

ORDINANCE NO. \_\_\_\_\_

**AN ORDINANCE REPLACING CHAPTER 20, ARTICLE X OF THE CODE OF THE CITY OF FORT WORTH IN ITS ENTIRETY WITH EXHIBIT A, ATTACHED HERETO; REMEDYING THE UNDERUTILIZATION OF BUSINESS EQUITY FIRMS, AND TO ENHANCING THE UTILIZATION OF SAME; REPEALING ALL PREVIOUS MINORITY AND WOMEN BUSINESS ENTERPRISE ORDINANCES AND POLICIES PREVIOUSLY ADOPTED; AUTHORIZING THE CITY MANAGER TO CREATE ADMINISTRITVE REGULATIONS TO HELP ACCOMPLISH THE GOALS HEREIN; REQUIRING A DISPARITY STUDY PRIOR TO THE SUNSET DATE; PROVIDING A SEVERABILITY CLAUSE; PROVDING A SAVINGS CLAUSE; PROVIDING AN EFFECTIVE DATE AND A SUNSET DATE.**

**WHEREAS**, the United States Supreme Court in 1989 in the case of *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), held that state and local government’s use of race in contracting decisions would be subject to a “strict scrutiny standard” whereby a “compelling interest” in remedying discrimination must be shown, and any remedies adopted must be “narrowly tailored” to the evidence of discrimination.

**WHEREAS**, to determine the extent to which minority-owned or women-owned businesses have been underutilized or otherwise subject to discriminatory practices, the City of Fort Worth has undertaken periodic disparity studies at intervals of every five to ten years to ascertain the availability of minority- and women-owned businesses as a percent of the overall market and to evaluate the use thereof as percentages in City contracts, with the results of such analysis identifying evidence of discrimination and serving as the basis for establishing narrowly tailored race- and gender-conscious contracting measures as remedies therefor.

**WHEREAS**, in the interest of improving overall participation and opportunities in the City of Fort Worth (“City”) and having remedial criteria which were consistent with then governing statutes and judicial opinions, the 2011 Business Diversity Enterprise Program (“2011 Ordinance”) was proposed to amend the 1987 standards codified in the Fort Worth Municipal Code.

**WHEREAS**, the 2011 Ordinance was aimed at maximizing contracting and subcontracting opportunities in the City by facilitating networking, outreach, communication, education, training, internal accountability and employment opportunities for certain qualified business enterprises with the intent of being a proactive, fair, and reasonable, and in the best interest of our City.

**WHEREAS**, the City hired CH Advisors, Inc. (“CHA”) to conduct a Disparity Study to determine the City’s utilization of Business Equity Firms for fiscal years 2013 through 2018, the availability of Business Equity Firms in its market area; and any disparities between its utilization and Business Equity Firm availability; to evaluate whether the use of race and/or gender conscious measures is supported by the results of this analysis; and to make

recommendations for increasing the inclusion of Business Equity Firms, all in conformance with applicable constitutional scrutiny.

**WHEREAS**, the Disparity Study supports the City’s compelling interest in continuing a race and gender-conscious Business Equity Firm program because statistical data and anecdotal testimony provide a sound basis for use of narrowly tailored remedial race and gender-based measures to ensure equal opportunities for all firms to do business with the City.

**WHEREAS**, it is the City Council’s intent for this Ordinance to reduce barriers to opportunities on City contracts for Business Equity Firms by adopting mechanisms to capture and quantify Business Equity Firm utilization in City contracting and procurement and providing for development of Business Equity Firms.

**NOW THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF FORT WORTH, TEXAS, THAT:**

**SECTION 1.**

That the Code of the City of Fort Worth, Texas (2015), as amended, is hereby further amended by replacing Chapter 20, Article X: Minority and Women Business Enterprises in its entirety with Exhibit “A,” attached hereto and incorporated herein. The provisions of this ordinance shall apply to all Contracts, unless explicitly excepted, as defined in Exhibit A, awarded by the City, except as may be hereafter specifically exempted. Definitions for this ordinance and Contract administration procedures, including Debarment and Sanctions for Bidders, Contractors, Business Equity Firms, and other parties related to this ordinance are described on Exhibit “A.”

**SECTION 2.**

The purpose of this ordinance and the related administrative regulation is to remedy past underutilization and provide a fair and level playing field for Business Equity Firms and to encourage the participation of Business Equity Firms to contract with the City. It is intended to promote equitable opportunity and utilization of Business Equity Firms in the City’s contracting opportunities.

**SECTION 3.**

From and after the date of this ordinance, it shall supersede Ordinance No. 20020-12-2011 and any other ordinance, resolution or policy adopted by the Fort Worth City Council related to Business Equity Firms.

**SECTION 4.**

The City Manager, with the advice and counsel of DVIN and the Business Equity Board, is hereby authorized to establish, implement, and administer regulations necessary to carry out the intent of this ordinance and the goals set forth herein.

