

AN ORDINANCE

Enacting Sections 35.30 through 35.52 of the Revised Code of General Ordinances pertaining to the Adoption of the Findings of a Second Generation Disparity Study; Establishing a Process for Participation by Small, Minority and Female Business Enterprises in Contracting with the City of Dayton in Construction and Purchasing; Approving the Procurement Enhancement Plan Policies and Procedures; Repealing Sections 35.30 through 35.68 of the Revised Code of General Ordinances.

WHEREAS, In the *City of Richmond v. Croson*, 488 U.S. 469 (1989), the United States Supreme Court declared unconstitutional an MBE Program adopted by the City of Richmond, Virginia, which required its majority prime contractors to subcontract with minority business enterprises for at least 30% of the dollar amount of the prime contract; and

WHEREAS, In *Jurgensen v. City of Dayton*, No. C-3-89-295, Slip Op. (1989), the Federal District Court for the Southern District of Ohio invalidated the City of Dayton's Minority/Female Business Enterprise Goals Program and the Sheltered Market Program. The MBE/FBE Goals Program required prime contractors to subcontract with MBEs for 20% and with FBEs for 2% of the contract with the City. The Sheltered Market Program set goals of 15% for MBEs and 1% for FBEs of the funds earmarked by the City of Dayton for construction projects on which only MBEs and FBEs were eligible to bid; and

WHEREAS, Prior to 1991, the City of Dayton contracted with the Atlanta consulting firm of D.J. Miller & Associates to collect and develop evidence regarding the nature and extent of discrimination against MBEs/FBEs in the market areas relevant to the City of Dayton; and

WHEREAS, D.J. Miller & Associates, among other things, researched statutes and laws, periodicals, legislative histories, historical and economic literature, official reports from government and civic organizations and conducted numerous personal and confidential interviews and a public hearing with persons knowledgeable about contracting with the City of Dayton. D.J. Miller & Associates also collected, analyzed, and compiled statistical data on the participation of minorities and women in contracts with the City; and

WHEREAS, In March of 1991, D.J. Miller & Associates presented to the City of Dayton a report entitled "City of Dayton Disparity Study" containing its conclusions and recommendations; and

WHEREAS, On December 31, 1991, the Commission adopted Ordinance No. 28462 supplementing the Revised Code of General Ordinances by enacting new Sections 35.43 to 35.55 in order to adopt certain findings with respect to discrimination against businesses owned by females and minorities in the market areas relevant to the City of Dayton, establishing a rebuttable presumption that businesses owned by minorities and females are disadvantaged and creating a new process for participation by small/disadvantaged business enterprises in contracting with the City of Dayton in construction; and

WHEREAS, Ordinance No. 28462 was scheduled to expire ten years after its enactment, but was extended by the Commission in Ordinance No. 30112-02, for an additional five years on June 5, 2002; and

WHEREAS, In February of 2007, MGT of America, Inc. (MGT) was retained to conduct a Second-Generation Disparity Study for the City of Dayton in order to determine whether minority-and women-owned business enterprises (M/WBEs) were underutilized in City procurement activities; and

WHEREAS, MGT, among other things, conducted a review of the Procurement Enhancement Plan (PEP); established data parameters; reviewed policies, procedures and programs, and conducted market area and utilization analyses; determined the availability of qualified firms; analyzed the utilization and availability data for disparity and statistical significance; conducted a telephone survey, one on one interviews, focus groups, and a public hearing; conducted a statistically valid regression analysis; conducted a disparity analysis of the relevant private market; collected and analyzed anecdotal information; identified narrowly tailored race- and gender-based remedies; and prepared the final report of the study; and

WHEREAS, On August 13, 2008, the Commission heard a presentation from MGT in connection with the Second-Generation Disparity Study, at which time the Commission received the Final Report dated August 8, 2008 and entitled "A Second-Generation Disparity Study for the City of Dayton, Ohio," along with the findings and recommendations of the study; and

WHEREAS, The statistical data included in the Second-Generation Disparity Study and the anecdotal and other evidence presented to the Commission identified discrimination against minority-and women-owned business enterprises (M/WBEs) in the marketplace relevant to the City of Dayton in construction; and

WHEREAS, The United States Supreme Court in *City of Richmond v. Croson* encouraged consideration as to whether the effects of past discrimination can be remedied by race-neutral efforts before resorting to race-conscious programs; and

WHEREAS, A strong Small Business Enterprise (SBE) program is central to maintaining a narrowly-tailored program to promote Minority Business Enterprise (MBE) and Female Business Enterprise (FBE) utilization; and

WHEREAS, The Human Relations Council, pursuant to authority conferred by Section 32.16 of the Revised Code of General Ordinances of the City of Dayton, has established Policies and Procedures for the Procurement Enhancement Plan, which includes a narrowly tailored Small Business Enterprise (SBE) Program, Minority Business Enterprise (MBE) Program, and Female Business Enterprise (FBE) Program; and

WHEREAS, To provide for the immediate preservation of the public peace, property, health or safety and for the usual daily operation of City departments, it is necessary that this Ordinance take effect immediately; now, therefore,

BE IT ORDAINED BY THE COMMISSION OF THE CITY OF DAYTON:

Section 1. This Division shall be known as the PROCUREMENT ENHANCEMENT PLAN FOR SERVICES, SUPPLIES, AND CONSTRUCTION

Section 2. That Sections 35.30 to 35.52 of the Revised Code of General Ordinances are hereby enacted:

Sec. 35.30. Adoption of the findings and conclusions regarding minority and female-owned business enterprises.

The Commission adopts the findings and conclusions of the MGT of America, Inc. Final Report dated August 8, 2008 and entitled "A Second-Generation Disparity Study for the City of Dayton, Ohio" and by this reference incorporates herein the Second-Generation Disparity Study.

Sec. 35.31. Findings.

On the basis of the foregoing and upon full consideration of all relevant facts, the Commission finds that:

- (A) Minorities and females continue to show disparities in entry into self employment, after controlling for age, wealth, and other variables.
- (B) Minorities and females that were self employed earned significantly less than non-minority males, after controlling for other factors.
- (C) Past discrimination in the private sector and in the City's overall contracting process has had the effect of significant underutilization of minority and female-owned business enterprises in contracts awarded by the City and has contributed to the underdevelopment of such businesses.
- (D) The present effects of such past discrimination continue to impede the development of businesses owned by minorities and females and, for this reason, such businesses may rebuttably be presumed to be disadvantaged.
- (E) Certain issues, such as difficulties in the financing and bonding markets, and problems obtaining credit and insurance, impede the development of minority and female-owned businesses as well as certain nonminority small business enterprises.
- (F) The City has long recognized the importance of small business enterprises to its economic vitality and has adopted several measures and programs in support thereof including, but not limited to, City Wide Development Corporation, the Office of Small Business Ombudsmen, the Small Business Advisory Council, the Minority Contractors Business Assistance Program, the Small Business Retention Program and the Small Business Assistance Program.
- (G) It is in the best interest of the City to continue to promote the equitable utilization of small business enterprises, minority business enterprises and female businesses enterprises in City contracting in order to eradicate the lingering effects of past discrimination and improve the City's economic viability.
- (H) The requirements of this division are necessary to overcome the present effects of past discrimination and are designed to achieve the goal of equitable utilization of small businesses and minority and female-owned businesses in contracting with the City.

