

By:.....

No:.....

**AN ORDINANCE**

Amending Sections 35.31, 35.32, 35.35, 35.371, 35.373, and 35.49 of the Revised Code of General Ordinances in Order to Adopt Certain Findings with Respect to a Third Generation Disparity Study, Establishing a Rebuttable Presumption that Businesses Owned by Minorities and Females are Disadvantaged, Renewing a Process for Participation by Small/Disadvantaged Business Enterprises in Contracting with the City of Dayton in Construction and Goods and Services, and Declaring an Emergency.

**WHEREAS**, In the *City of Richmond v. Croson*, 488 U.S. 469 (1989), the United States Supreme Court 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; and

**WHEREAS**, In March of 1991, D.J. Miller & Associates completed a disparity study for the City with conclusions and recommendations for enacting programs to remedy past and ongoing discrimination against minority and women owned businesses, which were adopted by the Commission on December 31, 1991; and

**WHEREAS**, In February of 2007, MGT of America, Inc. (“MGT”) was retained to conduct a Second-Generation Disparity Study for the City in order to determine whether minority and women owned businesses (“MBE” and “WBE”) were underutilized in City procurement activities; and

**WHEREAS**, MGT completed the disparity study for the City with conclusions and recommendations for revising and enacting further provisions to remedy past and ongoing discrimination against MBEs and WBEs, which were adopted by the Commission on September 29, 2010, and set to expire within ten years of adoption; and

**WHEREAS**, In December 2017, the City again contracted with MGT to conduct a Third Generation Disparity Study for the City in order to determine whether MBEs and WBEs were underutilized in City procurement activities and to collect and develop evidence regarding the nature and extent of discrimination against MBEs and WBEs in the market areas relevant to the City; and

**WHEREAS**, MGT, 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 with persons knowledgeable about contracting with the City. MGT also conducted a review of the City’s Procurement Enhancement Program (“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 interview 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 a final report of the study; and

**WHEREAS**, MGT determined that there is a strong basis to support the continuation of the City’s PEP to address the compelling governmental interest of remedying past discrimination and that the City’s PEP is narrowly tailored to meet Constitutional strict scrutiny review; and

**WHEREAS**, On November 6<sup>th</sup>, 2019, the Commission heard a presentation from MGT in connection to the Third General Disparity Study, at which time the Commission receive the Final Report, along with the findings and recommendations of the study; and

**WHEREAS**, The statistical data included in the Third-Generation Disparity Study and the anecdotal and other evidence presented to the Commission identified discrimination against MBEs and WBEs in the marketplace relevant to the City in construction and goods and services; and

**WHEREAS**, The Third-Generation Disparity Study identified factors which impair MBEs and WBEs, and that are also common to small business generally; and

**WHEREAS**, A strong Small/Disadvantaged Business Enterprise (“S/DBE”) program is central to maintaining a narrowly-tailored program to promote MBE and WBE utilization; 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.** That Sections 35.31, 35.32, 35.35, 35.371, 35.373, and 35.49 of the Revised Code of General Ordinances be amended to read as follows:

**Sec. 35.31. Adoption of the findings and conclusions regarding minority and woman owned business enterprises.**

The Commission adopts the findings and conclusions of the MGT of America Consulting, LLC Final Report, titled “A Third-Generation Disparity Study for the City of Dayton, Ohio” and by this reference incorporates herein the Third-General Disparity Study.

**Sec. 35.32. Findings.**

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

- (A) Minorities and women continue to show disparities in entry into self-employment, after controlling for age, wealth, and other variables.
- (B) Minorities and women 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 in construction and goods and services has had the effect of underutilization of minority and woman 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 women.
- (E) Certain issues, such as difficulties in the financing and bonding markets and problems obtaining credit and insurance, impede the development of minority and woman 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, Citywide Development Corporation, the Office of Small Business Ombudsmen, the Small Business Advisory Council, 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 women business enterprises in City contracting to combat 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 women-owned businesses in contracting with the City.

