

ORDINANCE NO. 25165-10-2021

AN ORDINANCE AMENDING CHAPTER 20, ARTICLE X OF THE CODE OF THE CITY OF FORT WORTH (2015), AS AMENDED, AS SHOWN ON THE ATTACHED EXHIBIT A, MAKING CHANGES INCLUDING, BUT NOT LIMITED TO NEW DEFINITIONS FOR THE CITY'S MARKETPLACE AND SIGNIFICANT BUSINESS PRESENCE, BROADENING THE DEFINITION OF A CONTRACT, AND MAKING CERTAIN ADDITIONS, INCLUDING, BUT NOT LIMITED TO ADDING A MECHANISM FOR COUNTING OUT-OF-MARKETPLACE BUSINESS EQUITY FIRMS TOWARD MEETING BUSINESS EQUITY GOALS, DETAILING PAYMENT REPORTING PROCEDURES, AND CLARIFYING THE VIOLATIONS AND SANCTIONS SECTION; PROVIDING A SAVINGS AND A CUMULATIVE CLAUSE; AND PROVIDING AN EFFECTIVE DATE.

WHEREAS, on November 17, 2020, the Fort Worth City Council approved Ordinance No. 54531-11-2020 (the "Business Equity Ordinance") that repealed all previous minority and women business enterprise ordinances and policies previously adopted and enacted a new business equity program in accordance with federal law and the findings of the City's most recent Disparity Study; and

WHEREAS, the Disparity Study supports the City's compelling interest in continuing a race and gender-conscious Business Equity Firm program because statistical data and anecdotal testimony provide a sound basis for use of narrowly tailored remedial race and gender-based measures to ensure equal opportunities for all firms to do business with the City; and

WHEREAS, City staff determined that Chapter 20, Article X of the Code of the City of Fort Worth (the "Article") which was repealed and replaced in the Business Equity Ordinance needed further changes and addition; and

WHEREAS, it is the City Council's intent for this ordinance to clarify the Business Equity Ordinance and Article and add certain terms to the Article that reflect the business processes of the City that will continue to reduce barriers to opportunities on City contracts for Business Equity Firms.

NOW THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF FORT WORTH, TEXAS, THAT:

SECTION 1.

That the Code of the City of Fort Worth, Texas (2015), as amended, is hereby further amended by changing portions of Chapter 20, Article X: Minority and Women Business Enterprises as detailed on Exhibit "A," attached hereto and incorporated herein. The provisions of this ordinance shall apply to all Contracts (as defined in Exhibit A) unless explicitly excepted, awarded by the City, except as may be hereafter specifically exempted. Definitions for this

ordinance and Contract administration procedures, including Debarment and Sanctions for Bidders, Contractors, Business Equity Firms, and other parties related to this ordinance are described on Exhibit "A."

SECTION 2.

It is hereby declared to be the intention of the City Council that the phrases, clauses, sentences, paragraphs and sections of this ordinance are severable, and, if any phrase, clause, sentence, paragraph or section of this ordinance shall be declared unconstitutional by the valid judgment or decree of any court of competent jurisdiction, such unconstitutionality shall not affect any of the remaining phrases, clauses, sentences, paragraphs and sections of this ordinance, since the same would have been enacted by the City Council without the incorporation in this ordinance of any such unconstitutional phrase, clause, sentence, paragraph or section.

SECTION 3.

This ordinance shall be cumulative of all provisions of ordinances of the Code of the City of Fort Worth, Texas, (1986), as amended, except where the provisions of this ordinance are in direct conflict with the provisions of such ordinances and such Code, in which event conflicting provisions of such ordinances and such Code are hereby repealed.

SECTION 4.

This ordinance shall be in full force and effect for any procurement or contracting activity where formal solicitation from on and after approval, and it is so ordained. This ordinance shall terminate on December 31, 2030, the same date of termination as the Business Equity Ordinance.

APPROVED AS TO FORM AND LEGALITY:

JB Strong

JB Strong (Oct 22, 2021 10:51 CDT)

Senior Assistant City Attorney

Ronald P. Gonzales

Ronald P. Gonzales

Acting City Secretary

ADOPTED: October 19, 2021

EFFECTIVE: October 19, 2021



EXHIBIT “A”

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§ 20-366 DEFINITIONS.

(a) *Annual Goal* means the overall target for Business Equity Firm utilization in Contracts (prime contracts and subcontracts combined) as defined by the calculation method used in the City's most recent Disparity Study, and should be the basis for consideration of overall, annual spending targets for City Funds. This target can be the City's goal for its overall spending with certified firms across all industry categories.

