



City of Asheville
**BUSINESS
INCLUSION
OFFICE**

CITY OF ASHEVILLE

BUSINESS INCLUSION POLICY

Department of Community and Economic Development

Asheville Business Inclusion Office

City of Asheville

P.O. Box 7148

Asheville, NC 28802

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Effective: 1/1/21

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RESOLUTION NO: 20- 192

RESOLUTION ESTABLISHING THE CITY OF ASHEVILLE BUSINESS INCLUSION POLICY TO PROMOTE ECONOMIC INCLUSION AND FULL EQUITABLE UTILIZATION OF FIRMS THAT ENGAGE IN BUSINESS WITH THE CITY IN THE ASHEVILLE REGIONAL AREA

WHEREAS, the City of Asheville has committed to Equity and Inclusion within all City practices to include City contracting; and

WHEREAS, the City of Asheville's Minority Business Plan expired in 2013; and

WHEREAS, the City of Asheville contracted with BBC Consulting to conduct a Disparity Study in 2018 to review City contracting ("the Disparity Study"); and

WHEREAS, the Disparity Study Final Report was presented to the Asheville City Council in April 2019. The results indicated that some minority-owned and women-owned businesses, viewed together, received lower participation in city contracts compared to business availability within the relevant geographic market ("Asheville Regional Area"), thus displaying substantial disparities in areas of City contracting; and

WHEREAS, the Disparity Study demonstrated a strong evidentiary basis for racial and gender disparities, which is supported by both substantial statistical evidence and anecdotal evidence of discrimination. There is, therefore, a compelling government interest in remedying such disparities; and

WHEREAS, such a compelling government interest has been accepted by federal courts as legally sufficient for governmental entities to incorporate a race and gender-conscious contracting policy which is narrowly tailored to remedy the aforementioned disparities; and

WHEREAS, implementing such a policy would promote equal opportunity through City contracts which will enhance competition on City projects and promote equal opportunity and full participation by all segments of the business community; and

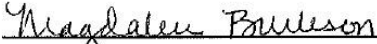
WHEREAS, this policy is consistent with the City of Asheville's Living Comprehensive plan in promoting a resilient economy and interwoven equity by providing opportunities for small, minority-owned, and women-owned businesses to participate in City contracting.

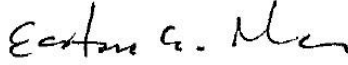
NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF ASHEVILLE THAT:

1. The Asheville Business Inclusion Policy ("ABI Policy") be and is hereby adopted.

2. The Asheville City Manager shall manage the implementation of the ABI Policy.
3. The Asheville City Manager shall have the authority to make modifications and amendments to the policy that are minor in nature. All other modifications and amendments shall be brought before the City Council for consideration.
4. In the form of a request for a budget amendment, the policy shall be brought before the City Council every five (5) years for consideration on funding for further disparity studies.
5. Should any section or provision of this policy be declared invalid or unconstitutional by any court of competent jurisdiction, the declaration shall not affect the validity of this policy as a whole or any part thereof that is not specifically declared to be invalid or unconstitutional.
6. The policy shall be implemented and effective, not before January 1, 2021.

Read, approved, and adopted this 27th day of October 2020.


CITY CLERK


MAYOR

Approved as to form:


CITY ATTORNEY

PART A: BACKGROUND, OBJECTIVES, AND SUNSET

I. BACKGROUND

In 2018, the Asheville City Council contracted with BBC Research & Consulting in order to conduct a disparity study evaluating the City's contracting practices. In April 2019, the study was presented to the Asheville City Council and indicated that both women-owned businesses and minority-owned businesses (African American, Hispanic, Asian, and Native American owned businesses) showed substantial disparities on contracts that the City awarded during the study period. Race and gender neutral measures such as the Minority Business Plan are not adequate to address the marketplace discrimination found in the 2018 Disparity Study. The 2018 Disparity Study establishes a strong basis in evidence that supports the use of narrowly tailored race and gender conscious procedures to more adequately address the ongoing effects of marketplace discrimination on City contracts.

II. DECLARATION OF POLICY

It is the policy of the City of Asheville to provide all, including minorities, equal opportunity to participate in all aspects of City contracting and purchasing programs, including, but not limited to, participation in procurement, professional services and construction contracts; prohibiting discrimination against any person or business in pursuit of these opportunities on the basis of race, color, sex, religion, disability, familial status, sexual orientation, gender identity, gender expression, national origin or any other unlawful discrimination; and conducting its contracting and purchasing programs so as to prevent any discrimination.

The City of Asheville will actively seek to identify minority- and women-owned businesses and offer them an opportunity to participate as providers of goods and services to the City. It is the intent of this policy to widen opportunities for participation, increase competition, and ensure the proper and diligent use of public funds.

By creating a race and gender conscious policy implemented through a minority and women business enterprise program, the City of Asheville Business Inclusion Policy will provide annual aspirational goals, subcontracting goals, and good faith efforts on City contracts that will further foster the City's commitment to Equity and Inclusion. This policy will further benefit the City by providing opportunities for minority-owned and women-owned businesses to participate in City contracting to further facilitate economic growth and development within the Asheville Regional Area.

The City will further incorporate equity and inclusion within City contracting by creating a small business enterprise program. This program will allow the use of subcontracting goals and good faith efforts on City contracts to further benefit the City by: (1) providing the opportunity to small businesses to participate in City contracting and (2) will facilitate small business growth within the Asheville Regional Area, further fostering economic growth and development within the City.

This policy is not intended in any manner to require that contracts be awarded by any means other than those provided in the NC competitive bidding statutes, such as the lowest responsive responsible bidder standard of award. This policy shall be followed in conjunction with the City's Procurement, Purchasing,

and Contracting Policy and is not to supersede the requirements of any federal, state or local laws and rules, regulations and policies adopted pursuant thereto.

III. AUTHORITY

The City Manager is hereby authorized to take all usual and legal administrative actions necessary to implement the Asheville Business Inclusion Policy. Notwithstanding any specific assignment contained in the Policy, the ultimate responsibility for its administration is assigned to the City Manager.

This Policy shall apply to all construction, procurement, general services and professional services contracts administered by the City. All agencies funded in whole or part by the City should be encouraged to adhere to the policies set forth herein. There shall be a brief statement recognizing the City's commitment to the Asheville Business Inclusion Policy included in all City written contracts. The provisions of this Policy take precedence over all departmental plans or procedures in conflict herewith, except for specific requirements mandated by state law or the terms of agreements enforced between the City and the federal government or the State of North Carolina that require different procedures than those described in this Policy.

This Policy, however, shall not apply in emergency situations when a contract is awarded pursuant to non-competitive solicitation. The appropriate Department Director shall, as soon as practical after the emergency non-competitive award, notify the Asheville Business Inclusion Manager. The Asheville Business Inclusion Manager shall calculate the percentage of City contracts awarded under this emergency exception to the Policy and include the same in the Annual Report hereinafter referenced.

IV. POLICY OBJECTIVES

The Asheville Business Inclusion Policy seeks to remediate the ongoing effects of marketplace discrimination that the City has found continues to adversely affect the participation of minority- and women-owned firms or businesses in City contracts. The Asheville Business Inclusion Policy further seeks to enhance competition in City contracting and promote economic growth and development in the City of Asheville by:

1. Increasing the City's awareness of available minority, women, and small business vendors and the available product lines and services they provide through the development of a minority business enterprise, women business enterprise, and small business enterprise vendor availability database;
2. Increasing Minority, Women, and Small Business Enterprise utilization in City contracting;
3. Promoting existing small business growth and profitability in the Asheville Regional Area;
4. Promoting small business start-up and development in the Asheville Regional Area;
5. Monitoring, evaluating and reporting on Minority and Women Business Enterprises' (here after "MWBE") participation and contract compliance with the provisions of the Asheville Business Inclusion Policy;
6. Monitoring, evaluating and reporting on Small Business Enterprises' (here after "SBE") participation and contract compliance with the provisions of the Asheville Business Inclusion Policy.

V. ANTI-DISCRIMINATION

The City's policy is to provide equal opportunity in City contracting. Every contracting-related decision the City makes shall be on the basis of merit, without regard to an individual's race, color, creed, religion, national origin, age, disability, sexual orientation, gender (including pregnancy), gender identity or expression, or familial status except when being a member of a particular group is deemed to be a bona fide occupational qualification. Moreover, in accordance with federal law, the City will not deny opportunity in contracting to any person or business because of marriage to, or association with, individuals of a particular race, religion, national origin, disability, sexual orientation, gender, or gender identity or expression. The City also prohibits discrimination based on an individual's participation in schools or places of worship associated with a particular racial, ethnic, or religious group.

VI. SCOPE

The Asheville Business Inclusion Policy shall apply to all contracts for the purchase of construction-related services, professional services, general services, goods, real estate development, renovation, maintenance, or other services awarded by, or on behalf of, the City; including, but not limited to, every contract or other agreement between the City of Asheville and any governmental agency, quasi-governmental agency, corporation, developer or contractor under which the agency, corporation, developer or contractor receives any fiscal assistance from or through the City for the purpose of contracting with businesses to perform construction-related services, general services, professional services, goods, real estate development, renovation, maintenance or other services and as such, the City shall require the agency, corporation, developer or contractor to comply with this Policy in awarding and administering that contract or agreement; provided, however, that the following categories of contracts shall be excluded from the scope and application of this Policy:

- Contracts that are subject to the U.S. Department of Transportation Disadvantaged Business Enterprise Program as set forth in *49 C.F.R. Part 26* or subsequent legislation;
- Contracts that are subject to an MWBE Goal set by North Carolina pursuant to *N.C. Gen. Stat. § 143-128.2*;
- Contracts for the purchase of goods or supplies of a unique nature for which there is only a sole source of supply, as determined by the City's Purchasing, Procurement, and Contracting Policy;
- Contracts for electricity or water and sewage services from a municipal utility district or governmental agency;
- Contracts or purchase orders that are entered into without a competitive process or entered into based on a competitive process administered by an entity other than the City;
- Contracts for the acquisition or lease of real estate;
- Contracts for legal services, unless otherwise indicated by the City Attorney;
- Emergency and exigency contracts for goods or supplies that the City Manager or designee determines are necessary for the preservation of public health or safety and whose immediacy of need is so great that it is impractical for the City to apply the terms of this Policy to the contract;
- Contracts for the City's lease or purchase of real property where City is lessee or purchaser; and
- Contracts for banking or insurance services

The aforementioned contracts shall be Exempt Contracts under this Policy.

VII. POLICY REVIEW AND SUNSET

At least every five years, the City of Asheville shall conduct a study on the availability and utilization of minority-owned and women-owned businesses and examine relevant evidence of the effects of race-based or gender-based discrimination upon the utilization of such businesses in City contracts. Should the study show a strong basis in evidence of ongoing effects of past or present discrimination that prevents or limits minority-owned and women-owned businesses from participating on City contracts at a level which would have existed absent such discrimination, such evidence shall constitute a basis for the City's continued compelling governmental interest in remedying such race and gender discrimination in City contracting.

Under such circumstances the City shall adopt a policy, a rule, contract provisions, and a specific program to remedy such discrimination. This policy, to the extent reasonably practical, should address each barrier identified in such a study that adversely affects contract participation by disadvantaged minority-owned and women-owned businesses.

Absent an extension, as evidenced by a valid disparity study, by the City Council, the race and gender conscious measures of the Asheville Business Inclusion Policy, including the establishment of MWBE goals, will expire on November 1, 2023.

VIII. SEVERABILITY

If any provision of the Asheville Business Inclusion Policy (here after "ABI Policy") or any application thereof is held invalid or unenforceable, such invalidity or unenforceability shall not affect other provisions or applications of the ABI Policy which can be given effect without the invalid provisions or applications and the remaining provisions are to be severable and shall remain in full force and effect.

PART B: DEFINITIONS

ABI Manager means a person established to manage and implement the ABI Policy and serve as a resource for the MWSBEs and contracting personnel.

ABI Policy means the Asheville Business Inclusion Policy

Affiliate Two entities are affiliates of one another when: (a) one controls or has the power to control the other, (b) a third party controls or has the power to control both, or (c) there is a significant relationship between the two entities based on common ownership, management or employees; shared equipment, assets, or facilities; physical proximity; percentage of revenue derived from the other entity; or loans, leases, contributions, and contracts.

Annual Aspirational Goal means a non-mandatory aspirational percentage goal applied annually for overall M/WBE Prime and subcontract participation in City of Asheville contracts that is established each year for Construction, Professional Services, Procurement and General Services contract Industry Categories. This Annual Aspirational Goal is based upon the availability in the Relevant Market as determined by the 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 Asheville Business Inclusion Policy on an annual basis, and to gauge the need for future adjustments to Policy administration and implementation.

Asheville Business Inclusion Office means The City office charged with administering and enforcing the ABI policy, as determined by the City Manager.

Asheville Regional Area means the relevant geographic market area defined by the disparity study.

ARA means Asheville Regional Area

Bidder means a Business Enterprise that submits a Bid or Proposal for a Contract.

The City means the City of Asheville, North Carolina

Commercially Useful Function means a function performed by a Business Enterprise when it is responsible for supplying goods or executing a distinct element of the work of a contract and carrying out its responsibilities by actually performing, managing and supervising the work involved. The Purchasing Division will determine whether an MWSBE is performing a Commercially Useful Function, in their discretion, based on the amount of work subcontracted, industry practices, whether the amount the MWSBE firm is to be paid under the contract is commensurate with the work it is actually performing, and other relevant factors. Commercially Useful Function is measured for purposes of determining participation on a Contract, not for determination of Certification eligibility.

