

**** THIRD READING – AS READ INTO THE RECORD ****

Item #: 14

Moved by: SHAFER

Prepared by: Qur'an N. Folsom

Seconded by: BASAR

Reviewed by: Marcy Ingram

ORDINANCE NO. 472

ORDINANCE TO ESTABLISH THE SHELBY COUNTY MINORITY AND WOMAN BUSINESS ENTERPRISE PROGRAM AND TO AMEND CURRENT SHELBY COUNTY PURCHASING PROCEDURES. SPONSORED BY CHAIRMAN MELVIN BURGESS, COMMISSIONER WALTER L. BAILEY, JR., COMMISSIONER STEVE BASAR, COMMISSIONER MARK BILLINGSLEY, COMMISSIONER WILLIE F. BROOKS, JR., COMMISSIONER JUSTIN J. FORD, COMMISSIONER EDDIE S. JONES, JR., COMMISSIONER REGINALD MILTON, COMMISSIONER TERRY ROLAND AND COMMISSIONER VAN D. TURNER, JR.

WHEREAS, It is the policy of the Shelby County Government (County) as articulated in Articles II and V of the Shelby County Government Charter (Charter) to implement a procurement program geared toward increasing the percentage of procurement dollars spent with Minority and Woman Business Enterprises (M/WBE) correlated to the availability level of M/WBEs operating within the County; and

WHEREAS, The Supreme Court of the United States, in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), required governmental entities to make an empirical assessment to determine whether past discriminatory practices or laws have contributed to the minimum participation of disadvantaged or historically underutilized businesses in the provision of goods and services prior to implementing a race-conscious program; and

WHEREAS, On March 26, 1992, the United States District Court for the Western District of Tennessee, Western Division, enjoined the County from enacting an Ordinance, law, or policy containing race-conscious criteria without complying with the standards set forth in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); and

WHEREAS, On July 7, 1999, the United States District Court for the Western District of Tennessee, Western Division, dissolved the March 26, 1992 injunction, allowing the County to enact an Ordinance containing race-conscious criteria that is consistent with the standards set forth in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); and

WHEREAS, On December 29, 2014, the County commissioned Mason Tillman Associates, Ltd. to conduct a 2016 Legal Analysis and Disparity Study; and

WHEREAS, The 2016 Legal Analysis and Disparity Study conforms to the legal tenets, set forth in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and its progeny, identifying any barriers to economic development and parity for M/WBEs and to address any such barriers; and

WHEREAS, The 2016 Legal Analysis and Disparity Study revealed statistically significant disparity in the County's award of construction and professional services contracts to available M/WBEs at both the prime contract and subcontract levels, and goods and services contracts to available M/WBEs at the prime contract level; and

WHEREAS, On March 28, 2016, the findings of the 2016 Legal Analysis and Disparity Study were adopted by the Shelby County Board of Commissioners in a public meeting at which public comment on the Study's findings was received; and

WHEREAS, The County shall be committed to using its spending power in a manner that promotes a robust and inclusive economy that fully utilizes all segments of its business population regardless of race or gender; and

WHEREAS, The County is committed to ensuring that all citizens of Shelby County participate in its economic growth and development and that no citizen be denied an opportunity to participate in the procurement of goods and services because of discrimination based on race or gender; and

WHEREAS, The County hereby enacts this Ordinance to adopt the race and gender-conscious and race and gender-neutral remedies stipulated in the 2016 Legal Analysis and Disparity Study in order to establish an M/WBE Program based on the factual predicate set forth in the 2016 Legal Analysis and Disparity Study to address the documented disparity; and

WHEREAS, The purpose of the M/WBE Program shall be to establish constitutionally sound and narrowly tailored M/WBE contracting goals to remedy the documented disparity in the award of prime contracts and subcontracts to M/WBEs; and

WHEREAS, the M/WBE Program's policies and objectives shall be communicated to the County's internal and external stakeholders; and

WHEREAS, The County's Office of Equal Opportunity Compliance (EOC) shall have responsibility for the administration of the M/WBE Program per Article V, Section 5.13 (B) (4) of the Charter.

NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF SHELBY COUNTY, TENNESSEE, That the following M/WBE

Program and procurement procedures hereby be promulgated and adopted and incorporated into the current Purchasing Policy Manual (See Exhibit A) as follows:

SECTION 1.

SCOPE OF M/WBE PROGRAM

The Equal Opportunity Compliance Office shall manage and monitor the County's utilization of M/WBEs. Specifically, the EOC shall: (1) adopt rules and procedures to implement the M/WBE Program, (2) create, maintain, and distribute the directory of certified M/WBEs, (3) regularly review the progress of each County department, office, board and agency's achievement of the M/WBE goals, (4) ensure that County bids and proposals adhere to the procurement procedures contained herein, (5) monitor all prime contracts with M/WBE goals throughout the duration of the contract to ensure that all efforts are made to comply with goals, and (6) present an annual M/WBE Utilization Report to the Shelby County Board of Commissioners. The EOC shall be adequately staffed with personnel who have the requisite skills, knowledge, and ability to implement the M/WBE Program objectives and responsibilities. The EOC shall collaborate with the Purchasing Administrator to adopt rules and procedures to implement the M/WBE program.

Routine county-wide training shall be provided to ensure that all personnel are knowledgeable about the M/WBE Program requirements and are capable of supporting the M/WBE Program and its policies and objectives. The training program shall be conducted by the EOC, and the following three training programs shall be implemented:

a. Annual Training Seminar

The Annual Training Seminar shall inform staff of any changes to the M/WBE Program policy and procedures and promote the M/WBE Program enhancements. An internal webpage shall be maintained in order to provide assistance, information, and responses to questions posed by County staff.

b. New Employee Training

New employee training shall be held by the Equal Opportunity Compliance Office to ensure that new employees understand the established policies and procedures. An electronic copy of the M/WBE Program Training Manual shall be provided to each new County employee.

c. M/WBE Program Training Manual

An M/WBE Program Training Manual describing the M/WBE Program mission, policy, and procedures shall be available to new staff electronically and shall be available for download on the County's Intranet.

SECTION 2.

DEFINITIONS

“Award” shall mean the selection of a vendor for a contract. Contract awards are made by the County to a prime contractor and by a prime contractor to a subcontractor.

“Bidder” shall mean any individual, company, or association seeking the award of a contract or subcontract on a project that is at least partially funded by the County.

“Commercially Useful Function” shall mean a subcontract fulfilled by a bidder responsible for the materials, supplies, and services used in the performance of the contract. To determine whether a subcontractor is performing a Commercially Useful Function, the subcontracted work shall be evaluated with respect to normal industry practices, including whether the contracted amount that the subcontractor is to be paid is commensurate with the work that it is contracted to perform. The subcontractor does not perform a Commercially Useful Function if its role is limited to being a participant in a contract through which funds are passed in order to convey the appearance of meaningful and useful subcontractor participation.

“Contract” shall mean a mutually binding legal relationship or any modification thereof obligating the vendor to furnish commodities or services, including construction and professional services, and the County or the County's prime contractor to pay for them.

“Control” shall mean the authority of an individual or business owner to sign responses to solicitations and contracts, to make price negotiation decisions, to sell or liquidate the business, and to direct the day-to-day business management and operations without interference from others.

“Eligible Purchase” shall mean all purchases made by purchase order or contract excluding those with governmental or non-profit entities, except in bidding situations, for inmate medical services and for maintenance of computer systems by the original provider of such systems. While these are excluded, every effort will be made to unbundle these excluded goods or services.

“Good Faith Effort” shall mean a documentation of the steps taken by a bidder to comply with the M/WBE goals and procedures established by this Ordinance and the requirements set forth in the County's solicitations.

“Minority Business Enterprise” shall mean a for-profit business enterprise that is 51 percent (51%) owned and controlled by one or more minority persons. The qualifying minority groups are defined by the United States Small Business Administration under 13 CFR 124.103 and the United States Equal Employment Opportunity Commission.

