

ORDAINING new Chapter 324, “Minority and Women Business Enterprise Programs,” of the Cincinnati Municipal Code to implement race- and gender-conscious programs designed to mitigate the existing disparity in the participation of minority business enterprises and women business enterprises in City contracts, consistent with the recommendations of the Economic Inclusion Advisory Council and the findings detailed in the Disparity Report.

WHEREAS, on August 7, 2013, the City Council adopted a motion (Doc. No. 201301088) recommending that the Administration undertake a disparity study, also known as a “Croson Study”; and

WHEREAS, following a competitive proposals process, the Administration chose Mason Tillman Associates, Ltd. to conduct the disparity study; and

WHEREAS, on January 15, 2014, City Council passed Ordinance No. 0006-2014 authorizing the City Manager to enter into the Agreement with Mason Tillman Associates, Ltd (“Mason Tillman”) to conduct the disparity study; and

WHEREAS, the Final Disparity Report dated July 2015 (“the Disparity Report”), which was prepared by Mason Tillman, identified statistically significant disparities in the participation of minority business enterprises (“MBEs”) and women business enterprises (“WBEs”) in City contracts; and

WHEREAS, the Disparity Report included recommendations for both race- and gender-neutral and race- and gender-conscious remedies for the identified and statistically significant disparities in the participation of MBEs and WBEs in City contracts; and

WHEREAS, the Economic Inclusion Advisory Council also has made recommendations for supporting greater economic inclusion of MBEs and WBEs in City contracts; and

WHEREAS, it is the desire of Council to remedy the statistically significant underutilization of women-owned and minority-owned business enterprises (“W/MBEs”) in City contracts for construction, professional services including architectural and engineering services, and non-professional services and commodities through the implementation of targeted race- and gender-conscious programs designed to permit full and fair participation of W/MBEs in City contracts; now therefore,

BE IT ORDAINED by the Council of the City of Cincinnati, State of Ohio:

Section 1. That new Chapter 324, “Minority and Women Business Enterprise Program” is hereby ordained to read as follows:

Section 324-1. – Definitions.

For the purpose of this chapter, the words and phrases defined in the sections hereunder shall have the meanings therein respectively ascribed to them, unless a different meaning is clearly indicated by the context.

Section 324-1-A. – Affiliation; Affiliate.

“Affiliation” and “affiliate” shall have the same meaning as provided in Section 323-1-A of the Cincinnati Municipal Code.

Section 324-1-A1. – African-American.

“African-American” means a U.S. citizen or lawfully admitted permanent resident whose ancestry originates from any of the black racial groups of Africa.

Section 324-1-A2. – Asian-American.

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

Section 324-1-B. – Bid.

“Bid” shall have the same meaning as provided in Section 321-1-B1 of the Cincinnati Municipal Code.

Section 324-1-B1. - Board.

"Board" shall mean the Certification Appeal Board.

Section 324-1-C. - Certification.

"Certification" or "recertification" shall mean a minority business enterprise (“MBE”) or women business enterprise (“WBE”) that meets the qualification criteria set forth in this chapter and in the rules and regulations promulgated under the authority of this chapter for participation in the MBE or WBE programs in the appropriate construction, professional services, or supplies and non-professional service category for which the contract is being awarded and is formally approved by the director or the director’s designee as having met such criteria. Certification or recertification relate to qualifications regarding ownership and control of the business, and not the quality of the service or product offered.

Section 324-1-C1. – Cincinnati Market Area.

“Cincinnati market area,” as determined by the 2015 disparity study, includes all of Hamilton County, Ohio and is the area in which firms must have an operating office in order to be considered for certification as an MBE or WBE.

Section 324-1-C2. – City Purchasing Agent.

“City purchasing agent” shall have the same meaning as provided in Section 321-1-C of the Cincinnati Municipal Code.

Section 324-1-C3. - Commercially Useful Function.

"Commercially useful function" shall have the same meaning as provided in Section 323-1-C2 of the Cincinnati Municipal Code, except that the phrase “MBE or WBE” shall be substituted for the phrase “SBE, SLBE or ELBE” wherever those terms appear in the definition.

Section 324-1-C4. – Compliance.

“Compliance” shall mean a determination by the director that a utilization plan for MBE and WBE participation in a particular contract is in compliance with this chapter, that the contractor has managed the contract as provided in the MBE/WBE utilization plan, and that the contractor or prospective contractor has otherwise complied with this chapter.

Section 324-1-C5. - Contract.

"Contract" shall mean a contract in excess of \$50,000.00, except contracts listed by the city purchasing agent as exempt and approved by the city manager, for:

- (a) Construction;
- (b) Supplies;
- (c) Services; or
- (d) Professional Services.

Section 324-1-C6. - Construction.

"Construction" shall have the same meaning as provided in Section 323-1-C4 of the Cincinnati Municipal Code.

Section 324-1-C7. – Contracting Agency.

“Contracting agency” shall mean the City agency, department, independent board or authorized representative that issues an invitation to bid, RFP or RFQ.

Section 324-1-C8. – Contractor.

“Contractor” shall mean an individual, joint venture, or legal entity with a written agreement to provide goods or services to the city.

Section 324-1-C9. – Control.

“Control,” as it relates to the control of a business by owners who are members of a minority group or women, means that such minority or women owners:

- (a) Possess and actively and continuously exercise the legal authority and power to direct or cause the direction of the management and policies of the business and to make day-to-day and long-term decisions for the business on matters of management, policy and operations;
- (b) Are not subject to any formal or informal restrictions that limit the discretion customarily within the purview of a business owner; and
- (c) Are not restricted, whether by agreement, by-laws, resolutions or other arrangements from making business decisions without the cooperation or vote of any owner who is not a minority or a woman.

Section 324-1-D. – Department.

“Department” shall mean the department of economic inclusion.

