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ARTICLE V. - MINORITY, WOMEN AND SMALL BUSINESS ENTERPRISES*

Editor's note—

Ord. No. 2009-280, § 5.1(Exh. B), adopted April 1, 2009, amended the title of Ch. 15, Article V to read as herein set out. Former Article V was entitled Minority and Women Business Enterprises.

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Sec. 15-81. - Declaration of policy.

- (a) It is the policy of the city to stimulate the growth of local minority, women and small business enterprises by encouraging the full participation of these business enterprises in various phases of city contracting, as set forth in this article. The purposes and objectives of this article are:
- (1) To increase the utilization of such local firms in providing certain goods and services; and
 - (2) To provide opportunities to broaden and enhance their range of capacities; and
 - (3) To increase opportunities for such local firms to serve as contractors, in addition to acting as subcontractors to others, where applicable, all in order to help eliminate statistical disparities in city contracting.
- (b) This article is intended to be remedial in nature and to continue only until its purposes and objectives are met as determined by regular periodic reviews.

(Ord. No. 84-1309, 8-22-84; Ord. No. 95-336, § 2, 3-29-95; Ord. No. 2009-280, § 5.1 (Exh. B), 4-1-09)

Sec. 15-82. - Definitions.

The words and phrases defined in this section shall have the meanings ascribed when used in this article and in article VI of this chapter, unless the context clearly indicates another meaning. For the purpose of these definitions, the singular shall also include the plural, and the plural shall also include the singular.

- (1) *Bidder* means any person or legal entity which submits a bid or proposal to provide labor, goods or services to the city by contract for profit.
- (2) *Contractor* means any person or legal entity providing goods, labor, or services to the city by contract for profit.
- (3) *Established business enterprise* shall mean an MBE, WBE, SBE or PDBE or any business applying for certification as an MBE, WBE, SBE or PDBE that, by virtue of its size meets or exceeds the standards promulgated by the U.S. Small Business Administration for that category of business, as determined by the procedures described in section 15-87(a) of this Code.
- (4) *Goal-oriented contract* shall mean any contract, agreement or other undertaking anticipated for construction work to be in excess of \$1,000,000.00 and for the supply of goods or nonpersonal or nonprofessional services to be in excess of \$100,000.00 for which:
 - a. Competitive bids are required by law to be taken;
 - b. Which is not within the scope of the disadvantaged business enterprise programs of the United States Environmental Protection Agency or the United States Department of

Transportation; and

- c.** Which the initiating city department, in consultation with the director of the affirmative action division, determines has significant subcontracting potential in fields in which there are adequate numbers of known MBEs, SBEs and/or WBEs to compete for and perform the subcontract service(s).
- (5) *Minority business enterprise or MBE*** shall mean a business which is:
- a.** A sole proprietorship in which the owner is a minority person who owns, controls and manages the business; or
 - b.** A corporation in which at least 51 percent of the stock or of the assets of such corporation is owned, controlled and managed by one or more minority persons; or
 - c.** A partnership in which at least 51 percent of the assets of such partnership is owned, controlled and managed by one or more minority persons; or
 - d.** A joint venture in which at least 51 percent of the interests of such joint venture is owned, controlled and managed by one or more minority persons; or
 - e.** Any other business or professional entity in which at least 51 percent of the assets in such business or professional entity is owned, controlled and managed by one or more minority persons; or
 - f.** Any entity in which at least 51 percent of the assets of such entity is owned, controlled and managed by one or more minority persons and one or more women and such minority person; or
 - g.** A business which has been certified as an MBE by the city's affirmative action division under any other MBE program.
- (6) *Minority person*** shall mean a citizen or legal resident alien of the United States who is:
- a.** Black (a person having origins in any of the black racial groups in Africa);
 - b.** Spanish/Hispanic (a person who is either Mexican, Puerto Rican, Cuban or "other Spanish/Hispanic" in origin or descent. "Other Spanish/Hispanic" are those whose origins are from Spain or the Spanish speaking countries of Central or South America. Persons of Spanish origin may be of any race);
 - c.** Asian-Pacific American (a person having origins in the Far East, Philippines, Vietnam, Korea, Samoa, Guam, the U.S. Trust Territories of the Pacific, Northern Marianas, Laos, Cambodia, Taiwan or the Indian Subcontinent);
 - d.** Native American (a person having origins in any of the original peoples of North America, American Indian, Eskimo, Aleut, Native Hawaiian).
- Origin or descent can be regarded as the ancestry, nationality group, lineage or country in which the person or persons' parents or ancestors were born before their arrival in the United States.
- (7) *Owned, controlled and managed*** shall mean that the one or more minority persons or women who own the requisite interests in or assets of a business applying for minority or women business enterprise certification, shall possess equivalent incidents of such ownership, including an equivalent interest in profit and loss, and shall have contributed an equivalent percentage of capital, equipment and/or expertise to the business. Ownership shall be measured as though not subject to the community property interest of a spouse, if both spouses certify in writing that the nonparticipating spouse relinquishes control over his or her community property interest in the subject business (but by doing so is not required to transfer to his or her spouse his or her community property ownership interest or to characterize the property as the separate property of the spouse). The one or more minority person or woman owners shall have recognized ultimate control over all day-to-day business decisions affecting the MBE or WBE and shall hold a title commensurate with such control. Such ultimate control shall be known to and at least tacitly acknowledged in day-to-day operations by employees of the business.
- (8) *Regulated contract*** shall mean any contract, agreement or other undertaking for which:
- a.** Competitive bids are not required by law to be taken;
 - b.** Which is not covered by the MBE/WBE programs of the United States Environmental Protection Agency or the United States Department of Transportation; and
 - c.** Which the recommending city department has determined, in consultation with the director of the affirmative action division:
 - 1.** Either has significant subcontracting potential in fields in which there are sufficient known MBEs and/or WBEs, or if a construction contract, MBEs and/or SBEs to perform the particular subcontract service(s); or
 - 2.** Is of a type for which there are sufficient known MBEs and/or WBEs, or if a construction contract, MBEs and/or SBEs, which have represented their ability to perform the prime