- i. **“African Americans”** shall mean persons having origins in any of the Black racial groups of Africa;
- ii. **“Hispanic Americans”** shall mean persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race;
- iii. **“Asian Americans”** shall mean persons whose origins are in Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, or Nauru, or Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal);
- iv. **“Native Americans”** shall mean persons who are enrolled members of a federally or state-recognized Indian tribe, Eskimos, Aleuts, or Native Hawaiians;

“Minority and Woman Business Enterprise Availability” shall mean the number of minority and/or woman-owned businesses located within the County that are willing and able to provide the commodities and services procured by the County.

“Prime Contractor” shall mean the individual or business that has a contract with the County and that has full responsibility for completing the terms of the agreement.

“Race-conscious” shall mean any M/WBE Program component whereby the race or gender of the business owner is taken into consideration.

“Race-neutral” shall mean any M/WBE Program component whereby the race or gender of the business owner is not taken into consideration.

“Subcontractor Utilization Plan” shall mean the documentation submitted by a prime contractor at the time of bid opening, listing the subcontractors, sub-consultants, suppliers, or truckers proposed to meet the M/WBE subcontract goals. The Subcontractor Utilization Plan details each business’ name, certification status, and percentage of the prime contractor’s bid amount.

“Subcontractor” shall mean an individual or business that has a contract to perform a service or provide materials, equipment, and/or supplies as a part of the scope of work set forth in a prime contract awarded by the County.

“User Department” shall mean the department, office, board, agency, or authorized representative of the County that issues a requisition for a solicitation to procure commodities or services.

“Woman Business Enterprise” shall mean a for-profit business enterprise that is 51 percent (51%) owned and controlled by one or more women.

SECTION 3.

M/WBE PROGRAM JUSTIFICATION

The 2016 Legal Analysis and Disparity Study documented a statistical disparity in the County’s award of construction prime contracts to African American and Asian American businesses. In addition, African American, Asian American, and Hispanic American businesses were found to have a statistical disparity in the County’s award of professional services prime contracts. The Study also documented a statistical disparity in the County’s award of commodities and services prime contracts to African American and Caucasian Female businesses.

Furthermore, the 2016 Legal Analysis and Disparity Study documented a statistical disparity in the award of construction subcontracts to African American businesses, and professional services subcontracts to African American and Caucasian Female businesses by the County’s prime contractors.

The Study examined the County’s Locally–owned Small Business (LOSB) Program to assess its effectiveness in utilizing available M/WBEs. The analysis documented that the LOSB Program promulgated in 2007 is robust including goals for the utilization of small businesses with gross income five million and under. However this race neutral program has not eliminated the disparity in the use of available M/WBEs documented in the Study.

SECTION 4.

STATEMENT OF POLICY

It is the Policy of the County to take all necessary, reasonable and legal action to prevent discrimination and to ensure that all businesses, including M/WBEs, are afforded the maximum practicable opportunity to participate in the County’s contracting process. The M/WBE Program shall be adopted to implement the County’s M/WBE Policy in order to remedy the documented statistical underutilization that continues to adversely affect the participation of M/WBE businesses in the awarding of the County’s prime contracts and subcontracts. The M/WBE Program shall ensure that County contracts are awarded in a manner that promotes economic inclusion of all segments of

the business population regardless of race or gender, in order to maximize the economic vitality and development of the County.

The County shall be committed to promoting fair and open competition for M/WBEs seeking to do business with the County. The County shall also ensure that prime contractors do not discriminate in their solicitation, selection, or treatment of subcontractors.

The County has established goals to ensure that M/WBE utilization on construction, professional services, and commodities and services contracts reflects the level of M/WBE availability. The M/WBE goals are based on the findings of statistically significant underutilization from the 2016 Legal Analysis and Disparity Study.

SECTION 5.

RACE AND GENDER-CONSCIOUS REMEDIES

The race and gender conscious remedies shall be met by the ethnic and gender groups that were found to have a statistically significant underutilization on the County's prime contracts and subcontracts. Race and gender-conscious subcontract goals, prime bid discounts, and evaluation preference points are the narrowly tailored remedies to address the documented statistical disparity. The subcontract goals are based on minority business enterprise (MBE) and woman business enterprise (WBE) availability.