**SECTION 5.**

The City Council shall, at least three to five years prior to the sunset date, commission an independent Disparity Study to make relevant findings, determine whether there is a continuing need for a Business Equity Firm program, and, if necessary, repeal in whole or in part or enact appropriate amendments and changes to this ordinance and Chapter 20, Article X of the Code of the City of Fort Worth, Texas (2015).

**SECTION 6.**

If any part, section, subsection, sentence, clause or phrase of this ordinance is for any reason declared to be unconstitutional or otherwise invalid by a court of competent jurisdiction, such decision shall not affect the validity of the remaining provisions of this ordinance.

**SECTION 7.**

For any procurement activity where formal solicitation occurred prior to January 1, 2021, the 2011 Ordinance shall continue to be in full force and effect.

**SECTION 8.**

This ordinance shall be in full force and effect for any procurement activity where formal solicitation from on and after January 1, 2021, and it is so ordained. This ordinance shall terminate on December 31, 2030 unless reauthorized by City Council.

APPROVED AS TO FORM AND LEGALITY:

By: \_\_\_\_\_  
Assistant City Attorney

ADOPTED: November 17, 2020

EFFECTIVE: January 1, 2021

## EXHIBIT "A"

### § 20-366 DEFINITIONS.

(a) *Annual Goal* means the overall target for Business Equity Firm utilization in Contracts (prime contracts and subcontracts combined) as defined by the calculation method used in the City's most recent Disparity Study, and should be the basis for consideration of overall, annual spending targets for City funds. This target can be the City's goal for its overall spending with certified firms across all industry categories.

(b) *Bidder* means any Person seeking to be awarded a Contract.

(c) *Bid Shopping* the practice of divulging a contractor's or Subcontractor's bid to other prospective contractor(s) or Subcontractor(s) before the award of a contract in order to secure a lower bid.

(d) *Business Equity Board* is the group of industry stakeholders established by City Council tasked with advising the City on Business Equity Firm participation in City procurement activities and is formerly known as the Minority and Women Business Enterprise Advisory Committee.

(e) *Business Equity Firm* means an Independent Firm that is a Certified MBE and/or WBE with a Significant Business Presence in the Marketplace.

(f) *Business Equity Goal* means a calculation prepared by the DVIN that includes all the following factors: the detailed cost estimate of the work to be performed, or goods purchased; the Marketplace; the availability of Business Equity Firms and non-Business Equity Firms in the Marketplace determined on a Contract-by-Contract basis; and the subcontracting/supplier opportunities of each project

(g) *Certified* means those firms identified by the North American Industry Classification System (NAICS) that have been determined to be a bona fide MBE or WBE by the North Central Texas Regional Certification Agency (NCTRCA), the Dallas/Fort Worth Minority Supplier Development Council (DFW/MSDC), Women's Business Council-SW (WBCS), Texas Department of Transportation (TxDOT) or other certifying agency that the DVIN may deem appropriate and accepted by the City of Fort Worth.

(h) *City* means the City of Fort Worth, Texas.

(i) *City Manager* means the City Manager of the City of Fort Worth, Texas.

(j) *Combined Project* means a construction contract including more than one of the following: paving, drainage, or water/sanitary sewer; the term does not include a standard water/sanitary sewer contract where the pavement is only temporarily or permanently repaired incidental to the water/sewer work.

(k) *Commercially Useful Function* means responsibility for the execution of a distinct element of the work of a Contract, which is carried out by actually performing, managing, and supervising the work involved, or fulfilling responsibilities as a Joint Venture partner.

(l) *Construction* means the processes involved in delivering buildings, infrastructure, or facilities; the term includes but is not limited to the erection, rehabilitation, alteration, conversion, extension, demolition, improvement, remodeling or repair to any real property, including streets, storm drains and facilities providing utility service owned by the City.

(m) *Contract* means any purchase order or contract that (i) involves expenditure of \$100,000 or more; (ii) utilizes Subcontractors; and (iii) is awarded by the City, whether directly or indirectly, for work, labor, services, supplies, equipment, professional services, goods,

construction, or construction-related activities, and materials or any combination of the foregoing; the term specifically includes but shall not be limited to, any purchase or lease of materials pursuant to Texas state law, any public work project authorized pursuant to Texas state law, or contract in which public bids are not required by law. A Contract does not include an Emergency Contract.

(n) *Contractor* means any Person that has been awarded a Contract.

(o) *Debar or Debarment* of a Bidder or Contractor means that the City will not consider offers from, award contracts to, renew or otherwise extend contracts with, or contract directly or indirectly through subcontracts with the Bidder or Contractor.

(p) *Discriminatory Practice* means the exclusion of a person or persons from equal business opportunity because of race, religion, color, sex, disability, national origin, ancestry, sexual orientation or gender identity or expression.

