

Item #: 1

Moved by: BRADFORD

Prepared by: Shep A. Wilbun, Jr.

Seconded by: SUGARMON

Reviewed by: Marcy Ingram

ORDINANCE NO. 555

ORDINANCE AMENDING THE SHELBY COUNTY CODE OF ORDINANCES, PART II, CHAPTER 2, ARTICLE IV, DIVISION 3 TO: (1) AMEND SECTION 2-225, KNOWN AS THE MINORITY AND WOMEN BUSINESS ENTERPRISE ("M/WBE") PROGRAM, AND (2) AMEND THE CORRESPONDING PURCHASING POLICIES AND REGULATIONS RELATED TO THE M/WBE PROGRAM. SPONSORED BY COMMISSIONER SHANTE K. AVANT, COMMISSIONER ERIKA SUGARMON, COMMISSIONER MISKA CLAY BIBBS AND COMMISSIONER BRITNEY THORNTON.

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WHEREAS, It is the policy of the Shelby County Government (the "County") as articulated in Articles II and V of the County's Charter ("Charter") to implement a M/WBE programs correlated to the availability level of M/WBEs operating within the County; and

WHEREAS, The 2022 Legal Analysis and Disparity Study conducted by Griffin and Strong, P.C. (2022 Disparity Study) conformed to the legal tenets set forth in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and its progeny, and it 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, The Shelby County Board of Commissioners ("County Commission") accepted the findings of the Disparity Study, on June 27, 2022, and the body hereby desires to amend the County's M/WBE program originally adopted on December 19,

2016, pursuant to Ordinance No. 472, to address the disparities identified in the findings of the 2022 Disparity Study; 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 Commission desires to amend the M/WBE program as stated in Exhibit A (Section 2-225 Revisions) and Exhibit B (Purchasing Policy and Regulations Revisions) attached hereto and incorporated herein.

NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF SHELBY COUNTY, TENNESSEE, That the following amendments to the Shelby County Code of Ordinances, Part II, Chapter 2, Article IV, Division 3, Section 2-225 as shown in Exhibit A (Section 2-225 Revisions) attached hereto and incorporated herein, are hereby approved, promulgated, adopted and incorporated into the current policies and procedures for the Office of Equal Opportunity Compliance ("EOC") and Purchasing Office, as described in Exhibit B (Purchasing Policy and Regulations Revisions) attached hereto and incorporated herein, to implement.

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 takes a super-majority vote, i.e., 2/3<sup>rd</sup> vote, of the County Commission and shall take effect 15 days after its passage pursuant to Art. II, Sec. 2.06(C) of the Charter, the public welfare requiring it.



\_\_\_\_\_  
Lee Harris  
County Mayor

Date: 7/14/2023

ATTEST:

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

FIRST READING: June 5, 2023

SECOND READING: June 26, 2023

THIRD READING June 28, 2023

**Sec. 2-225. Minority Women Business Enterprise (M/WBE) Program.**

*(a) Statement of purposes and objectives.*

It is the policy of Shelby 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 implemented to remedy the documented statistical underutilization that continues to adversely affect the participation of certain M/WBE businesses in the awarding of the County's prime contracts and subcontracts, as more fully set forth in the 2022 Disparity Study commissioned by, and subsequently adopted by, the County. 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 continues its commitment to promoting fair and open competition for M/WBEs seeking to do business with the County. The County shall also continue to ensure that prime contractors do not discriminate in their solicitation, selection, or treatment of subcontractors.

The best management practices employed by the County consist of implementation of consistent tracking and monitoring and progressive M/WBE outreach activities and mentoring services. The County's strategies are designed to deliver innovative solutions to increase the effectiveness of its Program. A core objective of the M/WBE Program is to increase both the dollar amount and percentage of services and supplies the County procures from M/WBE to more closely align with their Availability in the Program Area. The County will also continue to foster its best management practices and further build the capacity of M/WBEs in the Program Area toward this goal.

*(b) Commercial Nondiscrimination Policy.*

(1) Statement of Policy

It is the policy of the County not to enter into a contract or to be engaged in a business relationship with any business entity that has discriminated in the solicitation, selection, hiring or commercial treatment of vendors, suppliers, Subcontractors or commercial customers on the basis of race, color, religion, ancestry or national origin, sex, age, marital status, sexual orientation or on the basis of disability or any otherwise unlawful use of characteristics regarding the vendor's, supplier's or commercial customer's employees or owners; provided that nothing in this policy shall be construed to prohibit or limit otherwise lawful efforts to remedy the effects of discrimination that have occurred or are occurring in the Program Area.