Contractor means a Business Enterprise that enters into a Contract, including, but not limited to, construction contractors, consultants, architects, engineers, surveyors, suppliers, and other providers of goods and services.

Day(s) means calendar days, unless it is specifically indicated to be Business Days.

Department Director means the Head and Director of a department. The Director is responsible for ensuring the City's procurement, contracting, and purchasing policies and goals are met. This responsibility cannot be designated to another party.

Emergency Situations means a situation that poses a serious and immediate threat to the health and safety of the people or their property within the City of Asheville as declared by the governing body.

Exempt Contracts are contracts for which no MWSBE goal is set pursuant to the exemptions listed in Part A section VI of this policy.

First-tier subcontractor means a contractor that provides goods or services directly to the Prime Contractor.

Goal Setting Committee means a committee, or series of committees, appointed by the City Manager or designee and chaired by the ABI Manager or designee that includes, at a minimum, the ABI Manager or designee, and / or the Director of Finance or designee, and / or the Director of Capital Projects or their designees; and, in the case of contract by contract goal setting, the Director or designee of the Originating Department (assuming the Originating Department is neither the Finance nor Capital Projects Department); all without duplication of designees. The Goal Setting Committee establishes contracting Goals for the City of Asheville (e.g., Annual Aspirational Goals and Contract-by-Contract Goals) based upon Industry Categories, vendor availability and project-specific characteristics. The Goal Setting Committee also makes determinations about which Policy Elements are to be applied to specific contracts based upon various criteria.

Good Faith Efforts means the requirements that Bidders and Proposers must meet to show that they actively and aggressively sought to achieve the applicable MBE or WBE Goal. Good Faith Efforts requirements may vary based on the type of Contract, and are defined in Part D of this Policy.

Good Faith Negotiation means the requirements that Bidders and Proposers must meet to show that they negotiated in good faith with MBE/WBEs. Good Faith Negotiation requirements may vary based on the type of Contract, and are defined in Part D of this Policy.

Joint Venture means an association of two (2) or more Business Enterprises to constitute a single Business Enterprise for which purpose they combine their property, capital, efforts, skills, and knowledge. Each participant in the Joint Venture must be responsible for a clearly defined portion of work, must perform a Commercially Useful Function, and must share in the ownership, control, management responsibilities, risks, and profits of the Joint Venture.

MBE means Minority Business Enterprise

MBE Goal means a goal established by the City for MBE utilization on a Contract. Calculated as a percentage, the MBE Goal represents the total dollars spent with MBEs as a portion of the total Bid or Proposal amount, including any contingency.

Minority means only those racial or ethnicity classifications, identified by a study conducted in accordance with this policy, that have been subjected to discrimination in the relevant marketplace and that have been adversely affected in their ability to obtain contracts with the City of Asheville.

Minority Business Enterprise means a Business Enterprise that: (a) is certified with the City as a minority-owned business; (b) is registered with the City as a vendor; (c) is at least fifty-one percent (51%) owned by one or more persons who are members of one of the groups set forth below, as defined in *N.C. G.S. 143-128.2(g)(2)(a-d)*; and (d) meets the criteria established by the ABI Manager for determining whether the Business has a Significant Business Presence in the Asheville Regional Area:

- *African American or Black*, that is, a person having origins in any of the black racial groups of Africa;

- *Hispanic*, that is, a person of Spanish or Portuguese culture having origins in Mexico, South or Central America, or other Caribbean Islands, regardless of race;
- *Asian*, that is, a person having origins in any other Far East, Southeast Asia and Asia, Indian subcontinent, or Pacific Islands
- *Native American or American Indian*, that is, a person having origins in any of the original Indian people of North America

Minority-Owned Business means a business owned by a minority person.

MSBE Goal depends on the context. If a contract has separate Subcontracting Goals for MBEs and SBEs, the term MSBE Goal is a shorthand way to refer collectively to both the MBE and SBE Goals. In some instances, the City may set one combined goal for MBEs and SBEs on a Contract, in which event the term MSBE Goal refers to that one, combined goal. In the latter instance, calculated as a percentage, the MSBE Goal represents the total dollars spent with MSBEs as a portion of the total Bid or Proposal amount, including any contingency.

MWBE is used to refer collectively to MBEs and WBEs. In some contexts it means all MBEs and WBEs, and in other contexts it means one or more categories of MBEs or WBEs.

MWBE Annual Goal means annual aspirational goals, which are non-mandatory goals set for City contracting.

MWBE Goal depends on the context. If a contract has separate Subcontracting Goals for MBEs and WBEs, the term MWBE Goal is a shorthand way to refer collectively to both the MBE and WBE Goals. In some instances, the City may set one combined goal for MBEs and WBEs on a Contract, in which event the term MWBE Goal refers to that one, combined goal. In the latter instance, calculated as a percentage, the MWBE Goal represents the total dollars spent with MWBEs as a portion of the total Bid or Proposal amount, including any contingency.

MWBE Registration means the process by which an MBE or WBE is registered with the City as outlined in Part H of this Policy.

MWSBE means collectively SBEs, MBEs, and WBEs. In some contexts it means all SBEs, MBEs, and WBEs; and in other contexts it means one or more categories of SBEs, MBEs, or WBEs.

MWSBE Goal depends on the context. If a contract has separate Subcontracting Goals for MBEs, WBEs, and SBEs, the term MWSBE Goal is a shorthand way to refer collectively to the MBE, WBE, and SBE Goals. In some instances, the City may set one combined goal for MBEs, WBEs, and SBEs on a Contract, in which event the term MWSBE Goal refers to that one, combined goal. In the latter instance, calculated as a percentage, the MWSBE Goal represents the total dollars spent with MWSBEs as a portion of the total Bid or Proposal amount, including any contingency.

Originating Department means the City department or authorized representative of the City which issues a solicitation, or for which a solicitation is issued on behalf of, for department or City needs.

Prime Contract means A Contract between the City and a Business Enterprise.

Prime Contractor means the vendor or contractor to whom a purchase order or contract is issued by the City of Asheville for purposes of providing goods or services for the City.

Policy Elements means any process(es) defined in this policy that may be required in order for a contractor to be awarded a city contract.

Qualified MWBE means an MWBE that has the financial ability, skill, experience; access to the necessary staff, facilities and equipment needed to complete a particular Contract or subcontract; and otherwise meets the criteria for being a “responsible bidder” within the meaning of the North Carolina bid statutes. The ABI Manager, with advice from the City Attorney, may develop methods and criteria for assessment of whether a particular MWBE is Qualified for a particular Contract or subcontract for the purposes of the ABI Policy. Nothing contained herein shall in any respect supersede or invalidate rules and regulations that a Department Director may promulgate with respect to pre-qualification of City Contractors. The City makes no representations as to the qualification of any MWBE or any other Business Enterprise.

Responsive Bidder means bid documents conform to bid specifications and meet all applicable legal and policy requirements.

Second-tier subcontractor means a contractor that is hired by a first-tier subcontractor within the same contract or purchase order to provide a portion of the good and / or services the first-tier subcontractor is obligated to provide under its subcontract to the Prime contractor.

Small Business Enterprise (SBE) means a business enterprise that is certified with the City, as defined under Part H of this Policy, as meeting all of the requirements for SBE certification.

Small Business Enterprise Goal means a goal established by the City for SBE utilization on a contract. Calculated as a percentage, the SBE Goal represents the total dollars spent with SBEs as a portion of the total Bid or proposal amount, including any contingency.

Significant Business Presence means that the business enterprise is headquartered in the Asheville Regional Area, from which at least 25% of its total full-time, part-time, and contract employees are regularly based; and from which a substantial role in the business enterprises performance of a Commercially Useful Function is conducted. A location utilized solely as a post office box, mail drop or message center, or any combination thereof, will not be considered a Significant Business Presence.

Subcontractor means a Business Enterprise that directly contracts with a Contractor, subcontractor, or sub-consultant to provide goods or services or perform work in connection with a Contract. Subcontractor also includes any person who has contracted to furnish labor or materials to or who has performed labor for a contractor or another subcontractor in connection with a public construction contract. A subcontractor may be either a first, second, or third-tier subcontractor. The term “Subcontractor” also includes “Sub-consultants” and “Suppliers”.

Third-tier subcontractor means a contractor that is hired by the second-tier subcontractor within the same contract or purchase order to provide a portion of the goods and / or services it is obligated to provide under its subcontract with the first-tier subcontractor.

Vendor means a supplier of goods and services. A vendor sells products or services to another company or individual.

Vendor availability database means the database that tracks all vendors registered with the City of Asheville that participate in City contracting.

WBE means Woman Business Enterprise

WBE Goal means a goal established by the City for WBE utilization on a Contract. Calculated as a percentage, the WBE Goal represents the total dollars spent with WBEs as a portion of the total Bid or Proposal amount, including any contingency.

Woman Business Enterprise means a Business Enterprise that: (a) is certified by the State of North Carolina as a historically underutilized business within the meaning of *N.C. Gen. Stat. 143-128.4*; (b) is registered with the City as a woman-owned business; (c) is at least fifty-one percent (51%) owned by one or more persons who are female; and (d) meets the criteria established by the ABI Manager for determining whether the Business is within the City's relevant market (the Asheville Regional Area).

Woman-Owned Business means non-Hispanic white woman-owned businesses

Women means persons who are female.

WSBE means collectively Women and Small Business Enterprises. In some contexts it means all SBEs and WBEs. In other contexts it means one or more categories of SBEs or WBEs.

WSBE Goal depends on the context. If a contract has separate Subcontracting Goals for WBEs and SBEs, the term WSBE Goal is a shorthand way to refer collectively to the WBE and SBE Goals. In some instances, the City may set one combined goal for WBEs and SBEs on a Contract, in which event the term WSBE Goal refers to that one, combined goal. In the latter instance, calculated as a percentage, the WSBE Goal represents the total dollars spent with WSBEs as a portion of the total Bid or Proposal amount, including any contingency.

PART C: POLICY ADMINISTRATION

I. CITY PERSONNEL ROLES AND RESPONSIBILITIES

In addition to any responsibilities specifically identified in this policy, City personnel shall have the following roles and responsibilities in administering and enforcing the ABI Policy:

- **The Asheville City Manager** is primarily responsible for implementing the ABI Policy. The City Manager shall:
 - Determine the organizational structure and appropriate staffing for the ABI Policy Implementation, throughout City departments to include the Asheville Business Inclusion Office;
 - Determine the organizational structure and appropriate staffing for the ABI Policy Implementation, throughout City departments to include the Asheville Business Inclusion Office;
 - Establish lines of authority and reporting for successful policy implementation;
 - Recommend funding for staffing, operations, training, and outreach to further ABI policy administration and compliance;
 - Assure the integration of the ABI Policy components into the practices and processes of all City Departments;
 - Request revisions to the ABI Policy as needed to facilitate administration and fulfill Policy objectives;
 - Establish standards for good faith efforts for City staff with respect to MWBE and SBE Goals;
 - Evaluate all Department Directors' efforts in integrating the ABI Policy into their daily practices and processes; and
 - Appoint the Goal Setting Committee (here after "GSC", see reference below).
- **The ABI Manager** is responsible for:
 - Daily administration of all components of the ABI Policy administration and supervision of the ABI support staff;
 - Developing such rules and guidelines as may be necessary to effectuate the purposes of the ABI Policy;
 - Advising the City Manager on ABI Policy administration and implementation issues;
 - Consulting with Department Directors and their staffs on ABI Policy implementation;
 - Monitoring and reporting City-wide minority- and women-owned business enterprise participation as required by North Carolina law pursuant to N.C. Gen. Stat. §143-128.3;
 - Being the ombudsman for MBE, SBE, and WBE business concerns associated with the ABI Policy administration and implementation;
 - Making revisions to the ABI Policy administration procedures as needed to facilitate implementation and fulfill Policy objectives;
 - Chairing, or designating a representative for, the Goal Setting Committee; and
 - Managing the vendor availability database of MWBE and SBE firms.
- **Department Directors** are responsible for:
 - Ensuring ABI Policy compliance within their respective Departments;

- Developing and implementing strategies to achieve the annual and project participation goals established by through ABI Policy;
 - Integrating the ABI Policy into their departmental practices and processes;
 - Monitoring and reporting their Department’s minority and women business enterprise participation as required by the State of North Carolina pursuant to N.C. Gen. Stat. §143-128.3;
 - Reporting MBE, WBE, and / or SBE utilization, as required by the ABI Policy and Procedures, to the ABI Manager;
 - Promoting the ABI Policy implementation and MWSBE participation in the contracting and procurement activities of their Department;
 - Participating in the Goal Setting Committee as necessary and defined by this Policy; and
 - Holding key contracting staff accountable for adhering to the ABI Policy.
- **Key City of Asheville Contracting Staff** are responsible for:
 - Complying and assisting with implementation of the ABI Policy as adopted by the City of Asheville;
 - Assisting with the maintenance and development of the MWBE and SBE vendor availability database as requested by the ABI Manager;
 - Consulting City Departments to ensure compliance with policy; and
 - Participating on the goal-setting committee as necessary and defined by this Policy.
 - **The Asheville City Attorney’s Office** is responsible for:
 - Reviewing the ABI Policy, rules and standards to ensure their compliance with federal, state and local laws;
 - Reviewing recommendations to reject a Bid for non-compliance with ABI Policy requirements and provisions; and
 - Advising the Asheville City Council, City Manager, Department Directors, and the ABI Manager on legal issues related to the ABI Policy administration and implementation.