(q) *Disparity Study* means the City of Fort Worth Disparity Study finalized and presented to City Council on June 16, 2020 or a study presented to the City Council after that date.

(r) *Doing Business* means engaging in for-profit activities in the scope of the expertise of the firm and having a physical location and/or digital presence from which to do so.

(s) *DVIN* means the City's Department of Diversity and Inclusion.

(t) *Emergency Contract* means a Contract that is awarded on an emergency basis due to a threat of harm to person or property or threat of disruption of governmental services and approved by the City Attorney's office as an emergency contract exempt from Texas public bidding laws.

(u) *Good Faith Efforts* means the actions undertaken by a Contractor and approved by DVIN as described in §20-370, below.

(v) *Horizontal Construction* means construction of highways, roads, streets, bridges, utilities, water supply projects, water plans, wastewater plants, water and wastewater distribution or conveyance facilities, wharves, docks, airport runways and taxiways, drainage projects, or related types of projects associated with civil engineering construction as referenced in this Article.

(w) *Independent Firm* means a firm whose viability does not depend on its relationship with another firm.

(x) *Joint Venture* means a business entity formed by two or more independent Persons for the purpose of pursuing a common objective, such as a prime contract. The resulting business entity has additional resources and capacity, enhancing its ability to compete for larger awards. A joint venture is generally characterized by shared ownership, shared returns and risks, and shared governance. In a joint venture, the prime managing partner holds 51% or more interest in the business. Partner(s) hold less than 51% interest but in most cases, not less than 20%.

(y) *Marketplace* means the geographic area as defined by the City's most current Disparity Study and includes the City of Fort Worth, including portions of Parker, Wise and Denton counties, and all of Tarrant, Dallas, and Johnson counties. Additionally, the City may recognize other counties like Collin within a 100-mile radius from 200 Texas Street, Fort Worth, Texas 76102 on a case by case basis when contractors located within those counties can prove they have done business in the City of Fort Worth.

(z) *Mayor* means the Mayor of the City of Fort Worth, Texas.

(aa) *Minority Individual* means a person who is a member of any of the following:

(1) “Black Americans,” which includes persons having origins in any of the Black racial groups of Africa;

(2) “Hispanic Americans,” which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;

(3) “Native Americans,” which includes persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives, or Native Hawaiians;

(4) “Asian-Pacific Americans,” which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), Republic of the Northern Marianas Islands, Samoa, Macao, Fiji, Tonga, Kirbati, Tuvalu, Nauru, Federated States of Micronesia, or Hong Kong;

(5) “Subcontinent Asian Americans,” which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;

(bb) *Minority-Owned Business Enterprise (MBE)* means a business entity, including but not limited to a sole proprietorship, partnership, corporation, limited liability company, association or joint venture:

(1) which is at least fifty one percent (51%) owned by one or more Minority Individuals, or in the case of a publicly traded business, at least fifty one percent (51%) of all classes of the stock of which is owned by one or more Minority Individuals; and

(2) whose management, policies, major decisions and daily business operations are independently managed and controlled by one or more such more Minority Individuals;

(cc) *MPP* means the mentor protégé program described more fully in §20-369, below.

(dd) *Person* means a natural person or business entity, including but not limited to a sole proprietorship, partnership, corporation, limited liability company, association or joint venture.

(ee) *Program* means the Administrative Regulations for contracts with Business Equity Firms that do not involve Subcontractors.

(ff) *Significant Business Presence* means a business which has its principal place of business outside the Marketplace and a location within the Marketplace that has been verified to be in existence for a minimum of 24 months and from which (1) at least 20% of the business's workforce is based in the Marketplace and (2) provides a Commercially Useful Function that is significant to a specific project. A post office box, mail drop, or telephone message center or any combination thereof, with no other substantial work function, shall not be construed to constitute a Significant Business Presence.

(gg) *Solicitation* means the process of inviting companies to bid on opportunities to provide goods and services.

(hh) *Subcontractor* means any person entering into a contract with a Contractor or a higher Tier Subcontractor to directly furnish services or supplies toward the Contract.

(ii) *Tier* means the numerical level of subcontracting below the Contractor.

(jj) *Utilization Plan* means the list of Business Equity Firms that a Contractor commits will be utilized to meet the Business Equity Goal for a specific project, the scopes of the work and the dollar values or the percentages of the work to be performed.

(kk) *Vertical Construction* means the construction or remodeling of any building, structure or other improvement that is predominantly vertical, including, without limitation, buildings, the design and construction of which are governed by accepted building codes.

(ll) *Woman* means an adult person of the female gender.

(mm) *Women-Owned Business Enterprise (WBE)* means a business entity, including but not limited to a sole proprietorship, partnership, corporation, limited liability company, association or joint venture:

(1) which is at least fifty-one percent (51%) owned by one or more women, or in the case of a publicly traded business, at least fifty-one percent (51%) of all classes of the stock of which is owned by one or more women; and

(2) whose management, policies, major decisions and daily business operations are independently managed and controlled by one or more such women.