(2) Policy Implementation

The Administrator of EOC shall implement this policy by periodically conducting outreach and distributing educational materials to the County's contracting and vendor

community and related trade associations to advise such contractors, vendors and prospective respondents of this policy and the procedures to be followed in submitting complaints alleging violations of this nondiscrimination policy. The Administrator of EOC or designee, County Mayor or designee, and the County Attorney's Office shall insure that the following commercial nondiscrimination clause language is set forth in and incorporated into all the County contracts that result from formal solicitations:

"As a condition of entering into this agreement, the company represents and warrants that it will comply with the County's Commercial Nondiscrimination Policy. As part of such compliance, the company shall not discriminate on the basis of race, color, religion, ancestry or national origin, sex, age, marital status, sexual orientation, or on the basis of disability or other unlawful forms of discrimination in the solicitation, selection, hiring or commercial treatment of Subcontractors, vendors, suppliers, or commercial customers, nor shall the company retaliate against any person for reporting instances of such discrimination. The company shall provide equal opportunity for Subcontractors, vendors and suppliers to participate in all of its public sector and private sector subcontracting and supply opportunities, provided that nothing contained in this clause shall prohibit or limit otherwise lawful efforts to remedy the effects of marketplace discrimination that have occurred or are occurring in the Program Area. The company understands and agrees that a material violation of this clause shall be considered a material breach of this agreement and may result in termination of this agreement, disqualification of the company from participating in County contracts, or other sanctions. This clause is not enforceable by or for the benefit of, and creates no obligation to, any third party."

In addition, the Administrator of EOC may conduct an investigation into possible violations where the M/WBE participation is substantially below the M/WBE Annual Aspirational Goal or Subcontractor Goal established for the contract.

*(c) Race and gender-neutral remedies*

(1) Departmental Purchasing Forecasts

County departments shall submit an annual forecast of contracts anticipated to be awarded in the ensuing fiscal year within thirty (30) days of the formal adoption of the Annual Budget by the County Commission of Shelby County. Specifically, each department shall designate a staff member to serve as a liaison to the Office of EOC, and such departmental liaison shall be responsible for identifying for/with the Office of EOC upcoming procurement opportunities, with the anticipated work categories (or commodity codes) involved, the scope of the services or goods, and the estimated cost for each project. The Office of EOC shall email a copy of these departmental forecasts to all M/WBEs that are registered with the County as of the close of the previous fiscal year, so that they will be aware of upcoming opportunities to contract with the County and/or they can coordinate with potential prime contractors in preparation for bids or proposals. The forecasts shall also be posted on the County website and disseminated via social media.

County Departments shall quarterly submit a report which includes all revisions and updates to the annual forecast of contracts discussed herein.

(2) Vendor Rotation for Certain Architecture & Engineering Contracts

For Architecture & Engineering contracts that are valued below \$50,000 and that are of a fairly routine nature, the Goal Setting Committee (GSC), in consultation with the Public Works Department, may reserve such contracts for award to an on-call list or pre-qualified panel of firms on a rotating basis. In determining whether the Vendor Rotation program element should be applied to a particular contract, the GSC shall consider: whether there are at least three (3) firms that are available and capable to perform as Prime on such contracts and whether the anticipated frequency of such contract opportunities will warrant multiple awards on a rotating basis.

(3) Shelby County has implemented a Locally Owned Small Business Program (LOSB) Ordinance/Program (Ord. No. 324) which is a race- and gender-neutral procurement program. The M/WBE Ordinance shall have priority and be administered before the LOSB Ordinance. When in conflict, the MWBE Ordinance/Program shall supersede the LOSB Ordinance/Program.

(d) *Race and gender-conscious remedies.*

(1) Annual Aspirational Goals

Annual Aspirational Goals for M/WBE participation in County contracts in the Industry Categories of Construction (including Construction-related Professional Services), non-construction Professional Services, Other Services, and Goods (prime and subcontract dollars combined) are hereby established and are initially based upon the MBE and WBE Availability by industry/commodity in accordance with the findings of the 2022 Disparity Study. These Goals shall be adjusted annually based upon Availability and the prior year's utilization, but should not exceed Availability from the most recent disparity study.

Annual Aspirational Goals are not to be routinely applied to individual contracts but are intended to serve as a benchmark against which to measure the overall effectiveness of the Equal Opportunity Compliance Office in increasing M/WBE participation on an annual basis, and to gauge the need for future adjustments of the various M/WBE categories and the robustness of remedies and program elements being applied pursuant to this policy.

