



Legislation Text

File #: 16-0723, Version: 0

Introduced by: Councilmember Holton

A Bill Entitled

An Ordinance concerning

Minority and Women's Business Enterprises - Small Local Business Enterprise Procurement Preferences

For the purpose of creating a Small Local Business Enterprise ("SLBE") Program, to be administered by the Minority and Women's Business Opportunity Office; requiring the establishment of Goal Setting Committees for certain specified industry categories; defining certain terms; establishing the eligibility requirements for firms seeking to participate in the SLBE Program; establishing graduation and suspension criteria for firms in the SLBE Program; authorizing the City to employ various affirmative procurement initiatives to promote the award of City contracts to SLBEs; requiring annual reports on the SLBE Program; requiring periodic hearings on and review of the SLBE Program; providing for the appeal of certain adverse determinations by the Minority and Women's Business Opportunity Office; setting certain penalties; correcting, conforming, and clarifying related provisions; and generally relating to City procurement requirements.

By repealing and reordaining, with amendments

Article 5. Finance, Property, and Procurement

Subtitle 28. Minority and Women's Business Enterprises

Baltimore City Code

(Edition 2000)

Section 1. Be it ordained by the Mayor and City Council of Baltimore, That the Laws of Baltimore City read as follows:

Baltimore City Code

Article 5. Finance, Property, and Procurement

Subtitle 28. Minority and Women's Business Enterprises

Chapter 1. General Provisions

Part I. Definitions; General Provisions

§ 28-1. Definitions [- A to H.]

(a) *In general.*

In this subtitle, the following terms have the meanings indicated unless the context clearly requires a different meaning.

[(b) *African American.*]

["African American" means a U.S. citizen or lawfully admitted permanent resident who originates from any of the black racial groups of Africa.]

[(c) *Asian American.*]

["Asian American" means a U.S. citizen or lawfully admitted permanent resident who originates from the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands.]

(b) [(d)] *Baltimore City Market Area.*

"Baltimore City Market Area" means Baltimore City, Baltimore County, Anne Arundel County, Howard County, Harford County, Carroll County, and Queen Anne's County.

(c) [(e)] *Bid.*

"Bid" means a response to :

- (1) an invitation to bid; or
- (2) a request for proposals.

(d) [(f)] *Business enterprise.*

"Business enterprise" means a corporation, limited liability company, partnership, individual, sole proprietorship, joint stock company, joint venture, professional association, or any other legal entity operated for profit that is properly licensed and otherwise authorized to do business in the State of Maryland.

[(g) *Certified business enterprise.*]

["Certified business enterprise" means a minority or women's business enterprise that has been certified by the Minority and Women's Business Opportunity Office as meeting the criteria for certification under this subtitle.]

(e) [(h)] *Chief.*

"Chief" means the Chief of the Minority and Women's Business Opportunity Office.

(f) [(I)] *Construction.*

- (1) "Construction" means building, altering, repairing, improving, or demolishing any structure, building, street, utility, or other improvement to real property.
- (2) "Construction" includes:
 - (i) building construction;
 - (ii) heavy construction (road construction and bridge construction); and
 - (iii) specialty trades construction (e.g., carpentry, electrical, and plumbing).

(g) [(j)] *Contracting agency.*

“Contracting agency” means the City agency, department, or authorized representative that issues invitations to bid or requests for proposals.

(h) [(k)] *Contractor.*

“Contractor” means the person, firm, or legal entity with which the City has entered into an agreement.

[(l)] *Control.*]

[(1)] “Control”, for purposes of determining whether a business is a minority business enterprise or women’s business enterprise, means that the minority group member owners or women owners:

(i) possess and exercise the legal authority and power to manage business assets, goodwill, and daily operations of the business; and

(ii) actively and continuously exercise this managerial authority and power in determining the policies and directing the operations of the business.]

[(2)] If owners who are not minority group members or women are responsible for the operation of the business out of proportion to their ownership interest, then the business is not controlled by minority group members or women.]

[(m)] *Hispanic American.*]

[“Hispanic American” means a U.S. citizen or lawfully admitted permanent resident of Mexican, Puerto Rican, Cuban, Central American, South American, or other Spanish or Portuguese culture or origin, regardless of race.]

[§ 28-2. Definitions - I to Z.]

(i) [(a)] *Includes; including.*

“Includes” or “including” means by way of illustration and not by way of limitation.

(j) [(b)] *Joint venture.*

“Joint venture” means an association between business enterprises that provides for the sharing of economic interest.

(k) [(c)] *Manufacturer.*

“Manufacturer” means a business enterprise that:

(1) produces goods from raw materials or substantially alters or fabricates them before resale; and

(2) assumes the actual and contractual responsibility for providing the materials and supplies.

[(d)] *Minority business Enterprise (MBE).*]

[“Minority Business Enterprise” or “MBE” means a business enterprise:

- (1) that is owned, operated, and controlled by 1 or more minority group members who have at least 51% ownership;
- (2) in which the minority group members have day-to-day operational and managerial control, interest in capital, and risks and earnings commensurate with their percentage of ownership; and
- (3) that is located in the Baltimore City Market Area.]

[(e) *Minority group member.*]

["Minority group member" means a member of a minority group, such as African American, Hispanic American, Asian American, or Native American, for which a utilization disparity has been identified.]

[(f) *Native American.*]

"Native American" means a U.S. citizen or lawfully admitted permanent resident who originates from any of the original peoples of North America and who maintains cultural identification through tribal affiliation or other suitable authority in the community.]

[(l) [(g)] *Office.*

"Office" means the Minority and Women's Business Opportunity Office.

[(h) *Owned.*]

["Owned", for purposes of determining whether a business is a minority business enterprise or women's business enterprise, means that:

- (1) the minority group member or female owner, as the context requires, possesses an ownership interest of at least 51% of the business;
- (2) this ownership is real and continuing and goes beyond the mere indicia of ownership reflected in the ownership documents; and
- (3) the minority group member or woman owner enjoys the customary incidents of ownership and shares in the risks and profits commensurate with his or her ownership interests, as demonstrated by an examination of the substance, rather than the form of ownership arrangements.]

[(m) [(i)] *Purchasing.*

"Purchasing" means the buying, renting, leasing, or otherwise obtaining or acquiring any supplies, materials, equipment, or services.

[(n) [(j)] *Sole proprietorship.*

"Sole proprietorship" means a business enterprise that is 100% owned, operated, and controlled by 1 individual.

[(o) [(k)] *Subcontractor.*

"Subcontractor" means a business enterprise that has a direct contract with a contractor to perform part of the work on a contract.

(p) [(1)] *Supplier*.

“Supplier” means a business enterprise that:

- (1) furnishes needed items to a contractor; and
- (2) either:
 - (i) is involved in the manufacture or distribution of the supplies or materials; or
 - (ii) otherwise warehouses and ships the supplies.

[(m)] *Women’s Business Enterprise (WBE).*]

[“Women’s Business Enterprise” or “WBE” means a business enterprise:

- (1) that is owned, operated, and controlled by 1 or more women who have 51% ownership;
- (2) in which the women have day-to-day operational and managerial control, interest in capital, and risk and earnings commensurate with their percentage of ownership; and
- (3) that is located in the Baltimore City Market Area.]

§ 28-2. [§ 28-5.] Rules of construction.

(a) *Liberal construction*.

The provisions of this subtitle are to be liberally construed to accomplish its policies and purposes.

(b) *Mandatory, prohibitory, and permissive terms*.

(1) *Mandatory terms*.

“Must” and “shall” are each mandatory terms used to express a requirement or to impose a duty.

(2) *Prohibitory terms*.

“Must not”, “may not”, and “no ... may” are each mandatory negative terms used to establish a prohibition.

(3) *Permissive terms*.

“May” is permissive.

(c) *Number*.

The singular includes the plural and vice versa.

(d) *Severability*.

(1) All provisions of this subtitle are severable.

(2) If a court determines that a word, phrase, clause, sentence, paragraph, subsection, section, or other

provision is invalid or that the application of any part of the provision to any person or circumstances is invalid, the remaining provisions and the application of those provisions to other persons or circumstances remain in full force and effect to the maximum extent practicable.

(e) *Time computations.*

(1) *Computation of time after an act, event, or default.*

- (i) In computing any period of time prescribed by this subtitle, the day of the act, event, or default after which the designated period of time begins to run is not included.
- (ii) If the period of time allowed is more than 7 days, intermediate Saturdays, Sundays, and legal holidays are counted.
- (iii) If the period of time allowed is 7 days or less, intermediate Saturdays, Sundays, and legal holidays are not counted.
- (iv) The last day of the period so computed is included unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) *Computation of time before a day, act, or event.*

- (i) In determining the latest day for performing an act that is required by this subtitle to be performed a prescribed number of days before a certain day, act, or event, all days preceding that day, including intervening Saturdays, Sundays, and legal holidays, are counted in the number of days so prescribed.
- (ii) The latest day is included in the determination unless it is a Saturday, Sunday, or legal holiday, in which event the latest day is the first preceding day that is not a Saturday, Sunday, or legal holiday.