Section 324-1-D1. – Director.

“Director” shall mean the director of the department of economic inclusion or his or her designee.

Section 324-1-D2. – Disparity Study.

“Disparity study” means the study undertaken by Mason Tillman Associates, Ltd. that statistically analyzed the City of Cincinnati prime contracts and subcontracts during the period January 1, 2009 to December 31, 2013 to evaluate the use of willing and able minority- and women-owned business enterprises and that is reflected in a final report dated July 2015.

Section 324-1-H. – Hispanic-American.

“Hispanic-American” means a U.S. citizen or lawfully admitted permanent resident whose ancestry originates from Mexico, Puerto Rico, Cuba, Central America, South America, or Portugal, regardless of race.

Section 324-1-I. – Independent Operating Business.

“Independent operating business” shall mean a business where ownership is direct, independent, and by individuals only. Businesses that are owned by other

businesses that do not qualify under the MBE or WBE eligibility requirements shall not be eligible for certification unless the following conditions are met:

- (a) The minority or women owners own and control the business through a parent company that is a holding company, established for tax, capitalization or other purposes consistent with industry practice, and the minority or women owners of the parent/holding company control the subsidiary through the parent/holding company; and
- (b) The cumulative ownership by the minority or women owners in the parent/holding company is at least 51%.

Section 324-1-I1. – Invitation to Bid.

“Invitation to bid” shall have the same meaning as provided in Section 321-1-I of the Cincinnati Municipal Code.

Section 324 -1-J. – Joint Venture.

“Joint venture” shall have the same meaning as provided in Section 323-1-J of the Cincinnati Municipal Code.

Section 324-1-M. – Minority Business Enterprise; MBE

"Minority business enterprise" or "MBE" shall mean a business that meets each of the following criteria:

- (a) Is an independent operating business;
- (b) Is a sole proprietorship that is independently owned and controlled by an individual who is a minority group member; a joint venture that is at least 51% independently owned and controlled by minority group members; or a partnership, limited liability company or corporation that is at least 51% independently owned and controlled by minority group members;
- (c) The minority owners have interest in capital and earnings commensurate with the minority group members' percentage of ownership;
- (d) Has been in operation for at least twelve months before applying for certification;
- (e) Has been at least 51% minority-owned for at least 12 months before applying for certification;
- (f) Has an operating office located in the Cincinnati market area; and
- (g) Performs a commercially useful function.

Section 324-1-M1. – Minority Group Member.

“Minority group member” shall mean a member of the following groups for which the disparity study found a statistically significant underutilization for the following types of contracts:

- (a) For construction contracts and professional services contracts, African-Americans; and
- (b) For non-professional services and supplies contracts, African-Americans and Asian Americans.

Section 324-1-N. – Native American.

“Native American” shall mean a U.S. citizen or lawfully admitted permanent resident whose ancestry originates from the original people of North America and who maintains cultural identification through tribal affiliation.

Section 324-1-O. – Operating Office.

“Operating office” shall mean either a principal place of business or significant employee presence within the geographic limits of Hamilton County. For purposes of this definition, “significant employee presence” shall mean twenty-five percent or more of a firm’s total number of full- and part-time employees are domiciled within the geographic limits of Hamilton County, Ohio.

Section 324-1-P. - Points.

“Points” shall mean the quantitative assignment of value for specific response evaluation criteria in the contractor selection process initiated by a request for proposal.

Section 324-1-P1. – Prime Contractor.

“Prime contractor” shall mean the vendor or contractor to which a purchase order or contract is issued by the city for purposes of providing goods or services to the city.

Section 324-1-P2. - Professional Services.

"Professional services" shall mean professional services as defined in Section 321-1-P of the Cincinnati Municipal Code.

Section 324-1-R1. – Regulations; Rules.

“Regulations” or “rules” shall mean the regulations promulgated by the city manager pursuant to Section 324-9 of this chapter.

Section 324-1-R2. – Request for Proposal; RFP.

“Request for proposal” or “RFP” shall have the same meaning as provided in Section 321-1-R3 of the Cincinnati Municipal Code.

Section 324-1-R3. – Request for Qualifications.

“Request for qualifications” or “RFQ” shall have the same meaning as provided in Section 321-1-R4 of the Cincinnati Municipal Code.

Section 324-1-S. - Services.

"Services" shall mean service as defined in Section 321-1-S of the Cincinnati Municipal Code.

Section 324-1-S1. – Subcontractor.

“Subcontractor” shall mean any vendor or contractor that is providing goods or services to a prime contractor in furtherance of the prime contractor’s performance under a purchase order or contract with the City.

Section 324-1-S2. - Subcontractor Utilization Plan.

"Subcontractor utilization plan" shall mean a document submitted by a bidder with its bid or by respondent to an RFP or RFQ with its response, on a form required by the director, in which the bidder or respondent commits to utilize specifically identified certified MBEs and/or WBEs in a percentage that equals or exceeds the applicable MBE and/or WBE goals for the contract.

Section 324-1-S3. – Supplier.

“Supplier” shall mean a business that furnishes needed items to a contractor and either is involved in the manufacture or distribution of the supplies or materials or otherwise warehouses and ships the supplies or materials.

Section 324-1-S4. - Supplies.

"Supplies" shall mean supplies as defined in Section 321-1-S2 of the Cincinnati Municipal Code.

Section 324-1-W. – Women.

“Women” and “woman” shall mean persons whose gender is female and those persons who meet the definition of “transgender” in Section 914-1-T of the Cincinnati Municipal Code and identify their gender as female.

Section 324-1-W1. – Women Business Enterprise; WBE.