Sec. 35.32. Declaration of policy.

It is the policy of the City to promote full and equal business opportunity to all persons doing business with the City. The City must ensure that businesses seeking to participate in contracting and procurement activities with the City are not prevented from doing so on the basis of the race or gender of their owners. The City is committed to ensuring that it is not engaged in passive

participation in any form of discrimination. This policy will apply to all expenditures of City public funds, irrespective of source. This policy will also apply to all private sector economic development projects, where feasible, in which City public funds and/or tax incentives are utilized, in part or in total. In addition, where feasible, this policy will apply to contracts or agreements between the City and any other political subdivisions, governmental, or quasi-governmental agencies under which entities receive money from or through the City for the purposes of contracting with businesses to perform projects in the City.

This policy is enacted pursuant to the home rule powers of the City and supersedes any inconsistent provision of any law or regulation of the state of Ohio. This Division shall not apply to any contract to the extent that it is inconsistent with procedures or standards required by any law or regulation of the United States or the state of Ohio, to the extent such inconsistency is not permitted under the home rule powers of the City. In connection with any contract funded in whole or part from state or federal sources which require the imposition of 49 C.F.R. Parts 23 and/or 26, and of goals or by the appropriate Local Participation Agreement (LPA) related to the participation of Disadvantaged Business Enterprises, this division shall not apply to the extent inconsistent with such state or federal requirements. It is not the intent of this program to include federally grant funded contracts subject to a federally promulgated affirmative action program.

Sec. 35.33. Procurement Enhancement Plan for Small, Minority, and Female Business Enterprises.

In order to accomplish the declared policy of the City as set forth to ensure the full and equitable participation by Small Business Enterprises (“SBE”), Minority Business Enterprises (“MBE”) and Female Business Enterprises (“FBE”) in the provision of Supplies and Services to the City, including Construction, there is hereby created the Procurement Enhancement Plan (“PEP”) which shall consist of the following components: MBE, FBE and SBE Programs for Services and Supplies; MBE, FBE and SBE Programs for Construction; Joint Venture/Strategic Partnership Program; Small Contract Rotation Program; Dayton Local Business Preference; and Dayton Local Small Business Program. The PEP shall be administered and reviewed by the Human Relations Council.

Sec. 35.34. Duties of the Human Relations Council.

The Human Relations Council (“Council”) shall have the following duties and responsibilities for the administration and review of the Procurement Enhancement Plan (“PEP”):

- (A) Administration and enforcement of the PEP.
- (B) Promulgate, amend, and enforce Policies and Procedures consistent with this Ordinance as may be necessary and appropriate to promote the ethical practice of contracting and subcontracting and to carry out the provisions, intents, and purposes of this PEP.
- (C) Certification of businesses as MBEs, FBEs, and SBEs in accordance with the standards set forth under the PEP.
- (D) Development and maintenance of a database of certified MBEs, FBEs, and SBEs.
- (E) Institution of a pre-qualification process and procedures to establish the capability of those firms eligible for the Small Business Contract Rotation Program and the Dayton Local Small Business Program.
- (F) Monitor compliance with the requirements of the PEP.
- (G) Establishment of written procedures, informal guidelines, and forms as may be necessary to effectuate the PEP and the requirements set forth hereunder.

- (H) Investigation of alleged violations of this PEP, and the issuance of written statements following any determination of such investigation, stating the reasons therefore and any penalty imposed.
- (I) Collaboration with various City departments to ensure maximum outreach to MBEs, FBEs, and SBEs.
- (J) Determination of whether a bidder is responsive in making Good Faith Efforts as defined and required by the PEP.
- (K) Provision to businesses of all forms, applications, documents, and papers necessary to comply with the PEP.
- (L) Provision of information to potential bidders, upon request by the potential bidder, which shall include names and contact information of certified MBEs, FBEs, and SBEs, to reinforce and support outreach efforts by potential bidders.
- (M) Notification to an affected party by certified mail that it has the right to appeal a denial of certification as a MBE, FBE, and/or SBE to the Council within seven (7) days of receipt of the notice of refusal to certify the affected party.
- (N) Notification to the appropriate departments of the City of any determination of noncompliance with the PEP, and of any appeal from any such determination.
- (O) Provision of ongoing monitoring and oversight functions to determine the degree of compliance maintained by successful bidders and to monitor the utilization of MBEs, FBEs, and SBEs on eligible projects.
- (P) Maintenance of annual statistical data based on availability and utilization of certified MBEs, FBEs, and SBEs.
- (Q) Tracking and reporting of statistics regarding the effectiveness of this PEP as measured by a review of data indicating prime and subcontractor spending with MBEs, FBEs, and SBEs as required by the PEP Policies and Procedures.
- (R) Submission of an annual report and scorecard to the City Commission, the City Manager, and the PEP Oversight Committee reviewing the performance of each department in meeting the goals established under the PEP.
- (S) Recommendations to the PEP Oversight Committee regarding annual goals for the Program.
- (T) Recommendations to the PEP Oversight Committee regarding any further efforts needed to ensure participation by MBEs, FBEs, and SBEs in contracting with the City.
- (U) Development and implementation of outreach and technical assistance programs to assist businesses in gaining the ability to compete successfully in the marketplace and to promote equal contracting opportunities for all businesses desiring to conduct business with the City, regardless of MBE, FBE, or SBE status.

Sec. 35.35. Definitions.

For the purposes of this division, the following terms shall have the following meanings:

Annual receipts. Total income (or in the case of a sole proprietorship, gross revenue) plus cost of goods sold as these terms are defined and reported on Internal Revenue Service tax return forms.

Award. Legislation or City Manager action authorizing the award of a contract by the City, provided, however, that the contract will not become binding upon the City, and the City will incur no liability under it, until it has been duly executed by the contractor and the City with all required submittals, including insurance and bonding, if applicable.

Bid. Written quotations, proposals, or offers by a bidder or contractor to perform or provide labor, materials, equipment, supplies, or services to the City for a price submitted in response to a competitive bidding solicitation issued by the City.

Bidder. Any individual, business enterprise, partnership, joint venture, or corporation that submits a bid to the City as defined herein.

Certification. The criteria and process for participation in the PEP.

Certifying Agency. A private or public entity designated by the Executive Director of the Human Relations Council as an agency eligible to certify businesses for the City as an MBE, FBE, and/or SBE.

Certification program. Any one or more programs in the group consisting of the City's MBE, FBE, and/or SBE programs, and such other programs as the Human Relations Council may from time to time develop and implement, when legal opinion and legal evidence supports such establishment.