### **§20-367 PURPOSE AND APPLICATION.**

(a) The purpose of this Article and the Program is to remedy past underutilization and provide a fair and level playing field for qualified Business Equity Firms and to encourage the participation of Business Equity Firms to contract with the City.

(b) It is intended to promote equal opportunity and the utilization of Business Equity Firms in the City's contracting opportunities.

(c) This Article applies to any Contract awarded by the City or any of its departments, boards or commissions for work, labor, services, supplies, equipment, materials or any combination of the foregoing; specifically including but not be limited to, any purchase or lease of materials, any public work project, or contract in which public bids are not required by law.

(d) The requirements of this Article shall not apply to Emergency Contracts, however any department that procures an Emergency Contract must notify the DVIN, in writing, at the time it seeks legal approval of an Emergency Contract.

(e) Where Contracts involve the expenditure of federal or state funds, the state or federal policy related to Business Equity Firms participation may take precedence over this Article.

(f) The provisions of this Article shall be liberally construed for the accomplishment of its policies and purposes.

(g) Narrowly tailored goals shall be established in the areas of procurement.

(h) A Business Equity Goal may be set on a Contract-by-Contract basis based on the type of work or services to be performed, or goods to be acquired and the availability of Business Equity Firm in the Marketplace.

(i) All required notifications under this Article must be made to the DVIN at the following email address: DVIN\_BEOffice@fortworthtexas.gov.

### **§20-368 BUSINESS EQUITY GOAL SETTING**

(a) A Business Equity Goal should be set by DVIN for the entire scope of work on a project.

(b) A Business Equity Goal shall be expressed in terms of a percentage of the total dollar value of each Contract awarded by the City.

(c) Business Equity Goals shall be established for all Contracts where Business Equity Firms exist within the Marketplace.

(d) DVIN may set a Business Equity Goal for Community Facilities Agreements when City money is spent directly as part of a Community Facilities Agreements.

(e) The City will count a Business Equity Firm's self-performance towards meeting a Business Equity Goal.

### **§20-369 JOINT VENTURES AND MENTOR-PROTÉGÉ.**

(a) Joint Ventures. Where it is economically feasible, the establishment of Joint Ventures to ensure prime contracting opportunities for Business Equity Firms on certain Solicitations is encouraged. The factors used to evaluate economic feasibility, include, but are not limited to, the estimated dollar value of the Solicitation, the scope of work, the duration of the work, the complexity of the work, the availability of potential Business Equity Firm joint venture partners in the relevant market area and the nature of the work.

(1) When the City uses a procurement method other than lowest responsible bidder, the City may, at its discretion, designate a particular Solicitation as a "Joint Venture Preferred" Solicitation.

(2) A prospective Joint Venture partner shall state within its proposal or its statement of qualifications information that specifies the role and extent of the Business Equity Firm Joint Venture partner(s) involvement. Such information shall include, but is not limited to:

i. The name of the Business Equity Firm Joint Venture partner(s) that will participate on the project.

ii. The percentage of prime contract dollars attributable to the services to be provided by the Business Equity Firm Joint Venture partner; and, as appropriate the total dollar value of the services to be provided.

iii. A description of the work that each Business Equity Firm Joint Venture partner shall be responsible for performing under the terms of the Joint Venture agreement.



(3) The prospective Joint Venture partner must also submit the a “Joint Venture Eligibility Form.” DVIN will review the “Joint Venture Eligibility Form” and will have final approval, as to whether the proposed Joint Venture conforms to the DVIN’s definition of a Joint Venture.

(4) The Joint Venture shall ensure that, at a minimum, the following items are addressed in the formation and governance of the Joint Venture:

- i. The initial capital investment of each Joint Venture partner;
- ii. The proportional allocation of profits and losses to each Joint Venture partner;
- iii. The sharing of the right to control the ownership and management of the Joint Venture;
- iv. Actual participation of the Joint Venture partners on the project;
- v. The method of and responsibility for accounting;
- vi. The method by which disputes are resolved; and
- vii. Any additional or further information required by the DVIN as set forth in this Article, bid documents and/or otherwise.

(b) Mentor Protégé Program.

(1) The MPP is designed to foster relationships between Contractors and underutilized Business Equity Firms. The objective of the MPP is to provide professional guidance and support to the protégé (which must be a Business Equity Firm) in order to facilitate protégé growth and development and increase the number of Contracts and Subcontracts awarded to Business Equity Firm.

(2) The mentor-protégé relationship is intended to be mutually beneficial because it allows mentors to utilize their protégés to fulfill Business Equity Goals when bidding on Contracts. It is advantageous to build a partnership prior to a Solicitation or Contract award to establish confidence in performance.