II. GOAL SETTING COMMITTEE

A. Roles and Responsibilities

The Goal Setting Committee (hereinafter “GSC”) is to be appointed by the City Manager and chaired by the ABI Manager or their designee. The GSC, appointed for the City Annual Aspirational Goals, shall consist of members with first-hand knowledge of the applicable service or industry, to include the ABI Manager or their designee, and / or the Director of Finance or their designee, and / or the Director of Capital Projects or their designee. For contract-by-contract goal setting, the GSC will further include the Director or designee of the Originating Department (assuming the Originating Department is neither the Finance Department nor the Capital Projects Department), all without duplication of designees.

The Goal Setting Committee establishes the City’s contracting goals (e.g., Annual Aspirational Goals and contract-by-contract subcontracting goals) based upon Industry Categories and vendor availability for the Annual Aspirational Goals. The GSC further considers project-specific characteristics of the contract under consideration for contract-by-contract subcontracting goals. The ABI Goal Setting Committee also makes determinations about which policy elements are to be applied to specific contracts based upon various criteria. An MBE and / or WBE shall be counted only once in establishing goals.

At a minimum, the Goal Setting Committee shall:

- Meet as often as it deems necessary to accomplish its duties as outlined in this Policy;
- Review in advance proposed contract bid specifications to ensure that they are not unnecessarily restrictive and do not adversely affect the ability of SBE and MWBE firms to competitively bid without adequate business justification;
- Consider data about SBE and MWBE availability to perform the substantive work requirements of a Contract under consideration;
- Provide advice to the ABI Manager concerning SBE and MWBE goal setting on those projects for which the ABI Manager has requested their assistance; and
- Assist in monitoring and provide support for the implementation and administration of the ABI Policy

The ABI Manager may use such advice and assistance from the Goal Setting Committee to the extent that the ABI Manager deems appropriate and consistent with the purposes of the ABI Policy.

B. Annual Aspirational Goals

For compliance with ABI Policy, the City shall review its budget and establish a combined aspirational (not mandatory) goal every year, in the form of a percentage, for the overall participation in contracts by MBEs, WBEs, and SBEs, collectively referred to as “MWSBE Goals”. The aspirational goal for MBEs, WBEs, and SBEs shall be established consistent with federal methodology and shall not be applied rigidly on specific contracts or projects.

- **Annual Aspirational Goals for SBEs and MWBEs:** At the beginning of each fiscal year, the Goal Setting Committee will provide the ABI Manager with recommended goals, and the ABI Manager will recommend to the City Manager annual Citywide goals for MWSBEs for all contracts, including Prime Contracts and Subcontracts; the Goal Setting Committee shall further establish segmented goals within the Annual Aspirational Goals based on the MBE or WBE, collectively “MWBE,” availability by industry in accordance with the Disparity Study findings, along with such data to be collected by the City through the electronic vendor registration and contract monitoring systems on the utilization of MWBE firms. The annual SBE and MWBE goals may be combined or separate, and are collectively referred to as the “MWSBE Annual Goals.” The City Manager may further break down the Citywide MWSBE Annual Goals by Department. The ABI Manager may modify the categories for reporting purposes based on business trends and available data. In determining Contracting Goals and measuring goal achievement, the ABI Manager shall exclude Exempt Contracts (defined in Part A of this Policy), other than exemptions based on piggybacking, buying off the North Carolina state contract, or buying from a competitive bidding group.
 - If a Department consistently fails to meet its MWSBE Annual Goals, then the City Manager may require the Department to confer with the Asheville Business Inclusion Office regarding MWSBE opportunities on Prime Contracts and Subcontracts over a certain dollar threshold to be established by the ABI Manager. The MWSBE Annual Goals for Construction and Procurement Prime Contracts shall apply to Informal Contracts only (because Formal Contracts in these categories are subject to formal bid requirements under the North Carolina bid statute, thus limiting the City’s ability to impact MWSBE utilization).

- Notwithstanding the foregoing, the MBE and WBE component of the MWSBE Annual Goals shall be set only for those categories of firms that have experienced documented discrimination in the Asheville Regional Area for the particular categories of Prime Contracts and Subcontracts. For instance, the 2018 Disparity Study reported disparities on Prime Contracts for Asian American, Black American, and Native American firms. Thus, the MWBE Annual Goal for Prime Contracts will be based on the availability of Asian American, Black American, and Native American firms in the relevant market, and only MWBEs in those designated categories would count toward the MWBE Annual Goal.
- **Goal Setting Methodology:** In setting SBE and MWBE aspirational goals, the Goal Setting Committee shall take into account the availability of SBEs and MWBEs in the relevant market that are registered to do business with the City, as defined in Part H of this Policy. In addition, the ABI Manager shall conduct such inquiries and studies; and utilize information and assistance from such persons, contractors, entities or organizations; including, but not limited to, the Department Directors, as they deem necessary to establish recommended goals.
- **Data Tracking for MWSBEs:** The ABI Manager will issue reports on a bi-annual basis regarding the utilization of MWSBEs in various categories of Prime Contracts. MWSBE Goals will be adjusted annually based on documented disparity and achieved utilization.
- **Accountability:** The City Manager shall ensure that Department Directors contribute appropriately to the achievement of Citywide SBE and MWBE goals. The City Manager will further ensure that Department Directors work with the ABI Manager in developing appropriate measures to remediate ongoing marketplace discrimination against MBEs or WBEs that has impacted their ability to participate in City Contracts.

C. Contract-by-Contract Subcontracting Goal Setting

All contract-by-contract subcontracting goals will be set by the Goal Setting Committee pursuant to the ABI Policy. It is intended that such goal setting will be based upon careful analysis of the availability of Commercially Useful subcontracting opportunities within a given contract and the relative availability of SBE and MWBE firms to perform required tasks on such subcontract opportunities. Such contract-by-contract goal setting shall be based upon reasonably reliable Respondent and Subcontractor availability data. The SBE and MWBE goals may be combined or separate, but shall be set only for those categories of firms that have experienced documented discrimination in Asheville Regional Area for the particular category of contracting. Compliance with contract-specific subcontracting goals shall also require compliance with Good Faith Efforts and waiver procedures as established below in Part D of this policy.

- **Goal Setting Methodology.** The ABI Manager and the Goal Setting Committee shall follow the methodology for setting SBE and MWBE Goals, defined by the City, on City Contracts, through rules and guidelines for the implementation of the ABI Policy. Such methodology shall take into account contract size, reasonably known availability of subcontracting opportunities that SBEs and MWBEs can perform on each Contract, whether MWBE Goals for the project are legally warranted to remedy the effects of past discrimination, and other factors as the ABI Manager deems appropriate. MWBE Goals shall be set only for those categories of firms that have experienced discrimination in the Asheville Regional Area and have been adversely impacted in their ability to obtain Contracts with the City, as documented by the City.

- **Construction Contracts of \$300,000 or More.** The City shall establish one or more subcontracting goals on contracts unless the contract is determined to be an Exempt Contract. MWBE goals shall only be set for those categories of firms that have experienced discrimination in the Asheville Regional Area and have been adversely impacted in their ability to obtain construction contracts with the City, as documented by the City's current disparity study.
- **Professional Service Contracts \$50,000 or More.** The City shall authorize the Goal Setting Committee to set SBE goals on professional service contracts of \$50,000 or more at the discretion of the ABI Manager or the City Manager or designee, if it is determined to be in the best interest of the City. The ABI Manager may waive the goal requirement for a service contract or negotiate a committed SBE goal with the successful Proposer during the contract negotiation process. MBE and WBE goals may only be set for those contracts in categories that have documented discrimination with the City in Service Contracts as identified in the City's current disparity study.
- **State and Federally Funded Contracts.** Notwithstanding anything contained herein to the contrary, the City will not set Subcontracting Goals on any state or federally funded Contract that is subject to state or federal requirements for minority and women business utilization, including without limitation Contracts subject to the U.S. Department of Transportation's Disadvantaged Business Enterprise Program.

III. TRAINING AND WORKSHOPS

The intent of staff training is to create a culture of inclusion with respect to administration of City contracts and expenditures. The Asheville Business Inclusion Manager, with the assistance of the appropriate City departments, shall conduct seminars, workshops, and roundtable discussions to acquaint small businesses with City contracting activities and opportunities. Topics shall include, but not be limited to, the process used by the City in preparing bids and quotes, and information on accessing small business assistance programs. Additional classes may be provided with the assistance of the appropriate department on a project-by-project basis through structured seminars, classes, and individual assistance provided to minority and women businesses requesting this type of support.

Such workshops shall include a session on cultural diversity and customer service. The City Manager shall require appropriate Department Directors to attend such workshops as well, which will benefit from leadership by elected officials and management.

The Asheville Business Inclusion Manager shall conduct information sessions on the Asheville Business Inclusion policy and administration for City Department Directors and key contracting staff. Such sessions shall include, but not be limited to, Internal Compliance, N.C. Gen. Stat. 143-128.2 (Minority business participation goals), N.C. Gen. Stat. 143-128.3 (Minority business participation administration) and 143-131 (b) (Minority business participation with informal contracting), and City Resolutions.

IV. OTHER MEASURES FOR POLICY IMPLEMENTATION

To show its commitment to the Asheville Business Inclusion Policy, the City **may**, where consistent with federal, state and local laws:

- Evaluate bonding for contracts less than \$300,000 in value;

- Provide for alternative bids by considering dividing formal (large) projects/purchases into smaller contracts so long as compliance with statutory thresholds remains intact;
- Provide department flow charts with explanations of the major steps in the contracting and procurement process;
- Require the City Departments to provide project information on internet websites;
- Request that City Purchasing provide listings of commonly purchased items;
- Provide and make networking opportunities available to Prime contractors with SBE and MWBE Subcontractors;
- Develop policy framework for the creation of a small business shelter market.

The City may, where consistent with federal, state, and local laws:

- Develop internal procedures to support the Policy;
- Ascertain that the Community Reinvestment Act (CRA) ratings of banks are satisfactory prior to conducting business with them, and further make an assessment of their lending to minority-owned and women-owned businesses;
- If feasible, establish a community based loan pool in conjunction with local banking institutions by funding its administration;
- Allocate funding to create professional coworking spaces and business incubators to provide support for SBE and MWBE growth;
- Create procedures to provide mobilization payments for registered and certified MWBEs and SBEs;
- Allocate funding for subsequent disparity studies, conducted every 5 years, to ensure that the City is adequately addressing racial and gender disparities within City contracting; and
- Share any letters of complaint or recommendation regarding certified MWBEs and SBEs with the ABI Manager.

PART D: GOOD FAITH EFFORTS AND POLICY WAIVERS

I. GOOD FAITH EFFORTS: SBE AND MWBE GOALS OVER ZERO

Adequate good faith efforts mean that the Bidder took all necessary and reasonable steps to achieve the goal which, by their scope, intensity, and appropriateness, could reasonably be expected to obtain sufficient SBE and MWBE participation. Adequate good faith efforts also mean that the Bidder actively and aggressively sought SBE and MWBE participation. Mere *pro forma* efforts are not considered good faith efforts. If adequate good faith efforts have not been documented, the City reserves the right to deem the Bidder unresponsive.

A. Good Faith Efforts

For each subcontracting goal that a Bidder has not fully met for the established Contract, it must document that it has made good faith efforts for each unmet goal. The City will consider the quality, quantity, and intensity of the different kinds of efforts a Bidder has made.

Listed below are examples of the types of actions a Bidder will take in making a good faith effort to meet the goals, which are not intended to be exclusive or exhaustive, nor are they intended to be a mandatory checklist.

- **Contacting SBEs and MWBEs.** Contractor must contact SBEs and MWBEs in a reasonable manner to reach each subcontracting goal on a specific contract. Factors include, but are not limited to:
 - The number of SBEs and MWBEs contacted;
 - Contacting SBEs and MWBEs that reasonably could have been expected to submit a quote and that were known to the contractor or available on the City's maintained list;
 - Soliciting through all reasonable and available means (e.g. attendance at pre-bid meetings or in pre-bid conferences, advertising, written notices, use of verifiable electronic means through the use of the City's list of available MWBE Firms) the interest of certified MWBEs who have the capability to perform the work of the contract;
 - The Bidder solicits this interest at least ten (10) days prior to Bid Opening to allow the SBEs and MWBEs to respond to the solicitation;
 - Solicitation provides the opportunity to SBEs and MWBEs within the Asheville Regional Area, where the project is located;
 - Whether contacts were made and were documented in a verifiable way;
 - Whether the Bidder responded promptly and adequately to inquiries from SBEs and MWBEs; and
 - Whether the Bidder made follow-up contact with SBEs and MWBEs that did not respond to the Bidder's initial contact
- **Working with ABI Office, SBE or MWBE Assistance Programs.** Contractor documents that it worked the Asheville Business Inclusion Office, available minority community organizations, minority contractors' group, local minority business assistance offices and / or other local organizations that provide assistance in the recruitment and placement of minorities and women to solicit bids for the Contract for which the Bid was sought.
- **Breaking down work.** Selecting portions of the work to be performed by SBEs and MWBEs in order to increase the likelihood that the SBE and MWBE goals will be achieved.