City. The City of Dayton, Ohio.

Commercially Useful Function. The execution by a minority or female owned business enterprise, which contracts with the City, or subcontracts with another business enterprise which contracts with the City, of a distinct element of the work of the contract by actually performing, managing, and supervising the work involved, excepting a business enterprise which serves as a conduit for another.

Construction. The process of building, altering, repairing, remodeling, improving or demolishing any public structure or building or other public improvements of any kind to any public real property, excepting the routine operation, routine repair or routine maintenance of structures, buildings or real property.

Council. The members of the Human Relations Council of the City of Dayton, Ohio, as appointed by the City Commission pursuant to Section 32.13 of the Revised Code of General Ordinances.

Contract. Any agreement between the City and a person or business enterprise to provide or procure labor, materials, equipment, supplies and/or services to, for, or on behalf of the City. A "Contract" shall include an agreement between the City and a person or business enterprise to perform professional, architectural and engineering services, construction related services, or fund the performance of such services. Except as otherwise specifically defined in this section, a "Contract" shall not include:

- a) Awards made by the City with federal or state grant or City general fund monies to a non-profit entity to which the City offers assistance, guidance, or supervision on a project or program and the recipient of the grant award uses the grant monies to provide services to the community;
- b) Sales transactions where the City sells its real or personal property; or,
- c) Donations of materials, equipment, supplies, or services to or by the City.

Contractor. Any person or business entity that shall enter into a contract with the City, including all partners and all joint ventures of such person or entity.

Counting Towards Goals. The procedure for calculation of participation in the PEP as determined by the Program Policies and Procedures.

Dayton Local Small Business. A business that:

- a) Is certified by the Executive Director of the Council, or his/her designee, as a MBE, FBE, and/or SBE;
- b) Is headquartered within the corporate limits of the City; and
- c) In the case of a General Construction contractor,
 - (i) has annual average gross receipts for each of the preceding three (3) years of not more than fifteen million dollars (\$15,000,000); or,
 - (ii) in the case of a business engaged in Specialty Trade and Services has annual average gross revenue for each of the immediately preceding three (3) years of not more than five million dollars (\$5,000,000); or,

- (iii) in the case of a business engaged in Services has annual average gross receipts for each of the immediately preceding three (3) years of not more than one million dollars (\$1,000,000); or,
- (iv) in the case of a business engaged in Supplies has an annual average employee count of fifteen (15) or less.

Dayton Local Business. A business located within the corporate limits of the City that has filed or paid a payroll or earnings tax in the most recent tax quarter.

Dayton MSA. The Dayton Metropolitan Statistical Area; the geographic area that encompasses the scope of this program. The Dayton MSA currently includes the counties of Montgomery, Greene, Miami, and Preble in the State of Ohio.

Disadvantaged Business Enterprise or DBE. A for-profit small business concern:

- a) That is at least fifty-one percent (51%) owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which fifty-one percent (51%) of the stock is owned by one or more such individuals;
- b) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it; where each individual owner of a firm applying to participate as a DBE whose ownership and control are relied upon for DBE certification certifies that he or she has a personal net worth that does not exceed Five Hundred Thousand Dollars (\$500,000); and,
- c) Which has been certified as such by the Council.

Executive Director. The individual appointed by the Commission pursuant to Section 32.18 of the Revised Code of General Ordinances of the City of Dayton.

Female Business Enterprise ("FBE"). A business enterprise:

- a) which is at least fifty-one percent (51%) owned by one or more women, or, in the case of a publicly held corporation, fifty-one percent (51%) of the stock of which is owned by one or more women, whose management and daily business operations are controlled by one or more women;
- b) which, in the case of a general construction contractor, has annual average gross receipts for each of the preceding three (3) years of not more than Thirty-Three Million Five Hundred Thousand Dollars (\$33,500,000); or, in the case of a business engaged in a Specialty Trade and Services has annual average gross revenue over each of the immediately preceding three (3) years of not more than Fifteen Million Dollars (\$15,000,000); or, in the case of a business engaged in Supplies has an annual average employee count of one hundred (100) or less;
- c) which can demonstrate that the personal net worth of each owner whose ownership and control are relied upon for SBE certification does not exceed Seven Hundred Fifty Thousand Dollars (\$750,000) exclusive of the value of the owner's interest in the FBE and the individual's equity in his or her primary place of residence; and
- d) which has been certified as an FBE by the Executive Director of the Council or his/her designee.

Good Faith Efforts. The steps undertaken, prior to submission of a bid, to obtain MBE, FBE, and/or SBE participation for subcontracting opportunities related to the bid proposal, and submitted as defined in the Program Policies and Procedures.

Joint Venture. An association of two or more persons, partnerships, corporations, and any combination of them, formed to carry out a single business enterprise for profit, and for which purpose they combine their expertise, property, capital, efforts, skills and knowledge, having an agreement in writing specifying the terms and conditions of the relationships between the partners and their relationships and responsibility to business activity.

Lower Tier Subcontractor. A subcontractor who is not in privity of contract with a contractor but is in privity of contract with another subcontractor.

Lower Tier Supplier. A supplier who is not in privity of contract with a contractor but is in privity of contract with a subcontractor or a supplier.

Minority Group. Any of the following racial or ethnic groups which are referenced in the Second-Generation Disparity Study for the City of Dayton:

- a) African-Americans or Black Americans;
- b) Hispanic Americans;
- c) Asian-Americans; and
- d) Native Americans.

Minority Business Enterprise (“MBE”). A business:

- a) which is at least fifty-one percent (51%) owned by one or more members of one or more Minority Groups, or, in the case of a publicly held corporation, at least fifty-one percent (51%) of the stock of which is owned by one or more members of one or more Minority Groups, whose management and daily business operations are controlled by one or more members of one or more Minority Groups;
- b) which, in the case of a general construction contractor, has annual average gross receipts for each of the preceding three (3) years of not more than Thirty-Three Million Five Hundred Thousand Dollars (\$33,500,000); or, in the case of a business engaged in a Specialty Trade and Services has annual average gross revenue over each of the immediately preceding three (3) years of not more than Fifteen Million Dollars (\$15,000,000); or, in the case of a business engaged in Supplies has an annual average employee count of one hundred (100) or less;
- c) which can demonstrate that the personal net worth of each owner whose ownership and control are relied upon for certification does not exceed Seven Hundred Fifty Thousand Dollars (\$750,000) exclusive of the value of the owner’s interest in the MBE and the individual’s equity in his or her primary place of residence; and
- d) which has been certified as an MBE by the Executive Director of the Council or his/her designee.

Montgomery County Bidder. A business which has a physical business site located outside the corporate limits of the City, but within the corporate limits of Montgomery County, Ohio.

Owned. Having all the customary incidents of ownership, including the right of disposition, and sharing in all risks and profits commensurate with the degree of ownership interest.