(3) DVIN shall serve as a sponsor for the MPP. Companies interested in joining the MPP should contact DVIN to search a list of potential Business Equity Firm protégés that may provide complementary services, and supply chain opportunities.

(4) DVIN may prioritize protégé businesses in critical areas of City procurement or Contract needs.

(5) DVIN will consider the following criteria for selection of a mentor in the MPP:

- i. The mentor must be registered with the City of Fort Worth;
- ii. Previous mentoring experience and or successful prior work history;

- iii. The mentor must have been in operation for at least five years;
- iv. Ability to provide developmental guidance in areas identified by the protégé; and
- v. "Good Standing" in doing business with the City of Fort Worth and regional partners.

(6) DVIN will consider the following criteria for selection of a protégé in the MPP:

- i. Eligibility and willingness become a Business Equity Firm, as defined herein;
- ii. Business in operation for at least one year;
- iii. Desire to participate with a mentoring firm;
- iv. Ability to work with DVIN in identifying the type of guidance needed for business development; and
- v. "Good Standing" in doing business with the City of Fort Worth and regional partners.

### **§20-370 CONTRACT PRE-AWARD COMPLIANCE PROCEDURES**

(a) All Bidders seeking to enter into a Contract with the City shall be registered as a vendor with the City.

(b) Each Bidder shall submit a Utilization Plan detailing all Subcontractors the Contractor intends to utilize in its performance of a Contract. Business Equity Firms that are a Contractor may count their self-performed services towards meeting a Business Equity Goal.

(c) The Utilization Plan shall be due and delivered to the DVIN at the time specified in the Solicitation.

(d) Where the Bidder cannot achieve the Business Equity Goal, the Bidder must provide proof of having made Good Faith Efforts to meet the Business Equity Goal. Good Faith Effort requirement means an honest and conscientious effort by the Bidder to explore all available options to achieve, to the maximum extent practical to meet the Business Equity Goal.

(1) Compliance with each of the following steps shall satisfy the Good Faith Effort requirement absent mere pro forma efforts or proof of fraud, misrepresentation, or intentional discrimination by the Bidder:

- i. List each and every opportunity for Subcontractors for the completion of a Contract. On Combined Projects list each opportunity for Subcontractors through the 2nd Tier.
- ii. Obtain a current list (dated not more than two (2) months old prior to the bid open date) of Business Equity Firms from the DVIN.

iii. Solicit participation from Business Equity Firms, within the Subcontractor areas previously listed, at least ten calendar days prior to bid opening, exclusive of the day the bids are opened. Both Business Equity Firms and non-Business Equity Firms must receive the same Solicitation for each area of opportunity. The three methods identified below are acceptable for soliciting participation, and each selected method must be applied to the applicable contract. The Bidder must document, to the satisfaction of the DVIN, that at least two attempts were made using two of the three following methods: (i) email, (ii) fax, or (iii) telephone or that at least one successful contact was made using either (i) email, (ii) fax, or (iii) telephone in order to be deemed responsive to the Good Faith Effort requirement.

iv. Provide plans and specifications or information regarding the location of plans and specifications which shall be communicated to all Business Equity firms in each Subcontractor area.

v. Attach a copy of the Solicitation sent to the Business Equity firm identifying the instructions on how to obtain plans and specifications for this Solicitation.

vi. Submit documentation of any Business Equity Firm whose quotes were rejected. The documentation submitted should be in the form of an affidavit, include a detailed explanation of why the Business Equity firm was rejected and any supporting documentation the Bidder wishes to be considered by the City. In the event of a bona fide dispute concerning quotes, the Bidder will provide for confidential review of any relevant documentation by City personnel.

vii. All communications from the Bidder to potential Business Equity Firms shall be documented and submitted to the City.

(2) In making a Good Faith Effort determination, DVIN will also consider, at a minimum, the Bidder's efforts to:

i. Solicit through all reasonable and available means (*e.g.*, attendance at pre-bid meetings, advertising and written notices) the interest of all Business Equity Firms in the scopes of work of the Contract. The Bidder shall provide interested Business Equity Firms with timely, adequate information about the plans, specifications, and requirements of the Contract to allow such firms to respond to the Solicitation. The Bidder must follow up initial Solicitations with interested Business Equity Firms.

ii. Select portions of the work to be performed by Business Equity Firms in order to increase the likelihood that the Business Equity Goal will be achieved. This includes, where appropriate, breaking out Contract work items into economically feasible units to facilitate participation, even when the Bidder would otherwise prefer to perform these work items with its own forces. It is the

Bidder's responsibility to make a portion of the work available to Business Equity Firms and to select those portions of the work or material needs consistent with the availability of such Business Equity Firms to facilitate their participation.

iii. Negotiate in good faith with interested Business Equity Firms. Evidence of such negotiation includes the names, addresses, and telephone numbers of Business Equity Firms that were contacted; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and why agreements could not be reached. The Bidder may not reject Business Equity Firms as being unqualified without sound reasons based on a thorough investigation of their capabilities. That there may be some additional costs involved in finding and using Business Equity Firms is not in itself sufficient reason for a Bidder's failure to meet the Business Equity Goal, as long as such costs are reasonable.

iv. The performance of other Bidders in meeting the Business Equity Goal may be considered. For example, when the apparent successful Bidder fails to meet the Business Equity Goal but others meet it, it may be reasonably questioned whether, with additional reasonable efforts, the apparent successful Bidder could have met the Business Equity Goal.