contract service to afford effective competition for the prime contract.

- (9) *Small business enterprise* or *SBE* means a firm whose gross revenues or number of employees, averaged over the past three years, inclusive of any affiliates as defined by 13 CFR Section 121.103, does not exceed the size standards defined in Section 3 of the Federal Small Business Act and applicable Small Business Administration regulations related to the size standards found in 13 CFR Part 121. The term shall also include a certified minority/women business enterprise defined in this Code.
- (10) *Subcontractor* means any business providing goods, labor or services to a contractor if such goods, labor or services are procured or used in fulfillment of the contractor's obligations arising from a contract with the City of Houston.
- (11) *Woman* shall mean a person who is a citizen or legal resident alien of the United States and who is of the female gender.
- (12) *Women business enterprise* or *WBE* shall mean a business which is:
- a. A sole proprietorship in which the owner is a woman who owns, controls and manages the business; or
 - b. A corporation in which at least 51 percent of the stock or assets of such corporation is owned, controlled and managed by one or more women; or
 - c. A partnership in which at least 51 percent of the assets of such partnership is owned, controlled and managed by one or more women; or
 - d. A joint venture in which at least 51 percent of the interests in such joint venture is owned, controlled and managed by one or more women; or
 - e. Any other business or professional entity in which at least 51 percent of the assets in such business or professional entity is owned, controlled and managed by one or more women; or
 - f. Any entity in which at least 51 percent of the assets of such entity is owned, controlled and managed by one or more minority persons and one or more women; or
 - g. A business which has been certified as a WBE by the city's affirmative action division under any program.

(Ord. No. 84-1309, 8-22-84; Ord. No. 98-1213, § 2, 12-16-98; Ord. No. 2009-280, § 5.1 (Exh. B), 4-1-09)

Sec. 15-83. - Program elements.

- (a) Based upon a review of data submitted annually by affected city departments, the mayor's affirmative action division shall each year submit a progress report to the city council. The report shall include two percentage figures that are intended to as closely as possible represent the ratio of the prior year's measured utilization and capacities of local MBEs and WBEs to do business in:
- (1) The supply of goods and nonpersonal or nonprofessional services; and
 - (2) The performance of personal or professional services.

to the prior year's total local business community utilization and capacity to do business in each of the two-named fields of city contracting.

In addition, the report shall include percentage figures that are intended to as closely as possible represent the ratio of the prior year's measured utilization and capacities of local MBEs and SBEs to do business in construction to the prior year's total local business community utilization and capacity to do business in city construction contracting.