§ 28-3. Legislative findings and policy.

(a) *Findings.*

- (1) The Mayor and City Council makes the findings contained in this subsection, on full consideration of:
 - (i) the extensive findings made by an independent task force prior to the enactment of Ordinance 90-610;
 - (ii) the evidence of significant levels of utilization disparity identified by the 2000 Disparity Study;
 - (iii) hearings held by the City Council;
 - (iv) the extensive findings of the [2007 Disparity Study, “Race, Sex, and Business Enterprise: Evidence from the City of Baltimore”; and] 2014 Disparity Study, “The State of Minority and Women-owned Business Enterprise: Evidence from Baltimore”;
 - (v) the findings of the City Council that the prevalence of contract awards to large, non-local, businesses has significantly contributed to underutilization of minority and women’s

business enterprises; and

(vi) all other relevant facts.

- (2) Past discrimination in the City's contracting process by prime contractors against minority and women's business enterprises has resulted in significant underutilization of minority and women's business enterprises in contracts awarded by the City of Baltimore. As determined by the 2007 Disparity Study, this disparity has been persistent, pervasive, and statistically significant based on available vendor data.
- (3) This discrimination has occurred in the major City contracting markets (construction, commodities, architectural and engineering, and services), with the effect of significant underutilization of minority and women's business enterprises.
- (4) The provisions of this subtitle are necessary to overcome the effects of past discrimination and to prevent ongoing discrimination in the City's contracting process, while assuring that high quality goods and services are obtained through the competitive bidding process.
- (5) A general [goal] objective of this subtitle is to provide a narrowly tailored remedy to ongoing effects of past discrimination, [a goal] an objective that is advanced by:
 - (i) setting minority and women's business enterprise goals that are flexible and rationally related to the disparity identified in the City's contracting markets;
 - (ii) instituting race- and gender-neutral remedies, including a Small Local Business Enterprise Program in conjunction with the narrowly tailored administration of the MBE/WBE Program;
 - (iii) setting goals on a contract-by-contract basis;
 - (iv) providing criminal penalties for fraudulent misuse of this subtitle;
 - (v) requiring regular review of the necessity for this subtitle;
 - (vi) limiting those minority and women's businesses that qualify for certification under this subtitle to those located in the Baltimore City Market Area;
 - (vii) requiring regular review of the categories included in the definition of minority group members; and
 - (viii) providing for post-bid submission of required information about minority and women's business enterprises as well as other subcontractors.

(b) *Policy.*

It is the policy of the City of Baltimore to promote equal business opportunity in the City's contracting process by encouraging full and equitable participation by minority and women's business enterprises in the provision of goods and services to the City on a contractual basis.

§ 28-4. Scope of subtitle.

(a) *In general.*

This subtitle applies to all contracts awarded by the City.

(b) *Third-party contracts.*

Every contract or other agreement between the City of Baltimore and any governmental agency, quasi-governmental agency, corporation, developer, or contractor, under which the agency, corporation, developer, or contractor receives any fiscal assistance from or through the City for the purpose of contracting with businesses to perform real estate development, renovation, maintenance, or other services must require the agency, corporation, developer, or contractor to comply with this subtitle in awarding and administering that contract or agreement.

§ 28-5. [§ 28-6.] Automatic termination.

This subtitle automatically expires on July 30, 2019, unless the City Council, after causing an appropriate study to be undertaken, conducting public hearings, and hearing testimonial evidence, finds that the purposes identified in this subtitle have not yet been achieved, in which case this subtitle may be extended for 5 more years.

§§ [28-8] 28-6. to [28-10] 28-8. {Reserved}

Part II. Administration

§ 28-9. [§ 28-11.] Business Opportunity Office established.

(a) *In general.*

There is a Minority and Women's Business Opportunity Office in the Department of Law.

(b) *Chief to administer.*

The Office is administered and controlled by the Chief of the Minority and Women's Business Opportunity Office, who reports directly to the City Solicitor.

§ 28-10. [§ 28-12.] General functions and duties of Office.

(a) *In general.*

The Minority and Women's Business Opportunity Office is responsible for the administration of this subtitle.

(b) *Specific duties.*

The Office's duties include:

- (1) certification of [MBEs and WBEs] business enterprises covered by this subtitle;
- (2) maintaining a directory of [certified] business enterprises certified under this subtitle;
- (3) providing information and needed assistance to [MBEs and WBEs] business enterprises covered by this subtitle to increase their ability to compete effectively for the award of City contracts;
- (4) investigating alleged violations of this subtitle and, when appropriate, making written recommendations for remedial action;

- (5) developing and distributing all necessary forms, applications, and documents necessary to comply with this subtitle;
- (6) maintaining statistics on and reviewing regularly the progress of agencies towards achieving the annual goals for the utilization of minority business enterprises, [and] women's business enterprises, small business enterprises, and local business enterprises;
- (7) recommending to appropriate City officials methods to further the policies and goals of this subtitle;
- (8) monitoring contractors throughout the duration of their contracts to ensure that all efforts are made to comply with this subtitle; and
- (9) certifying compliance with this subtitle before contracts are submitted to the Board of Estimates for award.

§ 28-11 [§ 28-13]. Rules and regulations.

(a) *In general.*

The Office may adopt rules and regulations to carry out this subtitle.

(b) *Filing with Legislative Reference.*

A copy of all rules and regulations must be filed with the Department of Legislative Reference before they take effect.

§ 28-12. [§ 28-14.] Board of Estimates' authority.

(a) *Authority of Board not abrogated.*

Nothing in this subtitle abrogates the authority of the Board of Estimates to award contracts under Article VI, § 11 of the City Charter.

(b) *Board may waive minor defects.*

At its discretion, the Board of Estimates may waive minor defects and errors in a bidder's [MBE or WBE submission] submissions under this subtitle.

Chapter 2. MBE/WBE Subcontracting Requirements

Part I. Definitions; Short title

§ 28-13. Definitions

(a) *In general.*

In this chapter, the following terms have the meanings indicated unless the context clearly requires a different meaning.

(b) *African American.*

“African American” means a U.S. citizen or lawfully admitted permanent resident who originates

from any of the black racial groups of Africa.

(c) *Asian American.*

“Asian American” means a U.S. citizen or lawfully admitted permanent resident who originates from the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands.

(d) *Certified business enterprise.*

“Certified business enterprise” means a minority or women’s business enterprise that has been certified by the Minority and Women’s Business Opportunity Office as meeting the criteria for certification under this subtitle.

(e) *Control.*

(1) “Control”, for purposes of determining whether a business is a minority business enterprise or women’s business enterprise, means that the minority group member owners or women owners:

- (i) possess and exercise the legal authority and power to manage business assets, goodwill, and daily operations of the business; and
- (ii) actively and continuously exercise this managerial authority and power in determining the policies and directing the operations of the business.

(2) If owners who are not minority group members or women are responsible for the operation of the business out of proportion to their ownership interest, then the business is not controlled by minority group members or women.

(f) *Hispanic American.*

“Hispanic American” means a U.S. citizen or lawfully admitted permanent resident of Mexican, Puerto Rican, Cuban, Central American, South American, or other Spanish or Portuguese culture or origin, regardless of race.

(g) *Minority business Enterprise ; MBE.*

“Minority Business Enterprise” or “MBE” means a business enterprise:

- (1) that is owned, operated, and controlled by 1 or more minority group members who have at least 51% ownership;
- (2) in which the minority group members have day-to-day operational and managerial control, interest in capital, and risks and earnings commensurate with their percentage of ownership; and
- (3) that is located in the Baltimore City Market Area.

(h) *Minority group member.*

“Minority group member” means a member of a minority group, such as African American, Hispanic American, Asian American, or Native American, for which a utilization disparity has been identified.

(i) *Native American.*

“Native American” means a U.S. citizen or lawfully admitted permanent resident who originates from any of the original peoples of North America and who maintains cultural identification through tribal affiliation or other suitable authority in the community.

(j) *Owned.*

“Owned”, for purposes of determining whether a business is a minority business enterprise or women’s business enterprise, means that:

- (1) the minority group member or female owner, as the context requires, possesses an ownership interest of at least 51% of the business;
- (2) this ownership is real and continuing and goes beyond the mere indicia of ownership reflected in the ownership documents; and
- (3) the minority group member or woman owner enjoys the customary incidents of ownership and shares in the risks and profits commensurate with his or her ownership interests, as demonstrated by an examination of the substance, rather than the form of ownership arrangements.

(k) *Women’s Business Enterprise; WBE.*

“Women’s Business Enterprise” or “WBE” means a business enterprise:

- (1) that is owned, operated, and controlled by 1 or more women who have 51% ownership;
- (2) in which the women have day-to-day operational and managerial control, interest in capital, and risk and earnings commensurate with their percentage of ownership; and
- (3) that is located in the Baltimore City Market Area.