Annual Aspirational Goals may be included only in those County solicitations that do not contain contract-by-contract goal setting for specific M/WBE subcontractor goals and when included, shall be advisory only.

The County encourages maximum practicable opportunity(ies) for successful participation of MBE and WBE as subcontractors on formal contracts. The County also requires a written plan for including MBE and WBE firms, which becomes a material part of the contract. The Bidder's plan must be responsive in the opinion of the County, which means a meaningful and successful search and commitments to include MBE and

WBE firms for subcontracting work. They County reserves the right to improve the plan in consultation with the winning Bidder before contract execution.

Bidders should use selection methods and strategies sufficiently effective for successful MBE and WBE participation, including but not limited to:

- a. Forming an outreach strategy for meeting M/WBE aspirational goals
- b. Building an internal subcontractor connection and project team
- c. Strengthening business relationships with potential M/WBE subcontractors
- d. Improving the lines of communication
- e. Establishing business development support activities for M/WBE firms
- f. Developing approaches to resolving disputes
- g. Creating avenues to build capacity, including possible mentorship opportunities

At the County's request, Bidders must furnish evidence, such as copies of agreements or letters of intent with MBE and/or WBE subcontractors, either before contract execution or during contract performance. The winning Bidder must request written approval for changes to its inclusion plan once it is agreed upon. This includes changes to Subcontractor awards and inclusion efforts.

## (2) Contract-By-Contract Subcontracting Goals

Race and gender-conscious remedies shall be met only by the ethnic, minority, and gender groups that were found to have a statistically significant underutilization on the County's prime contracts and subcontracts in each Industry Category. The race and gender-conscious subcontractor goals policy is among the narrowly tailored remedies intended to address the documented statistical disparity. The subcontract goals are based on Availability of Small M/WBEs.

### *Eligible Contracts*

The county, through the Goal Setting Committee (GSC), will set a specific, separate percentage-based Small MBE and Small WBE Subcontracting Goals on a contract-by-contract basis for Prime contracts in construction, architecture and engineering, professional services, and other services valued in excess of \$50,000. There will be no M/WBE goals applied to the "commodity" designation of "goods". The County shall establish such goals based upon the type of contract, the type of subcontracting work that will be required, and the availability of eligible M/WBE firms to perform the work for that specific contract. M/WBE goals shall be applied to all construction, non-professional services, and professional services designated solicitations with an estimated cost above \$50,000 and greater, and all formal solicitations, subject to determination of availability as defined by the GSC.

Within the above specific work categories, such goals will only be set to include the M/WBE subcategories (*i.e.*, by ethnicity or gender) for which statistically significant underutilization was demonstrated in the 2022 Disparity Study.

All Subcontracting Goals authorized under this policy are intended to be established by the GSC and implemented only on a contract-by-contract basis. It is intended that such goal setting will be based upon careful analysis of the Availability of commercially useful

scopes of work within a given contract and the relative Availability of M/WBE firms to perform required tasks on such subcontract opportunities. When goods and services are requested in a solicitation, the estimated proportional value of the good or service will determine the bid designation. Contract-by-contract goal setting shall be based upon reasonably reliable M/WBE subcontractor Availability data. Compliance with contract-specific subcontracting goals shall require compliance with Good Faith Efforts as established herein if the contract-specific goal is not met.

The GSC shall not establish a Subcontracting Goal for a contract where there are no bona fide subcontracting opportunities identified for the contract or there are not at least three (3) MBEs or WBEs (as applicable) to perform scopes of work or provide products or services that the GSC regards as realistic opportunities for subcontracting. Accordingly, in establishing Subcontracting Goals, the GSC shall:

- a. Review in advance proposed contract bid specifications to ensure that they are not unnecessarily restrictive and do not adversely affect the ability of M/WBE firms to competitively bid;
- b. Formulate, recommend to the User Department's project manager or its designee, then implement additional rules and procedures for M/WBE subcontracting goal-setting and other aspects of its duties in selecting and applying specific program elements to contracts with the County in an efficient and effective manner; and
- c. Monitor and support the implementation of the contract-by-contract goals aspect of the MWBE Program.

#### *Goal Setting Committee*

The Goal Setting Committee (GSC) is to be chaired by the Administrator of EOC or its designee. The GSC shall include, at a minimum in addition to the Administrator of EOC or his/her designee, the County Commission EOC committee chair or his/her designee, Administrator of Purchasing or his/her designee, and the County Mayor or his/her designee. The County Attorney or his/her designee may attend GSC meetings and provide legal advice pursuant to Charter responsibilities. Any of these committee members may, on an as-needed basis, also designate a subject matter expert to participate in the goal setting for the particular contract(s) at issue.