"Women business enterprise" or "WBE" shall mean a business that meets each of the following criteria:

- (a) Is an independent operating business;
- (b) Is a sole proprietorship that is independently owned and controlled by a woman; a joint venture which is at least 51% independently owned and controlled by women; or a partnership, limited liability company or corporation that is at least 51% independently owned and controlled by women;
- (c) The women owners have interest in capital and earnings commensurate with the women's percentage of ownership;
- (d) Has been in operation for at least twelve months before applying for certification;
- (e) Has been at least 51% women-owned for at least twelve months before applying for certification;
- (f) Has an operating office located in the Cincinnati market area; and
- (g) Performs a commercially useful function.

Section 324-3. – Rules of Construction.

- (a) The provisions of this chapter are to be liberally construed in order to accomplish its policies and purposes.
- (b) "Must" and "shall" are mandatory terms used to express a requirement or to impose a duty.
- (c) "Must not," "may not," and "no" are mandatory negative terms used to establish a prohibition.
- (d) All provisions of this chapter are severable. 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 same to any person or circumstances is invalid, the remaining provisions and the application of those provisions to other persons or circumstances shall remain in full force and effect to the maximum extent practicable.
- (e) Unless otherwise specified, the first day of a designated period of time is not to be counted. The last day of a period of time is to be counted unless it is a Saturday, Sunday or legal holiday observed by the city of Cincinnati.

Section 324-5. – Legislative Findings, Policy and Purpose.

- (a) The council of the city of Cincinnati finds, based on the disparity study, that:
- (1) There is evidence of disparities in the city's utilization of MBEs and WBEs in city purchasing and contracting;
 - (2) There is evidence of the existence in the Cincinnati market area of discriminatory practices and attitudes that impede the full and fair participation of MBEs and WBEs as prime contractors in city contracts for construction, professional services, and non-professional services and supplies;
 - (3) There is evidence of discrimination in the city's contracting process by prime contractors against MBEs and WBEs resulting in the underutilization of MBEs and WBEs as subcontractors in contracts awarded by the city of Cincinnati;
 - (4) It is in the best interest of the city to adopt measures to eliminate barriers that prohibit full and fair participation of MBEs and WBEs in city contracts;
 - (5) Race- and gender-neutral remedies alone will not adequately remedy existing disparities in city contracting, as evidenced by the fact that the city has had a race- and gender-neutral program for small business enterprises for more than ten years and the disparity study found that MBEs and WBEs continue to be underutilized; and
 - (6) Race- and gender-conscious remedies are also necessary in order to provide opportunities for full and fair participation of MBEs and WBEs in city contracts.
- (b) It is the policy of the city of Cincinnati to promote equal business opportunity in the city's contracting process by ensuring full and equitable participation by MBEs and WBEs in the provision of goods and services to the city on a contractual basis. This policy is intended to further the city's compelling interest in stimulating economic development through the support and empowerment of all segments of the local business community.
- (c) The purpose of the MBE and WBE program is to provide a necessary race- and gender-conscious tool for the city to use, along with its race- and gender-neutral programs, to ensure that all segments of its local business community have a reasonable and significant opportunity to participate in city contracts. The program shall be regularly evaluated using accumulated availability and utilization data to determine whether specific program provisions may require modification, expansion or curtailment during the effective period of this chapter.

Section 324-7. – Scope and Effective Period of Chapter.

- (a) This chapter applies to all contracts for construction, professional services, and non-professional services and supplies valued at \$50,000.00 or more for which a contractor provides goods or services to the city.
- (b) This chapter shall remain in effect for a period of five years after its initial effective date and shall automatically expire at the end of that five year period unless, prior to that time, the council of the city of Cincinnati, after authorizing an appropriate study to be undertaken and conducting public hearings, finds that statistically significant disparity continues to exist and extends the effective period of this chapter for an additional five years.

Section 324-9. – Rules and Regulations.

The city manager shall issue and enforce rules and regulations to carry out the meaning and purpose of the MBE and WBE program authorized by this chapter.

Section 324-11. – MBE and WBE Certification.

- (a) *Requirements.* To be eligible for certification as an MBE, each applicant must meet the definition of an MBE in Section 324-1-M. To be eligible for certification as a WBE, each applicant must meet the definition of a WBE in Section 324-1-W1.
- (b) *Certification Process.*
 - (1) A business seeking certification as an MBE or WBE must:
 - (A) Submit an application to the department on the prescribed form, affirming under penalty of perjury that the business qualifies as a city of Cincinnati MBE or WBE as those terms are defined in Section 324-1-M or Section 324-1-W1, respectively; and
 - (B) If requested by the department, the applicant must provide any and all materials and information necessary to demonstrate active participation in the control, operation, and management of the business.
 - (2) The department will review and evaluate applications, and may reject an application based on one or more of the following: the applicant does not meet the requirements of the definition of an MBE or WBE, as applicable; the application is not complete; the application contains false information; or the applicant has not provided materials or information requested by the director.
 - (3) The director will make a certification determination within 90 days after the date the city receives a satisfactorily completed application from the

applicant. If certification is denied, the director will notify the applicant in writing and specify the reason(s) for the denial.