- i. The construction subcontract goal shall be twenty-eight percent (28%) for MBEs, and the professional services subcontract goal shall be twenty-six percent (26%) for MBEs and fourteen percent (14%) for WBEs.
- ii. The construction subcontract goal shall be met by African American businesses and the professional services subcontract goal shall be met by African American businesses and Caucasian Female businesses. The construction subcontract goal shall be applied to requests for bids, and the professional services subcontract goals shall be applied to requests for proposals as well as requests for statements of qualifications. Proof of subcontract participation shall be submitted at the time of bid opening and documented on the Subcontractor Utilization Plan. If a bidder fails to meet the solicitation's subcontract goals, the bidder can provide evidence of a good faith effort to meet the goal. A bid that does not meet the subcontract goals or provide evidence of a good faith effort will be deemed non-responsive and therefore ineligible for award. The Subcontractor Utilization Plan shall be reviewed at the time of bid opening for subcontractor goal compliance, verification of subcontractor certification, and evidence that the subcontractor shall perform a commercially useful function.

Good faith effort elements shall be quantified to determine whether a prime contractor has provided evidence of a good faith effort to meet the M/WBE subcontract goals. In order to be considered a responsive bidder, the prime

contractor must demonstrate a sufficient good faith effort to achieve a minimum score of 80 percent (80%) of the required points. The point assignments and requirements to document evidence of good faith efforts are as follows:

- a. Advertising - five (5) points: Opportunities for M/WBEs shall be advertised to certified M/WBEs in three (3) digital media outlets during the three (3) weeks prior to the bid opening. Opportunities for M/WBEs shall only be advertised in print media, if required by statute. A subcontracting opportunity shall be published online in general circulation media, minority-focused media, trade association publications, or trade-related publications at least twice, unless the solicitation waives this requirement.
- b. Attend the Pre-bid Meeting - five (5) points: Attendance at the scheduled pre-bid meetings shall be mandatory to comply with the good faith effort requirement. The contractor's name on the pre-bid meeting sign-in sheet shall serve as documentation.
- c. Bidder's Outreach to Identify M/WBEs - fifteen (15) points: Contractors shall communicate with M/WBEs through personal, frequent, and persistent contact by promptly returning telephone calls, facsimiles, and emails. Correspondence logs shall list the names of the businesses, the representatives contacted by the bidder, and dates of contact. Copies of correspondence with the businesses contacted by the bidder, including the responses received, shall be provided. Documentation shall also include facsimile transmittal confirmation slips or written confirmation of receipt via email with the date of transmission. The contractor shall be required to contact at least three businesses.
- d. Contact Follow-up - fifteen (15) points: Contractors are required to promptly return telephone calls, facsimiles, and emails after the initial solicitation. The follow-up shall consist of a telephone call, facsimile, or email during normal business hours at least two (2) weeks prior to the bid opening. The prime contractor shall maintain correspondence logs that list the subcontractors who were contacted, including the results of that contact. The list shall also include the names of the eligible businesses and of contact persons, as well as telephone numbers, dates of contact, and notes regarding the outcome of said contact. The record shall also identify the scope of work for which each was asked to provide a bid.
- e. Identify Items of Work - fifteen (15) points: Subcontracts shall be broken down into discrete items or packages that M/WBEs may find economically feasible to perform. The documentation shall include a list with descriptions of the specific items of work solicited from eligible businesses, as well as notices and advertisements targeting M/WBE subcontractors.