The GSC establishes contract-by-contract Subcontracting Goals based upon work categories (or commodity codes), vendor Availability, and contract-specific characteristics.

At a minimum, the GSC shall:

- a. Meet as often as it deems necessary to accomplish its duties as outlined in this policy, but not less than once monthly;
- b. Calculate goals in an objective as possible manner;
- c. Review in advance proposed contract bid specifications to ensure that they are not unnecessarily restrictive and do not adversely affect the ability of M/WBE firms to competitively bid without adequate business justification;



- d. Formulate and implement additional rules and procedures for goal-setting and other aspects of its duties in selecting and applying specific program elements to County contracts in an efficient and effective manner; and
- e. Support the implementation and efforts of the goals program.

#### *Program Waiver Process*

Should the GSC determine after consideration of all relevant documents and other information that there are no bona fide subcontracting opportunities identified for a particular contract or there are no MBEs or WBEs (as applicable) to perform scopes of work or provide products or services that the GSC regards as realistic opportunities for subcontracting, no subcontracting goal shall be assigned to such contract and a Program Waiver notification shall be issued by the GSC. (Note: this is not the same as a "Waiver based on Good Faith Efforts," defined herein).

#### *Good Faith Efforts*

Good Faith Effort (GFE) elements shall be quantified to determine whether a prime contractor has provided evidence of a good faith effort to meet the M/WBE Subcontracting Goals. To be considered a responsive bidder, the prime contractor must demonstrate Good Faith Efforts sufficient to achieve a minimum score of eighty (80) out of the one hundred (100) available points. The point assignments and requirements to document evidence of GFE are as follows:

- a. Advertising - five (5) points:

Opportunities for M/WBEs shall be advertised to certified M/WBEs in three digital media outlets during the three 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 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 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.

#### *GFE Documentation*

Good Faith Efforts review and determination shall be conducted by the Chief Supplier Diversity Officer and the Administrator of Purchasing. If no agreement can be reached, the Administrator of EOC makes the final decision upon completion of his/her investigation/evaluation.

#### (3) Joint Venture Requirements

Based upon the scope of work and the Availability data, the Administrator of EOC or designee shall determine if a joint venture for a construction project is required with input from the User Department. Utilization efforts to form a joint venture shall be required for such project. Only Construction projects valued over \$5,000,000 are eligible for consideration under this section.

On such projects in which utilization efforts to form a joint venture relationship is required, no bid shall be accepted unless submitted by a joint venture, unless the Administrator of EOC, in consultation with the County Mayor or designee, determines that in its discretion and judgement sufficient utilization efforts to enter into a joint venture have been demonstrated based on a careful review of relevant facts, documents, and circumstances.

Also, on such eligible projects, the joint venture member businesses/partners must have different race ownership, different gender ownership, or both. M/WBE members of the joint venture must be certified as such. A bid submitted by a joint venture comprised of bidders with both the same race and gender ownership shall be deemed non-responsive and rejected.

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

The Administrator of EOC 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 eligible projects. The joint venture agreements should at a minimum include the following information:

- a. The initial capital investment of each venture partner;
- b. The proportional allocation of profits and losses to each venture partner;

- c. The sharing of the right to control the ownership and management of the joint venture;
- d. Actual participation of the venture partners on the project;
- e. The method of and responsibility for accounting;
- f. The method by which disputes are resolved; and
- g. Any additional or further information required by the office of EOC as set forth in bid documents or otherwise.

The joint venture, and each member of the joint venture, shall provide the Administrator of EOC 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.

A bid submitted by a joint venture that does not include a satisfactory written joint venture agreement in accordance with the requirements of this section shall be deemed non-responsive and rejected.

*(e) M/WBE Certification.*

Participants included in the race and gender-conscious provisions of the MWBE Program must be certified by the Office of EOC. M/WBE certification and Small M/WBE certification standards include eligibility criteria based on ethnicity and gender. The standards also include, within those eligible groups, ownership and control, and residency and licensing. Certifications are effective for three (3) years and may be renewed for an additional three (3) years upon satisfactory demonstration of continued eligibility.