§ 28-14. [§ 28-7.] Short title.

This [subtitle] chapter may be cited as the “Minority and Women’s Business Program”.

§ 28-15. {Reserved}

Part II. [Part III.] Annual Participation Goals

§ 28-16. Establishment.

Annually, the Board of Estimates, with the advice of the Minority and Women’s Business Opportunity Office, must review and establish the participation goals for Minority Business Enterprises and for Women’s Business Enterprises.

§ 28-17. Purpose.

(a) *In general.*

The purpose of the annual goals is to aid the City in its annual evaluation of the Program’s effectiveness.

(b) *Goals, not quotas.*

Annual participation goals are not and may not be quotas.

§§ 28-18 to 28-20. {Reserved}

Part III. [Part IV.] Contract Participation Goals

§ 28-21. Establishment.

The Minority and Women's Business Opportunity Office must establish appropriate MBE and WBE participation goals on each specific contract, as provided in this [Part IV] Part III.

§ 28-22. Considerations.

(a) *In general.*

In setting the goals on a contract, the Office must consider:

- (1) the availability in various industry classifications and professions of MBEs and WBEs that are qualified and willing to provide goods, expertise, and services on the particular contract;
- (2) the level of utilization of these firms in past contracts awarded by the City;
- (3) the contract specifications;
- (4) the adverse impact on non-MBEs and -WBEs; and
- (5) any other relevant factors.

(b) *{Vacant}*

(c) *Construction contracts of \$1,000,000 or more.*

On construction contracts for which the estimated cost is \$1,000,000 or more, the Office may, in consultation with the contracting agency, set goals for MBEs divided into subgoals for African American-, Hispanic American-, Asian American-, or Native American-owned firms.

(d) *Architectural or engineering contracts.*

On architectural or engineering contracts, the Office may, in consultation with the contracting agency, set goals for MBEs divided into subgoals for African American-, Hispanic American-, Asian American-, or Native American-owned firms.

(e) *Consultation.*

In establishing goals on each contract, the Office must consult with the contracting agency, the City Purchasing Agent, or both.

§ 28-23. Publication.

The contract goals must be clearly published as part of the contract specifications in the invitation to bid or request for proposals.

§ 28-24. Applicability to alternates, modifications, etc.

The contract goals apply to the initial contract amounts, to any alternates, and to all subsequent amendments, supplements, extra work orders, change orders, or other modifications that, whether

individually or in the aggregate, increase the dollar value of the contract by more than 10%.

§ 28-25. Office review and report.

(a) *Office to evaluate.*

Annually, the Office must review MBE and WBE participation on all contracts and procurement to evaluate the effect of the Program and the City's progress towards meeting the annual goals.

(b) *Report to Board of Estimates.*

The Office must report its findings to the Board of Estimates.

§§ 28-26 to 28-30. {Reserved}

Part IV [Part V.] Counting MBE and WBE Participation

§ 28-31. In general.

(a) *Part governs.*

MBE and WBE participation toward meeting contract goals must be counted in accordance with this [Part V] Part IV.

(b) *Dual certification.*

A business that is certified both as an MBE and a WBE may be counted towards either the MBE or the WBE contract goal, but not towards both. The participation of the certified firm cannot be split between the MBE goal and the WBE goal.

(c) *Payment required.*

Participation of an MBE or WBE subcontractor cannot be counted towards the goal until the amount being counted has been paid to the MBE or WBE.

(d) *Credit for self performance.*

(1) Subject to limitation in paragraph (2) of this subsection, a certified MBE or WBE that has been awarded a contract as a prime contractor may count up to 50% of the dollar value of the work it intends to perform with its own forces towards the applicable MBE or WBE goal.

(2) The amount of the credit may not exceed the MBE's or WBE's available work capacity calculated in accordance with the contractor prequalification rules established by the Board of Estimates.

§ 28-32. Commercially useful function.

(a) *"Commercially useful function" defined.*

In this section, "commercially useful function" means the performance by a business enterprise of real and distinct work for which the business enterprise has the skill, expertise, and actual responsibility to perform, manage, and supervise.

(b) *Requirement.*

The bidder may count toward the contract goals only expenditures to certified business enterprises that perform commercially useful functions in the execution of the contract.

(c) *Determination.*

(1) To determine whether a certified business enterprise is performing a commercially useful function, the City must evaluate:

(i) the amount of work subcontracted;

(ii) industry practices;

(iii) whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and with the MBE or WBE credit claimed for its performance of the work; and

(iv) other relevant factors.

(2) With respect to materials and supplies used on the contract, the MBE or WBE is responsible for negotiating price, determining quality and quantity, ordering the material, installing (where applicable), and paying for the material itself.

(3) When an MBE or WBE is presumed not to be performing a commercially useful function, the MBE or WBE may present evidence to rebut this presumption. The MBE or WBE must provide written documentation to the Chief, whose decision is final.

§ 28-33. Joint ventures.

(a) *Percentage of participation.*

A bidder may count toward the contract goal the portion of its expenditure to a joint venture that is equal to the percentage of a certified business enterprise's participation in the joint venture.

(b) *Nature and extent of interest.*

The MBE or WBE member of the joint venture must have an interest in the control, management, risks, and operation of the joint venture commensurate with the member's percentage of ownership.

(c) *Share of work responsibility.*

The certified business enterprise that is a member of the joint venture must be responsible for a distinct, clearly defined portion of the work to be performed with its own forces, equal to its share in the ownership, control, and management of the joint venture.

§ 28-34. Subcontracting by MBE or WBE.

(a) *Limitation.*

A bidder may not count toward its contract goal any agreements with certified business enterprise subcontractors who intend to subcontract more than 10% of the dollar amount of the services to be performed under the agreement between the bidder and the certified business enterprise.

(b) *Exception for supplies, etc.*

This section does not apply to a subcontractor's contracts for the purchase of materials, equipment, or supplies as an incident to the performance of services under its contract.

§ 28-35. One subcontractor, one goal.

A business enterprise that is certified as both an MBE and a WBE may not be counted toward both MBE and WBE goals for the same project. The bidder must select the goal for which the business enterprise is to be counted toward.

§ 28-36. Manufacturers.

A bidder may count towards the contract goal its entire expenditure to a certified business enterprise manufacturer.

§ 28-37. Suppliers.

(a) *In general.*

If a bidder uses 1 or more suppliers to satisfy a contract goal, in whole or in part, the certified business enterprise supplier participation may be credited towards the applicable goal, as provided in this section.

(b) *Supplier-manufacturers.*

A bidder may count 100% of its expenditure to a certified business enterprise supplier who manufactures the goods supplied.

(c) *Others.*

(1) A bidder may count 100% of its expenditure to a certified business enterprise supplier who is:

- (i) a wholesaler warehousing the goods supplied; or
- (ii) a manufacturer's representative,

(2) However, only 25% of the applicable contract goal may be attained by expenditures to certified business enterprises that are non-manufacturing suppliers.

(d) *Adjustment for extraordinary proportion.*

For contracts where an extraordinarily large proportion of the contract price is for equipment or supplies:

- (1) a lower project goal may be set than otherwise would be required;
- (2) the 25% limit for suppliers may be increased; or
- (3) a combination of these two methods may be used.

§ 28-38. Insurance companies; travel agents.

A bidder may count towards the contract goals the fees or commissions charged by a certified business

enterprise insurance company or travel agent, as long as the fee or commission is reasonable and not excessive as compared with fees or commissions customarily allowed for similar services.

§ 28-39. Financial institutions.

A bidder may count towards the contract goals only the fees charged and earned by a certified business enterprise financial institution.

§ 28-40. {Reserved}

§ 28-41. Non-affiliation.

(a) *Affiliation disallowed.*

A bidder is precluded from using a certified business enterprise to meet a contract goal if the bidder has a financial interest in, has an interest in the ownership or control of, or is significantly involved in the operation of the certified business enterprise.

(b) *Office criteria to be met.*

In order for a non-certified bidder to use a certified business enterprise to meet a contract goal, the non-affiliation criteria established by the Minority and Women's Business Opportunity Office must be met.

§§ 28-42 to 28-45. {Reserved}

Part V. [Part VI.] Utilization Requirements

§ 28-46. Contracts between \$1,000 - \$4,999.

(a) *In general.*

The following standards and procedures apply to every contract for which the estimated cost is \$1,000 or more and less than \$5,000.

(b) *Office to provide list of certified enterprises.*

The Office must provide the contracting agency with a list of certified business enterprises qualified to provide each of the materials, equipment, supplies, or services that the contracting agency indicates are required by the City.

(c) *Agencies to solicit certified enterprises.*

The contracting agency must solicit bids from certified business enterprises that are certified to supply the required materials, equipment, supplies, or services.

(d) *When certified enterprises unavailable.*

If no qualified certified business enterprise is available:

- (1) the contracting agency must so notify the Office before the solicitation of bids; and
- (2) the Office must attempt to identify qualified businesses and, if successful, notify the contracting agency of their availability.