**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.

*Annual eligible spend for construction.* The total amount spent annually on construction projects, excluding money spent from state and federal funds and other funding streams that limit or prohibit local goal setting. Funds excluded from the annual spend for construction include, but are not limited to, those projects that are bid with a federal DBE goal as specified by the Federal Aviation Administration, Federal Highway Administration, Environmental Protection Agency, and Ohio Department of Transportation. The federal and state programs are further clarified in the PEP Policies and Procedures Manual.

*Annual eligible spend for goods and services.* The total amount spent annually for goods and services, excluding funds expended for the following, as further clarified in the PEP Policies and Procedures: payments to governmental entities or governmental agents; payments made because of negotiated settlements and required by the court system or state or federal government; payments made to the following regulated utilities: railroads, telephones, electric and natural gas; those purchases that are not for the following: equipment, materials, supplies, services; payments made because of prompt pay penalties; right-of-way payments made to owner for the purchase of land and/or property, and; sole source expenditures.

*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, goods, 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 or the Human Relations Council as an agency eligible to certify businesses for the city as an MBE, WBE, and/or SBE.

*City.* The City of Dayton, Ohio.

*Commercially useful function.* The execution by a minority or women 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, goods 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 or purchases real or personal property; or,

(c) Donations of materials, equipment, goods, 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 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 calendar quarter and is a taxpayer in good standing with the City of Dayton.

*Dayton Local Small Business.* A business that:

(a) Is certified by the Executive Director of the Council, or his/her designee, as an MBE, WBE, and/or SBE; and

(b) Is a Dayton Local Business; and

(c) Is a general construction contractor, which has annual average gross receipts for each of the preceding three years of not more than \$15,000,000.00; or,

(d) Is a business engaged in specialty trade and services which has annual average gross revenue for each of the immediately preceding three years of not more than \$5,000,000.00.

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

*Good faith efforts.* The steps undertaken, prior to submission of a bid, to obtain MBE, WBE, and/or SBE participation for subcontracting opportunities related to the bid proposal, and submitted as defined in the program policies and procedures.

*Goods.* All things, including specially manufactured goods, which are movable at the time of identification to the contract for sale, other than the money in which the price is to be paid, investment securities and things in action, and excluding land or a permanent interest in land.

*Joint Venture.* An association of two or more persons, partnerships, corporations, and any combination of them, whereby they combine their expertise, property, capital, efforts, skills and knowledge, which is also:

- (a) Comprised of at least one certified MBE, WBE, or SBE;
- (b) Evidenced by a notarized, written agreement executed by all joint venture partners;
- (c) Approved by the Executive Director of the Council, or his/her designee;
- (d) Compliant with any additional criteria established by the council in its policies and procedures; and
- (e) Comprised of member businesses that have either different race ownership, different gender ownership, or both.

*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, including:

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

*Minority business enterprise ("MBE").* A business:

- (a) Which is at least 51 percent owned by one or more members of one or more minority groups, or, in the case of a publicly held corporation, at least 51 percent 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 years of not more than \$33,500,000.00; 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 years of not more than \$15,000,000.00; or, in the case of a business engaged in goods and services has an annual average employee count of 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 \$1,402,500.00 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.

*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 MBE, WBE or 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 goods, services and/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 year;
- (c) In the case of a general construction contractor, has annual average gross receipts for each of the preceding three years of not more than \$33,500,000.00; 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

years of not more than \$15,000,000.00; or, in the case of a business engaged in goods and services has an annual average employee count of 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 \$1,402,500.00; and,
- (e) Which has been certified as an SBE by the Executive Director of the Council or his/her designee.

*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.

*Women business enterprise ("WBE").* A business enterprise:

- (a) Which is at least 51 percent owned by one or more women, or, in the case of a publicly held corporation, 51 percent 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 years of not more than \$33,500,000.00; 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 years of not more than \$15,000,000.00; or, in the case of a business engaged in goods has an annual average employee count of 100 or less;
- (c) Which can demonstrate that the personal net worth of each owner whose ownership and control are relied upon for WBE certification does not exceed \$1,402,500.00 exclusive of the value of the owner's interest in the WBE and the individual's equity in his or her primary place of residence; and
- (d) Which has been certified as a WBE by the Executive Director of the Council or his/her designee.