(1) Eligibility

- a. **Minority groups:** the qualifying minority groups are defined by the United States Small Business Administration under 13 C.F.R. 124.103 and the United States Equal Employment Opportunity Commission, and includes African Americans, Hispanic Americans, Asian Americans, and Native Americans.
- b. **Other disadvantaged group:** Women.
- c. **Ownership and Control:** An eligible minority business shall be a for-profit enterprise that is 51 percent 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 or more owned and controlled by one or more women.
- d. **Residency and Licensing:** An eligible business owner shall provide proof of being a resident of Shelby County for at least six months prior to the time of application for certification and have a physical business address located within the county and have continuously maintained the physical address for at least six months prior to the time of application. In addition, the business shall be authorized to do business under the laws of the state, and eligible to do business in the county.

An exemption to the Shelby County residency requirement will be granted by the Administrator of EOC to those eligible minority and/or women business owners who have operated the qualifying business within Shelby County for a minimum of two years and employ a minimum of three employees who are residents of Shelby County.

- e. Size limits/graduation for small M/WBEs: A small M/WBE is eligible for initial certification for the M/WBE Subcontracting Goals program (Section (d)(2) herein) if the size of the business is less than 75 percent of the applicable Small Business Association (SBA) size standards set forth in 13 C.F.R. Part 121 and is at least 51 percent owned by one or more persons whose individual net worth is not more than the personal net worth of an “economically disadvantaged” person as measured by the applicable federal standards. This eligibility certification shall last three (3) years and may be renewed for an additional three (3) years upon satisfactory demonstration of continued eligibility – *i.e.*, that the above size standard/limit has not been exceeded by the business.

A Minority or Women owned business graduates from, and is therefore ineligible for, the M/WBE Subcontracting Goals program if it exceeds 75 percent of the applicable SBA size standards set forth in 13 C.F.R. Part 121 or is at least 51 percent owned by one or more persons whose individual net worth exceeds the personal net worth of an “economically disadvantaged” person as measured by the applicable federal standards. This determination shall be made by the EOC at the time of certification renewal (as discussed herein), and the size standard evaluation/measurement shall be made based on the annual *average* revenue and/or personal net worth calculation(s) over the three-year certification period.

(2) Certification process.

The Administrator of EOC shall implement, manage, and revise (if appropriate) 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.

- a. 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.
- b. Additionally, the above-mentioned principals 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 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.
- c. 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 herein.
- d. If the above-mentioned principals of a 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 Administrator of

EOC before bidding on any business with Shelby County Government under this M/WBE section and subject to the same penalties herein.

- e. In the event that the Administrator or EOC determines that the business is not eligible for the M/WBE certification, or certification as a Small M/WBE, the written communication to the business shall include a detailed explanation for the denial.

(3) Appeals of Certification Decisions.

To appeal a denial of certification, the business must submit a written request to the Office of EOC within ten (10) business days of receiving the denial notification.

If the denial is not reversed, then the business may appeal the Office of EOC's decision to the EOC appeals board within ten (10) business days of receiving the denial notification. The members of the EOC appeals board are appointed by the Chairman of the County Commission. The decision of the EOC appeals board shall be final.

(f) *Duties of the Equal Opportunity Compliance Office*

(1) Overview.

The Equal Opportunity Compliance Office (EOC) 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 Office of 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 Office of EOC shall collaborate with the Administrator of Purchasing to adopt rules and procedures to implement the M/WBE program.

(2) Specific Duties.

The Administrator of EOC shall be primarily responsible for the administration and enforcement of the MWBE Program and ensuring that the rules and regulations governing it are implemented as stated. It shall encourage equal business opportunities to achieve the policies and objectives of the MWBE Program by:

- (a) Preparing written rules, regulations and procedures consistent with this Program.
- (b) Recruiting businesses to apply for certification as an M/WBE through contact with other government agencies, community organizations or business associations, or by advertising or other outreach methods.
- (c) Maintaining outreach and assistance programs to promote equal contracting opportunities for M/WBEs that wish to do business with the County.
- (d) Distributing annual "forecasting" report(s) of the several County Departments internally and to the firms on the registered M/WBE database discussed herein.

- (e) Maintaining a current database of certified and available M/WBEs and making this database accessible to interested parties. The list shall include the types of services provided by the M/WBE and contact information for the M/WBE. A list from the database will be made available to Participants to assist them in their efforts to meet the Annual Aspirational Goals or contract/project goals of the MWBE Program. The list prepared from the database will specify which firms the County has determined to be certified in accordance with its definitions and requirements for M/WBEs.
- (f) Monitoring utilization of M/WBE participation on projects for data gathering and informational purposes.
- (g) Developing and supplying to each Bidder standard forms appropriate for consideration and evaluation of Bids submitted in response to a solicitation. The Administrator of EOC may revise these forms as necessary consistent with the purpose and requirements of this Chapter.
- (h) Investigating written complaints as provided herein below.
- (i) Notifying affected parties in writing of their right to review an adverse recommendation of the Office of EOC.
- (j) Preparing reports as requested by the County Commission as well as semiannual and annual reports as required herein.
- (k) Performing other tasks as may be required to fulfill the above-stated duties of the Administrator of EOC.