(e) *Opportunity to bid.*

The contracting agency must provide certified business enterprises every practical opportunity to submit bids.

§ 28-47. Contracts between \$5,000 - \$49,999.

(a) *In general.*

The following standards and procedures apply to every contract for which the estimated cost is \$5,000 or more and less than \$50,000.

(b) *Agency to provide Office with bid documents.*

Before the solicitation of bids, the contracting agency must furnish the Office with an informational copy of all bid conditions and requests for proposals.

(c) *Office may recommend certified enterprises.*

The Office may recommend to the contracting agency certified business enterprises that can be solicited directly to submit bids.

§ 28-48. Contracts of \$50,000 or more.

(a) *In general.*

The following standards and procedures apply to every contract for which the estimated cost is \$50,000 or more.

(b) *Participation affidavit required.*

(1) In addition to any other applicable requirements, the bid conditions and requests for proposals must require each bidder to include in its bid a certified business enterprise participation affidavit in which the bidder commits to utilize certified business enterprises in a percentage that equals or exceeds the applicable contract goals.

(2) Any bid that does not include the certified business participation affidavit is non-responsive.

(c) *Participation affidavit requirements.*

(1) Prior to bid opening, bidders must submit to the City the certified business enterprise participation statement, including executed statements of intent, that specify:

(i) the name of each certified business enterprise to whom the bidder intends to award a subcontract;

(ii) whether that subcontractor is:

(A) a minority business enterprise; or

(B) a women's business enterprise.

- (iii) the dollar value of each subcontract;
- (iv) the scope of the work to be performed under that subcontract; and
- (v) any other information the Office requires to determine whether the contract goals have been satisfied.

(d) *Verifying certification.*

Each bidder is responsible for verifying that all MBEs and WBEs to be used have been certified by the Office before bid opening.

(e) *Maintaining levels during contract term.*

During the term of the contract, any unjustified failure to comply with the levels of certified business enterprise participation identified in the bid is a material breach of contract.

(f) *Report for final payment.*

(1) Before final payment may be made under the contract, the contractor must submit a list of all subcontractors utilized on the contract, both MBE/WBE and non-MBE/WBE.

(2) The list must include, as to each subcontractor:

- (i) its name;
- (ii) the service or goods provided;
- (iii) the total amount paid to it; and
- (iv) its owner's race/ethnicity and sex.

§ 28-49. Leases and concessions.

(a) *In general.*

The following standards and procedures apply to:

- (1) every lease in which the City is the lessee; and
- (2) every contract for a concession.

(b) *Agency to solicit certified enterprises.*

City agencies must solicit bids from certified business enterprises that are certified to enter into leases or concession contracts.

(c) *When qualified enterprises unavailable.*

If, after investigation, a contracting agency determines that no qualified certified business enterprise is available:

- (1) the contracting agency must so notify the Office before signing a lease or awarding a concession contract, unless the Office has waived notification based on the known unavailability of

qualified certified businesses to perform a particular contract; and

- (2) the Office may attempt to identify qualified certified business enterprises and, if successful, must notify the contracting agency of their availability.

(d) *Opportunity to bid.*

The contracting agency must provide the minority and women's business enterprises every practical opportunity to submit bids.

(e) *Concession subcontractors and suppliers.*

- (1) All requests for concession bids must require concessionaires to make every good faith effort to utilize minority and women's business enterprises as subcontractors and suppliers, whenever possible, if subcontractors are used.
- (2) Concession bidders must be required to submit their projected utilization of minority and women's business enterprises along with a description of the efforts made to utilize those businesses.

§ 28-50. Other services.

(a) *Efforts required.*

All City agencies, commissions, and boards, in the deposit of funds and performance of their other official duties, must make every good faith effort to equitably utilize the services of minority and women's business enterprises.

(b) *Scope.*

The services to which this section applies include, but are not limited to:

- (1) the financial services of banks, savings and loan companies, insurance companies, and other commercial financial institutions;
- (2) arrangements for travel and accommodations when traveling on official City business; and
- (3) legal services.

(c) *Annual reports.*

- (1) All City agencies must submit to the Office, on an annual basis, a written report on the efforts made under this subsection.
- (2) The City Finance Department, City Comptroller, and Retirement Boards must report annually to the Mayor and City Council on their utilization of financial institutions that are minority or women's business enterprises.

§ 28-51. {Reserved}

§ 28-52. All contracts - In general.

In addition to any other applicable requirements, the following requirements apply to all contracts awarded by the City.

§ 28-53. All contracts - Bid specifications.

Bid conditions, requests for proposals, and all other specifications for contracts awarded by the City must require that, where a contract goal is applicable, the bidder must:

- (1) make good faith efforts before the opening of bids or submission of proposals to meet the contract goal; and
- (2) keep records of its good faith efforts, adequate to permit a determination of compliance with this [subtitle] chapter.

§ 28-54. All contracts - Contract specifications.

Each contract must:

- (1) incorporate this [subtitle] chapter by reference;
- (2) provide that the failure of any bidder, contractor, or subcontractor to comply with this [subtitle] chapter is a material breach of contract; and
- (3) require that, during its term, the contractor will:
 - (i) fulfill Program commitments submitted with the bids;
 - (ii) continue to make good faith efforts to utilize minority and women's business enterprises; and
 - (iii) maintain records reasonably necessary for monitoring compliance with this [subtitle] chapter.

§ 28-55. All contracts - Payments to subcontractors.

(a) *In general.*

A contractor must pay its subcontractors in a timely fashion for satisfactory work.

(b) *When payment considered timely.*

A payment is timely if it is mailed, delivered, or transferred to a subcontractor no later than 7 calendar days after the contractor receives payment from the City.

(c) *Evidence of compliance.*

Beginning with the second pay request from a contractor to the City, the contractor must provide the City with evidence that all subcontractors have been paid out of the proceeds of the prior payment, unless a bona fide dispute, documented in writing, exists between the contractor and the unpaid subcontractor.

§ 28-56. All contracts - Reports and documentation.

As a condition of each contract, the awardee of the contract must submit the following when requested by the Office:

- (1) copies of signed agreements with the business enterprises being utilized to achieve the contract goals;
- (2) reports and documentation verifying payments to the business enterprises being used to achieve the contract goals; and
- (3) reports and documentation on the extent to which the contractor has awarded subcontracts to minority and women's business enterprises under contracts not affected by this [subtitle] chapter.

§§ 28-57 to 28-60. {Reserved}

Part VI. [Part VII.] Waivers

§ 28-61. Agency's pre-solicitation request.

(a) *In general.*

A contracting agency may request that the Office waive or reduce the contract goals by submitting the reasons for the request in writing before bids are solicited.

(b) *Criteria for granting.*

The Office may grant the waiver or reduction if the Office determines that:

- (1) the reasonable and necessary requirements of the contract render subcontracting or other participation of businesses other than the bidder infeasible; or
- (2) at least 2 qualified certified business enterprises capable of providing the goods or services required by the contract are unavailable in the Baltimore City Market Area despite every feasible attempt to locate them.

(c) *Amount to be specified.*

Any reduction granted by the Office must specify the amount to which the goal has been reduced.

(d) *Appeal of denial.*

- (1) Whenever the Office denies a request to waive or reduce a goal, the contracting agency may appeal that denial to the Board of Estimates.
- (2) The Board's decision on the request is final.

§ 28-62. Bidder's pre-award request.

(a) *In general.*

If a bidder is unable to comply with the contract goals, the bidder may submit a request for a waiver at the time of bid opening.

(b) *Documentation of efforts.*

The request for a waiver must include documentation that demonstrates the bidder's good faith efforts to

meet the goals.

§ 28-63. Contractor's post-award request.

(a) *Effort to substitute required.*

- (1) If, after award of a contract, the contractor is unable to meet any contract goal by utilizing the certified business enterprises specified at bid opening, the contractor must seek a substitute certified business enterprise to fulfill its commitment.
- (2) The Office may approve the substitution only after consulting with the Mayor's Office of Minority and Women's Business Development.

(b) *Request for waiver.*

- (1) If, after reasonable good faith efforts, the contractor is unable to find a substitute, the contractor must request a post-award waiver.
- (2) A contractor may not substitute an MBE or WBE subcontractor or perform the work designated for an MBE or WBE subcontractor with its own forces unless the Chief, after consulting with the contracting agency, approves the substitution in writing.

(c) *Documentation of reasons.*

- (1) The request must be in writing and document the reasons for the contractor's inability to meet the contract goal.
- (2) The contractor must negotiate with the MBE or WBE subcontractor to resolve the problem.
- (3) The Chief's final decision to permit or deny a proposed substitution, and the basis of any denial, shall be communicated to the parties in writing by the Chief.
- (4) Where the contractor has established the basis for a substitution to the satisfaction of the Chief, the contractor must make good faith efforts to achieve the goals. The contractor may seek the assistance of the Office in obtaining a new MBE or WBE. If the contract goals cannot be reached and good faith efforts have been made, the contractor may substitute with a non-certified business.