- (b) Based upon the measured utilization and capacities identified in subsection (a) above, city council shall from time to time set annual city-wide percentage goals for city contracting with MBEs and WBEs in each of the first two named categories described in subsection (a)(1) and (2) above and for contracting with MBEs and SBEs in the construction category. The adjustment, if any, in the percentage goals shall be made during the first quarter of the fiscal year.
- (c) It is the responsibility of each city department to determine which contracts initiated by it are goal-oriented contracts and which are regulated contracts. If the determination is made that a contract is a goal-oriented contract or a regulated contract, the initiating department shall review the contract and shall determine, by reference to the MBE/SBE/WBE register, the number of certified MBEs and WBEs in each of the two named categories described in subsection (a)(1) and (2), above, and for construction, the number of certified MBEs and SBEs in the construction category. The initiating department director or his or her designee shall determine whether the contract is one to which MBE/SBE/WBE provisions should be applied.

- (1) These provisions are not required to be applied in the following circumstances:
- a. A public or administrative emergency exists which requires the goods or services to be provided with unusual immediacy;
 - b. The service or goods requested are of such a specialized, technical or unique nature as to require the city department to be able to select its contractor without application of MBE/SBE/WBE provisions (such as contracts for expert witnesses, certain financial advisors or technical consultants); or
 - c. If application of MBE/SBE/WBE provisions would impose an unwarranted economic burden or risk on the city or unduly delay acquisition of the goods or services, or would otherwise not be in the best interest of the city; or
 - d. If the possible MBE/SBE/WBE participation level based on MBE, SBE and WBE availability would produce negligible MBE, SBE or WBE participation.

If one of the above-listed conditions is determined to exist, the department director shall certify that determination to the director of the affirmative action division and specify the conditions which lead to the determination. This certification is to be made prior to award of the contract.

- (2) If the contract does not fall within one of the above-listed exceptions, based upon its overall review, the initiating department shall assign an appropriate MBE/SBE/WBE participation level, if any, for the contract (whether goal-oriented or regulated) considering the local availability of certified MBEs, SBEs and, except for construction contracts, WBEs in the contract field.

The intention of this article is to provide administrative flexibility in the application of MBE/SBE/WBE provisions of this Code and in the percentage participation level on a contract-by-contract basis so as not to limit access to city contracting by nonminority-owned, nonwomen-owned or established business enterprises to a greater degree than necessary to meet the city-wide annual goal and the policies and objectives of this article.

- (d) The bidding documents and the contract documents for goal-oriented contracts for which an MBE/SBE/WBE participation level has been established shall contain a provision detailing the purposes and objectives of the city's MBE/SBE/WBE ordinance and shall incorporate by reference this article and the then-current motion or ordinance establishing MBE, SBE and WBE annual goals. Regulated contracts which are determined to have significant subcontracting potential for which an MBE/SBE/WBE participation level has been established shall contain contractual provisions (and proposal provisions if submitted for proposals or for bids) requiring the contractor to meet or exceed the determined MBE/SBE/WBE participation level for that contract, or to establish that it has made good-faith efforts to do so, and that notwithstanding such efforts, was unable to meet or exceed the determined participation levels. The directors of the administration and regulatory affairs, general services and public works and engineering departments will establish procedures defining good-faith efforts. These procedures will be reviewed and approved by the affirmative action division, the mayor and the city attorney.

(Ord. No. 84-1309, 8-22-84; Ord. No. 86-528, § 17, 4-22-86; Ord. No. 93-514, § 33, 5-5-93; Ord. No. 95-336, §§ 3, 4, 3-29-95; Ord. No. 99-378, § 10, 4-21-99; Ord. No. 07-840, § 13, 7-18-07; Ord. No. 08-52, § 43, 1-16-08, eff. 1-26-08; Ord. No. 2009-280, § 5.1 (Exh. B), 4-1-09)

Sec. 15-84. - Affirmative action division.