(e) A signed letter of intent from each listed Business Equity Firms describing the work, materials, equipment or services to be performed or provided by the Business Equity Firms and the agreed upon dollar value shall be due at the time specified in the Solicitation.

#### **§20-371 CONTRACT ADMINISTRATION PROCEDURES**

(a) Upon award of a Contract by the City that includes a Business Equity Goal, such Business Equity Goal becomes a covenant of performance by the Contractor in favor of the City.

(b) Contracts shall incorporate the Ordinance and this Article by reference, and shall provide that the Contractor's violation of the Ordinance and this Article shall constitute a breach of such Contract and may result in Debarment in accordance with the procedures outlined in this Article.

(c) The Contractor shall provide a list of all Subcontractors to be used in the performance of the Contract, and detailed Subcontractor information to the City with each request for payment submitted to the City or as otherwise directed by the DVIN.

(d) The DVIN shall monitor Subcontractor participation and Business Equity Goal attainment during the course of the Contract.

(e) The DVIN shall have full and timely access to view the Contractor's relevant books and records relating to each specific Contract with the City to determine the Contractor's compliance with its commitment to Business Equity Firm participation and the status of any Business Equity Firms performing any portion of the Contract. The DVIN shall not record,

maintain copies, or disclose industry or trade secrets of a Contractor or Vendors books and records in its execution of this duty. This provision shall be in addition to, and not a substitute for, any other provision allowing inspection of the Contractor's records by any officer or official of the City for any purpose.

(f) Business Equity Firm Subcontractor Substitution.

(1) The Contractor shall not make changes to the Utilization Plan or substitute Business Equity Firms named in the Utilization Plan without the prior written approval of the DVIN. Unauthorized changes or substitutions shall be a violation of this Article and a breach of Contract, and may constitute grounds for rejection of the bid or cause termination of an executed Contract for breach, the withholding of payment and/or subject the Contractor to certain sanctions.

(2) A Contractor shall not substitute a Business Equity Firm Subcontractor or perform the work designated for a Business Equity Firms with its own forces unless and until approval has been received in writing by the DVIN.

(3) The facts supporting the request for substitution of a Business Equity Firm must not have been known nor reasonably should have been known by the Contractor before the submission of the Utilization Plan.

(4) Bid Shopping as a part the substitution of a Business Equity Firm is prohibited.

(5) The Contractor must negotiate in good faith with the Business Equity Firm Subcontractor to resolve any issues between the Contractors and Business Equity Firm Subcontractor. Where there has been a mistake or disagreement about the scope of work, the Business Equity Firm can be substituted only where an agreement cannot be reached for a reasonable price for the corrected scope of work.

(6) Substitutions of the Business Equity Firm Subcontractor shall be permitted only after submission of a request for Subcontractor substitution in the B2GNow System and only on the following bases:

- i. Unavailability after receipt of reasonable notice to proceed;
- ii. Failure of performance;
- iii. Financial incapacity;
- iv. Refusal by the Subcontractor to honor the bid or proposal price;
- v. Mistake of fact or law about the elements of the scope of work of a Solicitation where agreement upon a reasonable price cannot be reached;
- vi. Failure of the Subcontractor to meet insurance, licensing or bonding requirements; or
- vii. The Subcontractor's withdrawal of its bid or proposal.

(7) The DVIN's final decision whether to permit or deny the proposed substitution, and the basis of any denial, shall be communicated to the Contractor and Business Equity Firm Subcontractor in writing within seven (7) business days of receipt of the request for substitution in the B2Gnow System.

(8) Where the Contractor has established the basis for the substitution to the satisfaction of the City, the Contractor shall make Good Faith Efforts to fulfill the Utilization Plan. The Contractor may seek the assistance of the City in obtaining a new Business Equity Firm.

(9) If the Business Equity Goal cannot be reached and Good Faith Efforts have been made, the Contractor may substitute with a non-Business Equity Firm.

(g) Contract Amendment / Change Order. The Contractor shall comply with the provisions of this Article with respect to any contract amendments, change orders, or extra work orders.

(1) If a Contract has been assigned a Business Equity Goal and requires a reduction in work or additional work through a change order, contract amendment or other mechanism, the Contractor shall notify DVIN.