§ 28-64. Waiver by agency.

(a) *In general.*

A contracting agency may waive the utilization requirements for a specific contract as provided in this section.

(b) *Sole source.*

The agency may waive the utilization requirements if, with the advice of the Office, it finds that:

- (1) needed goods or services are available only from a sole source; and
- (2) the prospective contractor is not currently disqualified from doing business with the City.

(c) *Emergency.*

The agency may waive the utilization requirements if it certifies in writing to the Office that:

- (1) an emergency exists that requires goods or services to be provided with such an immediacy that the agency is unable to comply with this [subtitle] chapter; and
- (2) the prospective contractor will make every good faith effort to subcontract to minority and women's business enterprises if subcontracting is utilized.

§ 28-65. {Reserved}

Part VII. [Part VIII.] Agency's Duties

§ 28-66. In general.

Each contracting agency must take the following actions to ensure that MBEs and WBEs have maximum opportunity to participate on City contracts.

§ 28-67. Adherence to bid procedures, etc.

Every contracting agency must ensure that invitations to bid or requests for proposals emanating from the agency comply with this [subtitle] chapter.

§ 28-68. Responsibility for achieving goals.

Each agency head or designee must:

- (1) assume primary responsibility for achieving the goals of the Program; and
- (2) on a continuing basis, review all aspects of the Program's operations to assure that the purpose is being attained.

§ 28-69. Advertisements, notices, etc.

(a) *Media advertisements.*

Advertisements for bids must appear in minority-owned media no less than 10 days before bids are due for specific contracting opportunities.

(b) *Notices to trade associations.*

A written notification of contracting opportunities must be sent to minority and women's business trade associations and contractor's associations no less than 10 days before bids are due.

(c) *Solicitation materials.*

All contract solicitations must include the MBE/WBE policy and any related materials required by the bid documents.

§ 28-70. Contract division.

All contracting opportunities must be evaluated in an effort to divide the total requirements of a contract to provide reasonable opportunities for participation by minority and women's business enterprises.

§ 28-71. Payment procedures.

Each contracting agency must establish procedures to ensure that:

- (1) all contractors who submit correct invoices are paid within 30 days; and
- (2) all subcontractors are paid within 7 days after the City pays the general contractor.

§ 28-72. Conditioning notice to proceed.

Each contracting agency must establish guidelines to ensure that a notice to proceed is not issued until the contracting agency has received copies of all documents needed to evidence the contractor's fulfillment of its commitments under this [subtitle] chapter.

§ 28-73. Documentation.

Each contracting agency must submit to the Office all statistics and documentation that the Office requests.

§§ 28-74 to 28-75. {Reserved}

Part VIII. [Part IX.] Certification

§ 28-76. Required before bid opening.

(a) *In general.*

For the purposes of determining compliance with contract goals, a business enterprise may be counted as an MBE or WBE only if it has been so certified by the Office before bid opening.

(b) *Effect on participation amount.*

If a business listed in a bidder's Information and Utilization Commitment Form has not been certified, the amount of participation will be deducted from the total MBE or WBE utilization in determining whether the bidder is responsive.

§ 28-77. {Repealed}

§ 28-78. MBEs and WBEs - General criteria.

(a) *General eligibility requirements.*

To be eligible for certification as a minority business enterprise or women's business enterprise, the business enterprise must:

- (1) be an independent, operating business;
- (2) be at least 51% minority- or women-owned;
- (3) before applying for certification, have been in operation for at least 12 months before applying for certification;
- (4) have been minority- or women-owned for at least 12 months before applying for certification;
and

(5) have an operating office in the Baltimore City Market Area.

(b) *Operating office.*

To determine whether the business enterprise has the required operating office, the Office will consider the office arrangements, industry practices, and other relevant factors.

§ 28-79. MBEs and WBEs - Control.

(a) *In general.*

(1) The ownership and control by minorities or women must be:

(i) real and substantial; and

(ii) indicated by the customary incidents of ownership, as demonstrated by an examination of the substance rather than the form of ownership and operating arrangements.

(2) The minority or women owners must possess the power:

(i) to direct or cause the direction of the management and policies of the business enterprise; and

(ii) to make day-to-day decisions, as well as decisions on matters of management, policy, and operations.

(b) *Restrictions precluded.*

(1) The business enterprise may not be subject to any formal or informal restrictions that limit the customary discretion of the minority or women owners.

(2) There may not be any restriction, whether by partnership agreement, charter requirements, or other arrangement, that prevents the minority or women owners from making business decisions without the cooperation or vote of any owner who is not a minority or a woman.

(c) *12-month prerequisite.*

The operating arrangements and the ownership and control by the minority group members must have been in operation for at least 12 months before applying for certification.

§ 28-80. MBEs and WBEs - Size standards.

(a) *Board to set standards.*

(1) With the advice of the Office, the Board of Estimates may establish maximum size standards for minority and women's business enterprises.

(2) There may be separate size standards for separate business categories.

(3) The Board of Estimates must annually review any size standards established under this section.

(b) *Certification contingent.*

A business enterprise may not be certified as an MBE or WBE or, once certified, have its certification

renewed if, on the effective date of the application or renewal, the MBE or WBE no longer meets size standards established under subsection (a) of this section.

§ 28-81. Certification investigations.

(a) In general.

The Office may investigate a business enterprise's ownership, management, qualifications, and other relevant matters beyond formal documentation:

- (1) at the initial certification; and
- (2) during certification or recertification.

(b) Scope.

To the extent reasonably necessary to ensure compliance, these investigations may include, but are not limited to:

- (1) personal interviews with persons having knowledge or relevant information relating to a business enterprise's eligibility, certification, or decertification;
- (2) personal interviews with bidders, contractors, vendors, or suppliers involved in a joint venture or contractual relationship with the business enterprise;
- (3) reviewing records pertaining to certification; and
- (4) conducting random, on-site visits, audits, or relevant inquiries.

§ 28-82. Decertification.

The Office may decertify a business that it determines no longer meets the certification criteria.

§ 28-83. Certification appeals.

(a) Office determinations.

All adverse certification determinations by the Office must:

- (1) be in writing;
- (2) include the reasons for the determination; and
- (3) be sent to the affected business enterprise.

(b) Appeal.

- (1) An aggrieved party has a right to protest an adverse certification determination and seek administrative review.
- (2) To obtain administrative review, the aggrieved party must submit a written protest to the Chief within 7 days of receipt of the adverse determination.
- (3) The protest must specify the reasons and factual grounds of the protest and be accompanied by any

supporting documents.

(c) *Action by Chief.*

Within 25 days of receipt of the protest, the Chief must:

- (1) review the protest and all relevant supporting documents; and
- (2) render a written decision that includes the reasons for the decision.

(d) *Hearing.*

- (1) After all departmental remedies have been exhausted, the aggrieved applicant may request a hearing before a panel of independent hearing officers, with 1 member of the panel being appointed by the President of the City Council and the other members of the panel being appointed by the City Solicitor.
- (2) The hearing officer must be knowledgeable of Baltimore City procurement laws and procedures, including this subtitle.

§§ 28-84 to 28-85. {Reserved}

Part IX. [Part X.] Enforcement

§ 28-86. Office to monitor compliance.

During the term of a contract subject to this [subtitle] chapter, the Office must monitor continued compliance with this [subtitle] chapter.

§ 28-87. Noncompliance - Contractor or subcontractor.

(a) *Notice and attempt to resolve.*

If the Office finds cause to believe that a contractor or subcontractor has failed to comply with any requirement of this [subtitle] chapter or with any contract provision relating to utilization under this [subtitle] chapter, the Office must:

- (1) so notify the contracting agency and the contractor; and
- (2) attempt to resolve the noncompliance through conciliation.

(b) *Referral to Board of Estimates.*

- (1) If the noncompliance cannot be resolved, the Office and the contracting agency must submit written findings and recommendations to the Board of Estimates.
- (2) The Board of Estimates may impose sanctions in accordance with [Part XI] Chapter 4 of this subtitle.

§ 28-88. Noncompliance - Agency.

(a) *Notice and attempt to resolve.*

If, after investigation, the Office finds that a contracting agency has failed to comply with a provision of this [subtitle] chapter, the Office must:

- (1) send the agency a written finding that specifies the nature of the noncompliance; and
- (2) attempt to resolve the noncompliance through conference and conciliation.

(b) *Referral to Board of Estimates.*

- (1) If the noncompliance cannot be resolved, the Office must submit its written findings and recommendations to the Board of Estimates.
- (2) the Board of Estimates may take appropriate action to secure compliance.

§ 28-89. Office may require reports, etc.

The Office may require contractors, bidders, contracting agencies, and the head of any City agency to submit any reports, documents, or other information reasonably necessary to determine compliance with this [subtitle] chapter.

§ 28-90. Agencies to keep records.

(a) *Records required.*

A contracting agency must keep accurate records for each contract it awards.