**Sec. 35.371 Annual participation goals for goods and services.**

(A) In an effort to remedy the present effects of past identified discrimination in the Dayton market area and contracting and procurement with the City, as found in the Third-Generation Disparity Study reported by MGT of America, Inc., on November 6, 2019 and in order to provide MBEs, WBEs and SBEs equal opportunity and access to participate in all City procurement of goods and services, including professional services, the Council shall annually establish aspirational goals for MBE, WBE and SBE participation in contracting for City goods and services.

(B) The following factors shall be utilized as part of the methodology for establishing annual aspirational MBE, WBE and SBE goals for the MBE, WBE and SBE programs for goods and services:

- (1) The number of minority, women and small businesses in the State of Ohio;
- (2) The availability of minority, women and small businesses in the State of Ohio willing and able to do business with the City;
- (3) Annual participation figures for minority, women and small businesses in both City contracting and the private marketplace;
- (4) Analysis of disparities between the availability and participation of willing and able minority, women and small businesses in both the City and the private marketplace;
- (5) The findings and conclusions contained in the Third-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, WBE and SBE goals for goods and services shall be as follows, indicated in percentage of annual eligible spend for goods and services.

- (1) Goals for goods: 6.5% MBE; 1.5%WBE; 10% SBE.
- (2) Goals for services (including professional services and other services): 6.5% MBE; 1.5% WBE; 10% SBE.

(D) These annual aspirational goals shall be reviewed each year by September 15 by the Council. The annual goal setting process shall include consultation with the PEP Oversight Committee.

(E) These 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, WBEs and SBEs certified by the Executive Director of the Council or his/her designee, or a Council-approved certification agency, shall be considered.

**Sec. 35.373 Annual participation goals for construction.**

(A) In an effort to remedy the present effects of past identified discrimination in the Dayton market area and contracting and procurement with the City, as found in the Third-Generation Disparity Study reported by MGT of America, Inc., November 6, 2019, and in order to provide MBEs, WBEs and SBEs equal opportunity and access to participate in all City procurement of construction, the Council shall annually establish aspirational goals for MBE, WBE 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, WBE and SBE programs for construction:

- (1) The number of minority, women and small businesses in the State of Ohio;
- (2) The availability of minority, women and small businesses in the State of Ohio willing and able to do business with the City;
- (3) Annual participation figures for minority, women and small businesses in both City contracting and the private marketplace;
- (4) Analysis of disparities between the availability and participation of willing and able minority, women and small businesses in both the City and the private marketplace;
- (5) The findings and conclusions contained in the Third-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,
- (6) Other relevant factors.

- (C) The initial annual aspirational MBE, WBE and SBE goals for construction shall be as follows, indicated in percentage of Annual Eligible Spend for Construction: 13% MBE; 3% WBE; 20% SBE.
- (D) These annual aspirational goals shall be reviewed each year by November 15 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 satisfying annual participation goals, only participation of MBEs, WBEs and SBEs certified by the Executive Director of the Council or his/her designee, or a Council-approved certification agency, shall be considered.

**Sec. 35.49. Sunset provision.**

This division shall expire on December 31, 2030, unless the Commission, after conducting a public hearing, finds that the purposes identified herein have not been achieved, in which case this division may be extended for an additional five-year period subject to the annual review provided for herein.

**Section 2.** That previously enacted Sections 35.31, 35.32, 35.35, 35.371, 35.373, and 35.49 of the Revised Code of General Ordinances are hereby repealed.

**Section 3.** For the reasons stated in the preamble hereof, this Ordinance is declared to be an emergency measure and shall take effect immediately upon its passage.

Passed by the Commission....., 2020

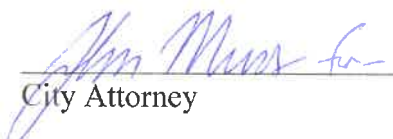
Signed by the Mayor....., 2020

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MAYOR OF THE CITY OF DAYTON, OHIO

Attest:

\_\_\_\_\_  
Clerk of Commission

APPROVED AS TO FORM:

  
\_\_\_\_\_  
City Attorney