- f. Negotiate in Good Faith - fifteen (15) points: Contractors may not unjustifiably reject bids, quotes, or proposals prepared by eligible businesses based on the subcontractor's standing within its industry, or on membership in a specific group, organization, association, and/or political or social affiliation. A written statement with names, addresses, and telephone numbers of subcontractors contacted and the negotiated price and services shall be submitted. This list shall include dates of the negotiations and the results, and document the bids received from businesses that could provide a commercially useful function.
 - g. Offer Assistance in Securing Financing, Bonding, Insurance, or Competitive Supplier Pricing - ten (10) points: Contractors shall provide M/WBEs with technical assistance regarding plans, specifications, and requirements of the contract in a timely manner to facilitate responses to solicitations. Contractors may not deny a subcontract solely because a certified M/WBE cannot obtain a bond, and shall make efforts to assist interested businesses in obtaining financing, bonds, and insurance required by the County, as well as provide competitive pricing. The contractor shall provide a written description of the type of assistance, the company name, contact person and telephone number, and the name of the person who provided the assistance as well as that of the supplier that offered competitive pricing.
 - h. Provide Timely Written Notification - twenty (20) points: Contractors are required to solicit in writing subcontract bids and material quotes from relevant M/WBEs at least two (2) weeks prior to the bid opening. Relevant businesses are those that could feasibly provide the goods or services required to satisfy the terms specified in the County's solicitation. When soliciting bids, quotes, and proposals, the contractor shall provide the project name, the bidder's name, subcontract items, primary contact person's name and phone number, information on the availability of plans and specifications, and the date on which the subcontractor's written bid shall be submitted to the prime contractor. Written notification shall include verification of the transmission date, the recipient's name, and the company name. Documentation shall also include facsimile transmittal confirmation slips or written confirmation of receipt via email with the date of transmission.
- iii. M/WBE prime contract bid discounts shall be applied to construction prime contracts. An eight percent (8%) bid discount on construction prime contracts shall be applied to African American and Asian American prime bidders, for a maximum discount of \$40,000. The bid discount shall be applied during the evaluation process. The discount shall lower the eligible M/WBE's bid, but shall not reduce the contract award amount. The solicitation shall describe the bid discount as applied to eligible M/WBE prime contractors. In order to qualify for

the bid discount, the M/WBE prime contractor shall include in its bid a copy of the M/WBE certification approval letter issued by the M/WBE Program.

- iv. M/WBE prime contract bid discounts shall be applied to commodities and services prime contracts. An eight percent (8%) bid discount on commodities and services prime contracts shall be applied to African American and Caucasian Female prime bidders, for a maximum discount of \$40,000. The bid discount shall be applied during the evaluation process. In order to qualify for the bid discount, the M/WBE prime contractor shall include in its bid a copy of the M/WBE certification approval letter issued by the M/WBE Program.
- v. M/WBE prime contract preference points shall be applied to professional services contracts. Thirteen percent (13%) preference points shall be assigned on professional services contracts during the evaluation process for African American, Asian American, and Hispanic American prime consultants. A copy of the prime consultant's M/WBE certification approval letter issued by the M/WBE Program shall be included with the proposal or statement of qualifications. The submission requirements to receive the preference points shall be specified in the solicitation.
- vi. A small prime contract program targeting African American and Asian American business shall be established for construction prime contracts valued under \$5,000. If no M/WBE bidder is found to be responsive, the bid shall be open to all available businesses. In the County's annual contract forecast and prior to its respective bid announcements, the Administrator of Purchasing shall identify construction items of work that can be unbundled into contracts valued under \$5,000 for M/WBE participation.

On informal bid solicitations for purchases valued at \$25,000 or less, the Administrator of Purchasing shall target the solicitations to certified M/WBE's. There must be at least two (2) certified M/WBE's that provide the goods or services being procured. If no M/WBE is found to be responsive, then the County may solicit bids for the goods or services from all other vendors.

SECTION 6.

M/WBE PROGRAM CERTIFICATION

Participants included in the race and gender-conscious provisions of the M/WBE Program must be certified by the EOC. M/WBE certification standards include eligibility criteria for ethnicity and gender, ownership and control, residency, and license.

- i. Ethnic Groups

The qualifying ethnic groups shall include African Americans, Hispanic Americans, Asian Americans, and Native Americans.

ii. Ownership and Control

An eligible minority business shall be a for-profit enterprise that is 51 percent (51%) or more owned and controlled by one or more minority persons.

An eligible woman business shall be a for-profit enterprise that is 51 percent (51%) or more owned and controlled by one or more women.

iii. Residency and Licensing

An eligible business shall have a physical business address located within the County and have continuously maintained the physical address for at least six (6) months prior to the time of application. In addition, the business shall be authorized to do business under the laws of the State of Tennessee, and eligible to do business in the County.

iv. Certification Process

(a). The EOC shall design, implement, and manage the M/WBE certification process. The certification program shall include reciprocity with local agencies that have an M/WBE certification program which comports with the County's standards.