- (4) Firms certified as an MBE or WBE by other government agencies will be required to be certified under this chapter regardless of other certification. The city manager may provide by rules and regulations for an expedited or summary process for certification by the city if the business has a current MBE or WBE certification from agencies specifically identified in those rules and regulations.
- (c) *Period of Certification.* The certification is valid for a two-year period beginning on the date the city certifies the applicant as an MBE or WBE.
- (d) *Recertification.* Upon expiration of the two-year certification period, a business that desires recertification must return a completed recertification form as provided by the city and comply with the requirements of subsections (b)(1)(A) and (b)(1)(B) of this section.
- (e) *Revocation of Certification.*
 - (1) The director shall revoke the certification of a business if it is determined that the business was certified in error; the business no longer meets the definition of an MBE or WBE, as applicable; or the business fails to provide requested information in connection with a certification review conducted by the department.
 - (2) The director shall permanently revoke the certification of a business if it is determined that the certification was fraudulently obtained or that the firm allows its certified MBE or WBE status to be fraudulently used to obtain economic benefits for a firm that is not a certified MBE or WBE or for the owners of a firm that is not a certified MBE or WBE. In addition to certification revocation, any participant in the fraudulent use of certified MBE or WBE status for the benefit of another person or entity that is not a certified MBE or WBE shall be guilty of a misdemeanor of the first degree, punishable by imprisonment for up to six months and/or a fine of up to \$1,000.00.
 - (3) The director shall provide the MBE or WBE with written notice of the revocation of certification, subject to the right to request reconsideration and to request a hearing as provided in Section 324-35 of this chapter.
- (f) *Certification Reviews.* The department will conduct random certification reviews of certified businesses by auditing them to verify that the information submitted by a business is accurate and that the business remains eligible after certification has been granted. Certification reviews may be conducted for any business for which the city determines a certification review is warranted. Businesses subject to certification reviews must provide the department, within seven days of the request, with any information requested to verify the

certification eligibility of the business. Audits may include one or all of the following as reasonably necessary to ensure that all eligibility standards are satisfied:

- (1) Business owner interviews;
- (2) Employee and/or subcontractor interviews;
- (3) Interviews with bidders, contractors, vendors or suppliers involved in a joint venture or contractual relationship with the business enterprise;
- (4) Interviews with any other person who may have knowledge or relevant information relating to a business enterprise's eligibility for certification as an MBE or WBE;
- (5) Record and document review; or
- (6) Job site inspection.

(g) *Joint Ventures.*

- (1) On a contract-by-contract basis, an MBE or WBE may apply for certification of a joint venture with another MBE or WBE or with a non-MBE or non-WBE firm.
- (2) The MBE or WBE joint venture participant must be certified in the area of work to be undertaken as a member of the joint venture.
- (3) A holding company cannot be an MBE or WBE participant in a joint venture.
- (4) The MBE or WBE participant in the joint venture must not be an affiliate of the non-MBE or non-WBE firm.
- (5) The joint venture must have a business structure set forth in a signed written agreement that clearly and specifically defines the participation of each party in the contribution of property, capital, efforts, skills and knowledge.
- (6) 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 participation in the joint venture, and the profit or loss of the joint venture should be distributed between the participants in proportion to the interest in the joint venture.
- (7) The MBE or WBE 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.

- (8) The certification of a joint venture will be limited to the duration of the contract for which certification as a joint venture was requested and shall terminate upon completion of the city contract for which the joint venture was formed.

Section 324-13. – Annual Participation Goals for the MBE/WBE Program.

- (a) By July 30 of each year, the director, in consultation with the purchasing agent, shall review and establish the participation goals for MBEs and WBEs in city contracts.
- (b) The purpose of the annual review is to aid the City in its evaluation of the effectiveness of the MBE and WBE program and to identify areas in which the program may need to be modified in order to meet the stated purpose of the program.
- (c) The annual participation goals are not and may not be treated as mandatory quotas.
- (d) By July 30 of each year, the director shall review MBE and WBE participation on all contracts and procurements covered by this chapter to determine the city's progress toward meeting the annual goals, and the director shall report the findings to the city manager.

Section 324-15. – Contract Participation Goals.

- (a) The director, in consultation with the purchasing agent and/or the contracting agency must establish appropriate MBE and/or WBE participation goals on each specific contract covered by this chapter or determine that such contract is not appropriate for the MBE/WBE program.
- (b) In determining the appropriateness for inclusion in the program and setting the goals on a contract, the director must consider each of the following elements:
 - (1) The availability in the particular industry classification and industry of the MBEs and WBEs that are qualified and willing to provide goods, expertise and services required by the contract;
 - (2) The level of utilization of MBEs and WBEs in past contracts awarded by the city;
 - (3) The contract specifications;
 - (4) The extent of any adverse impact on non-MBEs and non-WBEs; and

- (5) Any other factor deemed by the director to be relevant to the determination.
- (c) Once established, the contract participation goals must be clearly published as part of the contract specifications in the invitation to bid or in the RFP or RFQ.
- (d) The contract participation 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, either individually or in the aggregate, increase the dollar value of the contract by ten percent or more.

Section 324-17. – Contracting Agency Duties; Unbundling Contracts.

- (a) Every contracting agency must ensure that invitations to bid, RFPs or RFQs originating with the contracting agency comply with this chapter.
 - (1) All invitations to bid, RFPs or RFQs must include a requirement that, if an MBE or WBE contract participation goal is applicable, the bidder or respondent must:
 - (A) Make good faith efforts, as defined by the rules and regulations of this chapter, before the opening of bids or submission of proposals to meet the applicable contract participation goal; and
 - (B) Keep records of its good faith efforts adequate to permit a determination of compliance with this chapter.
 - (2) Each contract must require the contractor during the term of the contract to:
 - (A) Fulfill the subcontracting commitments submitted with the bid or response;
 - (B) Continue to make good faith efforts to utilize certified MBEs and WBEs in the performance of the contract;
 - (C) Maintain records reasonably necessary for monitoring compliance with this chapter;
 - (D) Make payments to its subcontractors in accordance with Section 319-9 of the Cincinnati Municipal Code; and
 - (E) Submit copies of signed agreements with MBEs or WBEs before a notice to proceed is issued or the contractor otherwise begins providing services under the contract.

- (b) The head of each contracting agency, or his or her designee, shall be primarily responsible for achieving the goals of the MBE/WBE program and shall, on a continuing basis, review all aspects of the contracting agency's operations to assure that the purposes of the MBE/WBE program are being served.
- (c) All contracting opportunities must be evaluated in an effort to determine whether the total requirements of a contract may be unbundled or divided into smaller contracts in order to provide reasonable opportunities for participation by MBEs and/or WBEs.