(b) *Contents.*

These records must include:

- (1) dollar value of contract;
- (2) nature of goods or services to be provided;
- (3) name of contractor;
- (4) efforts employed to solicit bids from certified minority and women's business enterprises; and
- (5) all subcontracts awarded by the contractor, identifying for each:
 - (i) dollar value;
 - (ii) nature of goods or services provided;
 - (iii) name of subcontractor; and
 - (iv) race/ethnicity and sex of subcontractor's owner.

§ 28-91. Annual report.

(a) *Report required.*

The Office must submit an annual report to the Mayor and the City Council on the City's progress toward the utilization goals established under this [subtitle] chapter.

(b) *Contents.*

The report must include:

- (1) any problems; and
- (2) specific recommendations for improving the City's performance.

§§ 28-92 to 28-95. *{Reserved}*

Chapter 3. Small Local Business Enterprise Procurement Requirements

Part I. Definitions; General Provisions

§ 28-96. Definitions.

(a) *In general.*

In this chapter, the following terms have the meanings indicated unless the context clearly requires a different meaning.

(b) *Affirmative Procurement Initiative.*

“Affirmative Procurement Initiative” means a procurement tool authorized by Part IV of this chapter to be used to enhance contracting opportunities for Small Local Business Enterprise firms, including bonding and insurance waivers, bid incentives, price preferences, sheltered market, mandatory subcontracting, competitive business development demonstration projects, and SLBE evaluation preference points in the scoring of proposal evaluations.

(c) *Commercially useful function.*

- (1) “Commercially useful function” means the performance by a business enterprise of real and distinct work for which the business enterprise has the skill, expertise, and actual responsibility to perform, manage, and supervise, as determined by an evaluation of:

- (i) the amount of work subcontracted;
- (ii) normal industry practices;
- (iii) whether the amount the firm is to be paid under the contract is commensurate with both the work it is actually performing and the SLBE credit claimed for its performance of the work; and
- (iv) other relevant factors.

- (2) A firm 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 meaningful and useful SLBE participation, when in similar transactions in which SLBE firms do not participate, there is no such role performed.

(d) *Emerging SLBE.*

“Emerging SLBE” means a firm that meets the eligibility requirements specified in § 28-107(a) {“Emerging SLBE certification: Eligibility”} of this chapter.

(e) *Goal Setting Committee; GSC*

“Goal Setting Committees” or “GSC” means a committee appointed by the Chief in accordance with this chapter to assist in the administration of the SLBE Program.

(f) *Independently owned and operated.*

“Independently owned and operated” means a firm:

- (1) that is independent and directly owned by individuals only; and
- (2) whose day-to-day management is direct and independent of the influence of any other business that cannot itself qualify under the SLBE eligibility requirements.

(g) *Non-professional services.*

“Non-professional services” means non-construction, non-architectural, and non-engineering services that are not professional services and do not require any license or highly specialized training or credentials to perform.

(h) *Principal place of business.*

“Principal place of business” means a location where a firm maintains a headquarters or physical office within the geographic boundaries of the City limits and through which it coordinates and obtains no less than 50% of its overall sales dollars.

(i) *Professional services.*

“Professional services” means any non-construction, non-architectural, or non-engineering services that require highly specialized training or licensed credentials to perform, such as legal, accounting, scientific, technical, insurance, investment management, medical, or real estate services.

(j) *Sheltered market.*

“Sheltered market” means an Affirmative Procurement Initiative designed to set aside a City contract offering for bidding exclusively among certified SLBE firms or certified emerging SLBE firms.

(k) *Small Local Business Enterprise; SLBE.*

“Small Local Business Enterprise” or “SLBE” means a firm that meets the eligibility requirements specified in § 28-105(a) {“Eligibility for the SLBE Program: General eligibility requirements”} of this chapter.

§ 28-97. Purpose and Scope.

(a) *Purpose.*

- (1) The purpose of this chapter is to establish a race- and gender-neutral remedy for ongoing effects of past discrimination in the marketplace by providing a variety of procurement tools for the City that will ensure that all segments of its local business community have a reasonable and significant

opportunity to participate in City contracts for construction, architectural and engineering services, professional services, non-professional services, and commodities.

- (2) The SLBE Program also furthers the City's public interest to foster effective broad-based competition from all segments of the vendor community including minority business enterprises, small business enterprises, and local business enterprises. This policy is, in part, intended to further the City's compelling interests in both ensuring that it is neither an active nor passive participant in private sector marketplace discrimination, and in promoting equal opportunity for all segments of the contracting community to participate in City contracts.
- (3) The SLBE Program also provides additional avenues for the development of new capacity and new sources of competition for City contracts from the growing pool of small and locally based businesses. This capacity building will increase the quality of bidding on City contracts and lower prices for City contracts over the long term.

(b) *Scope and Limitations.*

This SLBE Program may be applied by the City on a contract-by-contract basis to the maximum practicable extent permissible under federal and state law, as well as the City Charter.

§ 28-98. Program objectives.

To meet the objectives of the SLBE Program, the City is committed to:

- (1) increasing the participation of SLBEs in City contracting and, to the extent possible, ameliorating through race- and gender-neutral means, any disparities in the participation of minority business enterprises or women business enterprises on City contracts;
- (2) regular evaluation regarding the progress of the SLBE Program using accumulated availability and utilization data to determine specific program provisions that require modification, expansion, or curtailment; and
- (3) providing accountability and accuracy in setting goals and in reporting program results through the implementation of a mandatory centralized bidder registration process capable of identifying with specificity the universe of firms that are available and interested in bidding on, or performing on, City contracts, and of providing the means of tracking actual City bids, contract awards, and prime contract and subcontract payments to registered bidders on the basis of firm ownership status, commodity or sub-industry codes, firm location, and firm size.

§ 28-99. {Reserved}

Part II. Administration

§ 28-100. Minority and Women's Business Office responsibilities.

The Office must:

- (1) report at least annually to the Mayor and the City Council on the City's progress towards satisfying SLBE Program objectives;
- (2) formulate SLBE Program waivers, improvements, and adjustments to the GSC goal-setting methodology and other program functions;
- (3) have substantive input in a contract specification review process to be undertaken in advance of the

issuance of City's RFPs and bid solicitations to ensure that contract bid specifications are not unnecessarily restrictive or unduly burdensome to small, local, minority-owned, and other businesses;

- (4) receive and analyze external and internal information, including statistical data and anecdotal testimonies, it deems appropriate to effectively accomplish its duties;
- (5) adopt rules and regulations to carry out this chapter; and
- (6) where appropriate, make recommendations for approval of changes to established size standards for SLBE firms.

§ 28-101. Goal Setting Committees.

(a) Chief to appoint.

The Chief must appoint 5 Goal Setting Committees to assist in the administration of the SLBE Program.

(b) Industry category specific committees.

A separate committee must be established with responsibility for each of the following industry categories:

- (1) architectural and engineering;
- (2) construction;
- (3) professional services;
- (4) non- professional services; and
- (5) commodities procurement.

(c) Committee membership; Chair.

- (1) Each GSC is chaired by the Chief or the Chief's designee.
- (2) The Chief determines the number of members on each GSC at the time of its establishment.
- (3) Each GSC must include representatives from the Office and from the primary contracting agencies and end-user agencies for the committee's industry category.
- (4) The Chief must appoint the remaining members of the GSC from the City's procurement personnel and other City departments affected by this Program.

(d) Meetings.

Each GSC may meet as often as necessary to accomplish its duties, but not less than twice annually.

§ 28-102. GSC responsibilities.

(a) Establishing SLBE parameters for each industry category.

(1) For its industry category, each GSC must:

- (i) establish SLBE participation goals; and
- (ii) select appropriate SLBE Affirmative Procurement Initiatives to be applied to each contract, subject to § 28-97(b).

(2) In making its decisions, the GSC must consider:

- (i) vendor availability;
- (ii) industry characteristics; and
- (iii) project-specific characteristics.

(b) *Review overall SLBE Program.*

Each committee may also review the regulations issued to implement this chapter and provide the chief with general advice on administering the policy and modifying the policy objectives of the SLBE Program.

§ 28-103. SLBE Program performance review.

(a) *Annual report by Chief.*

The Chief must submit an annual report to the Mayor and City Council that provides an assessment of:

- (1) the progress towards achieving the goals established for awards to certified SLBE and certified emerging SLBE firms;
- (2) both dollars awarded and expended through the SLBE Program; and
- (3) the progress towards achieving the stated Program Objectives including:
 - (i) enhancing competition;
 - (ii) establishing and building new business capacity; and
 - (iii) removing barriers to, and eliminating disparities in, the utilization of available minority business enterprises and women business enterprises on City contracts.

(b) *Public hearing every 2 years.*

At least once every 2 years, the City Council must conduct a public hearing to solicit public comments on the SLBE Program.