(b). The principals of a business applying for certification shall certify under penalty of perjury that the information submitted to obtain certification was provided without collusion and that no violation of any federal or Tennessee antitrust laws had occurred.

(c). Additionally, the above-mentioned principles and businesses that knowingly falsify ownership and control of said business will be prohibited from conducting business with Shelby County Government for a minimum of three (3) years after a thorough investigation and administrative hearing conducted by Shelby County Commission or an Ad Hoc Committee established by the Shelby County Commission and composed of individuals without a conflict of interest.

(d). If principals change ownership and control of their business under contract with Shelby County Government and active participant with rights and privileges conferred under this Ordinance, said new principals must inform the EOC Administrator. If after a change in ownership and control, and the new principal qualifies as minority or women owned and controlled business under this Ordinance, said new principal shall certify with the EOC Administrator and be subject to the same penalties mentioned in Section 6(iv)(b) and (c).

(e). If the above-mentioned principals of an certified and reciprocally accepted M/WBE changes control and ownership while NOT under contract with Shelby County Government, said new principals and business must inform the EOC Administrator before bidding on any business with Shelby County Government under this MWBE Ordinance and subject to the same penalties in Section 6(iv)(b)(c).

SECTION 7.

RULES AND REGULATIONS

i. M/WBE Program Outreach

- a. An outreach campaign shall be conducted to promote the M/WBE Program. Press releases and public service announcements shall be disseminated to the media. Partnerships with local business organizations shall be established in order to foster collaborative opportunities by which to communicate with M/WBEs. An electronic newsletter shall be published announcing the M/WBE Program, and there shall be coordination with governments and agencies to maximize the dissemination of M/WBE Program information. The outreach campaign shall be conducted annually.
- b. Business community outreach efforts targeting M/WBEs shall be conducted to solicit bids, proposals, and statements of qualifications. M/WBEs shall be solicited for prime contracts in industries of construction, professional services, and commodities and services. Outreach to the identified M/WBEs shall be performed before the solicitation is released, to notify them of the upcoming opportunities. The formation of joint ventures, partnerships, and other similar arrangements among ethnic and gender groups shall be encouraged. All solicitations shall be posted on the County's website on a regular basis and on the same day(s) each week.
- c. Annually, each user department shall submit a forecast of contracts to be awarded within the year. User departments shall designate a staff member to serve as the M/WBE Liaison to the Administrator of Purchasing and the EOC, and to assist in conducting the annual review. The user department's M/WBE Liaison shall be responsible for identifying the upcoming procurement opportunities, along with the industry, the scope of the services or goods, and the estimated cost for each project.

The Administrator of Purchasing and the EOC shall review the M/WBE directory in collaboration with the user department's M/WBE Liaison to determine which National Institute of Government Purchasing (NIGP) or Northern Industry Classification System (NAICS) codes meet the contract requirements. Outreach shall be conducted by the EOC to identify additional businesses in the appropriate industry classifications.

ii. M/WBE Program Directory

- a. The Equal Opportunity Compliance Office shall update the electronic certification mailing list within ten (10) days following the certification or re-certification of an M/WBE. Within ten (10) days following a decision by the EOC to revoke a business' M/WBE certification status, the mailing list shall be updated to reflect this change. The Equal Opportunity Compliance Office shall send digital copies of contracting opportunities, contract forecasts, requests for bids, requests for proposals, and requests for qualifications via the electronic mailing list. Any other digital message that a user department wants to transmit to certified businesses shall also be sent using the electronic mailing list.

Once a certification application is approved, the M/WBE's email address shall be auto-subscribed to the electronic mailing list. The EOC shall be responsible for updating and approving all communications disseminated through the electronic mailing list.

An electronic directory listing of M/WBEs certified by the County or an approved certifying agency shall be maintained by the EOC. The business listing shall include the company's name, contact person, contact information and NIGP or NAICS code, The M/WBE Directory shall be updated monthly to reflect any new certifications or changes to existing certifications. The M/WBE Directory shall be published on the County's Equal Opportunity Compliance webpage and downloadable in Microsoft Office Excel and Word format.

iii. General M/WBE Program Procedures

- a. Performance bonds shall not be required on construction contracts where the engineer's project estimate is less than \$25,000.
- b. The Consultant Review Committee shall be established by the County Mayor and the Shelby County Board of Commissioners for the purpose of reviewing, screening, and ranking the selection of professional architects, engineers, appraisers, and other types of consultants responding to solicitations to perform work on public works projects.