Personal net worth. The net value of the assets of an individual remaining after total liabilities are deducted, not including the individual's ownership interest in an applicant or participating SBE firm or the individual's equity in his or her primary place of residence. An individual's personal net worth includes only his or her own share of assets held jointly or as community property with the individual's spouse.

Policies and Procedures. The Policies and Procedures adopted by the Commission herein, including any future amendments, additions or deletions made by the Council pursuant to its authority and consistent with this Division.

Procurement. Buying, purchasing, renting, leasing or otherwise acquiring any supplies, services and/or construction. It also includes all functions that pertain to obtaining any supply, service or construction, including a description of requirements, selection and solicitation of sources, preparation and award of contracts and all phases of contract administration.

Professional services. Those services within the scope of the practices of architecture, investment banking, professional engineering, planning, landscape architecture, land surveying, the medical arts, management and analysis, accounting or auditing, law, psychology or any other similar kind or type of professional practice. For purposes of this division, professional services shall not include investment management services.

Responsive Bid. A quotation, proposal, solicitation, or offer that meets specifications, including, if applicable, any project participation goal as set out in the bid packet specifications.

Services. Those services within the scope of the practices included within professional services and general services.

Small Business Enterprise (“SBE”). A business that:

- a) Is an independent and continuing enterprise for profit, performing a commercially useful function;
- b) Has been in existence for not less than one (1) year;
- c) In the case of a general construction contractor, has annual average gross receipts for each of the preceding three (3) years of not more than Thirty-Three Million Five Hundred Thousand Dollars (\$33,500,000); or, in the case of a business engaged in a Specialty Trade and Services has annual average gross revenue over each of the immediately preceding three (3) years of not more than Fifteen Million Dollars (\$15,000,000); or, in the case of a business engaged in Supplies has an annual average employee count of one hundred (100) or less; In determining the average annual gross revenues of a small business enterprise, the Council shall include gross receipts of each of its affiliates. The gross revenue standard shall be adjusted from time to time consistent with the United States Small Business Administration (“SBA”) standards for small businesses.
- d) Certifies that its individual owner(s) whose ownership and control are relied upon for SBE certification has a personal net worth that does not exceed Seven Hundred Fifty Thousand Dollars (\$750,000); and,
- e) Has been certified as such by the Executive Director of the Council or his/her designee.

Socially and economically disadvantaged individual. Any individual who is a citizen (or lawful permanent resident) of the United States and who is:

- a) Any individual whom a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis;
- b) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:
 - (i) “Black Americans,” which includes persons having origins in any of the Black racial groups of Africa;
 - (ii) “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;
 - (iii) “Native Americans,” which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;
 - (iv) “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), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kirbati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;
 - (v) “Subcontinent Asian Americans,” which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;
 - (vi) Women; and
 - (vii) Any additional groups whose members are designated as socially and economically disadvantaged by the United States Small Business Administration (“SBA”), at such time as the SBA designation becomes effective.

Subcontractor. Any person or business enterprise providing goods, labor, or services to a contractor if such goods, labor or services are procured in fulfillment of the contractor’s

obligations arising from a contract with the City. Subcontractor includes every level of subcontracting required to fulfill a contract with the City.

Supplies. All property, including, but not limited to, equipment, materials, printing, insurance and leases of real property, excluding land or a permanent interest in land.

Wages due. The wages due to a laborer as of the date a contractor or subcontractor receives payment for any application or request for payment or retainage from any owner, contractor, or subcontractor.

Sec. 35.36. Non-Discrimination Policy for Contracting.

The City is committed to a policy of non-discrimination pursuant to Section 1 of the Fourteenth Amendment to the United States Constitution. It is further the policy of the City that its purchasing and contracting practices not implicate the City as a passive participant in discriminatory practices engaged in by private contractors or vendors who seek to obtain business with the City. In furtherance of these policy objectives, the City seeks to afford to its citizens equal opportunities to do business on City contracts and to ensure that all bidders, proposers, vendors, and contractors doing business with the City provide to businesses owned and controlled by minorities, women, and others whom it considers to be disadvantaged, opportunities to participate on contracts which are paid, in whole or part, with monetary appropriations from the City.

The City prohibits discrimination against any person or business in pursuit of these opportunities on the basis of race, color, religion, sex, sexual orientation, gender identity, ancestry, national origin, place of birth, age, marital status, or handicap. The City will conduct its contracting and purchasing programs so as to discourage any discrimination and will vigorously seek to resolve all claims of discrimination. The Council shall promulgate, amend and enforce such Policies and Procedures consistent with the provisions of this Section as may be necessary and appropriate to carry out the provisions, intent, and purpose of this Section.

Sec. 35.37. Procurement Enhancement Programs for Services, Supplies and Construction.

(A) Statement of Policy: It is the purpose of this program to promote the economic welfare of the people of the City of Dayton, to promote full and equal business opportunity for all persons doing business with the city, and to promote commerce by assisting Minority Business Enterprises and Female Business Enterprises (MBEs and FBEs) and Small Business Enterprises (SBEs) to actively participate in the City's procurement process for Services, Supplies and Construction.

(B) The Council shall promulgate, amend and enforce such Policies and Procedures consistent with the provisions of this Section as may be necessary and appropriate to carry out the provisions, intent, and purpose of this Section.

Sec. 35.371. Annual Participation Goals for Services and Supplies.

(A) In an effort to remedy the present effects of past identified discrimination in the City of Dayton marketplace and contracting and procurement with the City, as found in the Second-Generation Disparity Study reported by MGT of America, Inc., August 8, 2008, and in order to provide MBEs, FBEs and SBEs equal opportunity and access to participate in all City procurement of professional services, other services, and supplies, the Council shall annually establish aspirational goals for MBE, FBE and SBE participation in contracting for City services and supplies.

(B) The following factors shall be utilized as part of the methodology for establishing annual aspirational MBE, FBE and SBE goals for the MBE, FBE and SBE Programs for Services and Supplies:

- 1) The number of minority and female businesses in the relevant market area;
- 2) The availability of minority and female businesses in the relevant market area willing and able to do business with the City;
- 3) Annual participation figures for qualified minority and female businesses in both City contracting and the private marketplace;
- 4) Analysis of disparities between the availability and participation of qualified minority and female businesses in both the City and the private marketplace;
- 5) The findings and conclusions contained in the Second-Generation Disparity Study and other reports undertaken by the City, organizations, and governmental entities relating to the Dayton market area;
- 6) Review and analysis of the reports generated by the Council or other City departments in accordance with Policies and Procedures for Outreach and Business Assistance to Subcontractors by the Council; and,
- 7) Other relevant factors.

(C) The initial annual aspirational MBE, FBE and SBE goals for Services and Supplies will be:

- 1) *Goals for Services* (including Architecture & Engineering, Professional Services, and Other Services): 12% - MBE; 3% - FBE; 20% - SBE
- 2) *Goals for Supplies*: 10% - MBE; 5% - FBE; 15% - SBE.

(D) These annual aspirational goals shall be reviewed each year by January 30th by the Council. The annual goal setting process shall include consultation with the PEP Oversight Committee.