The affirmative action division of the mayor's office has responsibility for:

- (1) Establishing procedures for the implementation of this article, and reviewing and approving procedures established by city departments, such procedures to be narrowly designed to attain the purposes and objectives specified herein without unduly limiting nonminority-owned or nonwoman-owned or established business enterprises. Such procedures shall be reviewed and approved by the mayor and by the city attorney prior to implementation;
- (2) Certifying businesses as minority, small or women business enterprises and maintaining and distributing to affected city departments a current register, updated monthly, of such business (including a separate listing of such businesses whose applications for certification are pending) specifying the categories of city contracting represented by the certified MBEs, SBEs and WBEs;
- (3) Developing educational programs for and otherwise assisting (without offering favoritism in relation to the competitive bidding system) minority, small and women business enterprises to compete effectively for city contracts;
- (4) Making recommendations to the mayor, city council and city departments to further the policies and objectives of this article;
- (5) Reviewing documentation from potential contractors and from contractors concerning good-faith efforts made to meet or exceed the participation level for contracts. The final recommendation to city

council for award or for acceptance of work shall be the city department's, although the affirmative action division may take exception;

- (6) Compiling, bimonthly, a report of the progress of city departments, by department, in attaining the city-wide goals set by city council. This report shall be based upon MBE, SBE and WBE contractor and subcontractor information, to be specified by the affirmative action division, which each department is to submit to the affirmative action division monthly. The report is to be submitted bimonthly to city council members, the mayor and all affected city department directors for their information;
- (7) Receiving and reviewing complaints and suggestions concerning the MBE/SBE/WBE program from contractors, MBEs, SBEs, WBEs and city departments; and
- (8) Without limiting the authority of the affirmative action division to establish procedures that are consistent with the terms of this article, the division is specifically directed to promulgate and implement procedures as follows:
 - a. Grievance procedures for any person aggrieved by any decision of the division under this article. The procedures shall include notice and a hearing before an impartial hearing officer who shall be appointed by the mayor;
 - b. Arbitration/mediation procedures for the resolution of disputes between contractors or bidders and MBE/SBE/WBE participants or potential participants with respect to any aspect of compliance with this article, including, without limitation, any assertion that a contractor, subcontractor, or MBE/SBE/WBE has failed to make good faith efforts to comply with this article;
 - c. Procedures to implement and enforce any sanctions provided under this article;
 - d. Procedures to ensure performance of work by MBE/SBE/WBEs, which procedures shall include: (i) a requirement that no more than 50 percent of their work may be subcontracted, without a specific waiver from the division for cause; (ii) a requirement that the minority person, small business or woman owner of an MBE/SBE/WBE have the necessary experience, expertise, credentials and regulatory authority to conduct the type of business for which the business is certified; (iii) a requirement that bidders and contractors make good faith efforts to meet or exceed contract MBE/SBE/WBE goals; and (iv) a requirement that MBE/SBE/WBEs accurately represent all material information required for certification and truly perform the work they are represented to have performed;
 - e. Procedures for counting participation by MBE/SBE/WBEs as prime contractors, subcontractors, suppliers and joint venturers on city contracts, which procedures shall ensure that all work performed by MBE/SBE/WBEs as prime contractors is included in the computation of the progress made toward meeting the annual city-wide goals;
 - f. Procedures to ensure that this article is limited in its application to the certification of locally based MBEs, SBEs and WBEs;
 - g. Procedures to coordinate the operation of this article with other local MBE/SBE/WBE programs, which may include reliance upon certification procedures of other entities that are determined to be reliable and equivalent to this article; and
 - h. Procedures to ensure access to necessary records of prime contractors and subcontractors on city contracts.

All procedures established under this section shall be reviewed and approved by the city attorney prior to implementation. A copy of all procedures hereunder shall be maintained in the offices of the division for inspection, and copies may be purchased at the fees prescribed by law.

(Ord. No. 84-1309, 8-22-84; Ord. No. 95-336, § 5, 3-29-95; Ord. No. 2009-280, § 5.1 (Exh. B), 4-1-09)

Sec. 15-85. - Filing of plan.

Before execution of any contract or issuance of any purchase order for which an MBE/SBE/WBE goal has been established, a bidder or potential contractor shall submit a plan setting forth how it intends to meet the contract MBE/SBE/WBE goal. After execution of a contract or receipt of a purchase order, the contractor shall comply with the submitted plan, unless it has received approval from the director of affirmative action for a deviation therefrom. Approval shall not be unreasonably withheld. While it is not a requirement that a contractor meet its goal, it is required that the contractor objectively demonstrate to the affirmative action division that it has made good faith efforts to meet the goal. To this end, the contractor shall maintain records as prescribed by the affirmative action division demonstrating its efforts at compliance. The contractor shall be required to submit to the affirmative action division reports of its efforts under this article in such form or manner as shall be

prescribed by the division.