- Where appropriate, breaking out contract work items into economically feasible units to facilitate SBE and MWBE participation, even when the Prime Contractor might otherwise prefer to perform these work items with its own forces.
- Negotiate with subcontractors to assume part of the responsibility to meet the contract MWBE goals when the work to be subcontracted includes potential for SBE and MWBE participation (second- and third-tier subcontractors).
- **Making Plans Available.** Providing prospective SBEs and MWBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner or within 10 days before the bid proposals are due to assist them in responding to a solicitation.
- **Negotiating in Good Faith.** Negotiating in good faith with interested SBEs and MWBEs and not rejecting SBEs and MWBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The bidder's standing within its industry, membership in specific groups, organizations, or associates and political or social affiliations (for example, union vs. non-union employee status) are not legitimate causes for the rejection or non-solicitation of bids in the Bidder's efforts to meet the project goal. The Bidder shall document in writing the reasons for any rejection of an SBE or MWBE based on lack of qualifications.
- **Bonding or Insurance Assistance on Construction Contracts.** Providing assistance to interested SBEs and MWBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or Bidder or providing alternatives to bonding or insurance for subcontractors;
- **Financial Assistance.** Providing assistance to otherwise qualified SBEs and MWBEs in need of obtaining necessary equipment, supplies, materials, loan capital, lines of credit, joint pay agreements to secure loans, supplies or letters of credit (including waiving credit that is ordinarily required), or related assistance or services. No credit will be given to an Affiliate of a Bidder.
- **Joint Ventures.** Negotiating joint venture and partnership arrangements with SBE and MWBEs in order to increase opportunities for SBE and MWBE participation on public construction and repair contracts. No credit will be given to an Affiliate of the Bidder;
- **Quick Pay Commitment.** Providing quick pay agreements and policies to enable SBE and MWBE contractors and suppliers to meet cash-flow demands. Bidder will not receive credit if the Quick Pay Commitment has a statement indicating that the Bidder will consider entering into a Quick Pay Commitment OR the Bidder verbally communicated the Quick Pay Commitment to the subcontractor;

In addition, the City may take into account (a) whether the Bidder's documentation reflects a clear and realistic plan for achieving the MBE and WBE goals; (b) the Bidder's past performance in meeting the SBE and MWBE goals; (c) The performance of other bidders in meeting the SBE and MWBE goals. For example, when the apparent successful bidder fails to meet the goals, but others meet it, staff may reasonably raise the question of whether, with additional reasonable efforts, the apparent successful bidder could have met the goals.

If the apparent successful bidder fails to meet the SBE and MWBE goals, but meets or exceeds the average MBE and WBE participation obtained by other bidders, the City may view this, in conjunction with other factors, as evidence of the apparent successful bidder having made a good faith effort.

B. Negotiating in Good Faith with Interested SBEs and MWBEs

The Bidder/Participant must comply with the Good Faith Negotiation. All Bidders/Participants that fail to meet a Subcontracting Goal must negotiate in good faith with each certified SBE and MWBE that

responds to the Bidder's/Participant's solicitation or contacts the Bidder/Participant of its own accord with respect to the unmet Goal(s). If the Bidder/Participant does not receive a response from the solicited Subcontractors, the Bidder/Participant must notify the ABI Manager that no response was received.

- It is the Bidder's responsibility to make a portion of subcontracted work available to SBE and MWBE subcontractors and suppliers to bid on and to select those portions of the work or material needs consistent with the available SBE and MWBE subcontractors and suppliers, so as to facilitate SBE and MWBE participation. Evidence of such negotiation includes the names, addresses, and telephone numbers of MBEs/WBEs/SBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional agreements could not be reached for SBEs and MWBEs to perform the work.
- A Bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including SBE and MWBE subcontractors, and would take a firm's price and capabilities as well as contract goals into consideration. However, the fact that there may be some additional costs involved in finding and using MWBEs is not in itself sufficient reason for a Bidder's failure to meet the contract MBE, WBE, or SBE goals, as long as such costs are reasonable. Also, the ability or desire of a Prime Contractor to perform the work of a contract within its own organization does not relieve the Bidder of the responsibility to make good faith efforts. Bidding contractors are not, however, required to accept higher quotes from MWSBEs if the price difference is excessive or unreasonable.

II. POLICY WAIVERS

Prior to submission of a prospective solicitation to the Goal Setting Committee, and prior to the public release of solicitations, a City Originating Department may request the City Manager or designee to waive or modify the application of Policy Element requirements for MWBE or SBE participation by submitting its reasons in writing. The Department must fully and accurately document the necessity for the waiver. The Asheville Business Inclusion Office shall evaluate the request to determine that the requirements for a waiver have been satisfied and make a recommendation to the City Manager.

1. The City Manager or designee may grant such a waiver or modification upon determination that:

- The extraordinary and necessary requirements of the contract render application of the Policy Elements infeasible or impractical;
- The nature of the goods or services being procured are excluded from the scope of this Policy; or
- Sufficient qualified SBEs and MWBEs providing the goods or services required by the contract are unavailable in the Asheville Regional Area of the project despite every reasonable attempt to locate them.

Otherwise, such solicitations shall be forwarded to the Goal Setting Committee for review and possible application of Policy Elements. Any further requests from a City Originating Department for modification of set goals or other Policy Elements as established by the ABI Policy or Goal Setting Committee shall be presented to the City Manager or designee, whose decisions on such requests shall be final.

2. The ABI Manager may waive the application of Policy Elements to enhance SBE and MWBE utilization for a specific contract under the following circumstances:

- The non-compliance is minor in nature;

- Waiving the non-compliance would not put Bidders that complied with the ABI Policy at a competitive disadvantage; and
- The non-compliance does not reflect a lack of diligence on the Bidder's part in complying with the Policy. For example, a repeated violation of the same Policy provisions on two or more bids might be deemed a lack of diligence in complying with the ABI Policy.
- Whenever the needed goods or services are available only from a sole source and the prospective contractor is not currently disqualified from doing business with the City, or the procurement is necessary to preserve or protect the health and safety of the City's residents; and
- The Originating Department certifies to the ABI Manager and City Manager or designee:
 - That an emergency exists which requires goods or supplies to be provided with such immediacy that it is unable to comply with the requirements of this Policy; and
 - That the prospective contractor is an MWSBE or, if not, that the prospective contractor will make a good faith effort to utilize MWSBEs.

Nothing in this Policy shall require the ABI Manager to grant a waiver in any situation, or give rise to a suggestion that the ABI Manager might be inclined to grant a waiver in a certain situation. Likewise, the City shall not be bound by any oral representation made by any City employee, official, agent or representative that a waiver will be granted for a particular instance or for a category of instances. Any waivers authorized for this policy shall be issued in writing.

PART E: BUILDING, CONSTRUCTION AND REPAIR CONTRACTS

I. SCOPE

The City of Asheville shall provide equal opportunity for SBEs and MWBEs to compete for construction projects. Those actions shall include those matters hereinafter set out. This Policy shall be referenced in the specifications and guidelines for any such project, and non-compliance by any Bidder shall be grounds for declaring the Bid non-responsive. This policy shall be followed in conjunction with the City's Procurement, Purchasing, and Contracting Policy along with all applicable federal, state, and local laws.

II. GENERAL REQUIREMENTS

A. Subcontracting Goal Setting

All Subcontracting Goals will be set by the Goal Setting Committee, in conformity with the ABI Policy, and provided to the Bidder/Participant with the City Solicitation documents. **When the City sets a Subcontracting Goal for Building, Construction, Repair Contracts collectively referred to as "Construction Contracts", each Bidder must either: (a) meet each Subcontracting Goal established; or (b) comply with the Good Faith Negotiation and Good Faith Efforts requirements set forth in Part D for each unmet Subcontracting Goal.** For example, if a Contract has a WBE Goal and an MBE Goal, and if the Contractor meets the MBE Goal but not the WBE Goal, the Contractor must demonstrate that it met the Good Faith Negotiation and Good Faith Efforts requirements with respect to the WBE Goal.

The City Solicitation Documents will contain certain forms that Bidders must complete to document having met these requirements. Failure to comply constitutes grounds for deeming the Bid unresponsive. This shall only apply to projects with SBE and MWBE goals above zero.

B. Responsibilities

1. City Responsibilities

- The ABI Manager shall provide a list of registered qualified SBEs and MWBEs included in the Asheville Regional Area for the particular bidding industry, using information obtained from the City's vendor availability database. The list shall describe the capabilities of registered SBEs, MBEs, and WBEs depending upon the scope of the project involved.
- Simultaneously with each bid posting of Construction Contracts for which an SBE or MWBE Goal has been set, the City will send a "Project Notice" to all SBEs and MWBEs in the applicable categories that have registered with the City under Part H as performing the type of work being bid. The Project Notice will include:
 - A description of the work for which the Bid is being solicited;
 - The date, time and location where Bids are to be submitted;
 - The name of the individual at the City who will be available to answer questions about the Contract;
 - Where the City Bid documents may be reviewed; and
 - Any special requirements that may exist.
- For each Construction Contract of \$300,000 or more, the City will also:

- Make available (by email, posting on the City’s website or other means) a plan-holders list of Bidders that have picked up or requested the City Solicitation Documents for the project;
- Make available (by email, posting on the City’s website or other means) a list of Bidders that have attended the scheduled pre-bid conference, if a pre-bid conference has been held; and
- Utilize other media, as appropriate, likely to inform potential MWBEs, as applicable, of the Bids being sought.
- Formal Bidding
 - For formal construction contracts put out for bids that include a mandatory pre-bid meeting or conference, the department shall orient Contractors and Subcontractors on the steps for SBE and MWBE participation and good faith efforts as specified in this Policy as well as bid procedures and regulations.
 - A period of at least ten (10) days shall lapse between the date on which the advertisement appears and the date of the opening of formal bids (for Construction or Repair Contracts \$300,000 or more and purchase of apparatus, supplies, materials, or equipment Contracts \$90,000 or more) in accordance with *N.C. Gen. Stat. 143-128.2(e)(3)* and *143-129(b)*. Exceptions may be made in cases of special emergency involving the health and safety of the people or their property.

2. Bidder Responsibilities

- Self-performance
 - **Self-performance on Construction Contract with SBE and/or MWBE Goal.** Bidders that intend to perform 100% of the work on a Construction Contract with an established SBE, MBE and / or WBE Goal may submit an affidavit stating that the Bidder does not customarily subcontract elements of this type of project; and normally performs, has the capability to perform, and will perform all elements of work on this Contract with its own current workforces. The affidavit shall be in a form provided by the City as part of the City Solicitation Documents, and shall affirm (1) it is a normal business practice of the Contractor to perform all elements of the Contract with its own workforce without the use of subcontractors and (2) the Contractor in fact has demonstrated its capabilities to perform all elements of the Contract with its own workforce without the use of subcontracts. In such an event, the Bidder shall not be required to comply with Good Faith Efforts in Part D or III of this section.
 - If the Bidder is not licensed to perform each and every type of work included in the Contract, or if the City has cause to believe based on past practice or other grounds that the Bidder will not be performing all work under the Contract with its own current workforce, then the City may reject the Bidder’s Bid for non-compliance with the ABI Policy.
- For any Contract put out for bids, the Contractor shall:
 - Notify those registered SBEs, MBEs or WBEs appearing on the list provided by the ABI Manager, for the portion of the project which will be subcontracted by the single Prime or separate specification Contractor and solicit bids from those SBEs, MBEs or WBEs. Additional provisions exist with minority participation goals and outreach as specified in *N.C. Gen. Stat. 143-128.2* for construction.
 - Submit a listing of the SBE, MBE or WBE participation that will be utilized on the appropriate form (depending on project, ABI Manager will provide the forms for

completion) with the Bid in order for the Bid to be considered responsive. Blank forms will not be deemed to represent zero participation.

- Bidders must indicate the total dollar value of MWSBE participation for the contract at the time of the Bid Opening. Blank forms will not be deemed to represent zero participation.
- Bidders must submit all additional verification of the good faith efforts made to increase SBE, MBE and / or WBE participation with their Bid, for any Bid with an MWSBE goal.
- The successful Bidder shall:
 - Maintain subcontractor payment information, which includes date(s) and amount(s) of payment(s) and submit the same at the time of each pay application to the City.
 - Submit to the ABI Manager any SBE or MWBE subcontractor changes during projects.

