recertification

3.1.1 The application shall be dated and time-stamped upon receipt by SMBR or its designee, which conclusively establishes the receipt date. SMBR or its designee shall make a final certification decision within 60 days of receipt of a complete application unless extended by the Director for good cause. SMBR shall inform the applicant in writing of any such extension.

3.1.2 An application containing omissions, inaccuracies, or deficiencies shall be deemed incomplete, and SMBR or its designee shall notify the applicant in writing of the nature of the omissions, inaccuracies, or deficiencies. An incomplete application shall not be subject to the 60-day decision requirement.

3.1.3 As a condition of certification or recertification, SMBR or its designee may request at any time additional information relevant to the applicant's eligibility, including an updated application. Any request for additional information shall be in writing and direct the applicant to respond within a specified time. An applicant may request additional time if it consents to a corresponding extension of the 60-day decision deadline. Failure to request a timely extension shall result in SMBR or its designee closing the file without a certification determination.

3.1.4 The applicant must report any changes in its ownership, management, officers, or financial relationships during the pendency of its application to SMBR in writing within 10 days. A certified firm is required to report any change in ownership, control or available scopes of work within 30 days of such change if that change occurs when an application is not pending. Failure to report such change(s) may result in the denial of certification or recertification.

3.1.5 A certified firm shall inform SMBR in writing within 30 days of any changes in its management or ownership. Failure to inform SMBR may constitute grounds for decertification or denial of recertification.

3.2 Application for Certification

3.2.1 A certification application shall be executed under oath by the owner or duly authorized officer of the applicant. If such form is signed by any party other than the president or secretary of a corporation, general partner of a partnership, managing member of a limited liability company or owner of a sole proprietorship, such party must also submit evidence of his or her authority. Material factual representations must be based upon the personal knowledge of the person executing the application.

3.2.2 An applicant shall affirm that no principal, officer, owner, or any person having decision-making authority or any direct or indirect interest in the applicant has, within 5 years of the date of such application, owned a direct or indirect interest in, or been financially affiliated with, any firm to which MBE, WBE or DBE certification has been denied or withdrawn by any governmental entity where such denial or withdrawal was based, in whole or in part, upon false information contained in an application for certification.

3.2.3 During any period for which certification shall be effective, all books and records in the applicant's or its agent's possession, which may prove or disprove eligibility, shall be open for inspection and examination by the Director or designee upon reasonable notice.

3.2.4 An applicant's refusal to accept a site visit, schedule a personal interview with SMBR or provide additional information as requested shall be grounds for denial of certification.

3.2.5 Certification applications shall include authorization to permit the Director to obtain from third persons (e.g., utility companies, business references, and lessors/lessees) information relevant to any applicant's eligibility for certification.

3.2.6 The following materials must be provided as a part of the certification application:

A) Ownership and control:

- i) Work history of the applicant;
- ii) Resumes of owners, managers and key personnel;
- iii) Evidence of all owners' capital contribution to start up or to acquire ownership;
- iv) Partnership agreement (if applicable);
- v) Joint Venture agreement (if applicable);
- vi) Corporation documents (articles of incorporation and bylaws; minutes of board of directors and stockholders' meetings; stock certificates or ledgers; shareholder agreements) (if applicable);
- vii) Limited liability company documents (articles of organization

- and regulations).
 - viii) Titles to or leases for major equipment and/or vehicles;
 - ix) Past and current loan agreements of applicant or between any owners;
 - x) Financial records, including the applicant's tax returns (including returns from each partner of a Joint Venture) for the current year and two previous years or, in the case of a newly formed business, a balance sheet and/or business plan and current and previous two years individual tax returns of the owners; and
 - xi) Bank signature authorization cards.
- B) Proof of racial or ethnic identity or gender:
- i) Birth certificate;
 - ii) Naturalization papers (if applicable);
 - iii) Resident alien card (if applicable);
 - iv) Passport (if applicable);
 - v) Driver's license;
 - vi) Tribal membership (if applicable); and
 - vii) Affidavits (if applicable).
- C) Scope(s) of work:
- i) Evidence of contracts with clients or suppliers;
 - ii) References; and
 - iii) Licenses (if applicable).
- D) Certification by other agencies (if applicable); and
- E) Other documents as required by SMBR.