(E) These overall goals are only intended to be benchmarks for evaluating overall performance of the Program on an annual basis. These participation goals are not and shall not be quotas.

(F) For purposes of determining or satisfying annual participation goals, only participation of MBEs, FBEs and SBEs certified by the Executive Director of the Council or his/her designee, or a Council-approved certification agency, shall be considered.

Sec. 35.372. Project and Contract Goals for Services and Supplies.

(A) The Executive Director of the Council, or his/her designee, shall set MBE, FBE and SBE contracting goals for each specific prime contract, to include those with subcontracting and/or supplier possibilities, and include goals for subcontracting where applicable.

(B) The Executive Director of the Council, or his/her designee, shall have the authority to reduce or eliminate such MBE, FBE and SBE goals on a contract-by-contract basis based on the type of contract, the type of subcontracting work that will be required, and the availability of MBEs, FBEs and SBEs. Prime bidders will also be subject to the contract goals for subcontractors.

(C) Project and Contract Goals shall be based on the statistical data cited in Section 35.371(B).

(D) Every prime bidder on an eligible project shall be required to submit with its bid submittal the applicable MBE, FBE or SBE Participation Form, which shall include the names, addresses, phone number, Tax I.D. number, certification numbers, if applicable, of certified MBEs, FBEs or SBEs, or businesses that have applied for MBE, FBE or SBE certification at the time of bid submission, and any other information required as set forth in the project's solicitation documents.

(E) The City shall indicate goals for the MBEs, FBEs and/or SBEs in solicitations for contracts that provide opportunities for MBE, FBE or SBE participation.

(F) Solicitations for contracts that provide opportunities for MBE, FBE or SBE participation shall require all bidders to submit a written assurance that the MBE, FBE or SBE goals are met in their bids or proposal.

(G) Bids must also include a proposed schedule of MBE, FBE or SBE participation that lists the names of the MBE, FBE or SBE subcontractors, a description of the work each is to perform, and the dollar value of each proposed MBE, FBE or SBE subcontract.

(H) Where a contract provides a goal for MBE, FBE or SBE participation, the Executive Director of the Council, or his/her designee, shall recommend a bidder be awarded a contract only where the bidder has demonstrated good faith efforts to meet the designated goal. A bidder has demonstrated good faith efforts if it does either of the following: 1) document sufficient commitments to meet the goal in accordance with the Program Policies and Procedures; or 2) request a waiver by documenting that it made adequate good faith efforts to meet the goal, even though it did not succeed in obtaining sufficient commitments to do so, in accordance with the Program Policies and Procedures.

(I) Where a bidder fails to meet MBE, FBE or SBE goals and fails to demonstrate Good Faith Efforts to meet MBE, FBE or SBE goals, as defined in the Program Policies and Procedures, the Executive Director of the Council, or his/her designee, shall not recommend the bidder be awarded the contract.

(J) If a waiver is sought, a bidder is required to submit a waiver request with its bid, and bidders shall be so informed at the time of solicitation.

(K) Agreements between a bidder and an MBE, FBE or SBE in which the MBE, FBE or SBE promises not to provide subcontracting quotations to other bidders shall be prohibited.

Sec. 35.373. Annual Participation Goals for Construction.

(A) In an effort to remedy the present effects of past identified discrimination in the City of Dayton marketplace and contracting and procurement with the City, as found in the Second-Generation Disparity Study reported by MGT of America, Inc., August 8, 2008, and in order to provide MBEs, FBEs and SBEs equal opportunity and access to participate in all City procurement of construction, the Council shall annually establish aspirational goals for MBE, FBE or SBE participation in contracting for City procurement of Construction.

(B) The following factors shall be utilized as part of the methodology for establishing annual aspirational goals for MBE, FBE and SBE Programs for Construction:

- 1) The number of minority and female businesses in the relevant market area;
- 2) The availability of minority and female businesses in the relevant market area willing and able to do business with the city;
- 3) Annual participation figures for qualified minority and female businesses in both City contracting and the private marketplace;
- 4) Analysis of disparities between the availability and participation of qualified minority and female businesses in both the City and the private marketplace;
- 5) The findings and conclusions contained in the Second-Generation Disparity Study and other reports undertaken by the City, organizations, and governmental entities relating to the Dayton market area;
- 6) Review and analysis of the reports generated by the Council or other City departments in accordance with the Policies and Procedures for Outreach and Business Assistance to Subcontractors by the Council; and,
- 7) Other relevant factors.

(C) The initial annual aspirational MBE, FBE and SBE goals for Construction will be: 17% - MBE; 5% - FBE; 20% - SBE.

(D) These annual aspirational goals shall be reviewed each year by January 30th by the Council. The annual goal setting process shall include consultation with the PEP Oversight Committee.

(E) These overall goals are only intended to be benchmarks for evaluating overall performance of the Program on an annual basis. These participation goals are not and shall not be quotas.

(F) For purposes of determining or satisfying annual participation goals, only participation of MBEs, FBEs, or SBEs certified by the Executive Director of the Council or his/her designee, or a Council-approved certification agency, shall be considered.

Sec. 35.374. Project and Contract Goals for Construction.

(A) The Executive Director of the Council, or his/her designee, shall set MBE, FBE and SBE contracting goals for each specific prime construction contract, to include those with subcontracting possibilities, and include goals for subcontracting where applicable.

(B) The Executive Director of the Council, or his/her designee, shall have the authority to reduce or eliminate such MBE, FBE and SBE goals on a contract-by-contract basis based on the type of contract, the type of subcontracting work that will be required, and the availability of MBEs, FBEs and SBEs. Prime bidders will also be subject to the contract goals for subcontractors.

(C) Project and Contract Goals shall be based on the statistical data cited in Section 35.373(B).

(D) Every prime bidder on an eligible project shall be required to submit with its bid submittal the applicable MBE, FBE or SBE Participation Form, which shall include the names, addresses, phone number, Tax I.D. number, certification numbers, if applicable, of certified MBEs, FBEs or SBEs, or businesses that have applied for MBE, FBE or SBE certification at the time of bid submission, and any other information required as set forth in the project's solicitation documents.

(E) The City shall indicate goals for the MBE, FBEs and/or SBEs in solicitations for contracts that provide opportunities for MBE, FBE or SBE participation.

(F) Solicitations for contracts that provide opportunities for MBE, FBE or SBE participation shall require all bidders to submit a written assurance that the MBE, FBE or SBE goals are met in their bids or proposal.

(G) Bids must also include a proposed schedule of MBE, FBE or SBE participation that lists the names of the MBE, FBE or SBE subcontractors, a description of the work each is to perform, and the dollar value of each proposed MBE, FBE or SBE subcontract.