(c) *Periodic City review.*

The Board of Estimates, or its designee, must periodically review the SLBE Program to determine whether the various contracting procedures used to enhance SLBE contract participation need to be adjusted or used more or less aggressively in future years to achieve the goals stated §§ 28-97 {“Purpose and Scope”} and 28-98 {“Program objectives”} of this chapter.

§ 28-104. *{Reserved}*

Part III. SLBE Program Participation Criteria

§ 28-105. Eligibility for the SLBE Program.

(a) *General eligibility requirements.*

To be eligible for certification as an SLBE, the business enterprise must:

- (1) be an independently owned and operated business enterprise that is not a broker, that is not a subsidiary of another business, and that is not dominant in its field of operation;
- (2) have owners who are actively involved in day-to-day management and control of the business;
- (3) perform a commercially useful function;
- (4) not have employed more than 50 full-time persons at any time during the last 3 years;
- (5) have annual gross revenues within its largest primary NAICS commodity code as averaged over its most recent past 3 fiscal years, or if the business has not existed for 3 years, over the course of the existence of the business, of not more than:
 - (i) \$10 million for construction firms, specialty trade contractors, and manufacturing firms;
 - (ii) \$5 million for architectural firms;
 - (iii) \$3 million for professional services firms;
 - (iv) \$2.5 million for engineering firms; or
 - (v) \$2 million for wholesale operations, retail firms, and all other services firms (e.g., truck transportation, administrative support services, repair and maintenance services); and
- (6) have a principal place of business in Baltimore City;
- (7) have:
 - (i) been established for at least 1 year; or
 - (ii) managing principals of the business who each have at least 3 years of relevant experience prior to forming or joining the business; and
- (8) in the year preceding the date of the initial certification application, not have received more than \$1,000,000 in City contract payments as a result of contract awards from the City achieved through an open competitive bidding process.

(b) *Ineligible firms.*

- (1) A business firm is not eligible to become a certified SLBE if it is owned by:

- (i) other businesses that cannot themselves qualify under the SLBE eligibility requirements in subsection (a) of this section; or
 - (ii) the principals or owners of other businesses that cannot themselves qualify under the SLBE eligibility requirements in subsection (a) of this section.
- (2) A business firm that has graduated from the SLBE Program under § 28-109. {"Graduation and suspension criteria"} is no longer eligible to participate in the SLBE Program even if it otherwise meets all other eligibility criteria.

§ 28-106. Application for certification or recertification.

(a) *In general.*

In order to apply for certification or recertification as an SLBE an enterprise must provide the Office with:

- (1) a completed certification or recertification application in the form required by the Office;
- (2) all supporting documentation required by the Office; and
- (3) a signed affidavit stating that it meets all of the SLBE eligibility criteria as set forth in § 28-105 {"Eligibility for the SLBE Program"}.

(b) *Recertification.*

Certified SLBEs must submit a completed re-certification application to the Office every 2 years for review and continued certification.

(c) *Application review.*

- (1) After receiving an SLBE certification or recertification application, the Office must review all enclosed forms, affidavits, and documentation to make a prima facie determination as to whether the applicant satisfies the SLBE eligibility requirements as set forth in this chapter.
- (2) If after the review required by this section the Office finds that the applying firm satisfies the SLBE eligibility requirements as set forth in this chapter, the Office must grant the firm certified SLBE status.

(d) *Ineligible applicants.*

- (1) If an applicant is determined to be ineligible for certification as an SLBE, the Chief must send a letter to the applicant stating the basis for the denial of eligibility.
- (2) Applicants determined to be ineligible are not eligible to submit a new application until at least 1 year after the date of the notice of denial of eligibility.

(e) *Joint ventures.*

- (1) Joint ventures must be certified on a bid-by-bid basis.
- (2) A joint venture seeking certification is not itself subject to the size limitations imposed by § 28-105 (a)(4) and § 28-105(a)(5).

- (3) Each individual business participating in the joint venture must be a certified SLBE in order for the joint venture to receive the benefits of the SLBE Program.

(f) *Certification audits.*

In the course of considering the certification or recertification status of any SLBE firm or joint venture, the Office must periodically conduct audits and inspect the office, job site, records, and documents of the firm, and interview the firm's employees, subcontractors, and vendors as reasonably necessary to ensure that all eligibility standards are satisfied and that the integrity of the SLBE Program is maintained.

§ 28-107. Emerging SLBE certification.

(a) *Eligibility.*

A firm is eligible for certification as an emerging SLBE if it meets the eligibility criteria set forth below:

- (1) the firm complies with SLBE criteria as specified above in § 28-105 {"Eligibility for the SLBE Program"};
- (2) the firm has been in existence for less than 5 years;
- (3) the firm has no more than 5 full-time employees; and
- (4) the firm's annual gross revenues as averaged over the life of the firm are less than \$1 million.

(b) *Application.*

In order to apply for certification or recertification as an emerging SLBE an enterprise must provide the Office with:

- (1) a completed application for certification in the form specified by the Office;
- (2) all supporting documentation required by the Office; and
- (3) a signed affidavit stating that it meets all of the eligibility criteria in subsection (a) of this section.

(c) *Application review.*

- (1) After receiving an emerging SLBE certification or recertification application, the Office must review all enclosed forms, affidavits, and documentation to make a prima facie determination as to whether the applicant satisfies the emerging SLBE eligibility requirements as set forth in this chapter.
- (2) If after the review required by this section the Office finds that the applying firm satisfies the emerging SLBE eligibility requirements as set forth in this chapter, the Office must grant the firm certified emerging SLBE status.

(d) *Ineligible applicants.*

- (1) If an applicant is determined to be ineligible to participate as an emerging SLBE, the Chief must send the applicant a letter stating the basis for the denial of eligibility.

- (2) Applicants determined to be ineligible are not eligible to submit a new application for emerging SLBE certification for 1 year after the date of the notice of denial of eligibility.
- (3) Applicants determined to be ineligible for certification as an emerging SLBE may still be eligible for certification as an SLBE.

§ 28-108. {Reserved}

§ 28-109. Graduation and suspension.

(a) Permanent graduation from SLBE Program.

- (1) An SLBE firm must be permanently graduated from the SLBE Program after it has received a cumulative total of \$5 million of City-funded prime contract or subcontract payments in at least 5 separate contracts since its initial certification as an SLBE firm.
- (2) An SLBE firm must be permanently graduated from the SLBE Program after its 3 fiscal year average gross sales exceeds the size standard eligibility requirements.

(b) Temporary suspension from SLBE Program.

An SLBE firm must be temporarily suspended by the Chief for the balance of any fiscal year after it has received, as contractor or subcontractor of City-funded contracts, a cumulative total of \$1.5 million in payments for that fiscal year.

(c) Permanent revocation of SLBE eligibility.

An SLBE firm may have its SLBE certification and eligibility permanently revoked by the Chief if it:

- (1) fails to perform a commercially useful function under a contract; or
- (2) allows its certified SLBE status to be fraudulently used for the benefit of a non-SLBE firm or the owners of a non-SLBE firm so as to provide the non-SLBE firm or firm owners benefits from Affirmative Procurement Initiatives to which they would not otherwise be entitled.

(d) Permanent graduation from emerging SLBE Program.

- (1) An emerging SLBE firm must be permanently graduated from emerging SLBE status after it has received a cumulative total of \$2.5 million of City-funded prime contracts or subcontract payments in at least 5 separate contracts since its initial certification as an emerging SLBE firm.
- (2) An emerging SLBE firm must be permanently graduated from emerging SLBE status once its 3 year average annual gross sales exceeds \$2 million.

(e) Temporary suspension from emerging SLBE Program.

- (1) An emerging SLBE firm must be temporarily suspended from emerging SLBE status by the Chief for the balance of any fiscal year after it has received, as a contractor or subcontractor on City-funded contracts, a cumulative total of \$750,000 in payments for that fiscal year.
- (2) an emerging SLBE firm suspended under this subsection may still be eligible to continue participating in Affirmative Procurement Initiatives as an SLBE firm for the remainder of the fiscal

year.

§ 28-110. Adverse determinations and appeals.

(a) *Office determinations.*

All adverse certification or eligibility determinations by the Office or Chief must:

- (1) be in writing;
- (2) include the reasons for the determination; and
- (3) be sent to the affected business enterprise.

(b) *Appeal.*

- (1) An aggrieved party has a right to protest an adverse determination and seek administrative review.
- (2) To obtain administrative review, the aggrieved party must submit a written protest to the Chief within 7 days of receipt of the adverse determination.
- (3) The protest must specify the reasons and factual grounds of the protest and be accompanied by any supporting documents.

(c) *Action by Chief.*

Within 25 days of receipt of the protest, the Chief must:

- (1) review the protest and all relevant supporting documents; and
- (2) render a written decision that includes the reasons for the decision.

(d) *Hearing.*

- (1) After all departmental remedies have been exhausted, the aggrieved applicant may request a hearing before a panel of independent hearing officers, with 1 member of the panel being appointed by the President of the City Council and the other members of the panel being appointed by the City Solicitor.
- (2) The hearing officer must be knowledgeable of Baltimore City procurement laws and procedures, including this subtitle.