(Ord. No. 95-336, § 6, 3-29-95; Ord. No. 2009-280, § 5.1 (Exh. B), 4-1-09)

Sec. 15-86. - Sanctions.

- (a) The director of affirmative action is authorized to suspend any contractor who has failed to make good faith efforts to meet any goal established under this article from engaging in any contract with the city for a period up to, but not to exceed, five years. The director is also authorized to suspend any MBE, SBE or WBE who has failed to make good faith efforts to meet all requirements necessary for participation as an MBE, SBE or WBE from engaging in any contract affected by this article for a period up to, but not to exceed, five years.
- (b) In accordance with section 15-84 of this Code, the affirmative action division shall establish procedures for the imposition of sanctions and shall ensure that no sanction is imposed without notice of the grounds being given, an opportunity for a hearing and an opportunity for appeal to city council or to an impartial hearing officer designated by the mayor. Any procedure established shall be consistent with state law.

(Ord. No. 95-336, § 6, 3-29-95; Ord. No. 2009-280, § 5.1 (Exh. B), 4-1-09)

Sec. 15-87. - Determination of established business enterprise status.

- (a) Based upon a review of data submitted by MBEs, SBEs, WBEs or MBE/SBE/WBE applicants and any other information available from its files or the files of any other governmental entity, the affirmative action division of the mayor's office shall determine the size of each MBE, SBE, WBE or MBE/SBE/WBE applicant by determining the average of the gross receipts for the prior three years and the average number of employees for the 12 calendar months immediately preceding the review, as applicable. The calculation of size shall be based solely upon the size standards and methods of calculation identified by the U.S. Small Business Administration (SBA) including, without limitation those set forth in 13 C.F.R. part 121, subpart A, secs. 121.101 through 121.107, and sec. 121.201, any amendment or successor thereto, or any other document defining such size standards or the calculation thereof that has been fully and finally adopted by the SBA. The review shall be applicable to business entities applying for initial certification as an MBE, SBE or WBE or to certified MBEs, SBEs or WBEs, provided that such review may not be initiated until the applicant or certified MBE, SBE or WBE has established a business history of sufficient length to allow calculation of size based on the three year financial or 12 month employee data, as applicable.
- (b) Following the review described in this section, each certified MBE, SBE, WBE or MBE/SBE/WBE applicant shall be re-evaluated under this section on an annual basis, beginning with the next annual application for re-certification of the business. Provided, however, that if any such business has been subjected to a size evaluation under any provision of this chapter within 180 days immediately preceding the date of its re-certification application, the director of affirmative action may defer a re-evaluation until the annual re-certification next following such date.
- (c) All MBEs, SBEs, WBEs and MBE/SBE/WBE applicants shall, upon written request of the director of affirmative action, provide to the director copies of any and all documents, including without limitation financial statements and tax records, requested by the director in connection with the review authorized in subsection (a) of this section, not later than 20 business days following the date of mailing of the request. Failure to timely and completely comply with any such request will authorize the imposition of sanctions under section 15-86 of this Code, or denial of certification in the case of an MBE, SBE or WBE applicant.
- (d) Following the review authorized by subsection (a) of this section, the affirmative action division of the mayor's office shall classify each MBE, SBE, WBE or MBE/SBE/WBE applicant whose size meets or exceeds the size standard identified by the SBA for that class of enterprise as an established business enterprise. The classification shall be effective as of the date of mailing the notice provided in section 15-88 of this Code.

(Ord. No. 98-1213, § 3, 12-16-98; Ord. No. 2009-280, § 5.1 (Exh. B), 4-1-09)

Sec. 15-88. - Notice, appeal and waiver.

- (a) Immediately upon classification of a certified MBE, SBE, WBE or MBE/SBE/WBE applicant, as an established business enterprise pursuant to section 15-87 of this Code, the affirmative action division of

the mayor's office shall notify the business so classified of the action by United States certified mail, return receipt requested, addressed to the last known address of the business and deemed given when placed in a United States mail depository.