(H) Where a contract provides a goal for MBE, FBE or SBE participation, the Executive Director of the Council, or his/her designee, shall recommend a bidder be awarded a contract only where the bidder has demonstrated good faith efforts to meet the designated goal. A bidder has demonstrated good faith efforts if it does either of the following: 1) document sufficient commitments to meet the goal in accordance with the Program Policies and Procedures; or 2) request a waiver by documenting that it made adequate good faith efforts to meet the goal, even though it did not succeed in obtaining sufficient commitments to do so, in accordance with the Program Policies and Procedures.

(I) Where a bidder fails to meet MBE, FBE or SBE goals and fails to demonstrate Good Faith Efforts to meet MBE, FBE or SBE goals, as defined in the Program Policies and Procedures, the Executive Director of the Council, or his/her designee, shall not recommend the bidder be awarded the contract.

(J) If a waiver is sought, a bidder is required to submit a waiver request with its bid, and bidders shall be so informed at the time of solicitation.

Sec. 35.375. Request for Waiver of Project or Contract Goals.

If a bidder is unable to meet all or part of the MBE, FBE or SBE project or contract goals, a partial or total waiver may be sought by the prime bidder. The waiver request shall be submitted with the bid and reviewed for approval by the Executive Director of the Council or his/her designee. The bidder who submitted the waiver request shall, within two (2) business days after submission of its

bid, submit full documentary evidence of the Good Faith Efforts it used to meet the contract goals, as defined in the Program Policies and Procedures.

Sec. 35.376. Records and Reports for PEP Programs.

(A) The effectiveness of the MBE, FBE and SBE Programs for Services and Supplies, and the MBE, FBE and SBE Programs for Construction will be measured by a review of data indicating prime and subcontractor spending with MBEs, FBEs and SBEs. Program effectiveness measurements will also include efforts by the City to provide prime contracting opportunities for MBEs, FBEs and SBEs. The Council shall prepare and present a report to the City Commission from time to time, as the Program Policies and Procedures require.

(B) The Council shall promulgate, amend, and enforce the Program Policies and Procedures for the maintenance of records and reports in accordance with this Section.

Sec. 35.377. Review and Oversight.

The City shall establish the PEP Oversight Committee comprised of the City Manager, the Executive Director of the Council, the Director of the Department of Central Services, and one community representative. The City Commission will appoint a community representative to serve on the PEP Oversight Committee. The PEP Oversight Committee shall:

(A) Review annually the results of the Program and submit recommendations for improvement as indicated by reports and performance results;

(B) Review the annual goals for MBEs, FBEs, and SBEs by January 30th of each year;

(C) Review the quarterly reports published by the Council, and provide guidance and direction to encourage improved performance where indicated;

(D) Review the Policies and Procedures promulgated by the Council pursuant to this Division.

(E) Review the performance of each department in the contracting with MBEs, FBEs, and SBEs, and communicate to each department their performance metrics in comparison to the total.

Sec. 35.38. Outreach to Subcontractors by the Division of Purchasing.

The City considers information distributed and communicated with MBEs, FBEs and SBEs to be an integral part of the City's PEP. The Department of Central Services, Division of Purchasing shall do the following to assist in meeting the outcomes included in this Division:

(A) Create and maintain a policy and system of centralized or decentralized purchasing for all contracting services such that all goals shall be met through MBE, FBE and SBE participation in all expenditure of City funds, irrespective of source.

(B) Establish telephone notification of bid opportunities to MBEs, FBEs and SBEs.

(C) Provide that procurement and City administrative department staff actively participate in trade fairs and association meetings for MBEs, FBEs and SBEs.

(D) Establish a City-wide monitoring system for specifications and product requirements.

(E) Maintain a tracking chart of the number of MBEs, FBEs and SBEs contacted with the quotes received over a period of time, such as monthly, which data can be classified into the different commodity categories.

(F) Require public solicitations by buyers and user departments for purchases over Ten Thousand Dollars (\$10,000).

(G) Conduct bi-annual in-house training sessions for City staff involved in procurement related activities to ensure awareness of MBE, FBE and SBE procurement policy and procedures.

(H) Evaluate the effectiveness and performance of buyers and management in utilizing MBEs, FBEs and SBEs in purchasing all services.

- (I) Implement procedures to include MBEs, FBEs and SBEs in all contracts funded by the City, regardless of funding source.
- (J) Establish a proposal review process that provides feedback to unsuccessful bidders about their proposal. Conduct debriefing sessions with the cooperation of the department involved to explain and analyze why certain bids were unsuccessful.
- (K) Involve the Executive Director of the Council, or his/her designee, in the procurement bid review process.
- (L) Develop a centralized list of all user departments as the source from which solicitations can be made by contract category.
- (M) Permit MBEs, FBEs and SBEs, upon request, to review and evaluate successful bid summaries of similar procurements.
- (N) Ensure that MBEs, FBEs and SBEs are contacted for solicitation lists at least ten (10) calendar days prior to the bid date.
- (O) In the event a need arises for the City to execute a sole source contract, receive approval from the Executive Director of the Council, or his/her designee, to obtain an exemption from the requirements of this Division.

Sec. 35.39. Outreach and Business Assistance to Subcontractors by the Council.

To ensure that opportunities to participate on City contracts are available to the widest feasible universe of interested, available, and qualified businesses, the Council has developed a written comprehensive outreach program aimed at increasing business participation in the City's contracting and procurement process. The Council shall implement its Outreach and Business Assistance to Subcontractors, as defined in the Program Policies and Procedures. The Council is authorized to develop and implement such other and further outreach activities and programs as the Executive Director of the Council may from time to time recommend. From time to time overall evaluation of the effectiveness of the program with regard to non-discrimination in contracting shall be conducted. Appropriate changes to the measures and programs based on the results of the evaluations shall then be implemented.

Sec. 35.40. Certification of MBEs, FBEs and SBEs.

- (A) For purposes of contracting with the City of Dayton under the Programs established herein, a MBE, FBE, and/or SBE must be certified as a MBE, FBE, or SBE by the City and must be located within the State of Ohio.
- (B) The Executive Director of the Council, or his/her designee, shall be responsible for implementing a system for MBE, FBE, SBE certifications and certification removals on behalf of the City. The Council shall consider appeals from the decision of the Executive Director of the Council, or his/her designee. For the purposes of this Section, the City will consider certifications from other entities.
- (C) The Council shall promulgate, amend and enforce such Policies and Procedures regarding certification consistent with the provisions of this Section as may be necessary and appropriate to carry out the provisions, intent, and purpose of this Section

Sec. 35.41. Joint Venture/Strategic Partnership Program.

- (A) The City will encourage and promote, where economically feasible, establishment of joint ventures or strategic partnerships (joint ventures/partnerships) to ensure prime contracting opportunities for all businesses, including MBEs, FBEs and SBEs.
- (B) Based upon the scope of work and market availability, the Executive Director of the Council, or his/her designee, will determine, in consultation with the Purchasing Department, on a project-

by-project basis on all eligible projects over Five Million Dollars (\$5,000,000), whether good faith efforts to enter into a joint venture/partnership will be required for such a project.