C. Meeting Subcontracting Goals

- **Counting MWSBEs.** The City will give Bidders credit toward meeting the Subcontracting Goals at bid only for those SBEs and MWBEs that:
 - Are certified with the City as SBEs and/or MWBEs as of the Proposal due date; and
 - With respect to MWBEs, are listed in the City's vendor availability database as being at least 51% owned by individuals in one of the MWBE categories included in the MBE or WBE Goal set for that project (for instance, if a MBE Goal has been set for African American, Native American and Hispanic MBEs, subcontracts awarded to Asian MBEs will not count toward the MBE Goal); and
 - Will actually perform a Commercially Useful Function as defined in Part B (which means, among other things, an MWBE acting solely as a conduit will not be counted)
- **Decertified MWSBEs.** The City will not give credit toward Subcontracting Goals for subcontracting to SBE or MWBEs that are found to be Affiliates of the Bidder prior to Bid Opening. If an MWBE or SBE is decertified between Bid Opening and Contract award, the City will not allow credit toward the Subcontracting Goal for the amounts committed to that MWBE or SBE, but will allow the Bidder to replace the decertified MWBE or SBE with a certified MWBE, unless the certification was based on false or fraudulent information of which the Bidder had or should have had knowledge. However, the City may refuse to allow the substitution and reject the Bid if the MWBE or SBE is decertified for being an Affiliate, or is found to be an Affiliate of the Bidder (even if not decertified), if the City determines in its sole discretion that the Bidder knew or should have known prior to Bid Opening that there was a significant risk that the City would consider the MWBE or SBE an Affiliate. Bidders shall be deemed to have knowledge of all ABI Policy provisions, including those relating to Affiliates.
- **MWBE Prime.** A Prime MWBE may count the work it intends to perform, with its own current workforces, towards the MWBE Subcontracting Goals to the extent the requirements set forth in this Section are satisfied.
- **Using MWSBEs the City Did Not List in City Solicitation Documents.** Bidders shall receive credit for using MWSBEs that the City did not list in the City Solicitation Documents, as long as the requirements above are met.
- **Calculating SBE or MWBE Participation Based on Type.** The City shall count SBE and MWBE participation on a Construction Contract as set forth below:
 - **Subcontractor:** If the Bidder utilizes an SBE or MWBE as a Subcontractor to perform services, the City shall count 100% of the value of the Commercially Useful Function the SBE or MWBE performs toward satisfaction of the Subcontracting Goals, except to the extent the SBE or MWBE performs services as a Regular Dealer, Hauler, Broker or

- Packager (in which event the amount counted will be determined by the applicable Section below).
- **Second and Third Tier Subcontractor:** If the Bidder or subcontractor for a Bidder utilizes an SBE or MWBE as a second or third tier Subcontractor to perform services, the City shall count 100% of the value of the Commercially Useful Function the SBE or MWBE performs toward satisfaction of the Subcontracting Goals, except to the extent the SBE or MWBE performs services as a Regular Dealer, Hauler, Broker or Packager (in which event the amount counted will be determined by the applicable Section below).
 - **Manufacturer:** The City shall count 100% of all expenditures for materials, supplies and equipment obtained from an SBE or MWBE Manufacturer toward the Subcontracting Goals.
 - **Regular Dealer:** The City shall count 60% of all expenditures for materials, supplies and equipment obtained from an SBE or MWBE Regular Dealer toward the Subcontracting Goals.
 - **Hauler, Broker or Packager:** The City shall count fees or commissions charged by an SBE or MWBE Hauler, Broker or Packager for providing a Commercially Useful Function toward the Subcontracting Goals, provided that the Contract Manager determines that the fee or commission is reasonable and not excessive as compared with fees customarily charged for similar services. A Hauler may or may not take title to the materials or supplies it delivers. Either way, the cost of such materials and supplies shall not count as part of the Hauler's fees or commissions for purposes of this Section.

For construction projects not requiring formal bids in accordance with state law, the City shall, in addition to its normal procedures, include on its bid list for direct solicitation the SBEs and MWBEs listed for the type of construction needed. The non-availability or limited availability of certified businesses in a specific type of construction does not limit the maximum number of non SBEs or MWBEs which may be solicited. Contracts for building construction are further governed by State Law and may be precluded from complying with requirements of this Policy.

The City will meet its payment obligations in accordance with established City policy and State Law. Nevertheless, payments for construction contracts will be made no later than thirty (30) days after receipt of an approved invoice, provided the construction work has been accepted by the City.

III. GOOD FAITH EFFORTS AND NEGOTIATIONS

If a Bidder has not fully met each Subcontracting Goal established for a Contract, then it must document that it has made Good Faith Efforts with respect to each unmet Goal. The City's process for establishing subcontracting goals is set forth in Part C of this Policy.

Adequate good faith efforts means that the Bidder took all necessary and reasonable steps to achieve the goal which, by their scope, intensity, and appropriateness, could reasonably be expected to obtain sufficient SBE and MWBE participation. Adequate good faith efforts also means that the Bidder actively and aggressively sought SBE and MWBE participation. Mere *pro forma* efforts are not considered good faith efforts. If adequate good faith efforts have not been documented, the City reserves the right to deem the Bidder non-responsive.

A. SBE and MWBE Solicitation

Using the directory of certified SBE and MWBE firms maintained by the ABI Manager, the Bidder shall be required to solicit subcontractor bids and material quotes from individual certified SBEs and MWBEs having their principal place of business or a Significant Business Presence in the Asheville Regional Area. The Bidder shall solicit bids and quotes from SBEs and MWBEs to perform subcontracts for a Commercially Useful Function on behalf of the Bidder. Such subcontractor solicitations shall occur in advance of Bid submittal, and shall, at a minimum, furnish the following information:

- Bidder's name, address, telephone number, and email address;
- Project location name, bid solicitation number, and description;
- Description of areas of work to be subcontracted or materials to be supplied;
- Location and availability of project plans, specifications, or blueprints;
- The identity and contact information of the Bidder's contracting representative;
- Location, date, and time when subcontractor bids or quotes must be received by Bidder; and
- The proposed project timeline.

The City may only give Bidders credit toward the Subcontracting Goals for MWSBE participation that is:

- Listed on the Utilization and Good Faith Efforts Affidavit, and the applicable form from the Asheville Business Inclusion Office submitted with the Bid; and
 - **Utilization and Good Faith Efforts Affidavit.** The City Solicitation Documents for each Construction Contract will include a form affidavit that: (a) captures information regarding the MWSBEs and other subcontractors and suppliers that the Bidder intends to use on the Contract and (b) lists the good faith efforts undertaken by the Bidder to meet the Subcontracting Goals (the "Utilization and Good Faith Efforts Affidavit"). Failure to properly complete and submit the Utilization and Good Faith Efforts affidavit with the Bid constitutes grounds for rejection of the Bid.

B. Good Faith Efforts Categories

For each Subcontracting Goal that a Bidder has not fully met for the established contract, it must document that it has made good faith efforts for each unmet goal. For each unmet subcontracting goal **a minimum of five (5) categories below must be checked in order to have demonstrated "good faith efforts"**. For building construction projects, each Bidder must earn fifty (50) points to demonstrate "good faith efforts", each category below shall be assigned a minimum of ten (10) points, in consistency with N.C. G.S. 143-128.2. The City will consider the quality, quantity, and intensity of the different kinds of efforts a Bidder has made. Unless otherwise stated, the categories listed below are as defined in Part D, and are listed here:

- Contacting SBEs and MWBEs.** Contractor must contact SBEs and MWBEs in a reasonable manner to reach each subcontracting goal on a specific contract at least 10 days prior to submittal deadline/bid opening.
- Followed up with SBEs and MWBEs.** Followed up with contacted SBE/MWBEs subsequent to the initial contact and at least 72 hours prior to submittal deadline/bid opening either by phone, writing or in person.
- Attendance at Pre-Bid Meeting.** To receive credit, the Bidder must attend pre-bid meetings scheduled by the City for the Contract in question.
- Breaking Down Work.** Selecting portions of the work to be performed by SBEs and MWBEs in order to increase the likelihood that the SBE and MWBE goals will be achieved.

- ❑ **Working with ABI Office, SBE or MWBE Assistance Programs.** The Bidder must document that it worked with the Asheville Business Inclusion Office, available minority community organizations, minority contractors' group, local minority business assistance offices and / or other local organizations that provide assistance in the recruitment and placement of minorities, women and / or small businesses to solicit bids for the Contract for which the Bid was sought.
- ❑ **Making Plans Available.** Providing prospective SBEs and MWBEs with adequate information about the plans, specifications, and requirements of the Contract in a timely manner or within 10 days before the Bid Proposals are due to assist them in responding to a solicitation.
- ❑ **Negotiating in Good Faith.** Negotiating in good faith with interested SBEs and MWBEs and not rejecting SBEs and MWBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities.
- ❑ **Bonding or Insurance Assistance on Construction Contracts.** Providing assistance to interested SBEs and MWBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or bidder; or providing alternatives to bonding or insurance for subcontractors;
- ❑ **Financial Assistance.** Providing assistance to otherwise qualified SBEs and MWBEs in need of obtaining necessary equipment, supplies, materials, loan capital, lines of credit, joint pay agreements to secure loans, supplies or letters of credit (including waiving credit that is ordinarily required), or related assistance or services. No credit will be given to an Affiliate of a Bidder.
- ❑ **Joint Ventures.** Negotiating joint venture and partnership arrangements with SBEs and MWBEs in order to increase opportunities for SBE and MWBE participation on public Construction and Repair Contracts. No credit will be given to an Affiliate of the Bidder;
- ❑ **Quick Pay Commitment.** Providing quick pay agreements and policies to enable SBE and MWBE contractors and suppliers to meet cash-flow demands. Bidder will not receive credit if Quick Pay Commitment has a statement indicating that the Bidder will consider entering into a Quick Pay Commitment OR the Bidder verbally communicated the Quick Pay Commitment to the Subcontractor;

In addition, the City may take into account (a) whether the Bidder's documentation reflects a clear and realistic plan for achieving the SBE, MBE and WBE goals; (b) the Bidders' past performance in meeting the SBE and MWBE goals; and (c) the performance of other bidders in meeting the SBE and MWBE goals. To receive credit for some categories of "good faith efforts" additional documentation may be required.

C. Good Faith Negotiations

All Bidders that fail to meet a Subcontracting Goal must negotiate in good faith with each certified SBE and MWBE that responds to the Bidder's solicitation or contacts the Bidder of its own accord with respect to the unmet Goal(s). If the Bidder does not receive a response from the solicited subcontractors, the Bidder must notify the ABI Manager that no response was received.

A Bidder shall consider all subcontractor bids or quotes received from SBEs and MWBEs and will not reject such bids without sound and documented reasons based upon a thorough understanding of the prospective subcontractor's capabilities. If a subcontract is not awarded to a certified SBE or MWBE subcontractor that has provided a bid or quote to the Bidder, the Bidder must state in writing the reasons for the denial of subcontract award. This requirement applies to the Bidder regardless of the tier of subcontracting involved.

The City may find that a Bidder did not meet its Good Faith Negotiation obligation if in the City's judgment, the Bidder rejects an Interested SBE or MWBE's bid for reasons other than:

- The SBE or MWBE's bid was higher than what was proposed by the Subcontractor or Supplier the Bidder decided to use
- The SBE or MWBE was not "Qualified" as defined in Part B; or
- The Business Enterprise that will be performing in place of the Interested SBE or MWBE is more qualified than the Interested SBE or MWBE, to the extent that such difference in qualification would materially impact the Bidder's Bid, or
- There was a material deficiency with the Interested SBE or MWBE's bid (such as it being submitted late, containing inaccurate information, etc.).

To document Good Faith Negotiation, Bidders must complete a form that will be included in the City Solicitation Documents. The City may also request, on a case-by-case basis, documentation sufficient in the City's judgment to prove that the Bidder's reasons for rejecting an Interested SBE or MWBE are valid. Bidders must provide such forms and information within the time period specified by the City. Failure to comply with the requirements set forth in this Section (the "Good Faith Negotiation Requirements") shall constitute grounds for rejecting a Bid.

Notwithstanding the foregoing, Bidders participating in a mentor / protégé program recognized by the Asheville Business Inclusion Office may reject an Interested SBE's or MWBE's bid for work that is being performed by the Bidder's SBE or MWBE mentee or SBE or MWBE protégé, subject to approval of the ABI Manager.

IV. EXTENSIONS, FALSE STATEMENTS, AND EXPECTATIONS FOR MWSBES

A. Extensions

The ABI Manager may grant a written extension of any deadline, not to include bid submittal requirements, set forth in this Section. No extension shall be valid unless documented in writing by the City.

B. False Statements or Certifications

It shall be a violation of the ABI Policy and grounds for rejection of a Bid and other sanctions for any Bidder to make a false or materially misleading statement or certification regarding any matter relevant to the ABI Policy.

C. Expectations of MWSBES

MWSBES are responsible for promoting themselves and taking the initiative to obtain work on City Contracts. Specifically, MWSBES shall:

- Monitor the City's website for posting of contracting opportunities;
- Make every effort to establish contacts and relationships with prospective Bidders for potential future business, including attending pre-bid conferences;
- Respond promptly to solicitation requests; and
- Attend seminars, classes and workshops designed to facilitate networking and / or enhance business skills.

PART F: PROFESSIONAL AND GENERAL SERVICES CONTRACTS

I. SCOPE

The City of Asheville shall provide equal opportunity for SBEs and MWBEs to compete for Professional and General Service Contracts collectively referred to as “Service Contracts.” Examples include contracts for architectural, engineering, surveying or construction management services, janitorial services, computer consulting and language interpretation. The methodology for which the City sets subcontracting goals is described in Part C of this Policy. This Policy shall be followed in conjunction with the City’s Procurement, Purchasing, and Contracting Policy along with all applicable state, federal, and local laws.

II. PROFESSIONAL SERVICES

Professional Service Contracts include contracts for architectural, engineering, surveying or construction manager at-risk. A Proposer may submit documentation prior to proposal selection or after a successful proposal has been selected indicating SBE and/or MWBE outreach. The documentation shall not be considered in the selection of a proposal but will be used for City documentation of availability and utilization of MWSBEs.

Documentation may be submitted in the following forms:

- (1) **Statement of Commitment and Utilization Affidavit.** The Proposer may submit with its proposal or after proposal selection (a) a commitment to meet subcontracting goals; and (b) an affidavit listing the SBEs and MWBEs it intends to use on the Contract.
- (2) **Participation Plan.** The Proposer may provide a participation plan on how the Proposer plans to utilize SBE and / or MWBE participation on the Contract.
- (3) **Goods Faith Efforts Documentation.** As defined in Part D of this Policy.
- (4) **Other documentation of MWSBE outreach.** Any other evidence that the Proposer chooses to submit which shows that the Proposer has participated in SBE and/or MWBE outreach.

Any documentation provided by a proposer indicating SBE and/or MWBE outreach or utilization will not be considered in whether a proposal is responsive nor whether the proposal is best qualified.