Consultant Review Committee members shall not be actively engaged in professional consulting or employed by a design consulting business. Consultant Review Committee membership shall be comprised of representatives from the County or their designee and business community. There shall be five County representatives and four business community members.

- Director of Public Works

- Administrator of Purchasing
- County Engineer
- Director of Administration and Finance
- Director of the Equal Opportunity Compliance Office
- “Floating” representative from the user department, agency, or office of the elected official within whose jurisdiction the project is located
- Minority architecture and engineering professional, or other relevant professional with experience in a related field
- Female architecture and engineering professional, or other relevant professional with experience in a related field

Consultant Review Committee members who are County employees shall serve for the duration of their office, while the business members shall serve a two-year term. The Memphis Chapter of the American Institute of Architects and the Society of Professional Engineers shall make recommendations to the County Mayor concerning the nomination of a professional architect or engineer to serve as a member of the Consultant Review Committee. Architects, engineers, and other professional services providers may also apply to the Consultant Review Committee for consideration and approval. The Administrator of Purchasing shall serve as or provide a secretary to the Consultant Review Committee. All Consultant Review Committee members shall be required to sign a conflict of interest statement to foster transparency in the County’s procurement process.

The Consultant Review Committee’s recommendations shall be based upon criteria that include M/WBE subcontract goals and the number of the consultant’s previous awards, in order to avoid repeated awards to highly used prime contractors. The selection process for award of professional services contracts shall include a written recommendation report providing the evaluation point assignment for each consultant. The recommendations shall rank all respondents and list the sub-consultant businesses included to meet the subcontract goal, along with the percent of their participation. A signed copy of each evaluator’s scores and comments shall be attached to the report. The Committee’s written report shall be submitted to the Administrator of Purchasing and the County Mayor for final selection.

- iv. A County Contract Compliance Committee shall serve as an oversight working group to ensure that the rules and regulations set forth in this Ordinance are implemented as stated. The Contract Compliance Committee’s mission is threefold: (1) to advocate for M/WBE access to the County’s procurement process, (2) review procurement procedures and policies that impact M/WBE participation, and (3) monitor M/WBE utilization on the County’s contracts to ensure that all County departments, offices, boards and agencies adhere to the M/WBE Program requirements.

The Contract Compliance Committee shall have nine members. The Committee staff shall include County managers and the business community members appointed by the Shelby County Board of Commissioners. The business members shall reflect the underutilized business populations as reported in the 2016 Legal Analysis and Disparity Study. The Contract Compliance Committee members shall include:

- Chairman of the Shelby County Board of Commissioners or its designee
- Shelby County Board Commissioner
- County Mayor or designee

The business Committee members shall be representative the following associations:

- Latino Memphis
- National Association of Women Business Owners
- Mid-South Minority Business Continuum
- Black Business Association
- Minority Contractors Association
- Associated Builders and Contractors, West Tennessee Chapter

The Administrator of the EOC shall serve as the secretary and voting member of the Committee. The secretary shall submit a monthly compliance report listing utilization by department, MBE and WBE status, non-compliant departments, and non-compliant prime contractors. Public members of the Contract Compliance Committee shall serve for a two year term. Members shall serve a maximum of three (3) full two year terms.

- v. As a prequalification criterion, a manufacturer doing business with the County shall have M/WBE distributors authorized to sell its product line at the regional or national level. The manufacturer shall provide its distributors' business information and verification of M/WBE certification on the prequalification questionnaire.
- vi. Payments to prime contractors shall be made within fifteen (15) days of the County receiving an undisputed invoice. Prime contractors shall be required to pay their subcontractors within 10 days of receipt of their invoice payment from the County. The prime contractor shall be penalized if the subcontractor is not paid in a timely manner. All contracts with prime contractors shall include the following language:

The penalty for non-compliance with the 10-day timely payment to subcontractor(s) shall include:

- (a) any prime contractor who violates the timely payment term to a subcontractor more than once in a three-month period shall lose their EOC qualification number to do future business with the County for three (3) months;

(b) any prime contractor who violates the timely payment term to a subcontractor more than twice in a six-month period shall lose their EOC qualification number to do future business with the County for six (6) months;

(c) any prime contractor who violates the timely payment term to a subcontractor more than three (3) times in an one-year period shall lose their EOC qualification number to do future business with the County for one-year.