(3) Authority to Monitor.

The Office of EOC shall be authorized to collect from all Participants such data and information as is necessary to monitor this Program. This information may include information regarding business ownership, supplier information, subcontractor information, all of which shall reflect the race, ethnic origin, gender, and business location of the identified businesses. The Office of EOC shall continuously monitor the participation of M/WBEs in the procurement of all Industry Categories for the County. Such monitoring shall include, without limitation, a statistical analysis of each construction trade, professional service, and other service to determine whether there is utilization of M/WBEs in a manner that is proportionate to the identified Availability range.

(4) Duty to Report.

The EOC shall submit an annual report to the County Commission and County Mayor regarding the effectiveness of the MWBE Program. Such report shall include, without limitation, a summary of the purchases, contracts, and subcontracts placed with M/WBEs for the period and the relative percentage to the total of purchases and contracts for that period. The report shall also emphasize quantity and quality of M/WBE involvement by dollar volume. The report shall specify the race, national origin, and gender with each category reported separately. Payments made to non-certified M/WBEs shall be included as a separate set of figures for purposes of tabulating the total contract dollars going to M/WBEs. The report shall include an analysis of the percentage for the reporting period of M/WBE awards of the total awards for each M/WBE category and work/industry category and the percentage of Availability of M/WBEs in the Program Area for each M/WBE category and Industry Category.

The Office of EOC shall also submit annual reports to the Administrator of Purchasing and the County Mayor providing M/WBE utilization figures or estimates for each Industry Category. The utilization data provided in these reports shall be used to compare program outcomes to the Availability figures set forth in the applicable disparity study (and the aspirational goals set based on the study) and may be used to assist in the establishment of the contract-by-contract/project-by-project MBE and WBE Subcontractor Goals discussed herein.

(5) Authority to Investigate Discriminatory Practices, Non-Compliance, and Eligibility.

Should a Bidder or Participant submit a written complaint of discrimination, the Office of EOC is authorized to investigate the complaint. An investigation may also be initiated based solely on a finding of a significant statistical disparity from the Annual Aspirational Goal or contract/project goal(s), as detailed herein. The details of any investigation, including findings, shall be recorded and maintained by the Office of EOC.

Upon the submission of a written sworn complaint of noncompliance, 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.

The Office of EOC also has the authority to evaluate and/or investigate eligibility for inclusion in the MWBE Program.

(g) *Sanctions and Penalties for Non-Compliance.*

The Administrator of EOC shall recommend appropriate mechanisms to enforce the provisions of the MWBE Program to the Administrator of Purchasing and the County Mayor, including but not limited to withholding of progress payments for non-compliance. Further, the failure of a Bidder or Participant to comply with the requirements of the Program may be considered a material breach of Participant's agreement with the County and may be grounds for suspension or debarment, *i.e.*, loss of EOC Number.

(1) Standards for Sanctions/Penalties.

Sanctions shall not be imposed unless there is evidence of specific conduct on the part of Participant that is inconsistent with or in direct contravention of the applicable provisions of this Program. In determining appropriate sanctions, the Office of EOC and the Office of Purchasing, in consultation with the County Mayor (or designee), shall consider the following factors:

- (a) Whether the failure to comply with applicable requirements involved intentional conduct or, alternatively, may be reasonably concluded to have resulted from a misunderstanding on the part of the Participant of the duties imposed on them by this Program
- (b) The number of specific incidences of failure by the Participant to comply;
- (c) Whether the Participant has been previously suspended;
- (d) Whether the Participant has failed or refused to provide the Office of EOC with any information required or requested by this Program;



- (e) Whether the Participant has materially misrepresented any applicable facts in any filing or communication to the Office of EOC; and
- (f) Whether the Participant has subsequently restructured or taken other action to cure the deficiencies in meeting applicable requirements.

(2) Sanctions Process.

Upon a determination by the Administrator of EOC that a Participant has not fully and faithfully complied with the provisions of the Program, in addition to any other remedies as may be available to the County under the relevant contract at law or in equity, the Office of EOC may, in its sole discretion, deduct from any scheduled or final payment due to the Participant the difference – calculated in dollars – between the agreed-upon MBE/WBE participation goal and the actual MBE/WBE goal(s) achieved by the Participant. In the event the Participant is able to adequately demonstrate and document good faith efforts to achieve initial compliance and/or perform as initially agreed-upon with regard to MBE/WBE participation, then the Participant shall not be liable for such sanctions/damages.