III. GENERAL SERVICES

A. City Outreach Options

For General Service Contracts, the City may choose one or more of the SBE and MWBE outreach options:

- (1) **Subcontracting Goals.** The City may set an SBE goal for the Contract. The City may also set MBE, WBE, and MWSBE Goals for the Contract, but only for those categories of firms that have experienced discrimination in the Asheville Regional Area and have been adversely impacted in their ability to obtain General Service Contracts with the City, as documented by the City’s disparity study. The City shall not establish subcontracting goals for General Service Contracts where:
 - (a) There are no subcontracting opportunities identified for the Contract; or

- (b) There are no SBEs or MWBEs certified to perform the scopes of work that the City regards as opportunities for subcontracting.
- (2) **Statement of Commitment and Utilization Affidavit.** The City may require each Proposer to submit with its Proposal (a) a commitment to meet subcontracting goals; and (b) an affidavit listing the SBEs and MWBEs it intends to use on the Contract and any related information requested by the City.
- (3) **Participation Plan.** The City may require the Proposer to provide a participation plan on how the Proposer plans to utilize SBE and / or MWBE participation on the Contract.
- (4) **Good Faith Negotiation.** The City may require that the Proposer submit Good Faith Negotiation forms as described below.
- (5) **Good Faith Effort Affidavit.** The City may require the Proposer to submit a GFE Affidavit to show the efforts undertaken for SBE and MWBE utilization.
- (6) **Good Faith Effort Documentation.** As defined in Part D of this policy.
- (7) **Negotiated Goals.** The City may seek to negotiate subcontracting goals after Proposals for a contract have been submitted, provided that the City only seeks to negotiate MBE, WBE, and MWSBE goals for those categories of firms that have experienced discrimination in the Asheville Regional Area and have been adversely impacted in their ability to obtain Service Contracts with the City, as documented by the City's disparity study.

B. Submission Requirements for Consideration

The City may request that Proposers submit MWSBE Outreach Documentation with their Proposals, or at any time specified by the City. The City may consider the Proposer's MWSBE Outreach Documentation as a factor in the evaluation process, and may exclude a Proposal from further consideration if the City determines that the Proposer has not provided required documentation, has not made adequate good faith efforts (if applicable), has not met the Good Faith Negotiation Requirements (if applicable) or has failed to provide a reasonable Participation Plan (if applicable). Such determination may occur before or after the Proposal is sent to the City evaluation committee.

C. Self-Performance

Proposers that intend to perform 100% of the work on a General Service Contract with an established SBE, MBE and / or WBE Goal may submit an affidavit stating that the Proposer will not subcontract elements of the project; and has the capability to perform, and will perform all elements of work on this Contract with its own current workforces. Proposers that elect to fully self-perform a General Service Contract where the City has set a Subcontracting Goal must comply with each of the following provisions. Failure to do so will be considered as a factor in the proposal evaluation process and may result in a Proposal being excluded from consideration:

- (1) The affidavit shall be in a form provided by the City as part of the City Solicitation Documents, and shall affirm:
 - a) It is a normal business practice of the Contractor to perform all elements of the Contract with its own workforce without the use of subcontractors; and
 - b) The Contractor in fact has demonstrated its capabilities to perform all elements of the Contract with its own workforce without the use of subcontractors.
- (2) If the Proposer is not licensed to perform each and every type of work included in the contract, or if the City has cause to believe based on past practice or other grounds that the Proposer will not

be performing all work under the contract with its own current workforce, then the City may reject the Proposer's proposal as non-responsive for non-compliance with the ABI Policy and may be subject to sanctions as described in Part F Section V. B. and Part K of this Policy.

If the Proposer provides the above requested documentation the Proposer shall not be required to comply with Good Faith Efforts in Part D or IV of this section.

D. Meeting Subcontracting Goals

1. **The City will give Bidders credit toward meeting the Subcontracting Goals** at bid only for those SBEs and MWBEs that:

- Are certified with the City as SBEs and MWBEs as of the Proposal due date;
- With respect to MWBEs, are listed in the City's vendor availability database as being at least 51% owned by individuals in one of the MWBE categories included in the MBE or WBE Goal set for that project (for instance, if a MBE Goal has been set for African American, Native American and Hispanic MBEs, subcontracts awarded to Asian MBEs will not count toward the MBE Goal);
- Will actually perform a Commercially Useful Function as defined in Part B (which means, among other things, an MWSBE acting solely as a conduit will not be counted); and
- Will perform within the area(s) for which they are certified

2. **Affiliates of the Proposer.** The City will not give credit toward Subcontracting Goals for subcontracting to SBE or MWBEs that are found to be Affiliates of the Proposer prior to the Proposal due date.

3. **SBE or MWBE Decertification.** If an SBE or MWBE is decertified between Proposal due date and Contract award, the City will not allow credit toward the Subcontracting Goal for amounts committed to that SBE or MWBE, but will allow the Proposer to replace the decertified SBE or MWBE with a certified SBE or MWBE, unless the certification was based on false or fraudulent information of which the Proposer had or should have had knowledge. However, the City may refuse to allow the substitution and reject the Proposal if the SBE or MWBE is decertified for being an Affiliate, or is found to be an Affiliate of the Proposer (even if not decertified). Proposers shall be deemed to have knowledge of all ABI Policy provisions, including those relating to Affiliates.

An MWSBE may count the work it intends to perform with its own current workforces towards the MWSBE Subcontracting Goals to the extent the requirements set forth in this section are satisfied.

4. **Using MWSBEs the City Did Not List in City Solicitation Documents.** Bidders shall receive credit for using MWSBEs that the City did not list in the City Solicitation Documents, as long as the requirements set forth above are met.

IV. GOOD FAITH EFFORTS AND NEGOTIATIONS

A. Good Faith Efforts

When the City requires a Good Faith Efforts Affidavit, the GFEs undertaken by the Proposer will be considered as a factor in the evaluation process. Failure to undertake GFEs or submit the Good Faith

Efforts Affidavit where required, may result in the Proposer's Proposal being rejected. The focus will be on the likely effectiveness of steps taken. Mere *pro forma* efforts will not be sufficient. Unless otherwise stated the factors below are defined further in Part D of this policy. Factors that may be considered include, but are not limited to:

- (1) **Contacting SBEs and MWBEs.** Did the Proposer contact SBEs and MWBEs in a reasonable manner to reach each subcontracting goal on a specific contract? Factors include, but are not limited to:
 - (a) The number of SBEs and MWBEs contacted;
 - (b) Contacting SBEs and MWBEs that could reasonably have been expected to submit a quote and that were known to the Proposer or available on the City's maintained list;
 - (c) Soliciting through all reasonable and available means the interest of certified MWSBEs who have the capability to perform the scope of work sufficient to meet the goals;
 - (d) The Proposer solicits this interest at least ten (10) days prior to the Proposal due date to allow the SBEs and MBEs to respond to the solicitation;
 - (e) Solicitation provides the opportunity to SBEs and MWBEs within the Asheville Regional Area, where the project is located;
 - (f) Whether contacts were made and were documented in a verifiable way;
 - (g) Whether the Proposer responded promptly and adequately to inquiries from SBEs and MWBEs; and
 - (h) Whether the Proposer made follow-up contact with SBEs and MWBEs that did not respond to the Proposer's initial contact.
- (2) **Attendance at Pre-Proposal.** Did the Proposer must attend pre-proposal meetings scheduled by the City for the contract in question?
- (3) **Breaking Down Work.** Did the Proposer break down or combine portions of the work to be performed by SBEs and MWBEs in an economically feasible way in order to increase SBE and MWBE participation?
- (4) **Working with SBE or MWBE Assistance Programs.** Did the Proposer document that it worked with an SBE assistance organization and / or MWBE assistance organization, as applicable, to provide assistance in recruiting SBEs and MWBEs for the Contract?
- (5) **Negotiating in Good Faith.** Did the Proposer document having engaged in at least some back-and-forth negotiation between itself and Interested MWSBEs?
- (6) **Bonding or Insurance Assistance on Construction Contract.** Did the Proposer provide significant and meaningful assistance to an SBE or MWBE in getting required bonding or insurance coverage for the Contract at issue or provide alternatives to bonding or insurance for SBEs and MWBEs? No credit will be given for assistance to an Affiliate of the Proposer;
- (7) **Financial Assistance.** Did the Proposer provide significant and meaningful assistance to an SBE or MWBE of the following nature in connection with the Contract: (a) assistance in obtaining equipment, a loan, capital, lines of credit; (b) joint pay agreements or guaranties to secure loans, the purchase of supplies, or letters of credit, including waiving credit that is ordinarily required; or (c) assistance in obtaining the same unit pricing with the Proposer's suppliers as the Proposer? No credit will be given for assistance provided to an Affiliate of the Proposer.
- (8) **Joint Ventures.** To receive credit for this GFE, the Proposer must demonstrate that it negotiated a Joint Venture or partnership arrangement with one or more SBEs or MWBEs as applicable on the Contract, by submitting the applicable form from the Asheville Business Inclusion Office;
- (9) **Quick Pay Commitment.** To receive credit for this GFE, the Proposer must provide the City with (a) a copy of the Proposer's Quick Pay Commitment related to the specific project; (b)

documentation indicating that all SBEs or MWBEs covered under the Contract have received a written copy of the Quick Payment Commitment contract prior to the proposal due date;

- (10) **Other Evidence of GFEs.** Any other evidence that the Proposer submits which shows that the bidder has made reasonable good faith efforts to meet the SBE, MBE and WBE goals.

In addition to the above, the City may also take into account (1) the Proposer's past performance in meeting MWBE and SBE goals; and (2) the performance of other Proposers in meeting the established Subcontracting Goals on the Contract up for award. For example, when a Proposer fails to meet a Subcontracting Goal but other Proposers met it, the City may reasonably raise the question of whether, with additional reasonable efforts, the Proposer in question could have met the goal.

B. Good Faith Negotiations

When one or more Subcontracting Goals are set for a Contract, Proposers that fail to fully meet such goals must negotiate in good faith with each SBE and applicable MWBE that responds to the Proposer's solicitations or contacts the Proposer of its own accord. The City may also require that a Proposer comply with this Section in the absence of Subcontracting Goals.

The City may find that a Proposer did not meet its Good Faith Negotiation obligation if, in the City's judgment, the Proposer rejects an Interested SBE's or MWBE's proposal for reasons other than:

- (1) The SBE's or MWBE's proposal was higher than what was proposed by the Subcontractor or Supplier the Proposer decided to use;
- (2) The SBE or MWBE was not "Qualified" as defined in Part B; or
- (3) The Business Enterprise that will be performing in place of the Interested SBE or MWBE is more qualified than the Interested SBE or MWBE, to the extent that such difference in qualification would materially impact the Proposer's Proposal, or
- (4) There was a material deficiency with the Interested SBE's or MWBE's proposal (such as it being submitted late, containing inaccurate information, etc.).

To document Good Faith Negotiation, the City may require Proposers to complete a form that will be included in the City Solicitation Documents. The City may also request on a case-by-case basis documentation sufficient in the City's judgment to prove that the Proposer's reasons for rejecting an Interested SBE or MWBE are valid. Proposers must provide such forms and information within the time period specified by the City.

Failure to comply with the requirements set forth in this Section (the "Good Faith Negotiation") shall constitute grounds for rejecting a Proposal. Notwithstanding the foregoing, Proposers participating in a mentor / protégé program recognized by the Asheville Business Inclusion Office may reject an Interested SBE's or MWBE's bid for work that is being performed by the Proposer's SBE or MWBE mentee or SBE or MWBE protégé, subject to approval of the ABI Manager.

V. EXTENSIONS, FALSE STATEMENTS, AND EXPECTATIONS OF MWSBES

A. Extensions

The ABI Manager may grant a written extension of any deadline set forth in this section. No extensions shall be valid unless documented in writing by the City.

B. False Statements or Certifications

It shall be a violation of the ABI Policy and grounds for rejection of a Proposal and other sanctions for any Proposer to make false statements or materially misleading statements, or certification regarding any matter relevant to the ABI Policy.

C. Expectations of MWSBES

MWSBES are responsible for promoting themselves and taking the initiative to obtain work on City Contracts. Specifically, MWSBES are encouraged to:

- Monitor the City's website for posting of contracting opportunities;
- Make every effort to establish contacts and relationships with prospective Bidders for potential future business, including attending pre-bid conferences;
- Respond promptly to solicitation requests; and
- Attend seminars, classes and workshops designed to facilitate networking and / or enhance business skills.

PART G: PURCHASE OF APPARATUS, SUPPLIES, MATERIALS AND EQUIPMENT CONTRACTS

I. SCOPE

The City of Asheville shall provide equal opportunity for minority, woman, and small businesses to compete for procurement bids for the purchase of apparatus, supplies, materials, or equipment, collectively referred to as “Procurement Contracts”. Those actions shall include those matters hereinafter set out. This Policy shall be followed in conjunction with the City’s Procurement, Purchasing, and Contracting Policy along with all applicable state, federal, and local laws.

II. GENERAL REQUIREMENTS

A. The following processes herein laid out shall be followed pursuant to the ABI Policy:

- For the procurement bid process, the City shall include in the bid specifications instructions and procedures to define ABI Policy compliance requirements.
- The ABI Manager shall provide a list of certified MBEs, WBEs, and / or SBEs from the City’s vendor availability database.
- The City Purchasing Division will send bid information to the appropriate registered SBEs or MWBEs mentioned on the above list.
- All documents related to the bid shall be available at the Purchasing Division Offices and / or the City’s website.
- For procurement contracts, the information in bid documents shall state the policy expressed in this policy, as well as bid procedures and regulations. Though not required, in those instances where a pre-bid conference is held, certified MBEs, WBEs and /or SBEs in applicable trades on the list obtained and maintained as provided herein shall be notified of and invited to pre-bid conferences. The City Purchasing Division shall forward to the ABI Manager a list of bidders contacted, provide bid summaries, and indicate which bidder was selected.
- A period of at least ten (10) full days will be given between advertising notice and receiving formal bids to provide MBEs, MBEs and / or SBEs adequate time to obtain bonding and any needed technical assistance. Exceptions may be made in cases of special emergency as declared by the governing body, involving the health and safety of the people or their property.
- The Purchasing Department/Division for the City shall maintain a list of bidders contacted indicating the successful bidder to the ABI Manager.