- (b) Each notice shall inform the affected MBE, SBE, WBE or MBE/SBE/WBE applicant of the following matters:
- (1) That the MBE, SBE, WBE or MBE/SBE/WBE applicant has been classified as an established business enterprise;
 - (2) That the classification is effective as of the date of mailing of the notice;
 - (3) That the MBE, SBE, WBE or MBE/SBE/WBE applicant may appeal the classification or seek a waiver of the classification pursuant to the procedures established under this section;
 - (4) That the provisions of section 15-89 of this chapter shall become enforceable with respect to any certified MBE, SBE or WBE one year following the notice of classification, unless the decision is reversed or a waiver is granted and the classification is withdrawn prior to the expiration of the one-year period; and
 - (5) That any MBE, SBE or WBE applicant is not eligible for certification based upon the classification as an established business enterprise and will remain ineligible for certification unless and until any withdrawal of the classification as an established business enterprise pursuant to an appeal or a request for waiver conducted under this section.
- (c) In order to appeal a classification as an established business enterprise, an MBE, SBE, WBE or MBE/SBE/WBE applicant must submit to the director of affirmative action a written notice of appeal no later than 60 days following the date of mailing of the notice of classification. The sole basis for an appeal shall be that the affirmative action division has incorrectly calculated the size of the business according to SBA standards based upon incorrect information or error in computation. The notice of appeal shall be accompanied by any documentation necessary to demonstrate the asserted error. If the director of the affirmative action division finds that an error or errors were made in calculating the size of the business and that any such error resulted in an incorrect classification as an established business enterprise, the classification shall be withdrawn and the business promptly notified of the withdrawal. If the director finds that no error was made, or that any error would not materially alter the classification, he shall notify the business that the classification is not altered, by certified mail, return receipt requested. The business may within 10 days of the date of mailing of the notice submit to the director of affirmative action a written request for a hearing, which hearing shall be conducted under the procedures set forth in subsections (e) through (g) of this section.
- (d) In order to seek a waiver of a classification as an established business enterprise, an MBE, SBE, WBE or MBE/SBE/WBE applicant must submit to the director of affirmative action a written request for a hearing no later than 60 days following the date of mailing of the notice of classification. The written request shall include documentary evidence, including but not limited to financial statements and tax records, relevant to the following criteria:
- (1) Profitability of the enterprise;
 - (2) Sales of the enterprise, including whether the enterprise has 55 percent or more of sales, within the period utilized by the division in its classification determination, that are not related to city contracts;
 - (3) Ability of the MBE, SBE, WBE or MBE/SBE/WBE applicant to obtain bonding, if the enterprise acts as a prime contractor or in a category in which obtaining bonding is required; and
 - (4) Positive comparison of the enterprise's business and financial profile with those of non-MBE/SBE/WBE firms in the same business category based on an objective industry standard.
- (e) The director of affirmative action shall notify the affected MBE, SBE, WBE or MBE/SBE/WBE applicant of the place and time of a hearing before the director or his designee to consider an appeal requested under subsection (c) of this section, or a request for waiver of the classification under subsection (d) of this section, or both, as applicable, by United States certified mail, return receipt requested. The hearing shall be set not later than 30 days following receipt of the request, provided that the director or his designee may in his discretion extend such date by a reasonable period for good and sufficient cause shown. Hearings for businesses that have both appealed under subsection (c) of this section and requested a waiver under subsection (d) of this section may be consolidated in a single hearing at the discretion of the director or his designee.
- (f) The director shall promulgate written procedures for the conduct of hearings. The director or his designee shall hear each appeal or request for waiver and shall consider only the criteria set forth under subsections (c) and (d)(1) through (d)(4) of this section, as applicable, in determining whether to withdraw the classification of the affected business as an established business enterprise. The director shall develop objective standards for evaluating each factor set forth under subsections (d)(1) through (d)(4) based upon recognized industry or governmental practices or standards. The burden shall be on the business to demonstrate by clear, convincing and cogent evidence either that a material error in classification was made or that the granting of a waiver is justified by at least two of the criteria set forth in

subsections (d)(1) through (d)(4) of this section.

- (g) Notwithstanding any provision of this Code or of the rules or regulations of the affirmative action division to the contrary, including any provision for arbitration or mediation of a decision of the director of affirmative action, the decision of the director or his designee regarding appeal or waiver shall be final.

(Ord. No. 98-1213, § 3, 12-16-98; Ord. No. 2009-280, § 5.1 (Exh. B), 4-1-09)

Sec. 15-89. - Effect of classification; re-application.