(h) *Definitions*

For the purpose of this Chapter, the following words, terms, phrases and abbreviations shall have the following meanings:

*African American:* means persons having origins in any black racial group of Africa. It includes people who indicate their race as "Black, African American, or Negro," or provide written entries such as African American, Afro American, Kenyan, Nigerian, or Haitian.

*Annual Aspirational Goal:* means a non-mandatory annual aspirational percentage goal for overall M/WBE Prime and Subcontractor participation in County contracts for Construction, Professional Services, other Services, and Goods/Supplies contracts. This goal is established every five (5) years by a duly-authorized disparity study and based upon and derived from the Prime and Subcontractor Availability statistics provided therein, and is measured every year to ascertain program effectiveness.

*Asian:* means persons having origins in any of the original people of the Far East, Southeast Asia, the Indian subcontinent or the Pacific Islands.

*Availability:* means being "qualified" to perform work for the County. This means that the Bidder does business within an industry group from which the County and its agencies make certain purchases; the firm's owner has taken steps to do business with the County and qualified itself to do such business by registering or certifying; and the firm is located within a relevant geographical area such that it can do business with the Shelby County.

*Award:* means 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.

*Bid:* means a quotation, proposal, sealed bid or offer to perform or provide labor, materials, supplies or services to the County for a price.

*Bidder*: means any individual, sole proprietorship, partnership, joint venture, or corporation that submits a Bid to the County.

*Certification*: means the qualifying process that assures buyers and local, state, and federal agencies that a particular business is an M/WBE. Certification or Recertification shall mean official recognition and approval by County (or other acceptable certifying agency) that a business meets the qualification criteria of an MBE/WBE, as set forth in this Program. Certification or Recertification relates to qualifications regarding ownership and control, not the quality of the service or product.

*Commercially Useful Function*: means performance or provision of real and actual services by a Participant under a contract with the County or under a subcontract with another business under a contract with the County. To determine whether a subcontractor is performing a commercially useful function (*i.e.*, real and actual services), 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.

Consistent with normal industry practices, an M/WBE Prime Contractor may enter into subcontracts. If an M/WBE Prime Contractor does not perform or exercise responsibility for at least 49% of the total cost of its contract with its own work force, however, or the M/WBE firm subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practices for the type of work involved, it is presumed that it is not performing a Commercially Useful Function. An M/WBE may present evidence to rebut this presumption.

*Compliance*: means the condition existing when a Participant has met the requirements of this MWBE Program.

*Contract*: means 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 Prime Contractor to pay for them.

*Control*: means 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.

*Covenant of Non-Discrimination*: means, collectively, one or more contractual affirmative promises (1) to adopt the policies of the County relating to the participation of M/WBEs in the procurement process; (2) to undertake certain good faith efforts to solicit MWBE participation; and (3) not to otherwise engage in discriminatory conduct against MWBEs.

*Goal, or Contract-by-Contract Goal*: means race or gender-conscious corrective measures administered on a contract-by-contract or project-by-project basis which measure sets a percentage-based minimum participation level for M/WBE subcontractors based on the available subcontracting opportunities for that project and the available firms and may be set as MBEs and WBEs.

*Goal Setting Committee ("GSC"):* means a committee tasked with setting contract/project goals for the MWBE Program.

*Good Faith Efforts:* means the voluntary actions of a Participant undertaken in good faith to ensure that it does not discriminate in its contracting practices and to explain any failure to meet either an Annual Aspirational Goal or a contract/project Goal set in accordance with this legislation.

*Hispanic American:* means people who identify with the terms "Hispanic" or "Latino" and who classify themselves in a specific Hispanic or Latino category such as "Mexican," "Puerto Rican," "Cuban," or "other Spanish, Hispanic, or Latino."

*Industry Categories:* means procurement groupings for the County inclusive of Construction, Professional Services, and Goods and Other Services (e.g., manufacturing, wholesale, and retail distribution of commodities, and non-professional services).

*Joint venture:* means a business entity that is formed to contract with the County through the M/WBE Program. On such eligible projects, the joint venture member businesses/partners must have different race ownership, different gender ownership, or both. M/WBE members of the joint venture must be certified as such.