Section 324-19. – Subcontractor Utilization.

- (a) In addition to any other applicable requirements, invitations to bid, RFPs and RFQs must include a requirement that the bidder or respondent include in its bid or response a certified MBE/WBE subcontractor utilization plan in which the bidder or respondent commits to utilize certified MBEs and/or WBEs in a percentage that equals or exceeds the applicable contract goals.
 - (1) Bids and responses to RFPs or RFQs that do not include a certified MBE/WBE subcontractor utilization plan prior to bid opening or response submission are non-responsive.
 - (2) The certified MBE/WBE subcontractor utilization plan and statement of intent to utilize shall include the following information:
 - (A) The name of each certified MBE or WBE to which the bidder or respondent intends to award a subcontract;
 - (B) Whether the subcontractor is a certified MBE or WBE;
 - (C) The dollar value of each subcontract;
 - (D) The scope of work to be performed under that subcontract; and
 - (E) Any other information the director requires in order to determine whether the certified MBE or WBE will be performing a commercially useful function or whether the contract participation goals have been satisfied.
- (b) Each bidder or RFP or RFQ respondent is responsible for verifying that all MBEs and WBEs to be utilized as subcontractors have been certified by the director before bid opening or response submission.
- (c) During the term of the contract, any failure to comply with the levels of certified MBE or WBE participation identified in the bid or response that is not approved by the director is a material breach of the contract.

Section 324-21. – Requests for Pre-Award Waivers or Reductions of Contract Participation Goals.

- (a) A contracting agency may make a written request to the director for a waiver or reduction of the MBE and/or WBE contract participation goals before bids are solicited or RFPs or RFQs are published.
 - (1) The director may grant the waiver or reduction if the director determines that either:
 - (A) The reasonable and necessary requirements of the contract render subcontracting or other participation of businesses other than the bidder or respondent infeasible; or
 - (B) There are not at least two qualified and certified MBEs or WBEs in the Cincinnati market area capable of providing the goods or services, despite feasible attempts to locate them.
 - (2) If the director denies a request to waive or reduce an MBE or WBE contract participation goal, the contracting agency may appeal that denial to the city manager.
- (b) The bidder or respondent may make a written request to the director for a waiver or reduction of the MBE and/or WBE contract participation goals at the time of bid opening or submission of the response to an RFP or RFQ if it is unable to comply with the MBE and/or WBE contract participation goals for the contract.
 - (1) The request must include documentation that demonstrates the bidder's good faith efforts, as defined in the rules and regulations for this chapter, to meet the goals.
 - (2) The director will review submitted requests for waivers or reductions and documentation of good faith efforts only in the event no bidder or respondent meets the MBE or WBE contract participation goals.
 - (3) In evaluating whether a bidder or respondent has made a good faith effort to meet the MBE or WBE contract participation goals, the director must consider the following factors:
 - (A) Whether the bidder or respondent identified sufficient subcontracting work;
 - (B) Whether the bidder or respondent conducted broad-based advertising to reach MBEs and WBEs;
 - (C) Whether MBEs and/or WBEs were given adequate notice of the subcontracting opportunity;

- (D) Whether the bidder or respondent followed up initial solicitations of written notice to MBEs and/or WBEs to determine their interest;
- (E) Whether the bidder or respondent provided plans and specifications for the project; and
- (F) Whether the bidder or respondent offered advice and assistance with bonding, insurance and credit lines.

Section 324-23. - Requests for Post-Award Waivers or Reductions of Contract Participation Goals; Substitution of MBEs or WBEs.

- (a) If, after award of a contract, the contractor is unable to meet the established MBE or WBE contract participation goal(s) for the contract through the use of an MBE or WBE specified by the contractor in the MBE/WBE subcontractor utilization plan submitted with its bid or response, the contractor must seek a substitute certified MBE or WBE to fulfill its commitment.
 - (1) Any proposed substitution of a certified MBE listed on the contractor's MBE/WBE subcontractor utilization plan with another certified MBE or proposed substitution of a certified WBE listed on the contractor's MBE/WBE subcontractor utilization plan with another certified WBE shall require the written approval of the director.
 - (2) If a contractor has established the basis for a substitution to the satisfaction of the director, the contractor may seek the assistance of the director in obtaining a new applicable certified MBE or WBE as a substitute.
- (b) If, after making good faith efforts, as defined by the rules and regulations for this chapter, the contractor is unable to find a qualified and certified MBE or WBE substitute capable of performing the work on the contract, the contractor must request a post-award waiver from the director, which, if granted, will permit the contractor to substitute a non-certified MBE or WBE, if available, or a non-MBE or non-WBE if there is no other qualified MBE or WBE available.
- (c) A request for approval of an MBE or WBE substitute or a post-award waiver must meet all of the following criteria:
 - (1) Be in writing;
 - (2) Document the reasons for the contractor's inability to meet its original MBE or WBE subcontractor utilization commitment with an MBE or WBE listed on the contractor's MBE/WBE subcontractor utilization plan; and

- (3) Document either the name and qualifications of the proposed substitute certified MBE or WBE or the good faith efforts made to find a substitute qualified and certified MBE or WBE.
- (d) The director's decision to permit or deny a proposed substitution or waiver, and the basis of any denial, shall be communicated to the contractor, the MBE or WBE originally listed on the MBE/WBE subcontractor utilization plan, and any proposed substitute MBE or WBE in writing.

Section 324-25. – Contracting Agency Requests for Waiver of Chapter Application.