3.3 Annual Continued Eligibility Review and Application for Recertification

3.3.1 Continued eligibility for certification shall be affirmed by the certified firm in a sworn affidavit, along with supporting documentation as requested by SMBR, ~~on an annual basis~~. Failure to submit a complete affidavit of continued eligibility may result in decertification.

3.3.2 The City or its designee may, at its discretion, conduct a review of a certified firm's continued eligibility. Such a review may include, but is not limited to, a site visit, audit, or a statement of fact regarding current business structure. Failure to respond to such a request shall be grounds for denial of continued certification or recertification.

3.3.3 Firms are required to seek recertification upon the fourth ~~third~~ anniversary of their certifications. A firm that fails to submit a complete and timely recertification application by the date of the fourth ~~third~~ anniversary of its certification will be placed on inactive status and removed from the City's list of certified firms on the day following the expiration.

3.3.4 SMBR shall notify the firm by certified letter that its certification has lapsed and that it must seek recertification within 60 days. Failure to seek recertification by filing

the necessary documentation within 60 days from the date of receipt of written notification shall result in decertification.

3.3.5 The firm shall provide to SMBR a recertification application, its three most recent tax returns or audited financial statements from a certified public accountant and any additional information the Director deems necessary to evaluate the firm's eligibility for recertification. SMBR shall review the scopes of work of firms seeking recertification.

3.3.6 SMBR shall consider all relevant factors in determining the firm's eligibility for recertification, including but not limited to, the firm's involvement in contracting irregularities; failure to respond to relevant requests for quotations; failure to honor quotations; non-compliance with reasonable requests by the City for information concerning Program eligibility or performance on any City contract; and submission of false, erroneous, or misleading information to any entity regarding the firm's business activities.

3.3.7 Decertification or denial of recertification shall not affect the firm's right to remain an active City of Austin vendor and retain registration on the Purchasing Office's vendor list as a non-certified vendor.

3.4 Individual Determinations of Social and Economic Disadvantage

3.4.1 Social Disadvantage: Socially disadvantaged individuals are those who are not Minority Persons as defined in City Code §§ 2-9A-4(32), 2-9B-4(32), 2-9C-4(32) and 2-9D-4(32) and who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. Social disadvantage must stem from circumstances beyond their control. Evidence of individual social disadvantage must include the following elements:

- A) At least one objective distinguishing feature that has contributed to social disadvantage, such as race, ethnic origin, gender, disability, long-term residence in an environment isolated from the mainstream of American society, or other similar causes not common to individuals who are not socially disadvantaged;
- B) Personal experiences of substantial and chronic social disadvantage in American society, not in other countries; and
- C) Negative impact on entry into or advancement in the business world because of the disadvantage. The City will consider education, employment and business history, where applicable, to see if the totality of circumstances shows disadvantage in entering into or advancing in the business world.
 - 1. Education. The City will consider such factors as denial of equal access to institutions of higher education and vocational training, exclusion from social and professional association with students or teachers, denial of educational honors rightfully earned, and social patterns or pressures that discouraged the individual from pursuing a professional or business education.
 - 2. Employment. The City will consider such factors as unequal treatment in hiring, promotions and other aspects of professional advancement, pay

and fringe benefits, and other terms and conditions of employment; retaliatory or discriminatory behavior by an employer or labor union; and social patterns or pressures which have channeled the individual into non-professional or non-business fields.

3. Business history. The City will consider such factors as unequal access to credit or capital, acquisition of credit or capital under commercially unfavorable circumstances, unequal treatment in opportunities for government contracts or other work, unequal treatment by potential customers and business associates, and exclusion from business or professional organizations.

3.4.2 Economic Disadvantage: Economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged. Economic disadvantage is defined at City Code §§ 2-9A-4(22), 2-9B-4(22), 2-9C-4(22) and 2-9D-4(23).

- A) Except as set forth in subparagraph (B), the City will attribute to an individual claiming disadvantaged status any assets which that individual has transferred to an immediate family member, or to a trust, a beneficiary of which is an immediate family member, for less than fair market value, within two years prior to a firm's application for participation in the MBE/WBE Program, unless the individual claiming disadvantaged status can demonstrate that the transfer is to or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support.
- B) The City will not attribute to an individual claiming disadvantaged status any assets transferred by that individual to an immediate family member that are consistent with the customary recognition of special occasions, such as birthdays, graduations, anniversaries, and retirements.