(2) If the Contract amendment, change order, or extra work adds work to a project that is already being performed by a Business Equity Firm, such firm shall be given the opportunity to perform the additional work.

(3) If the amendment, change order, or extra work adds work that like or similar work is not already being performed by a Business Equity Firm and the amount of such additional work is greater than or equal to \$100,000.00, the Contractor shall comply with Good Faith Effort requirements of this Article (exclusive of the time requirements stated therein) with respect to such additional work.

(4) A Contractor may submit an Acceptance of Previous Commitment Form (APCF) for contract amendments and change orders in which the Contractor agrees to the original Business Equity Goal for the project, inclusive of any prior change orders or amendments

(h) Prior to Contract Closeout, the DVIN shall evaluate the Contractor's fulfillment of the Business Equity Goal, considering all approved substitutions, terminations and changes to the Contract's scope of work. If the City determines that Good Faith Efforts to meet the Business Equity Goals were not made, or that fraudulent misrepresentations have been made, or any other breach of the Contract or violation of the Ordinance or this Article has occurred, a remedy or sanction may be imposed, as provided in this Article.

(i) Contract Payment Procedures.

(1) For vertical construction Contracts, the Contractor shall submit an invoice at least monthly and the City will pay the invoice as required by the Texas Prompt Payment Act (Tex. Gov't. Code, Chap. 2251) or any successor statute. The Contractor shall pay Subcontractors as required by the Texas Prompt Payment Act or any successor statute. The Contractor's failure to make payments as provided by state law shall, in addition to any other remedies provided by law, authorize the City to withhold future payments and/or reject future bids from the Contractor until compliance with this Article is attained.

(2) For horizontal construction Contracts, procedures will be established to ensure that all progress payments are made twice a month and that Subcontractors are paid in accordance with the provisions of the Texas Prompt Payment Act (Tex. Gov't. Code, Chap. 2251) or any successor statute. A Contractor's failure to make payments as required by state law shall, in addition to any other remedies provided by state law, authorize the City to withhold future payments and/or reject future bids from the Contractor until compliance with this Article is attained.

(3) For all other Contracts, the Contractor shall pay Subcontractors as required by the Texas Prompt Payment Act (Tex. Gov't. Code, Chap. 2251) or any successor statute. The Contractor's failure to make payments as provided by state law shall, in addition to any other remedies provided by law, authorize the City to withhold future payments and/or reject future bids from the Contractor until compliance with this Article is attained.

(j) Contract Close-Out Procedure. At the completion of a Contract, the following procedures shall be followed by the Contractor. The Program contains further requirements of City departments for close-out procedures.

(1) The Contractor shall submit a Notice of Final Payment in the B2GNow Business Equity Management System (B2GNow).

(2) The Contractor shall work with DVIN to correct any discrepancies in payments made under a Contract.

(3) If DVIN determines that the Contractor failed to meet the Business Equity Goal and the City made no changes that impacted the Contractor's ability to meet the Business Equity Goal, it shall be considered a breach of the Contract and DVIN may impose sanctions in accordance with this Article.

(k) Counting Business Equity Firm's Participation.

(1) In order for a Business Equity Firm to count toward a Business Equity Goal, such firm must be Certified at the time of bid submission. Business Equity Firms that are scheduled to become Certified in an additional NAICS area during execution of the Contract may count participation towards the Business Equity Goal for the additional

certified work upon notifying DVIN with proof of such certification prior to completion of the work under the Contract.

(2) The entire amount of that portion of a Contract that is performed by the Business Equity Firm's workforce shall be counted toward a Business Equity Goal, including the cost of supplies and materials obtained for the work performed by the Business Equity Firm's workforce.

(3) The entire amount of fees or commissions charged for providing a bona fide service, such as professional, technical, consultant or managerial services, or for providing bonds or insurance specifically required for the performance of a Contract, shall be counted toward the Business Equity Goal, provided the fee is reasonable and not excessive as compared with fees customarily charged for similar services.

(4) When a Business Equity Firm performs as a participant in a Joint Venture, only the portion of the total dollar value of the Contract equal to the distinct, clearly defined portion of the work of the Joint Venture's Contract that is performed by the Business Equity Firms with its own forces and for which it is separately at risk, shall be counted toward the Business Equity Goal.

(5) Only expenditures to a Business Equity Firm that is performing a Commercially Useful Function shall be counted. To determine whether a Business Equity Firm is performing a Commercially Useful Function, the City may evaluate the amount of work subcontracted, industry practices, whether the amount the registered firm is to be paid under the Contract is commensurate with the work it is actually performing and other relevant factors. A Business Equity Firm does not perform a Commercially Useful Function if its role is limited to that of an extra participant in the Contract through which funds are passed in order to obtain the appearance of participation. When a Business Equity Firm is presumed not to be performing a Commercially Useful Function, the Contractor or Business Equity Firm may present evidence to rebut this presumption.