- (a) A contracting agency may request the city manager to waive the requirements of this chapter for a particular contract if the purchasing agent determines that there is only a single source for the needed goods or services as provided in Section 321-85 or any related sections of the Cincinnati Municipal Code; or that it is in the best interest of the city to procure compatible equipment accessories or replacement parts, original manufacturer for supplies, or public utility services or to procure supplies for trial use or testing through a direct award as provided in Section 321-87 of the Cincinnati Municipal Code; and that the prospective contractor is not currently debarred or otherwise disqualified from doing business with the city.
- (b) A contracting agency may request the city manager to waive the requirements of this chapter for a particular contract if the purchasing agent makes a written determination that an emergency procurement is appropriate as provided in Section 321-89 of the Cincinnati Municipal Code and the contracting agency certifies the following in writing in its request:
 - (1) That an emergency exists that requires goods or services to be provided with such an immediacy that the contracting agency is unable to comply with this chapter; and
 - (2) That the contract will require the prospective contractor to make every good faith effort to subcontract to certified MBEs and/or WBEs if subcontracting is utilized.

Section 324-27. – Counting MBE and WBE Participation.

A bidder or respondent to an RFP or RFQ may only be credited with MBE or WBE participation on the contract as follows:

- (a) A business that is certified both as an MBE and as a WBE (“M/WBE”) may be counted either toward the MBE contract participation goal or toward the WBE contract participation goal, but not toward both. The participation of an M/WBE also may not be allocated partially to the MBE contract participation goal and partially to the WBE contract participation goal.

- (b) A certified MBE or WBE that has been awarded a contract as a prime contractor may count 100% of the dollar value of the work it intends to perform with its own forces toward the applicable contract participation goal.
- (c) In the absence of a written approval by the director of a substitution of a non-certified MBE or WBE as provided in Section 324-23 of this chapter, only businesses that were certified by the director as an MBE or WBE prior to bid opening or the submission of a response to an RFP or RFQ may be counted toward the applicable contract participation goal.
- (d) Only payments to certified MBEs or WBEs that perform a commercially useful function may be counted toward the applicable contract participation goal.
 - (1) To determine whether a certified MBE or WBE is performing a commercially useful function, the director must evaluate:
 - (A) The amount of work subcontracted;
 - (B) Industry practices;
 - (C) Whether the amount the MBE or WBE 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
 - (D) Any other factors deemed by the director to be relevant to the determination.
 - (2) If the director initially determines that an MBE or WBE is not performing a commercially useful function, the director shall give written notice to the MBE or WBE, and the MBE or WBE may provide written documentation to the director within seven days that evidences that it is or will be performing a commercially useful function.
 - (3) The decision of the director after submission of such additional evidence by the MBE or WBE, or within seven days of written notice of the initial determination if no additional evidence is submitted, shall be final and conclusive.
- (e) Only that portion of the payment to a joint venture that is equal to the percentage of ownership and contract performance of the certified MBE or WBE participant in the joint venture may be counted toward the applicable contract participation goal.
- (f) The entire expenditure to a certified MBE or WBE manufacturer or to a certified MBE or WBE supplier that also manufactures the goods supplied

may be counted toward the applicable MBE contract participation goal or WBE contract participation goal.

- (g) Twenty-five percent of the payment to a certified MBE or WBE supplier that is a wholesaler warehousing the goods supplied may be counted toward the applicable contract participation goal.
- (h) The fees or commissions charged by a certified MBE or WBE insurance company or travel agent may be counted toward the applicable contract participation, provided that the fee is reasonable and not excessive as compared with fees or commissions customarily allowed for similar services.
- (i) A certified MBE or WBE that intends to subcontract more than 10% of the dollar amount of the services to be performed under a subcontract with the bidder or respondent to an RFP or RFQ may not be counted toward the applicable MBE contract participation goal or WBE contract participation goal. This exclusion does not apply to an MBE's or a WBE's expenditures for the purchase of materials, equipment or supplies as an incident to the performance of services under its subcontract with the bidder or respondent to an RFP or RFQ.
- (j) A certified MBE or WBE may not be counted toward the applicable contract participation goal if the bidder or respondent to an RFP or RFQ has a financial interest in, has an interest in the ownership or control of, or is significantly involved in the operation of the certified MBE or WBE.

Section 324-29. – Prime Contractor Capacity-building Initiatives Authorized.

To promote the award of city contracts to certified MBEs or WBEs in an effort to remedy identified disparities in prime contracts historically awarded to MBEs or WBEs, preference points may be awarded to a response to an RFP or RFQ for professional services submitted by an MBE or WBE as provided in Section 324-31 of this chapter, and price preferences may be applied to a bid submitted by an MBE or WBE for goods and services prime contracts as provided in Section 324-33 of this chapter.

Section 324-31. – Preference Points for Professional Services Prime Contracts.

- (a) An MBE or WBE that submits a response to an RFP or RFQ for a professional services contract may be awarded up to ten evaluation preference points.
- (b) Preference points for joint ventures that include certified MBE or WBE participants must be allocated on a pro rata basis in the same proportion to which a clearly defined portion of the work to be performed by the MBE or WBE with its own forces and equal to its share in the ownership, risks, performance, management and control of the joint venture bears to the total work to be performed under the contract.

Section 324-33. – Price Preferences for Non-professional Services and Supplies Prime Contracts.

The city may award a prime contract for non-professional services or supplies to an MBE or WBE that submits, in response to an invitation to bid, a bid that is no more than five percent greater than the lowest and otherwise best bid unless either of the following applies:

- (a) The award to the MBE or WBE would result in a total contract cost that is, on an annual basis, \$25,000.00 or more higher than the lowest and otherwise best bid; or
- (b) The award to the MBE or WBE would cause the total contract cost to exceed the city's budgeted funding for the contract.

Section 324-35. – Request for Reconsideration and Appeal of Denial of Certification.

(a) *Noncompliance and Denial of Certification.* Upon a denial by the director of certification or recertification as an MBE or WBE, the director shall notify the affected party in writing by certified mail at the address provided by the applicant on the application, setting forth the reasons for the denial of certification or recertification.