Section 4: Procedures for Third Party Challenges to Certification

- 4.1 A Third Party may challenge the eligibility of a certified firm.
- 4.2 The challenge shall be made in writing under oath and shall include all information relied upon by the challenging party.
- 4.3 The Director shall provide an opportunity to the parties for an informal hearing.

Section 5: Procedures for Appealing Certification Decisions

5.1 The Director shall inform the applicant in writing of the basis for the denial of certification, recertification or decertification as required by City Code §§ 2-9A-16, 2-9B-16, 2-9C-16 or 2-9D-16.

5.2 If the firm desires to appeal the Director's decision, it must do so in writing within 7 days of the date the firm receives a notice of intent to impose an adverse certification decision. The written notice must be submitted to the Director. Failure to file a written notice of intent to appeal within this time waives all rights to appeal or protest the adverse certification

decision.

5.3 After filing a notice of intent to appeal, a firm may file a written appeal of an adverse certification decision or notice of intent to impose an adverse certification decision. The appeal must contain a statement of the grounds for appeal, including the reasons that the firm believes the adverse certification decision to be inappropriate. The appeal must be submitted to the Director within 21 days of the date the firm receives notice of intent to impose an adverse certification decision.

5.4 The Director's final decision on the written appeal shall be made in writing after an informal hearing and shall be communicated to the firm within 10 days of the hearing.

5.5 A firm that is subject to an adverse certification decision after appeal may protest the Adverse Decision to an independent hearing examiner appointed by the City. The firm must submit a notice of intent to protest to the Purchasing Office within four calendar days of receipt of the final adverse certification decision, in accordance with the procedures established by the Purchasing Office.

5.6 A firm denied certification or recertification or decertified may not apply for certification for 180 days from the effective date of denial or decertification.

Section 6: Graduation from the Program

6.1 Graduation Guidelines

6.1.1 Annual review and recertification review shall include an evaluation of whether the firm is a small business.

6.1.2 If the annual gross receipts of the firm and its affiliates exceed the federal small business size standard, for that industry code as promulgated in 13 CFR Part 121, the firm shall graduate from the Program.

6.2 Graduation Procedure

6.2.1 The Director shall notify the firm in writing that its annual gross receipts exceed the federal size standard.

6.2.2 The firm may appeal the decision pursuant to these rules.

6.2.3 The firm shall not be eligible to apply for certification for at least one year from the effective date of its graduation, and it must establish that its gross receipts during that year did not exceed the applicable federal size standard.

Section 7: Goals for MBE and WBE Participation

7.1 MBE and WBE subcontracting goals for a solicitation shall be based on the dollar value of the solicitation; the type and scopes of work of the solicitation; the availability of MBEs and WBEs to perform the scopes of work anticipated in the solicitation; and the City's progress toward achieving annual participation goals and sub-goals in the fiscal year

in which the solicitation will be awarded.

7.2 Goals may be set if there are at least three certified MBEs or three certified WBEs currently available to provide the commodities or services identified in the solicitation.

7.3 In certain circumstances, the Department may elect not to set goals for a solicitation. The Department may elect not to set goals when there is insufficient availability of MBEs or WBEs to provide the commodities or services identified in the solicitation, or when there are insufficient subcontracting opportunities, or when it is in the best interest of the City to do so.

Section 8: Solicitation Documents

8.1 For solicitations that must be approved by City Council and for which Annual Participation Goals, or Project Participation Goals, have been established, the Contract Awarding Authority shall include in its solicitation and contract documents:

- A) A description of the Chapter and the Program;
- B) The goals or sub-goals for the specific solicitation;
- C) The requirements related to achieving the goals or sub-goals;
- D) The requirements and deadlines to submit a Compliance Plan either (1) to document that the goals are met or (2) to document that the bidder/proposer has made good faith efforts as described at 9.1 below, including all instructions and forms; and
- E) An availability list of MBEs and WBEs identified for possible subcontracting opportunities.

8.2 If a bidder/proposer identifies one or more scopes of work that are appropriate subcontracting/subconsulting opportunities for the solicitation that are not included on the availability list, the bidder/proposer must solicit available certified firms for those scopes of work, in accordance with Section 9.1 below. The bidder/proposer may contact SMBR or use the City of Austin's vendor database, if available, for a supplemental list of MBEs and WBEs for the identified work.