B. Payments

The City will meet its payment obligations in accordance with established City policy and State Law. Nevertheless, payments for procurement contracts will be made no later than thirty (30) days after receipt of an approved invoice, provided the apparatus, supply, material or equipment has been accepted by the City.

C. Expectations of SBEs and MWBEs

MWSBEs are responsible for promoting themselves and taking the initiative to obtain work on City Contracts. Specifically, MWSBEs shall:

- Monitor the City’s website for posting of contracting opportunities;
- Make every effort to establish contacts and relationships with prospective Bidders for potential future business, including attending pre-bid conferences;
- Respond promptly to solicitation requests; and
- Attend seminars, classes and workshops designed to facilitate networking and / or enhance business skills.

PART H: RESPONSIBILITY OF SBEs, MBEs AND WBEs

I. CERTIFICATION AND REGISTRATION

A. Certification by the City of Asheville for MBEs and WBEs

To be certified with the City as an MWBE and comply with the ABI Policy, a Business Enterprise must meet the following requirements:

1. **Ownership.** The business enterprise must be owned by an “Eligible Owner” (a) to receive WBE certification, the Business enterprise must be at least fifty-one percent (51%) owned by one or more persons who are female; and (b) to receive MBE certification, the Business Enterprise must be at least fifty-one percent (51%) owned by one or more persons who are members of one of the groups set forth below:

MBE Category	Owned or Controlled by a Person or Persons
African American or Black	Having origins in any of the black racial groups of Africa
Hispanic	Of Spanish or Portuguese culture having origins in Mexico, South or Central America, or the Caribbean islands, regardless of race
Asian	Having origins in any of the original peoples of the Far East, Southeast Asia, Asia, Indian continent, or Pacific islands
Native American or American Indian	Having origins in any of the original Indian peoples of North America

2. **Significant Business Presence in Relevant Market.** To be certified as an MBE or WBE with the City of Asheville, the business enterprise must have a Significant Business Presence in the Asheville Regional Area (which is the City’s relevant geographic market as defined by the current Disparity Study). The Significant Business Presence determination will be made by the ABI Manager as provided below, under Section E: Geographic Restriction and Significant Business Presence. A state-certified MWBE that meets the certification and Significant Business Presence requirements is deemed to be “Certified” as an MWBE for purposes of certification with the City of Asheville.
3. **Licensed and For-Profit.** Non-profit organizations cannot become certified as MBEs or WBEs. To obtain MBE or WBE certification, the Applicant Business must: (a) be a legal entity authorized to do business in the State of North Carolina; and (b) demonstrate that the Applicant Business, its employees, or eligible owners hold each business or professional license required for the operation of each scope of business for which the Applicant Business seeks MBE or WBE certification;

4. **Management and Control.** The daily business operations of the Applicant Business shall be managed and controlled by one or more eligible owners. The eligible owner(s) shall be deemed to manage and control the daily business operations only if:
 - a. Their management and control is specifically demonstrated to be real, substantial, and continuing; and goes beyond the *pro forma* ownership of the applicant business as reflected in its ownership documents;
 - b. They possess the power to and actually direct the management and policies of the applicant business;
 - c. They make both routine and major decisions on matters of management, policy, and operations; AND
 - d. They are not subject to formal or informal restrictions that are inconsistent with the customary discretion of majority owners.
5. **Registration as a vendor with the City of Asheville.** To be certified as an MBE or WBE with the City, the business enterprise must register with the City through the Asheville Business Inclusion Office as a vendor with the City's vendor availability database.

While not required for certification by the City, certification as a North Carolina Historically Underutilized Business (hereinafter referred to as "HUB"), within the meaning of N.C. Gen. Stat. 143-128.4, will be considered in City certification as outlined in Section C below. Some contracts require State certifications and may preclude Business Enterprise participation without such certifications.

B. Certification as a Small Business Enterprise (SBE)

The Applicant Business seeking Certification shall provide documentation of (a) formation of the Applicant Business; (b) commencement of sustained business activity in each trade or profession described on the Certification Application; and (c) commencement of ownership, management and control of daily business operations by the identified eligible owner(s). The Applicant Business shall be eligible for Certification as a City of Asheville SBE so long as it complies with the following requirements:

1. **Geographic Restriction:** The Applicant Business must be headquartered in the Asheville Regional Area (ARA);
2. **Ownership:** At least 51% of the Applicant Business must be owned by one or more "Eligible Owners," each of whom must meet the following requirements: (a) Owns a legal and equitable interest in the Applicant Business in his or her own name (with the ownership of all Eligible Owners being 51% or more); (b) Acquired the interest in a real and substantial arms-length transaction utilizing real and substantial consideration; (c) Acquired the interest with his or her own financial or equivalent resources or has put his or her own financial resources at risk in the operation of the Applicant Business; (d) Is not currently an official, officer or employee of the City; (e) Is either a U.S. citizen or permanent resident, or has a valid work visa from the U.S. government appropriate for the type of work the Business Enterprise performs;
3. **Licensed and For-Profit:** Non-profit organizations cannot become certified as SBEs. To obtain SBE certification, the Applicant Business must: (a) Be authorized to do business in the State of North Carolina; (b) Demonstrate that the Applicant Business, its employees, or eligible owners hold each business or professional license required for the operation of each scope of business for which the Applicant Business seeks SBE certification;
4. **Management and Control:** The daily business operations of the Applicant Business shall be managed and controlled by one or more eligible owners. The eligible owner(s) shall be deemed to

manage and control the daily business operations only if: (a) Their management and control is specifically demonstrated to be real, substantial, and continuing; and goes beyond the *pro forma* ownership of the Applicant Business as reflected in its ownership documents; (b) They possess the power to and actually direct the management and policies of the Applicant Business; (c) They make both routine and major decisions on matters of management, policy, and operations; and (d) They are not subject to formal or informal restrictions that are inconsistent with the customary discretion of majority owners;

5. **Perform a commercially useful function:** The Applicant Business must perform a Commercially Useful Function. A Business Enterprise does not perform a Commercially Useful Function if it merely acts as a Conduit by passing the scope of work for which it is scheduled to perform or supply on a contract to another firm;
6. **Threshold size:** The annual sales receipts cannot exceed \$250,000; and
7. **Affiliates:** In determining whether the Applicant Business is within the size thresholds, you must include the combined sales volume of all “Affiliates” of the Applicant. Two entities are Affiliates of one another when one controls or has the power to control the other, a third party or parties controls or has the power to control both; or other significant relationships exist between the two entities. This presumption is rebuttable at the City’s discretion if the Applicant Business shows that the connection between the two businesses is minimal, and that the Applicant Business is no longer at any risk of being financially dependent on the other entity.
8. **Registration as a vendor with the City of Asheville:** To participate in the ABI program as an SBE, the business enterprise must register with the City through the Asheville Business Inclusion Office as a vendor with the City's vendor availability database.

C. Proof of Certification by another certifying entity for MWBEs

Proof of certification by another certifying entity may be accepted by the City in consideration within the City certification process, if the certifying entity adheres to the same or similar criteria or similar policies and standards as those established by the City of Asheville. To the extent the City’s factual predicate for the ABI Policy requires a narrower definition of MWBE firm categories than other certifying entities, the City shall limit the MWBE categories of the firms certified by the other certifying entities as necessary to ensure that the race and gender conscious measures provided by this Policy, and supported by the City’s Disparity Study, are sufficiently narrowly-tailored.

Prior to accepting another jurisdiction’s MWBE certification, the ABI Manager shall examine the definitions, standards, and certification practices of the jurisdiction’s program to ensure that it adheres to established City Certification guidelines.

D. Verification of Certification

The ABI Manager shall establish reasonable procedures and methods for the Registration of Applicant Business Enterprises as SBEs and MWBEs. The ABI Manager shall be responsible for developing, issuing, and reviewing all certification forms and applications in a manner that is consistent with the standards, definitions, and intent established by this Policy.

- The ABI Manager shall also maintain an automated and up-to-date vendor availability database of all certified SBE and MWBE firms that is readily available to the general public, as well as City

personnel. Verification of certification of all SBE and MWBE firms shall be the responsibility of the Project Manager for the Operating Department initiating the Contract.

The Asheville Business Inclusion Office may interview all persons upon whom eligibility for Certification is based, and is empowered to interview such other persons and conduct such onsite visits and investigations as may be appropriate in its sole discretion to verify eligibility for Certification.

- A Business Enterprise wishing to become or remain Certified as an SBE and / or MWBE shall cooperate with the Asheville Business Inclusion Office in supplying additional information that may be requested in order to make a determination.
- If an SBE or MWBE fails to respond to the Asheville Business Inclusion Office's request for information within (a) either the time period specified in the notice requesting information or (b) if no time is specified in the notice, within 15 days subsequent to the date of the notice, the City may immediately suspend eligibility and / or terminate SBE or MWBE Certification.

Unless otherwise revised by the City, an MWBE Certification shall be valid for as long as the MWBE is certified as such by the State of North Carolina.

E. Geographic Restriction and Significant Business Presence

The Business Enterprise must have a Significant Business Presence in the Asheville Regional Area.

- **Duration.** The Business Enterprise must satisfy the Significant Business Presence requirement throughout the period the Business Enterprise becomes registered with the City as an SBE or MWBE. If after a Business Enterprise becomes a certified SBE or MWBE, and the Asheville Regional Area changes so as to exclude the area where the SBE or MWBE's qualifying place of business is located, the SBE or MWBE shall be entitled to retain its certification and registration until the date on which its certification with the City expires in accordance with this policy.
- **Significant Business Presence Factors.** The City will consider all relevant factors as to whether the business has a significant business presence, including, but not limited to:
 - Business Enterprise is headquartered in the Asheville Regional Area;
 - Number of full-time employees;
 - Location of managerial or decision-making personnel;
 - Lease agreement;
 - Post office box, mail drop, or message center;
 - Previous work or contracts performed in the Asheville Regional Area;
 - Percentage of income or revenue derived from Asheville Regional Area;
- **Totality of the Circumstances Test.** The City will apply a totality of the circumstances test in deciding whether a Business Enterprise has a Significant Business Presence. No single factor is essential to such a finding. However, a location utilized solely as a post office box, mail drop or message center, or any combination thereof, will not be considered a Significant Business Presence.

F. Appeal of SBE or MWBE Designation

If a Business Enterprise feels that it has been unfairly denied SBE or MWBE status or that its SBE or MWBE status has been wrongfully terminated by the City, the Business Enterprise shall submit its concerns in writing to the ABI Manager, within 30 days after the aggrieved incident. The ABI Manager

shall issue a decision within ten (10) days of receiving a complaint. If the aggrieved party is dissatisfied with the ABI Manager's decision, the aggrieved party may appeal the decision within ten (10) days by sending written notice to the City Manager, or a person designated by the City Manager, to review the decision. The Notices of appeal submitted to the City Manager shall identify: (1) the decision being appealed and (2) each reason why the aggrieved party takes issue with the decision. The City Manager or designee shall review the appeal and issue a decision within a reasonable time. All decisions made by the City Manager or designee shall be final. This paragraph shall not be construed to create a right of standing that does not otherwise exist under North Carolina law.

II. CERTIFICATION, EXPIRATION AND GRADUATION OF SBE AND MWBE FIRMS

A. Expiration of SBE or MWBE Certification

An SBE or MWBE's certification shall expire under the following circumstances:

1. SBE certification shall be valid for four (4) years from the date of business enterprise designation granted by the City of Asheville, unless there is a change in the business ownership, management, or control of daily business operations that affects SBE certification status, at which time the business enterprise will need to reapply with the Asheville Business Inclusion Office for recertification.
2. MWBE certification shall be valid for four (4) years from the date of business enterprise designation granted by the City of Asheville, unless there is a change in the business ownership, management, or control of daily business operations that affects MWBE certification status. At which time the business enterprise will need to reapply with the Asheville Business Inclusion Office for recertification. While not required for City certification, an MWBE certified with the State of North Carolina shall be certified with the City of Asheville so long as the State of North Carolina certification is valid, subject to the constraints outlined in Section I.C. above.
3. A firm or business enterprise's certification shall expire when it no longer meets the eligibility for certification that has been set out above for SBEs (Part H. I. B.) and MWBEs (Part H. I. A.). If a business enterprises certification expires under these circumstances it shall follow the graduation provisions and reapplication process as set out below for recertification.

B. Graduation of SBE and MWBE Firms

The ABI Manager or designee, shall graduate SBE and / or MWBE firm as established by this Policy if, under the policy provisions, the firm no longer is eligible for the City certification, nor qualifies for its remedial benefits and assistance. The ABI Manager shall be responsible for monitoring and conducting periodic reviews of the size, City contract participation levels, and conduct of all Certified SBE and MWBE firms to determine when they should be graduated from City certification in a manner consistent with the standards, definitions and intent established by this Policy. The ABI Manager shall also ensure that its directory of certified SBE and MWBE firms reflects the graduation in an accurate and timely manner. In making the determination required by this paragraph, the ABI Manager shall, to the extent practicable, adhere to the following guidelines:

- MWBE firms shall be graduated from participation under the ABI Policy Elements when the firms are no longer eligible for MWBE certification, based upon the certification standards and

definitions set forth in this Policy in Part H. I. A (Certification by the City of Asheville for MBEs and WBEs).