(b) *Request for Reconsideration.*

(1) Any applicant who has been denied certification or recertification as an MBE or WBE, or whose certification has been revoked, may request the director to reconsider the denial or revocation by filing a written request for reconsideration with the director, which request shall state with specificity the factual grounds supporting certification or recertification, within fourteen days of the date of mailing the notice of denial of certification or recertification.

(A) In the event such a notice sent by certified mail is returned as refused or unclaimed, the director shall send the notice via regular U.S. mail, postage pre-paid, and, provided the notice sent by regular U.S. mail is not returned as undeliverable within ten days, the notice shall be presumed to have been delivered and a request for reconsideration must be filed with the director in writing within ten days of the date the notice was mailed.

(B) The request for reconsideration may be accompanied by any supporting documents the applicant believes supports approval of the application for certification or recertification or supports continued certification.

(2) Within thirty days of receipt of a request for reconsideration, the director must review the request and all relevant documents submitted in support

thereof and render a written decision that states with specificity the reasons for the decision, which decision shall be sent by certified mail to the address provided by the applicant on the application.

- (3) If, upon reconsideration, the director affirms the denial of certification or recertification or affirms the revocation of certification, the applicant may request a hearing before the certification appeals board by filing a notice of appeal with the director within fourteen days of the date of mailing the notice of decision on reconsideration. In the event such a notice sent by certified mail is returned as refused or unclaimed, the director shall send the notice via regular U.S. mail, postage pre-paid, and, provided the notice sent by regular U.S. mail is not returned as undeliverable within ten days, the notice shall be presumed to have been delivered and a request for hearing must be filed with the director in writing within ten days of the date the notice was mailed.

(c) *Certification Appeals Board.* The city manager shall establish a certification advisory board for the purpose of reviewing and either affirming or overruling the director's disposition of an application for certification or recertification as an MBE or WBE or the director's revocation of certification. The board shall be comprised of five members, one of whom shall be appointed by the mayor and four of whom shall be appointed by the city manager. The members must be knowledgeable about the city's procurement laws, rules and regulations, and procedures, including this chapter, and shall serve for a period of two years. A chairperson shall be elected by the members of the board. Included on the board shall be:

- (1) At least one member with demonstrated experience in the field of finance and accounting;
- (2) At least one member with demonstrated experience in the field of construction;
- (3) At least one member with demonstrated experience with MBE and WBE matters; and
- (4) At least one member with demonstrated legal experience with business associations and business structures.

(d) *Notice of Hearing Date and Hearing.*

- (1) Within three working days of receipt of a written notice of appeal, the director shall forward the notice to the certification appeals board.
- (2) The board shall set a hearing date not more than 28 days from the date of receipt of the notice of appeal forwarded by the director. The board shall cause notice of the hearing to be served upon all parties, by certified mail. Such notice shall set forth the adverse determination by the director from

which the appeal was taken and the errors identified by the applicant. The notice shall also state the date, time, and place of the hearing. If the certified mail notice is returned as refused or unclaimed, the notice of hearing shall be mailed by regular U.S. mail, postage pre-paid, and will be deemed to have been received if it is not returned as undeliverable within ten days of mailing.

- (3) All parties shall be provided a fair and impartial hearing and shall be allowed to produce any and all evidence that supports and substantiates the information submitted with the application for certification or recertification.
- (e) *Decision.* Within seven days of the conclusion of the hearing, the board shall render its decision on the disposition of the appeal, which decision shall be to affirm, modify, or reverse the denial of certification or recertification or the revocation of certification by the director, and shall state the reason(s) for such decision. The board shall decide whether the determination of certification or revocation being appealed was in accordance with the law. If the board finds for the applicant, the business shall be certified or recertified as an MBE or WBE and added to the appropriate certification list maintained by the department. The decision of the board shall be final, subject to the right of further appeal as may be provided by law.

Section 324-37. - Duties of the Department of Economic Inclusion.

The department, or as applicable, the director shall have the following functions and duties associated with the programs set forth in this chapter:

- (a) Review of applications for certification of MBEs and WBEs;
- (b) Maintain a directory of MBEs and WBEs certified under this chapter;
- (c) Provide information and needed assistance to MBEs and WBEs;
- (d) Investigate alleged violations of this chapter and, when appropriate, make written recommendations to the city manager for remedial action;
- (e) Develop and distribute all forms, applications, and documents necessary to comply with this chapter;
- (f) Maintain statistics on and regularly review the progress toward achieving the annual goals for the utilization of MBEs and WBEs;
- (g) Monitor contractors throughout the duration of their contracts to ensure that all efforts are made to comply with this chapter; and
- (h) Certify compliance with this chapter before contracts are submitted to the city manager for execution.

Section 324-39. - City Maintained Records and Reports.

- (a) The effectiveness of this program will be measured by a review of data indicating prime and subcontract awards to MBEs and WBEs. Program effectiveness measurements will also include efforts by the city's contracting agencies to provide prime contracting opportunities for MBEs and WBEs. At the end of each contract, after receipt of the information required by subsection (b) of this section, the department will prepare a report on the utilization of firms in the MBE and WBE program. Data in this report will include information on the gross income size of the firms participating on each contract, the race and gender of each contractor and subcontractor performing work under the contract, and the total payments made to each contractor and subcontractor performing work under the contract.
- (b) At the end of a contract, the director shall require the prime contractor to report to the department the identity of each MBE and/or WBE to which the contractor awarded a subcontract for the purchase of non-professional services, professional services, and supplies, and the total payments made to each MBE and/or WBE.
- (c) The director shall prepare a quarterly consolidated report based on a compilation and analysis of the reports submitted by each project manager and procurement officer, information provided by the finance department, and the reports submitted by prime contractors. This record-keeping system will identify and assess MBE and WBE contract awards, prime contractors' progress in achieving MBE and WBE subcontract participation, and other MBE and WBE development and contracting efforts. Specifically, the department in conjunction with all city contracting agencies, will maintain records showing:
 - (1) Awards to MBEs and WBEs, including names of contractors and subcontractors, nature of the work and services performed, and the percentage of MBE and WBE participation per contract. The department will obtain regular reports from prime contractors on their progress in meeting contractual MBE and WBE commitments;
 - (2) Specific efforts to identify and award contracts to MBEs and WBEs;
 - (3) Copies of direct mailings to MBEs and WBEs;
 - (4) Pre-bid conference information;
 - (5) Requests for assistance from the MBEs and WBEs interested in bidding or proposing on city contracts and subcontracts;
 - (6) Workshops, seminars and training programs conducted for MBEs and WBEs; and