§§ 28-111 to 28-112. {Reserved}

Part IV. Affirmative Procurement Initiatives.

§ 28-113. Affirmative procurement initiatives to be set by GSCs.

To promote the award of City contracts to SLBEs or emerging SLBEs, each GSC may, subject to § 28-97 (b), authorize the use of any or all of the SLBE Affirmative procurement initiatives in this Part IV for contracts in its industry category.

§ 28-114. Bonding or insurance waiver.

Subject to applicable federal and state law, as well as the City Charter, the Board of Estimates, at its discretion, may waive or reduce the bonding or insurance requirements, depending on the type of contract and whether the Board determines that the bonding or insurance requirements would deny the SLBE or emerging SLBE an opportunity to perform the contract which the SLBE or emerging SLBE has shown itself otherwise capable of performing.

§ 28-115. Price preferences.

(a) *In general.*

Subject to § 28-97(b), the Board of Estimates may award a contract to a certified SLBE or certified emerging SLBE that submits a bid within 10% of a low bid by a non-SLBE.

(b) *Exclusions.*

A price preference may not be applied if:

- (1) the award to the SLBE would result in a total contract cost that is, on an annual basis, more than \$25,000 higher than the low bid; or
- (2) if the total contract cost would exceed the City's budgeted funding for the contract.

§ 28-116. Evaluation preferences.

(a) *In general.*

The City may reserve up to 20% of the total points available for RFP evaluation purposes for firms that are certified as SLBE or emerging SLBE firms, or to joint ventures that have certified SLBE or certified emerging SLBE partners.

(b) *Allocation among joint venturers.*

For joint ventures, available evaluation preference points must be allocated on a pro rata basis, based on the percentage of SLBE or emerging SLBE participation in the overall ownership, performance, and management of the joint venture.

§ 28-117. Mandatory subcontracting.

(a) *Determined on a contract-by-contract basis.*

A GSC may, on a contract-by-contract basis, at its discretion, require that a predetermined percentage of a specific contract, up to 40%, be subcontracted to certified SLBEs or to certified emerging SLBEs.

(b) *Subcontracting by SLBEs.*

- (1) If the contractor is a certified SLBE or certified emerging SLBE, then the contractor is entitled to count the dollar value of the work performed by its own forces towards satisfaction of the mandatory subcontracting goal for that contract.
- (2) An SLBE or emerging SLBE contractor may not subcontract more than 49% of the contract value to a non-SLBE.

(c) *Required bidder submissions.*

- (1) For a contract bid out under this section, a prospective bidder must submit, at the time of bidding, a form providing the name of the SLBE or emerging SLBE subcontractor or subcontractors and describing both the percentage of subcontracting by the SLBE or emerging SLBE, and the work to be performed by the SLBE or emerging SLBE.
- (2) At the time of bidding, a bidder may request a full or partial waiver of this mandatory subcontracting requirement from the Chief for good cause by submitting an SLBE unavailability certification to the Chief along adequate documentation of good faith efforts to obtain SLBE participation, in the form required by the Office.

(d) *Review of waiver requests.*

The Chief must base his or her determination on a waiver request on the following criteria:

- (1) whether the requestor of the waiver has made good faith efforts to subcontract with qualified and available SLBEs or emerging SLBEs;
- (2) whether subcontracting would be inappropriate or not provide a commercially useful function under the circumstances of the contract; and
- (3) whether there are no certified SLBE or certified emerging SLBE firms that are qualified and available to provide the goods or services required.

(e) *Failure to satisfy SLBE subcontracting goals.*

- (1) In the absence of a waiver, failure of a contractor's bid or proposal to satisfy the mandatory SLBE subcontracting goal renders its bid or proposal non-responsive.
- (2) In the absence of a waiver, failure of a contractor, in the performance of the contract, to attain a mandatory subcontracting goal for SLBE participation is grounds for termination of existing contracts with the City, debarment from performing future City contracts, or any other remedies available under the terms of its contract with the City or under the law.
- (3) A Contractor commits a material breach of contract if it fails to notify and obtain written approval from the Chief in advance of any negative change in usage of a designated SLBE or emerging SLBE subcontractor, including any:
 - (i) reduction in subcontract scope;
 - (ii) termination of a subcontract; or
 - (iii) substitution of a new SLBE or emerging SLBE subcontractor for a designated SLBE or emerging SLBE.

§ 28-118. Sheltered market.

(a) *Eligible contracts.*

- (1) The Chief and a contracting agency may select certain contracts which have a contract value of \$250,000 or less for award to a certified SLBE, or a joint venture with a certified SLBE, through the

Sheltered Market Program.

- (2) The Chief and a contracting agency may select certain contracts that have a value of \$50,000 or less for award to a certified emerging SLBE firm through the Sheltered Market Program.

(b) *Contract selection for the Sheltered Market Program.*

In determining whether a particular contract should be bid through the Sheltered Market Program, the contracting agency and Chief must consider:

- (1) whether there are at least 3 certified SLBEs or certified emerging SLBEs that are available and capable to participate in the Sheltered Market Program for that contract;
- (2) the degree of underutilization of the SLBE and emerging SLBE contractors in the specific industry categories; and
- (3) the extent to which the City's SLBE and emerging SLBE contractor utilization goals are being achieved.

(c) *Removal of contracts from the Sheltered Market Program.*

A contract may be removed from the Sheltered Market Program for purposes of rebidding if:

- (1) a responsive and responsible bid or response is not received for the contract; or
- (2) the apparent low bid is determined by the Chief to be too high in price.

§ 28-119. Competitive business development demonstration project.

(a) *Eligibility.*

If an industry category routinely has too few sources of bidders to provide meaningful or sufficient competition for City contracts, the Chief, with the concurrence of the impacted contracting agency, may reserve certain contracts within that industry category for placement into a competitive business development demonstration project to encourage the development of new capacity within the industry to competitively bid on the future supply of specialized goods or services to the City.

(b) *Competitive Business Development Process.*

- (1) Contracts reserved for Competitive Business Development Demonstration Projects are subject to a Request for Proposals process open only to joint ventures between an established firm, or experts in the relevant industry, and a certified SLBE firm.
- (2) The scope of work for the selected joint venture must include teaching a hands-on curriculum to SLBE firms that have expressed an interest in diversifying into the relevant industry, in addition to performing the customary functions of the contract.
- (3) The curriculum required by paragraph (2) of this subsection must teach skills required to qualify for future City contracts and to successfully compete in the industry, including both:
 - (i) technical skills taught through hands-on demonstrations of how to perform necessary tasks in the field; and

(ii) administrative skills such as cost estimating, bidding, staffing, or project management.

(c) *Selection of candidate firms.*

The Chief must select certified SLBE candidate firms for participation in competitive business development demonstration projects on the basis of an assessment of their current capabilities and their likely success in diversifying into the new relevant industry once given technical assistance, training, and an opportunity to develop a performance track record in the industry.

§§ 28-120 to 28-121. {Reserved}

Chapter 4. Penalties

[Part XI. Penalties]

§ 28-122. [§ 28-96.] Administrative penalties.

A contractor who fails to comply with any provision of this subtitle is subject to any or all of the following penalties:

- (1) suspension of contract;
- (2) withholding of funds;
- (3) rescission of contract based on material breach;
- (4) refusal to accept a bid;
- (5) disqualification of a bidder, contractor, or other business from eligibility for providing goods or services to the City for a period not to exceed 2 years; and
- (6) payment of liquidated damages.

§ 28-123. {Reserved}

§ 28-124. [§ 28-98.] Criminal penalties.

(a) *Prohibited conduct.*

No person may:

- (1) fraudulently obtain, retain, attempt to obtain or retain, or aid another in fraudulently obtaining, retaining, or attempting to obtain or retain certification under this subtitle;
- (2) in any matter administered under this subtitle, willfully falsify, conceal, or cover up by a trick, scheme, or device a material fact or make any false writing or document knowing that it contains any false, fictitious, or fraudulent statement or entry;
- (3) willfully obstruct, impede, or attempt to obstruct or impede an authorized official or employee who is investigating the qualifications of a business enterprise that has requested certification under this subtitle;
- (4) fraudulently obtain, attempt to obtain, or aid another in fraudulently obtaining or attempting to

obtain public money to which the person is not entitled under this subtitle; or

- (5) make a false statement to any person or entity that another person or entity is or is not certified under this subtitle.

(b) *Penalties.*

Any person who violates any provision of this section is guilty of a misdemeanor and, on conviction, is subject to imprisonment for not more than 1 year, to a fine of not more than \$1,000, or to both imprisonment and fine.

Section 2. And be it further ordained, That the catchlines contained in this Ordinance are not law and may not be considered to have been enacted as a part of this or any prior Ordinance.

Section 3. And be it further ordained, That this Ordinance takes effect on the 30th day after the date it is enacted.