- (a) Upon the expiration of one year following the notice of classification as an established business enterprise referenced in section 15-88(a) of this Code, and in the absence of any withdrawal of such classification by the director of affirmative action, each certified MBE, SBE or WBE so classified shall be ineligible for future participation in any city contract as an MBE, SBE or WBE and its certification shall be withdrawn. No application for re-certification shall be granted absent the prior determination of the director of the affirmative action division that the applicant does not meet or exceed the SBA size standards referenced in section 15-87(a) of this Code. Certified businesses whose evaluation results in classification as an established business enterprise shall timely file any re-certification application due prior to expiration of the one year extension of program eligibility referenced in this section, but the application shall not be granted unless and until the classification is withdrawn or waived.
- (b) Notwithstanding any provision of this Code or the rules or regulations of the affirmative action division to the contrary, including any provision for arbitration or mediation of a decision of the director of affirmative action, any initial applicant for MBE/SBE/WBE certification who meets the criteria for an established business enterprise at the time of its application and is so classified shall be denied certification on that basis alone and shall have no recourse for the denial except through challenging the classification in the manner set forth in section 15-88 of this chapter. Any and all other matters pertaining to the eligibility of the applicant shall be abated and shall only be reinstated if the classification as an established business enterprise is withdrawn.
- (c) The affirmative action division may continue to assist established business enterprises following ineligibility as follows:
- (1) Such businesses, if formerly certified by the city, may be continued to be listed in any listing of MBE/SBE/WBE firms in a separate category of established MBE/SBE/WBE firms for the information of other private or public entities; and
 - (2) Such businesses, if formerly certified by the city, may receive information, counseling and referrals to other agencies supporting business enterprises from the affirmative action division after their classification as established business enterprises.
- (d) No sooner than one year following the date of program ineligibility provided in subsection (a) of this section or the denial of certification provided in subsection (b) of this section, any established business enterprise may apply for reinstatement as a fully eligible, certified MBE, SBE or WBE or reinstatement of an application for certification abated under subsection (b) of this section, as applicable, upon demonstrating the existence of one or more of the following conditions:
- (1) That the subsequent history from the date of initial classification as an established business enterprise demonstrates that a size calculation as of the date of application for reinstatement would place the business below the SBA size standards for that category of business;
 - (2) That the established business enterprise has successfully obtained an SBA size determination from a federal agency authorized to make such a determination, or has prevailed in an SBA size protest under 13 CFR § 121.1001, et seq., as amended, including any judicial review thereof, establishing that the business does not meet or exceed the applicable SBA size standard;
 - (3) That the SBA size standards have been revised in such a manner that the subject business no longer meets or exceeds the size standard for its category based upon the most recent three-year average for receipts or 12 month average for employees, as applicable; or
 - (4) That the criteria listed in section 15-88(d) of this Code demonstrate the need to grant a waiver and withdraw the classification of the business as an established business enterprise.
- (e) Applications for reinstatement shall be on a form prescribed by the director of the affirmative action division and shall be accompanied by relevant documentary evidence supporting the ground or grounds for reinstatement asserted, as requested by the director.
- (f) Within 30 days following receipt of a completed application for reinstatement, the director shall grant the application or deny the application and set the matter for hearing within 30 days of the date of mailing notice of such denial.
- (g) The burden on the business applying for reinstatement shall be to demonstrate the existence of one or

more of the conditions set forth in subsections d(1) through d(4) of this section by clear, convincing and cogent evidence, to be evaluated by the director under hearing procedures consistent with the nature of the application and, to the extent applicable, with the provisions of subsections (c), (d), (e) and (f) of section 15-88 of this Code. In addition, a business seeking reinstatement under subsection (b)(4) of this section that has previously sought a waiver of classification as an established business enterprise pursuant to section 15-88(d) of this chapter must present evidence of a material and substantial change in circumstances not shown at the preceding hearing, and the director or his designee shall disregard evidence that is repetitious or cumulative of the prior hearing on the matter.

- (h)** The decision of the director of affirmative action or his designee following a hearing on reinstatement shall be final, and any applicant denied reinstatement is to be notified in writing of the decision within ten days following the hearing. No business denied reinstatement may subsequently apply for reinstatement until the expiration of one year from the date of the denial.

(Ord. No. 98-1213, § 3, 12-16-98; Ord. No. 2009-280, § 5.1 (Exh. B), 4-1-09)