8.3 For all solicitations for contracts that must be approved by the City Council and for which there is insufficient availability of MBEs and WBEs to set subcontracting/subconsulting goals, the Contract Awarding Authority shall include in its solicitation documents a description of the Program, a statement that no goals have been set for the solicitation and no Compliance Plan is required, and a statement that the City encourages bidders/proposers to contract with MBEs and WBEs when subcontracting opportunities are identified.

Section 9: Pre-Award Compliance

9.1 Good Faith Efforts

9.1.1 A bidder/proposer responding to a solicitation on a project for which Annual Participation Goals, or Project Participation Goals, have been established must meet the goals or demonstrate its good faith efforts to do so. The bidder/proposer can meet this requirement by either:

- A) Documenting commitments for participation by MBEs and WBEs sufficient to meet the goal(s); or
- B) Documenting good faith efforts to meet the goal(s). The bidder/proposer must show that it took all necessary and reasonable steps to achieve the goal(s), which, by their scope, intensity and appropriateness to the objective, could reasonably be expected to obtain MBE or WBE participation, even if they were not fully successful. A bidder or proposer need not actually meet a contract goal (i.e., obtain a specified amount of MBE and/or WBE participation) in order to be awarded a contract if the bidder/proposer documents in their response to a solicitation with supporting evidence they have made adequate good faith efforts. SMBR is specifically prohibited from ignoring bona fide good faith efforts.

9.1.2 The efforts employed by the bidder/proposer must be those that one could reasonably expect a bidder/proposer to take if the bidder/proposer were actively trying to obtain MBE and WBE participation sufficient to meet the MBE and WBE contract goals. Mere pro forma efforts are not good faith efforts to meet the MBE and WBE contract goals.

9.1.3 The specific requirements that SMBR will consider as part of the bidder's/ proposer's good faith efforts to obtain MBE and WBE participation are identified in City Code §§ 2-9A-21, 2-9B-21, 2-9C-21 or 2-9D-21.

9.1.4 In certain cases, SMBR, rather than the bidders, will initially notify subcontractors of bidding opportunities, pursuant to § 2-9A-21(E)(1) of the City Code. SMBR will conduct such notifications on certain solicitations meeting the following criteria:

- A) The solicitation is a Capital Improvement Project identified in the Capital Improvement Program or otherwise defined by the City; and
- B) The solicitation method is an invitation for bids.

9.1.5 SMBR shall endeavor to make the initial notification to subcontractors required under § 2-9A-21(E)(1) of the City Code on no less than three and up to five contracts issued by the City's Capital Contracting Office within Fiscal Years 2017-2018 through 2018-2019.

SMBR shall keep the MBE/WBE and Small Business Enterprise Procurement Program Advisory Committee informed of the MBE/WBE participation levels for the contracts selected for initial notification by SMBR.

9.1.6 When SMBR undertakes the responsibility of notifying subcontractors of bidding opportunities, subcontractors must submit bids directly to bidders.

9.1.7 When SMBR makes first contact with certified subcontractors, prime contractors must still comply with all subsequent good faith effort requirements pursuant to City Code § 2-9A-21(E)(3)-(7) and these Rules.

9.1.8 If SMBR deems the pilot program effective, SMBR may extend this pilot program to the Corridor Mobility Program solicitations issued as Invitations for Bid only without the need to further amend these Rules. Effectiveness will be measured by the following:

- Feedback received from prime contractors, subcontractors and stakeholders;
- Feedback from SMBR and other impacted City departments;
- Increased MBE/WBE participation at time of bid;
- Increased number of bids received by Prime contractors; and
- Number of violation notices issued for insufficient good faith efforts on solicitations that are part of the pilot program.

9.2 Elements of Compliance Plans

9.2.1 In order to be responsive to a solicitation for which goals have been established, the bidder/proposer must submit a completed Compliance Plan that demonstrates achievement of the goals or its good faith efforts to do so.

9.2.2 Bidders/proposers must notify MBEs and WBEs of subcontracting/subconsulting opportunities at least seven business days before submission of the bid/proposal.