(6) In determining achievement of a Business Equity Goal, the participation of a Business Equity Firm shall not be counted toward the Business Equity Goal until the respective amount has been paid to the Business Equity Firm.

(7) Business Equity Firms that meet the Significant Business Presence definition and bid as a Contractor or Subcontractor may count their participation towards the goal. Acceptance is on a contract-by-contract basis.

#### **§20-372 CONTRACT EXCEPTIONS AND WAIVERS.**

(a) If a Bidder or Contractor is unable to comply with the Business Equity Goal requirements for a Contract, such Bidder or Contractor may submit one of the two forms prepared by the DVIN listed below. If the DVIN denies a request to waive a goal; the Bidder or City department may appeal that denial to the City Manager whose decision on the request shall be final.



(1) A Contractor Waiver Form may be submitted if a Bidder will perform the entire contract without Subcontractors or suppliers.

(2) A Good Faith Effort Form is submitted if the Bidder or Contractor has a subcontracting and/or supplier opportunity but was unable to meet or exceed the Business Equity Goal. The Bidder or Contractor shall submit requested documentation that demonstrates a Good Faith Effort to comply with the Business Equity Goal.

## **§20-374 SANCTIONS.**

(a) If a Business Equity Firm, Bidder, Contractor, Subcontractor, or supplier provides false or misleading information to the City in connection with submission of a bid, responses to requests for qualifications or proposals, Good Faith Efforts documentation, post-award compliance, or commits any other violations of this Article and/or the Program, it may result in a breach of Contract and the following sanctions and penalties:

(1) Payments Withheld. A Contractor's failure to make payments to Subcontractors in accordance with the provisions of this Article and the Texas Prompt Payment Act (Tex. Gov't. Code, Chap. 2251) or any successor statute shall authorize the City to withhold payment from the Contractor until all required payments are made and compliance is attained.

(2) Debarment.

i. Any Business Equity Firm or other relevant Subcontractor or supplier who intentionally and/or knowingly misrepresents facts or otherwise violates the provisions of this Article or the Program may be Debarred for a period not to exceed one (1) year, and if Debarred, such Business Equity Firm shall not be included in calculating a Bidder's Business Equity Goal and be barred from bidding on City work.

ii. A Bidder or Contractor who intentionally and/or knowingly misrepresents material facts shall be Debarred for a period of time of not less than three (3) years.

iii. The failure of a Bidder or Contractor to comply with this Article or the Program where such non-compliance constitutes a material breach may result in the Bidder or Contractor being Debarred for a period of time of not less than one (1) year.

iv. The DVIN shall determine whether Debarment is appropriate. If it decides in the affirmative, DVIN shall send a written statement of facts and a recommendation for Debarment to the City Manager. The City Manager, after consultation with the City Attorney's Office, shall make a decision regarding Debarment. If the City Manager upholds DVIN's recommendation for Debarment, the City Manager shall send a certified notice to the Bidder or Contractor informing them of the Debarment.

v. A party that receives notification of Debarment may appeal to the Business Equity Board by giving written notice within ten (10) days from the date of receipt of notice of Debarment to the City Manager and the Business Equity Board of its request for an appeal of the Debarment.

(b) Discrimination Complaint in the Contracting or Awarding of Contracts with the City.

(1) If a Bidder, Contractor, Subcontractor, or Business Equity Firm desires to make an allegation of discrimination in the City's award of a Contract or the performance of a Contract, such person shall submit such allegation to the DVIN.

(2) The DVIN shall determine whether the allegation of discrimination is true and correct and if it decides in the affirmative send a written statement of facts to the City Manager and the Business Equity Board.

(3) A determination of discriminatory practice in the City's award of a Contract or performance of a Contract shall also be referred to the appropriate City, state, and federal enforcement agencies for appropriate action.

#### **§20-374 APPEAL.**

(a) The Business Equity Board shall conduct a hearing within thirty (30) days from the date of receipt of the request for any appeal of this Article, unless the appellant requests an extension of time. The Business Equity Board will notify the appellant of the hearing time and location.

(1) The appellant shall be afforded an opportunity to appear with counsel if they so desire, submit documentary evidence, and confront any witness that the City presents at the hearing.

(2) The Business Equity Board shall render its decision not more than thirty (30) days after the hearing and send a certified notice to the appellant.

(3) If the Business Equity Board upholds the sanctions, the appellant may appeal to the City Manager within ten (10) days from the date of receipt of the Business Equity Board's decision by giving written notice to the City Manager. The City Manager has the final determination whether to uphold the sanctions assigned by the Business Equity Board.

#### **§20-375 SUNSET DATE**

(a) This Article shall terminate on December 31, 2030 unless reauthorized by City Council.

#### **§§20-376 - 20-382 RESERVED.**