(C) On such projects in which good faith efforts to enter into a joint venture/partnership relationship are required, no bid shall be accepted unless submitted by a joint venture/partnership, unless the Executive Director of the Council, or his/her designee has determined that good faith efforts to enter into a joint venture have been demonstrated.

(D) The Executive Director of the Council, or his/her designee, shall determine whether good faith efforts to enter into a joint venture/partnership have been adequately demonstrated based on a review of the relevant facts, documents, and circumstances.

(E) On such eligible projects in which good faith efforts to enter into a joint venture/ partnership relationship are required, the joint venture/partnership member businesses must have either different race ownership, different gender ownership, or both. MBE, FBE, and/or SBE members of the joint venture/partnership must be qualified as defined for each in Section 35.35. A bid submitted by a joint venture/partnership comprised of bidders with both the same race and gender ownership shall be deemed non-responsive and rejected.

(F) As to each joint venture/partnership under this section, a written joint venture or partnership agreement must be completed by all parties to the joint venture/partnership and executed before a notary public, which clearly delineates the rights and responsibilities of each member or partner, complies with any requirements of the Council as set forth in bid documents or otherwise, and provides that the joint venture/ partnership shall continue for, at a minimum, the duration of the project.

(G) For joint ventures/partnerships, each partner shall provide the Executive Director of the Council, or his/her designee, access to review all records pertaining to the agreement between the partners before and after the award of the contract in order to reasonably assess compliance with their agreement, to include agreements pertaining to:

- 1) The MBE, FBE or SBE venture partner's liability versus said partners percentage of revenue earned for the project.
- 2) The actual participation of the strategic partners on the project;
- 3) The method of and the responsibility for accounting, and;
- 4) The method by which disputes are resolved.

(H) For joint venture/partnerships, the Executive Director of the Council, or his/her designee, shall review and approve all contractual agreements regarding the terms and provisions of each joint venture relationship prior to the award of a contract on an eligible project to the joint venture/partnership, including agreements pertaining to:

- 1) The initial capital investment of each venture partner;
- 2) The proportional allocation of profits and losses to each venture partner. No MBE, FBE, or SBE venture partner's liability shall ever exceed said partner's percentage of revenue earned while a participant in the joint venture.
- 3) The sharing of the right to control the ownership and management of the joint venture;
- 4) Actual participation of the venture partners on the project;
- 5) The method of and responsibility for accounting;
- 6) The method by which disputes are resolved; and
- 7) Any additional or further information required by the Executive Director of the Council, or his/her designee, as set forth in bid documents or otherwise.

(H) Joint ventures/partnerships may submit agreements for pre-approval no later than fourteen (14) calendar days prior to the date set for receipt of bids on an eligible project. Otherwise, agreements must be submitted on or before the date set for receipt of bids on an eligible project. A bid submitted by a joint venture/partnership that does not include a satisfactory written joint

venture or partnership agreement in accordance with the requirements of this section shall be deemed non-responsive and rejected.

(I) The joint venture/partnership, and each member of the joint venture/partnership, shall provide the Executive Director of the Council, or his/her designee, access to review all records pertaining to joint venture agreements before and after the award of a contract in order to reasonably assess compliance with this subdivision.

Sec. 35.42. Small Contract Rotation Program.

(A) The Council shall establish a Small Contract Rotation Program for certified MBEs, FBE and SBEs, applicable to the categories of professional services, other services, and supplies where the cost of the contract is anticipated to be under One Hundred Thousand Dollars (\$100,000) (“Small Contract”). Each eligible business, after gaining admission into the Small Contract Rotation Program, will be ranked in all categories for which the business is technically certified. Each firm’s initial position in the rotation is based on the businesses prior years’ revenue or potential revenue for services on City projects.

Contract rotation will be established in the following formats:

1) Professional Services (including Architectural and Engineering): Where the department directors are authorized to use discretion in the selection of contractors based on technical expertise and experience, department directors should select a qualified firm who has established a joint venture/partnership with a certified MBE, FBE, or SBE in accordance with Section 35.41.

2) Goods and Services:

a) Departments will identify a minimum of three (3) MBE, FBE, and SBE firms that are qualified to perform the scope of services requested by the departments and notify those firms of Small Contract opportunities. If there are less than three (3) MBE, FBE, and SBE firms available, departments can request quotes from any number of MBE, FBE, and/or SBE firms in the available pool.

b) Departments will request quotes from MBEs, FBEs, and SBEs for requested services. Each MBE, FBE, and SBE that submits a responsive and responsible quote will receive just consideration of contract award.

c) The MBE, FBE, and SBE awarded a contract will not be eligible to bid or be awarded a small contract for other similar services unless:

(i) The contract term of the awarded MBE, FBE, and SBE has expired or will expire prior to the award of the pending contract;

(ii) No other MBE, FBE, and SBE firms are available to perform the requested scope of work; or

(iii) No other bids are received by available MBE, FBE, and/or SBE firms.

3) Construction: The Council shall establish the Small Contract Rotation Program for small construction, excluding small construction projects and emergency construction which are not subject to public bidding requirements, where the cost of the contract is anticipated to be under One Hundred Thousand Dollars (\$100,000).

Sec. 35.43. Dayton Local Business Preference.

(A) The City may give a local preference to Dayton Local Businesses, as defined in Section 35.35, in awarding City contracts and making purchases whenever the application of such a preference is reasonable in light of the dollar value of the proposal received in relation to such expenditures.

(B) In the bidding of or letting all contracts for procurement of Services and Supplies with a total price of Ten Thousand Dollars (\$10,000) or more, Dayton Local Business preference shall mean that if the lowest responsive bidder is a non-local business, then all bids received from responsive Dayton Local Businesses are decreased by five (5) percent. The five (5) percent decrease is

calculated only for the purposes of determining the Dayton Local Business preference and shall not change the original bid. The Dayton Local Business preference cost differential is not to exceed One Hundred Thousand Dollars (\$100,000) or ten (10) percent whichever is less.

(C) In the case of request for proposal, letters of interest, best evaluated bids, qualifications or other solicitations and competitive negotiation and selection in which objective factors are used to evaluate the responses, Dayton Local Businesses are assigned five percent of the total points of the total evaluation points up to a maximum of five points.

(D) If, after applying the formula, a Dayton Local Business is still not the lowest and the best, then the same formula shall apply/inure to the benefit of a Montgomery County bidder.

(E) In the event of a tie between a Dayton Local Business bidder and one or more non-local business bidders meeting specifications, the ties shall be broken in favor of the Dayton Local Business bidder. In the event of a tie between two (2) or more Dayton Local Business bidders, ties will be broken through a coin toss method until the winner remains. In the event of a tie between a Montgomery County bidder and one or more non-local/non-Montgomery County bidders, ties shall be broken in favor of the Montgomery County bidder. Ties between two (2) or more Montgomery County bidders will be broken through a coin toss method until the winner remains.