9.2.3 The Compliance Plan shall be due at the time set out in the solicitation documents, which time shall, in the event of a bid/proposal, not be less than four hours after the bid/proposal submission deadline, and in any event shall be due no later than 5:00 p.m. on the day of the bid/proposal submission deadline. Failure to submit a timely and complete Compliance Plan shall result in rejection of the bid/proposal as being non-responsive.

9.2.4 MBE and WBE bidders/proposers may count their own participation, less any amount subcontracted, toward a goal for which they qualify but may not divide their own participation between two goals. If race and ethnic specific sub-goals are specified, the participation of a MBE owned by a member of one racial or ethnic group cannot be counted toward another racial or ethnic group's sub-goal.

9.2.5 Bidders/proposers may count only the participation of MBEs and WBEs for the scopes of work for which they are certified on or before the date the bid/proposal is submitted. If the MBE/WBE firm ceases to be certified during the contract, participation will only be counted for the value of the work that was performed while the firm was certified.

9.2.6 Bidders/proposers may count the MBE or WBE participation of every level of subcontracting toward the project goal(s). In order to count the participation of every level of subcontracting, the MBEs and WBEs must be listed on the compliance plan.

9.3 Evaluation of Compliance Plans

9.3.1 The Contract Awarding Authority shall initially forward the Compliance Plans of the three lowest bidders to SMBR when bids are in response to solicitations for competitive bids. Subsequent Compliance Plans may be forwarded as needed.

9.3.2 The Contract Awarding Authority shall forward all Compliance Plans received in response to Request for Proposals and Requests for Qualifications to SMBR.

9.3.3 Each goal listed in the solicitation shall be evaluated separately. If a bidder/proposer fails to meet any goal or sub-goal or make good faith efforts with respect to any goal or sub-goal, the bid or proposal is non-responsive for lack of compliance with the Program.

9.3.4 Where the solicitation requires the bidder/proposer to submit a base bid and one or more alternates, the Compliance Plan must demonstrate the bidder/proposer's achievement of the goals or good faith efforts to achieve the goals on the base bid. SMBR's evaluation of the bidder/proposer's achievement of the goals shall be calculated on the base bid.

9.3.5 SMBR shall verify that the MBE or WBE (1) is certified in the scope(s) of work listed by the bidder/proposer in the Compliance Plan; (2) agrees with the price and scope as stated in the Plan; and (3) is performing a Commercially Useful Function.

9.3.6 Within 7 business days of receiving the Compliance Plans, SMBR shall inform the Contract Awarding Authority whether the Compliance Plans meet the goals or establish good faith efforts to meet the goals and the reasons for the determinations, or if additional time is required to evaluate the Compliance Plans, SMBR shall inform the Contract Awarding Authority of the reason(s) and the anticipated date for completion of the review.

9.4 Notification of Bidder/Proposer

9.4.1 The Contract Awarding Authority shall notify a non-responsive bidder/proposer of the basis for that determination. If the bid/proposal would have been one of the two lowest bids, the Contract Awarding Authority shall retain any bid bond or other required bid guarantee instruments until the expiration of the period for filing a protest of the denial of the Compliance Plan, as described at Section 9.6 below, or until a filed protest is resolved.

9.4.2 The Contract Awarding Authority shall notify the lowest responsive bidder or highest ranking proposer of the City's determination.

9.5 Letters of Intent and Award of Contract

9.5.1 For all solicitations, notarized letter(s) of intent from MBEs and WBEs to be utilized on the contract must be submitted by the bidder/proposer on the form provided with the solicitation documents no later than three business days after written notification of its status as apparent low bidder or successful proposer. Failure to provide such letters shall be grounds for rejection of the bid/proposal. If a MBE or WBE fails to sign a letter of intent after one is requested by the contractor/consultant, the contractor/consultant may request approval to substitute the subcontractor/subconsultant after contract execution.

9.5.2 After receiving the letters of intent, the Contract Awarding Authority may recommend award of the contract to the responsive lowest bidder or highest-ranking proposer.

9.5.3 The City staff's recommendation for City Council action shall include reasons for recommending any bidder/proposer whose bid/proposal did not meet the goals or who did not make good faith efforts to meet the goals.

9.6 Procedure for Protesting Denial of Compliance Plan For Lack of Good Faith

Efforts

If a Compliance Plan is denied on the grounds that the good faith efforts requirement has not been met, the Contract Awarding Authority shall inform the bidder/proposer in writing of the basis for the denial. To protest such a decision, the bidder/proposer shall follow the purchasing protest process described in the City of Austin's Purchasing Office Solicitation Instructions.