- (7) Efforts to assist MBEs and WBEs in acquiring bonding and insurance.
- (d) The director will prepare quarterly MBE and WBE development reports for submission to city council. These reports shall be disaggregated by minority group as defined in Section 324-1-M1 and shall include:
 - (1) The number of contracts awarded to MBEs and WBEs;
 - (2) A description of the general categories of contracts awarded to MBEs and WBEs;
 - (3) The dollar value of contracts awarded to MBEs and WBEs;
 - (4) The percentage of the dollar value of all contracts awarded to MBEs and WBEs during the preceding year;
 - (5) The actual dollar amount paid to MBE, WBE and non-M/WBE vendors as prime or subcontractors; and
 - (6) The percentage of the dollar amount paid to MBEs and WBEs compared to the total amount paid under the contracts.

Section 324-41. - MBE and WBE Resource Information.

The department and purchasing division will make the following available to MBEs and WBEs upon request:

- (a) Procedures outlining specific steps on how to bid;
- (b) Prerequisites for bidding on contracts;
- (c) Information on how plans and specifications can be obtained;
- (d) Names of persons to contact concerning questions on bid documents;
- (e) Names of procurement officers and office hours;
- (f) Types of supplies and services purchased; and
- (g) Explanations of standard contract implementation procedures and requirements, concerning such matters as timely performance of work, contract changes, and payment schedules.

Section 324-43. – MBE and WBE Directory.

The department will create an MBE and WBE directory that lists MBEs and WBEs categorized by types of firms to facilitate identifying businesses with capabilities relevant to a particular specification. Each business listing will contain the business

name, contact person, address, phone number, legal structure of the business, and details concerning the company's business specialty(ies). The directory will be continuously updated and maintained electronically. In compiling this directory, the city will identify and attempt to certify as many MBEs and WBEs as possible that have the potential of doing business with the city. The city will maintain and have available an updated MBE and WBE Directory and source list(s) for each bid/proposal solicitation to facilitate identifying MBEs and WBEs with capabilities relevant to general contracting requirements and to particular solicitations. The city will make the directory and source list(s) available to bidders and respondents in their efforts to meet the MBE and WBE commitments under this chapter.

Section 324-45. - MBE and WBE Assistance to Provide an Equitable Opportunity to Compete for Contracts and Subcontracts.

The department and the procurement staff may utilize any of the same specific affirmative procedures set forth in Section 323-33 of the Cincinnati Municipal Code for SBEs, SLBEs and ELBEs to encourage maximum practicable opportunities for MBE and WBE participation in city contracts.

Section 324-47. – Enforcement.

- (a) During the term of a contract subject to this chapter, the department must monitor continued compliance with the chapter, and the director may require contractors, bidders, respondents, MBEs, WBEs and contracting agencies to submit any reports, documents or other information reasonably necessary to determine compliance with this chapter.
- (b) If the director finds cause to believe that a contractor or subcontractor has failed to comply with any requirement of this chapter or with any contract provision relating to utilization of MBEs or WBEs, the director shall notify the contracting agency and the contractor of the noncompliance and shall attempt to resolve the noncompliance by agreement.
 - (1) If the noncompliance cannot be resolved, the director and the contracting agency must submit written findings and recommendations to the city manager.
 - (2) The city manager may impose penalties for noncompliance as provided in Section 324-99.
- (c) If the director finds that a contracting agency has failed to comply with a provision of this chapter, the director shall send the contracting agency written findings that specify the nature of the noncompliance and attempt to resolve the noncompliance through conciliation. If the noncompliance cannot be resolved, the director must submit written findings and recommendations for further action to the city manager.

Section 324-99. – Penalties.

- (a) *Administrative Penalties.* A contractor, potential contractor, MBE or WBE that fails to comply with any provision of this chapter is subject to any or all of the following administrative penalties:
- (1) Suspension of contract until noncompliance is resolved;
 - (2) Withholding of funds;
 - (3) Rescission of contract based on material breach;
 - (4) Refusal to accept a bid or response to an RFP or RFQ;
 - (5) Debarment from providing goods or services to the city for a period not to exceed two years; and
 - (6) Payment of liquidated damages.
- (b) *Prohibited conduct.* No person shall do any of the following:
- (1) Fraudulently obtain, retain, attempt to obtain or retain, or aid another person or entity in fraudulently obtaining, retaining or attempting to obtain or retain certification as an MBE or WBE under this chapter;
 - (2) In any matter administered under this chapter, falsify, conceal or cover up, by a trick, scheme, or device, a material fact or make any false writing or document knowing 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 as an MBE or WBE under this chapter;
 - (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 chapter; or
 - (5) Make a false statement to any person or entity that another person or entity is not certified under this chapter.
- (c) Any person who violates any provision of subsection (b) of this section is guilty of a first degree misdemeanor and on first conviction is subject to imprisonment for not more than six months, to a fine of not more than one thousand dollars (\$1,000.00), or to both imprisonment and fine.

Section 2. That this ordinance shall be effective as of January 1, 2016.

Passed: _____, 2015

Mayor

Attest: _____
Clerk