The prime contractor may appeal the above imposed penalty to the EOC Appeals Board.

SECTION 8.

PERIODIC REVIEW AND SUNSET CLAUSE

The factual basis upon which the race and gender-conscious provisions of the M/WBE Program are predicated shall be updated at least every five (5) years. If, at the end of five (5) years, the Shelby County Board of Commissioners finds that the purpose of this Ordinance has not been achieved, it may extend the effective date of the race and gender-conscious provisions of this Ordinance for an additional five (5) years by majority vote of the Shelby County Board of Commissioners.

SECTION 9.

REPORTING

A subcontract monitoring system shall be implemented by the County. M/WBE and non-M/WBE subcontracting participation shall be tracked electronically in the subcontract monitoring system. The system will include a relational database application that will allow the linking of subcontractor data to the appropriate prime contract. Each prime contract shall be identified by industry classification using NIGP or NAICS codes and the procurement method. At the time of bid opening, computerized data entry forms shall capture the required information to produce the M/WBE Utilization Reports. All information that contractors enter into the subcontract monitoring system shall be reviewed by the EOC on a bi-weekly basis to ensure consistent contract compliance. A record of any discrepancies or proof of failure to comply with the contract goals and regulations shall be filed by the EOC. Customizable queries designed into the data monitoring system shall analyze the data necessary for producing the M/WBE Utilization Reports electronically.

The M/WBE Utilization Report shall include prime contract and subcontract awards and payments, categorized by industry and contractor, user department, contractor ethnicity, contractor gender, and certification status. Change orders and substitutions shall also be tracked and reported according to the categories of prime contract, user department name, project name, and the contractor's ethnicity and gender.

The M/WBE Utilization Report shall be submitted on a quarterly basis to the Shelby County Board of Commissioners. The fourth-quarter report shall include an assessment of M/WBE Program activities as well as recommendations for program enhancements. An acknowledgement of program accomplishments shall also be detailed in the M/WBE Utilization Report. The M/WBE Utilization Reports shall be posted on the M/WBE webpage and distributed electronically to registered vendors.

SECTION 10

ON-SITE COMPLIANCE REVIEW INSPECTIONS

Upon the submission of a written sworn complaint of non-compliance, the EOC may conduct an on-site inspection or desk audit of the project to determine whether the prime contractor has been utilizing the subcontractor in accordance with the contractual agreement for services. During the investigation period, the payment for services may be temporarily suspended pending the outcome of the investigation. The investigation process may take up to 10 business days for completion.

BE IT FURTHER ORDAINED, That nothing contained in this Ordinance shall limit the County's ability to comply with the provisions of any federal or state grant in which the requirements or conditions of the grant exceed the requirements of this M/WBE Program.

BE IT FURTHER ORDAINED, That the provisions of this Ordinance are hereby declared to be severable, and if any of its sections, provisions, sentences, phrases, or parts be held unconstitutional or void, the remainder of this Ordinance shall continue in full force and effect, it being the legislative intent now hereby declared that this Ordinance would have been passed even if such unconstitutional or void matter had not been included herein.

BE IT FURTHER ORDAINED, That this Ordinance shall take effect fifteen (15) days after its passage, the public welfare requiring it.

Mark H. Luttrell, Jr.
County Mayor

Date: _____

ATTEST:

Clerk of County Commission

FIRST READING: November 14, 2016

SECOND READING: December 14, 2016

ADOPTED

THIRD READING: December 19, 2016



Mark H. Luttrell, Jr.
County Mayor

Date: 12-22-16

ATTEST:

Clerk of County Commission

FIRST READING: November 14, 2016

SECOND READING: December 14, 2016

ADOPTED
THIRD READING: December 19, 2016