Section 10: Monitoring Contract Performance

10.1 Verification of Compliance

10.1.1 Prime contractors and prime consultants are required to submit a monthly subcontract awards and expenditures report to the City's project manager or contract manager no later than the tenth day of each month. The report shall be in the format provided by the City.

10.1.2 Procedures for monitoring compliance may include, but are not limited to site visits or telephone audits; consideration of requests for substitutions, additions, deletions, or change orders; and review and verification of payments to subcontractors as documented by subcontractor monthly reports.

Section 11: Requests for Changes in Compliance Plans

11.1 Submission and Evaluation of Requests for Changes in Compliance Plan

11.1.1 The prime contractor or prime consultant must seek in writing and obtain the prior approval of changes to the original Compliance Plan on the form provided by SMBR. The Director has sole authority to approve or deny changes or substitutions to the Compliance Plan.

11.1.2 Prior to submitting a request for the deletion or substitution of a subcontractor or subconsultant, the prime contractor or prime consultant must send a letter via certified mail to the subcontractor or subconsultant with a copy to SMBR informing the subcontractor or subconsultant of the basis for the requested change and providing an opportunity for the subcontractor or subconsultant to resolve the problem. The prime contractor or prime consultant must immediately request a meeting with the subcontractor or subconsultant in a good faith attempt to resolve any outstanding issues. If requested by either party, the City shall facilitate such a meeting and monitor the process. The prime contractor or prime consultant must verify in a sworn statement that a meeting with the subcontractor or subconsultant has taken place. The sworn statement must be submitted to SMBR at the same time that a Request for Change is submitted.

11.1.3 The prime contractor or prime consultant may submit a request for change to SMBR upon a showing that the letter referenced in 11.1.2 has been sent as required and after the meeting with the subcontractor or subconsultant referenced above in 11.1.2 has occurred. However, notwithstanding the above, if the subcontractor or subconsultant has not responded to the prime contractor or prime consultant's letter or the prime contractor or prime consultant's request for a meeting by the eighth day after the letter was sent by certified

mail, the prime contractor shall be allowed to submit a request for change for consideration by SMBR.

11.1.4 The written request must state specific reasons for the proposed addition, deletion or substitution of a subcontractor or subconsultant. The facts supporting the request must not have been known nor reasonably should have been known by the contractor/consultant and proposed subcontractor/subconsultant prior to the submission of the Compliance Plan. The contractor/consultant must submit documentation to substantiate its request for a change in the Compliance Plan. Such documentation may include, but is not limited to the materials listed in Subsections A-D below:

- A) Documentation from the project manager or contract manager, City inspector or other appropriate City staff assigned to oversee the project.
- B) Correspondence between the prime contractor/consultant and the subcontractor or subconsultant.
- C) Field notes, laboratory reports, photographic evidence or other materials.
- D) A copy of the letter from the prime contractor or prime consultant to the subcontractor or subconsultant required by Section 11.1.2 above.

11.1.5 If a contractor/consultant proposes to add a MBE or WBE to the Compliance Plan after the contract has been awarded, a signed letter of intent must be submitted with the request.

11.1.6 Within 7 business days of receiving the Request for Change of Compliance Plan and documentation, the Director shall notify in writing all parties whether the request was approved or denied and, if denied, the basis for the denial. If additional time is required to evaluate the request for change, SMBR shall notify all parties in writing the reason(s) and the anticipated date for completion of the review.

11.2 Good Faith Efforts on Substitutions, Additions or Deletions of Subcontractors

11.2.1 If a contractor/consultant proposes to substitute, add or delete a subcontractor/subconsultant and either (1) the project goal(s) were not met prior to this action; or (2) the project goal(s) may not be met because of this action, the contractor/consultant must make good faith efforts to meet the goal(s).

11.2.2 Documentation demonstrating good faith efforts, as described in Section 9.1 above, must be submitted with a request for substitution, addition or deletion if the project goal(s) are not otherwise met. The Director will determine whether good faith efforts have been satisfactorily met to approve the request for change to compliance plan. If good faith efforts to substitute or add a MBE or WBE have been made to the satisfaction of the Director, then the contractor/consultant may substitute or add a non-certified firm.