(F) The Dayton Local Business preference shall not apply to purchases or contracts which are funded, in whole or in part, by another governmental entity where the laws, regulations, or policies governing such funding prohibit application of the local preference, nor shall the local preference apply to purchases made or contracts let under emergency or noncompetitive situations.

(G) Application of the Dayton Local Business preference to a particular purchase, contract or category of contracts for which the City is the awarding authority may be waived upon written justification and recommendation of the Executive Director of the Council, or his/her designee, after comparison of the qualification, character, responsibility and fitness of all persons, firms, or corporations submitting bids or proposals. Further, the preference established herein in no way inhibits the right of the City from giving any other preference permitted by law in addition to the preference authorized herein.

Sec. 35.44. Dayton Local Small Business Program.

(A) The Council shall establish a Dayton Local Small Business Program for Dayton Local Small Businesses certified as defined in Section 35.35, and will include establishing procedures applicable to the categories of construction, services, and supplies where the cost of the contract is anticipated to be between Two Thousand Five Hundred Dollars (\$2,500) and Fifty Thousand Dollars (\$50,000).

(B) The basis for the program is the Pub. L. No. 106-554, which targets businesses that have historically experienced limited participation in the marketplace.

(C) The purposes of the Dayton Local Small Business Program are:

- 1) To increase contract opportunities for categories of MBEs, FBEs, and SBEs that have been underutilized at a statistically significant level in contracts between Two Thousand Five Hundred Dollars (\$2,500) and Fifty Thousand Dollars (\$50,000); and,
- 2) To improve access to City contracting opportunities for businesses that are substantially below the SBA size standards by reserving certain procurements for competition among such Dayton Local Small Businesses.

Sec. 35.45. Penalties for Noncompliance.

A contractor or subcontractor who fails to comply with any portion of this ordinance, and whose failure to comply continues for a period of thirty (30) calendar days after the contractor or

subcontractor receives written notice of such noncompliance from the Executive Director of the Council, or his/her designee, shall be subject to any or all of the following penalties:

- (A) Withholding of ten percent (10%) of all future payments for the eligible project until the Executive Director of the Council, or his/her designee, determines that the contractor or subcontractor is in compliance with this ordinance.
- (B) Withholding of all future payments under the eligible project until it is determined that the contractor or subcontractor is in compliance with this ordinance.
- (C) Cancellation of the eligible project.
- (D) Refusal of all future contracts or subcontracts with the City for a minimum of one (1) year and a maximum of five (5) years from the date upon which this penalty is imposed.

Sec. 35.46. Remedies.

When the Council determines that discrimination or retaliation has occurred in violation of this Division, the Council shall order any one or more of the following actions (listed in ascending order of severity):

- A) Issuance of a finding that the respondent Bidder is not a responsive Bidder within the meaning of the bid statutes with respect to specific contracts that the City has put out for bids or intends to put out for bids at the time of such finding;
- B) Assessment of a fine at an amount determined by the Council, but at not less than Ten Thousand Dollars (\$10,000);
- C) Exercise of any other rights or remedies available to the City under any current contract between the Bidder and the City, other than rescission, suspension or termination of the contract, including but not limited to the assessment of liquidated damages;
- D) Rescission, suspension or termination of any current contract between the respondent business and the City under the terms thereof; or
- E) Disqualification of the respondent Bidder from bidding and receiving contract awards on City projects and from participating in City contracts as a subcontractor, vendor or supplier for a period of not more than two (2) years, provided that the respondent Business shall have the right to petition the City for reinstatement of its active bidder status by demonstrating to the City's reasonable satisfaction that the problems for which it was disqualified have been cured; and
- F) Referral of the matter for criminal prosecution of fraud and other violations under Ohio law if appropriate under the circumstances.

Sec. 35.47. Sanctions for Filing a False or Frivolous Complaint.

If the Executive Director of the Council, or his/her designee, determines that one or more allegations of a complaint of discrimination or retaliation are false, and that the complainant knew them to be false when filed or at the time the complainant requested arbitration, or that one or more of the allegations of a complaint are so frivolous that they are wholly without merit, the Executive Director of the Council, or his/her designee, may refuse to review or investigate any complaint filed under this policy by the same party for a period of up to three (3) years. The Executive Director of the Council, or his/her designee, may also determine that monetary sanctions be imposed against the complainant in the amount of the costs incurred by the City and/or the Bidder in the investigation and review of the false or frivolous complaint, including reasonable attorney's fees. The Council shall have authority and discretion to impose one or more of such remedies when, in their view, the totality of the evidence reflects such a measure is necessary to deter future abuse of this policy and process.

Sec. 35.48. Criminal Sanction for Fraud.

(A) The Council shall determine whether substantial evidence is available indicating that fraud or other unlawful activity has been committed by:

- 1) A MBE, FBE or SBE certification or recertification applicant;
- 2) A certified MBE, FBE or SBE or majority prime contractor falsely reporting the utilization of MBE, FBE or SBE subcontractors;
- 3) An individual or firm attempting to benefit from or participate in the MBE, FBE or SBE program through fronting activity or false representation of a commercially useful function; or
- 4) Whether other fraudulent or unlawful activity has occurred.

(B) If the Council determines that substantial evidence exists indicating fraud or other unlawful activity has occurred pursuant to Section 35.48(A), the matter shall be referred to the appropriate legal authorities for criminal prosecution; and, in the event a conviction or guilty plea is obtained stemming from such criminal prosecution, the business entity and its principals shall be barred from participation in City contracts for a minimum of one (1) year and may be barred permanently from participation in City contracts.

(B) Fronting activity shall be defined as any occurrence of collusion between a MBE, FBE or SBE and a majority business enterprise for the purpose of exploiting the MBEs, FBE's or SBE's certification status to primarily benefit a majority firm without the performance of any commercially useful function by that MBE, FBE or SBE.

Sec. 35.49. Prompt Payments to Subcontractors and Suppliers.

Any contractor, subcontractor or supplier participating in a City contract agrees to comply with R.C. § 4113.61 regarding prompt payments to subcontractors and suppliers. The text of R.C. § 4113.61, including any subsequent amendments, shall be incorporated herein as if the same were fully rewritten.

Sec. 35.50. Sunset provision.

This division shall expire ten (10) years from the effective date as set forth in § 35.52, unless the Commission, after conducting a public hearing, finds that the purposes identified herein have not yet been achieved, in which case this division may be extended for an additional five (5) year period subject to the annual review provided for herein.

Sec. 35.51. Severability.

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

Sec. 35.52. Effective date.

This division shall become effective on July 1, 2010.

Section 3. That, effective July 1, 2010, Sections 35.30 through 35.68 of the Revised Code of General Ordinances are repealed.

Section 4. That the proposed PEP Program Policies and Procedures, promulgated by the Council and attached hereto, are hereby adopted.

PASSED BY THE COMMISSION....., 2009

SIGNED BY THE MAYOR....., 2009

Mayor Rhine McLin, City of Dayton, Ohio

ATTEST:

Clerk of the Commission

APPROVED AS TO FORM:

City Attorney