- SBE firms shall be graduated from participation under the ABI Policy Elements based upon whichever of the following events occurs first:
 - The SBE firm cumulatively receives \$15 million in City prime contract and subcontract payments in each of two consecutive calendar years; or
 - Upon submission of re-registration documents that reflect the firm's average annual revenues or number of employees for the last three consecutive years have exceeded fifty (50) percent of the Small Business Enterprise's small business size standards for annual revenues or number of employees for the Relevant Industry;

Graduated SBE and MWBE firms shall be eligible to apply one time for SBE and MWBE re-registration following the expiration of the two-year period immediately following graduation. Such application for SBE and / or MBE re-registration shall only be granted on condition that the graduated SBE or MWBE firm presents documentation as required by the ABI Manager that establishes that the ABI Policy Requirements for certification have been met for two consecutive years of the post-graduation period. Each graduated SBE or MWBE firm shall be entitled to only one such opportunity to apply for re-registration, and all second graduations of SBE or MWBE firms shall be permanent.

III. SUSPENSION, REVOCATION, OR MODIFICATION

A. Suspension and Revocation

The Asheville Business Inclusion Office, through the ABI Manager, shall have the power to suspend or revoke any SBE or MWBE Certification issued under this Policy and may suspend an SBE or MWBE's participation from counting toward an MWSBE Goal if:

- The SBE or MWBE has by false or fraudulent representations obtained SBE or MWBE Certification;
- The ABI Manager at any time determines that the SBE or MWBE is not eligible for Registration due to Affiliate status, exceeding the size thresholds, or other reasons;
- The SBE or MWBE is found to have committed any act which constitutes improper, fraudulent or dishonest dealing;
- The SBE or MWBE acts as a Conduit or fails to perform a Commercially Useful Function on a City project;
- The SBE or MWBE fails to comply with the provisions of the ABI Policy, fails to submit information requested by the City, or fails to cooperate in investigations; or
- The SBE or MWBE fails to actively participate in City contracting (such as by responding to solicitations) for an extended time without justification deemed adequate by the ABI Manager.

The ABI Manager shall make all decisions regarding the suspension or revocation of an SBE's or MWBE's certification, and the duration of such suspension or revocation. The ABI Manager may consider an SBE's or MWBE's history of performance on City projects when determining whether to suspend or revoke SBE or MWBE certification status.

B. Modification

The ABI Manager may further modify the list of areas for which an SBE or MWBE is certified if the SBE or MWBE regularly fails to submit bids or proposals for work in a particular area, or if it becomes apparent that the SBE or MWBE is not qualified to perform work in a particular area. However, nothing in this ABI Policy or in any action or inaction by the Asheville Business Inclusion Office or the ABI Manager shall be deemed a representation or certification that a particular SBE or MWBE is qualified to perform work in a particular area

PART I: POST CONTRACT AWARD REQUIREMENTS

I. SCOPE

This document governs compliance with the ABI Policy after Contract award. It applies to and is incorporated into all City Contracts for which a Subcontracting Goal has been established or negotiated (which includes all Construction Contracts over \$300,000, and all Service Contracts over \$50,000, unless otherwise exempt).

II. COMMITMENT TO SUBCONTRACTING GOALS

Contractors shall have an affirmative, ongoing obligation to meet or exceed the Committed Subcontracting Goals for the duration of the Contract. Unless exempted by another Section of this Part I, the City may deem a Contractor to be in violation of the ABI Policy. The City may evaluate the Contractor's future participation in City contracting, if at any time the City determines that:

- The Contractor will not meet a Committed Subcontracting Goal; and
- The reasons for the Contractor's failure are, in the City's judgment, within the Contractor's control.

For example, if a Contractor does not meet the Committed WBE goal because the Contractor terminated the WBE without cause, or if the Contractor caused the WBE to withdraw from the project without justification, then the City could find the Contractor to be in violation, and consider them a non-responsible bidder on future City projects.

Exceptions. A Contractor shall not be deemed in violation of this Policy for failure to meet the Committed Subcontracting Goal to the extent such failure is directly attributable to:

- **The City reducing the scope of a Contract** so as to eliminate or reduce work that was going to be performed by MWSBEs (whether through a change order, Contract amendment, force account or otherwise);
- **An SBE or MWBE's voluntary withdrawal** from the project if the Contractor demonstrates that such withdrawal was beyond the Contractor's reasonable control, so long as the Contractor complied with the Good Faith Efforts to replace the SBE or MWBE with another SBE or MWBE; or
- **Termination or reduction in the work of an MWBE**, if the Contractor demonstrates that such termination was consistent with the terms of this Policy, and that the Contractor complied with the Good Faith Efforts to replace the SBE or MWBE with another SBE or MWBE. Refer to the good cause termination standard in Section IV below.

For purposes of meeting the Committed Subcontracting Goals, Contractors shall only receive credit for the amount of SBE or MWBE participation that constitutes a Commercially Useful Function.

III. CHANGE ORDERS

After an award, if the change order involves items of work already included in a SBE's or MWBE's subcontract, or the work is materially the same as the work included in the SBE's or MWBE's

subcontract, the SBE or MWBE is to have the opportunity to perform the work unless it is documented that the SBE or MWBE is unable or unwilling to perform the work.

If a change order involves work that is not already included in a MWSBE's subcontract, or the work is not materially the same as the work included in the SBE or MWBE's subcontract, and / or the work is not already included in the scope of the project being performed by the Prime Contractor or other non-MWSBE subcontractors, the Prime Contractor shall make good faith efforts to obtain SBE and/or MWBE participation equal to the existing percentage contract goal.

Under certain circumstances, a post-award waiver of Good Faith Efforts may be granted by the ABI Manager and the Contract Manager, and the waiver must be documented in writing.

IV. TERMINATIONS

After an award, a Prime Contractor is required to notify the City of any changes in their SBE and MWBE utilization and / or SBE and MWBE subcontracting plan. The City will evaluate (a) whether there was good cause to terminate the SBE or MWBE and (b) whether the Prime Contractor participated in subsequent SBE, WBE, or MBE outreach to reach the Committed Subcontracting Goals. The City's evaluation of the Contractor's efforts may provide for future sanctions as described in Part K.

Good cause does not exist if the Prime seeks to terminate an SBE or MWBE represented in the Prime's SBE or MWBE commitment so the Prime can self-perform or transfer to another subcontractor work originally committed to the SBE or MWBE.

- Good cause includes, but is not limited to the following circumstances:
 - The SBE or MWBE subcontractor fails or refuses to execute a written contract;
 - The SBE or MWBE subcontractor fails or refuses to perform the work of its subcontract in a manner consistent with normal industry standards. Provided, however, that good cause does not exist if the failure or refusal of the MWBE subcontractor to perform its work in the subcontract results from the bad faith or discriminatory action of the Prime Contractor;
 - The SBE or MWBE subcontractor voluntarily withdraws from the project and provides to the Prime written notice of its withdrawal;
 - The SBE or MWBE is ineligible to receive SBE or MWBE credit for the type of work required;
 - An SBE or MWBE owner dies or becomes disabled with the result that the SBE or MWBE subcontractor is unable to complete its work on the contract; or
 - Other documented good cause that the City determines compels the termination of the SBE or MWBE subcontract.

Any substitutions or terminations of SBE or MWBE firms, included in the Committed Subcontracting Goals, shall be submitted in writing to the Asheville Business Inclusion Office. The submission shall include the following information:

- The date the contractor determined the SBE or MWBE to be unwilling, unable or ineligible to perform;
- A brief statement of facts describing the situation and citing specific actions or inaction by the SBE or MWBE firm giving rise to the Contractor's assertion that the SBE or MWBE firm is unwilling, unable, or ineligible to perform;

- A brief statement of the subsequent good faith efforts undertaken by the contractor to enable the SBE or MWBE firm to perform or a brief statement as to why good faith efforts were not undertaken by the contractor to meet the committed SBE or MWBE goal;
- The total dollar amount currently paid for work performed by the SBE or MWBE firm;
- The total dollar amount remaining to be paid to the SBE or MWBE firm for work completed, but for which the SBE or MWBE firm has not received payment, and over which the contractor and the SBE or MWBE firm have no dispute; and
- The SBE's or MWBE's response to the notice of intent to terminate.

If there is no response from the SBE or MWBE within the time allowed in the notice of intent to terminate, the contractor shall state that no response was received. The Asheville Business Inclusion Office will consider both the Contractor's submission and the SBE's or MWBE's response in reviewing future participation within City contracts when applying the ABI Policy for both the Contractor and the SBE or MWBE.

PART J: DETERMINATION OF POLICY COMPLIANCE

I. SCOPE

The Asheville Business Inclusion Office shall review all Contracts for compliance with the ABI Policy. This review shall include, but not be limited to, whether the Committed Subcontracting Goals (in both dollar amounts and percentages) are maintained over the duration of the Contract, whether the Contractor improperly terminated, replaced or reduced the work of an SBE or MWBE, whether the Contractor complied with this Policy regarding any Contract amendments, renewals or additions to scope, whether SBEs or MWBEs on the Contract performed a Commercially Useful Function, etc. The Asheville Business Inclusion Office, through the ABI Manager, may conduct such review on its own, or may hire consultants to assist in such a process.

II. CONTRACTOR AND SUBCONTRACTOR NON-COMPLIANCE

Contracting staff of each City department, with assistance from the ABI Manager when necessary, shall monitor compliance with these Policy Element requirements during the term of the contract. If it is determined that there is cause to believe that a Prime Contractor or Subcontractor has failed to comply with any of the requirements of this Policy or with the contract provisions pertaining to SBE or MWBE utilization, the ABI Manager shall notify the Originating Department and the Contractor. The City may require such reports, information and documentation from Contractors, Respondents, and the Director of any City department, division, or office as are reasonably necessary to determine compliance with the Policy requirements within fifteen (15) calendar days after the notice of noncompliance. If the requested materials are not received within fifteen (15) calendar days, then a finding of noncompliance is determined and appropriate penalties and sanctions will apply as stated in Part K of this Policy.

When the Asheville Business Inclusion Office determines that a Contractor has violated the ABI Policy, the ABI Manager shall make a recommendation to the Department Director regarding appropriate remedies for the City to exercise in that situation and the Department Director is responsible for the affected procurement process or Contract shall make the decision as to what remedies will be exercised.

PART K: SANCTION AND GRIEVANCE PROCEDURES

I. PENALTIES AND SANCTION PROCEDURE

Upon determination and recommendation of sanctions by the City Manager or designee regarding the failure of a contractor, vendor, Respondent or other business representative to comply with any portion of this Policy, the non-complying party shall be subject to the following penalties:

- Determination as non-responsible or non-responsive bidder which may be considered in the award of future contracts to the bidder; and
- Refusal to award contracts to the bidder on the basis of being a non-responsible bidder for a period not to exceed one year from the date of notice.

It is a violation of this Asheville Business Inclusion Policy to:

- Fraudulently obtain, retain or attempt to obtain, retain or aid another in fraudulently obtaining, retaining, or attempting to obtain or retain certification and registration as an SBE, MBE, or WBE under this policy;
- Willfully falsify, conceal or cover up by a trick, scheme or device, a material fact or make any false, fictitious or fraudulent statements or representations; or make use of any false writing or document; knowing the same to contain any false, fictitious or fraudulent statement or entry pursuant to the terms of this Policy;
- Willfully obstruct, impede or attempt to obstruct or impede any authorized official or employee who is investigating the qualifications of a business entity which has requested registration as an SBE or MWBE;
- Fraudulently obtain, attempt to obtain or aid another person fraudulently obtaining or attempting to obtain public monies to which the person is not entitled under the terms of this Policy; or
- Make false statements to any entity that any other entity is or is not certified as an SBE or MWBE for purposes of this Policy.

Any person who violates the provisions of this section shall be subject to these sanctions, as well as any other remedies available under law up to the maximum penalty provided by law.

II. APPEAL PROCEDURE

Any person or entity who is the subject of and is directly and adversely affected by a determination of the ABI Manager may present such an appeal to the Asheville Business Inclusion Office within ten (10) days of being notified of bid results and /or City's intent to award.

The ABI Manager will review the grievance and supporting evidence and make a written response to the appellant within ten (10) business days of receipt of appeal.

In the event the appellant is not satisfied, said appellant may immediately appeal the grievance by filing a written description thereof and supporting evidence with the City Manager's Office. The City Manager's Office or designee shall hear the grievance within thirty (30) business days of the initial grievance documentation, and shall make a decision thereon.

The responsible originating department involved shall also submit a written response and supporting documentation to the City Manager's Office or designee for review at least three (3) days prior to the appeal being heard.

Throughout the appeal procedure and until such time as the appellant's appeal is resolved or pending the final decision of the City Manager, no awards shall be made.

Notwithstanding the foregoing, a person or entity seeking review of a decision relating to an upcoming Bid process must notify the ABI Manager in writing of the request for review within three (3) Business Days after the person or entity first learned of the decision for which review is sought. For instance, if a Bidder learns at 10:00 a.m. on Wednesday, April 2 that the City is rejecting its Bid due to non-compliance with this Policy, and the Bid Award is set for the following Wednesday, April 9, the Bidder must request a review in writing from the ABI Manager by 10:00 a.m. Friday, April 4.

This paragraph shall not be construed to create a right of standing that does not otherwise exist under North Carolina law.