11.3 Change Orders

11.3.1 Change orders issued on competitively bid contracts and amendments to contracts solicited through a proposal or qualifications process that do not alter the scopes of work

originally required to perform the contract shall be undertaken using the subcontractors/subconsultants and suppliers listed in the Compliance Plan. If the work involved in a change order is to be performed by the contractor/consultant or subcontractors/subconsultant already involved in the work, that fact shall be noted on the change order, a copy of which shall be forwarded to the Director.

11.3.2 If a change order requires that the contractor/consultant add a subcontractor/subconsultant to the project with the result that the project goal(s) will not otherwise be met, the contractor must make good faith efforts to meet the goal(s) by adding a MBE or WBE so as to meet the goal(s). If good faith efforts, as described in Section 9.1, to add an MBE or WBE have been made to the satisfaction of the Director, then the contractor/consultant may add a non-certified firm.

11.3.3 If a change order involves an increase or decrease in the amount of work, a statement to that effect shall be noted on the change order, a copy of which shall be forwarded to the Director and the goal(s) recalculated.

11.3.4 If a change order results in the deletion of a scope of work to be performed by a MBE or WBE, the City's contract manager or project manager shall notify in writing the prime contractor/consultant and the MBE or WBE. SMBR shall recalculate the contract goals.

11.4 Procedures for Appealing Denial of Request to Substitute, Add or Delete Subcontractors/Subconsultants

11.4.1 Within 7 days of the date the prime contractor/consultant receives a notice of intent to impose an adverse substitution, addition or deletion decision, the prime contractor/consultant may file a written notice of intent to appeal with the Director. Failure to file a timely notice waives all rights to appeal or protest the adverse decision.

11.4.2 After filing a notice of intent to appeal, a prime contractor/consultant may file a written appeal of the adverse decision. The appeal must be in writing and must contain a statement of the grounds for appeal, including the reasons that the prime contractor/consultant believes the denial of the request to substitute, add or delete subcontractors to be inappropriate. The appeal must be submitted to the Director within 21 days of receipt of the notice of intent to impose an adverse decision.

11.4.3 The Director's final decision on the written appeal shall be made after an informal hearing and shall be communicated to the prime contractor/consultant within 10 days of the hearing.

11.4.4 The Director's decision may be appealed to the City Manager within 7 days of the date the Director's decision is received. The City Manager's determination shall be rendered within 21 days and shall be final.

11.5 Sanctions for Noncompliance

11.5.1 Failure to obtain prior authorization for substitutions, additions or deletions of subcontractors as provided for in this Section is a violation of the MBE/WBE Ordinance. SMBR may recommend to the Purchasing Department that the City enforce the following sanctions for each violation within a rolling twenty-four month period:

1st Violation: Probation for a period of up to 6 months

2nd Violation: Suspension for a period of up to 24 months 3rd Violation: Debarment for a period of up to 5 years

If the prime contractor/consultant engages in more than one of the above actions (*i.e.*, unauthorized substitutions, additions, and deletions) at any given time, the Director has the discretion to determine whether such actions should be counted as multiple violations of the MBE/WBE Ordinance.

11.5.2 In order to dispute a finding of a violation, the prime contractor or prime consultant must submit a written request for an appeal to the Director within 4 days of receipt of written notice of the violation.

Section 12: Contract Closeout

12.1 Within 7 business days of receipt of contract close-out documents the Director shall notify in writing the Contract Awarding Authority that the contractor/consultant has paid all uncontested amounts to subcontractors/subconsultants and has fulfilled the contract's terms related to the MBE and WBE commitments or that additional time is required to determine whether the contractor/consultant has fulfilled the contract's terms.

12.2 If the Director determines that the contract's terms have been fulfilled, the Contract Awarding Authority, contract manager or project manager may authorize final payment and close out the contract in accordance with City's procedures.

12.3 If the Director determines that the contractor's terms have not been fulfilled, the Director shall inform the Contract Awarding Authority and the contractor/consultant in writing of the reasons for the determination, the sanctions recommended, and the procedures to appeal the determination. If the recommended sanction contains any fine or liquidated damages, the Contract Awarding Authority, contract manager, or project manager shall retain from any payment due the amount of such sanction during the pendency of an appeal.