*Lowest Responsive and Responsible Bidder:* means the bidder who fully complied with all of the bid requirements and whose past performance, reputation, and financial capability is deemed acceptable and has offered the most advantageous pricing or cost benefit, based on the criteria stipulated in the bid documents.

*Minority Business Enterprise ("MBE"):* means a business enterprise maintaining a significant business presence in the Program Area and performing a commercially useful function that is owned by one or more of the following: (1) African Americans, (2) Native Americans, (3) Hispanic Americans, (4) Asian Americans. ~~For purposes of the MWBE program, business enterprises owned by disabled individuals and business enterprises owned by service-disabled veterans are also considered MBEs.~~

*Minority or Women Owned Business Enterprise ("M/WBE"):* means a business enterprise maintaining a significant business presence in the Program Area and performing a commercially useful function that is owned by one or more of the following: (1) African Americans, (2) Native Americans, (3) Hispanic Americans, (4) Asian Americans, and (5) Women; ~~(6) disabled individuals, and (7) service-disabled Veterans.~~ Racial and gender categories are separated for monitoring and tracking purposes only.

*M/WBE Owned:* means that African American, Native American, Hispanic American, Asian American, or Woman owner(s) who are citizens or permanent residents of the United States individually or collectively possess an ownership interest of at least 51 percent of the business.

*Native American:* means persons having origins in any of the original people of North America, including American Indians, Eskimos and Aleuts.

*Non-Compliance:* means the condition existing when a Participant has failed to meet the requirements of the M/WBE Program.

*Participant*: means an individual or entity that enters into a contract with the County to provide goods or services within the scope of the MWBE Program, or a subcontractor or supplier to such an individual or entity.

*Prime contractor*: means the individual or business that has a contract with the County and that has full responsibility for completing the terms of the agreement.

*Program Area*: means the geographic area covered by the MWBE Program, as determined by the most recent disparity study.

*Program Waiver*: means a particular procurement for which goals are not required and is therefore waived from inclusion in the M/WBE subcontractor goals policy. This is not the same as a “Waiver based on Good Faith Efforts,” defined below.

*Race/Gender-Conscious*: means any governmental or legislative policy or programmatic action that uses race or gender as criteria for participation.

*Race/Gender-Neutral*: means any governmental or legislative policy or a programmatic action in which race or gender is not among the criteria for participation.

*Responsible*: means a contractor fully capable of meeting all the requirements of the solicitation and subsequent contract. The contractor must possess the full capability, including financial and technical, to perform as contractually required.

*Responsive*: means a contractor, business, or individual who has submitted a bid or request for proposal that fully conforms in all material respects to the County solicitation documents and all of its requirements, including all form and substance.

*Small M/WBE*: For the purposes of this Program, means a minority or woman owned business with a size less than 75 percent of the applicable ~~Small Business Association~~ SBA size standards set forth in 13 C.F.R. Part 121 and which is at least 51 percent owned by one or more persons whose individual net worth is not more than the personal net worth of an “economically disadvantaged” person as measured by the applicable federal standards.

*Subcontractor utilization plan*: means 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*: means 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*: means the department, office, board, agency, or authorized representative of the county that issues a requisition for a solicitation to procure commodities or services.

*Waiver based on Good Faith Efforts*: means an exception provided to the lowest responsive and responsible bidder who did not meet or exceed the M/WBE subcontractor goals on a specific project/contract but who satisfactory provided Good Faith Efforts documentation.

*Woman Business Enterprise (“WBE”)*: means a for-profit business enterprise that is 51 percent owned and controlled by one or more non-minority woman who shall provide proof of being a

resident of Shelby County for at least six months prior to the time of the application for certification.

*(i) Severability*

If any of the provisions set forth in this Chapter, or any section, subsection, paragraph, sentence, clause, phrase, or word thereof shall be found to be invalid, illegal or unenforceable for any reason, the application of the remainder of this Chapter shall not be affected by such invalidity.

*(j) Program Evaluation and Sunset*

Beginning no later than August 1, 2026, and every five years thereafter, the County shall issue a request for proposals to undertake a comprehensive update of the full disparity study, and upon completion of each disparity study, present disparity study results to the County, and following official review and a public comment period regarding those study findings and recommendations, the County shall consider any proposed modifications to, or sunset of, the MWBE Program.

*(k) Application*

The amendments set forth in this Chapter shall not apply to any contract entered into and executed by the County, or any formal solicitation issued, prior to the effective date of the revised ordinance. If any conflict shall arise between the MWBE Ordinance/Program and the LOSB Ordinance/Program, the M/WBE Ordinance/Program shall take precedence over the LOSB Ordinance/Program.