(b) *Article* means Chapter 20, Article X Code of the City of Fort Worth (2015).

(c) *Best Value* means a procurement method in which the selected Bidder is not determined solely by the lowest price bid.

(d) *Bidder* means any Person seeking to be awarded a Contract.

(e) *Bid Shopping* the practice of divulging a contractor's or Subcontractor's bid to other prospective contractor(s) or Subcontractor(s) before the award of a contract in order to secure a lower bid.

(f) *Business Equity Board* is the group of industry stakeholders established by City Council tasked with advising the City on Business Equity Firm participation in City procurement activities and is formerly known as the Minority and Women Business Enterprise Advisory Committee.

(g) *Business Equity Firm* means an Independent Firm that is a Certified MBE and or WBE with a Significant Business Presence in the City's Marketplace.

(h) *Business Equity Goal* means a calculation prepared by the DVIN that includes all the following factors: the detailed cost estimate of the work to be performed, or goods purchased; the Marketplace; the availability of Business Equity Firms and non-Business Equity Firms in the Marketplace determined on a Contract-by-Contract basis; and the subcontracting/supplier opportunities of each project.

(i) *Business Equity Management System* means an online business equity contract tracking system utilized by DVIN.

(j) *Certified* means those firms identified by the North American Industry Classification System (NAICS) that have been determined to be a bona fide MBE or WBE by the North Central Texas Regional Certification Agency (NCTRCA), the Dallas/Fort Worth Minority Supplier Development Council (DFW/MSDC), Women's Business Council-SW (WBCS), Texas Department of Transportation (TxDOT) or other certifying agency that the DVIN may deem appropriate and accepted by the City of Fort Worth.

(k) *City* means the City of Fort Worth, Texas.

(l) *City Funds* means all revenues derived from any source other than federal or state grants or allocations.

(m) *City Manager* means the City Manager of the City of Fort Worth, Texas.

(n) *Combined Project* means a construction contract including more than one of the following: paving, drainage, or water/sanitary sewer; the term does not include a standard water/sanitary sewer contract where the pavement is only temporarily or permanently repaired incidental to the water/sewer work.

(o) *Commercially Useful Function* means responsibility for the execution of a distinct element of the work of a Contract, which is carried out by actually providing materials, equipment, supplies, goods, or performing, managing, and supervising the work.

(p) *Construction* means the processes involved in delivering buildings, infrastructure, or facilities; the term includes but is not limited to the erection, rehabilitation, alteration, conversion, extension, demolition, improvement, remodeling or repair to any real property, including streets, storm drains and facilities providing utility service owned by the City.

(q) *Contract* means any purchase order or contract that (i) involves expenditure of \$100,000 or more of City Funds; (ii) could use Subcontractors; and (iii) is awarded by the City, whether directly or indirectly, for work, labor, services, supplies, equipment, professional services, goods, construction, or construction-related activities, and materials or any combination of the foregoing; the term specifically includes but shall not be limited to, any purchase or lease of materials pursuant to Texas state law, any public work project authorized pursuant to Texas state law, or contract in which public bids are not required by law. A Contract does not include an Emergency Contract.

(r) *Contractor* means any Person that has been awarded a Contract.

(s) *Debar or Debarment* means the City will not consider offers from or award new contracts to a Bidder. A debarred Business Equity Firm shall not be included in calculating a Business Equity Goal.

(t) *Disparity Study* means the City of Fort Worth Disparity Study finalized and presented to City Council on June 16, 2020 or a study presented to the City Council after that date.

(u) *Doing Business* means engaging in for-profit activities in the scope of the expertise of the firm and having a physical location and/or digital presence from which to do so.

(v) *DVIN* means the City's Department of Diversity and Inclusion.

(w) *Emergency Contract* means a Contract that is awarded on an emergency basis due to a threat of harm to person or property or threat of disruption of governmental services and approved by the City Attorney's office as an emergency contract exempt from Texas public bidding laws.

(x) *Good Faith Efforts* means the actions undertaken by a Contractor and approved by DVIN as described in §20-370, below.

(y) *Horizontal Construction* means construction of highways, roads, streets, bridges, utilities, water supply projects, water plans, wastewater plants, water and wastewater distribution or conveyance facilities, wharves, docks, airport runways and taxiways, drainage projects, or related types of projects associated with civil engineering construction as referenced in this Article.

(z) *Independent Firm* means a Person whose viability does not depend on its relationship with another Person.

(aa) *Joint Venture* means a business entity formed by two or more independent Persons for the purpose of pursuing a common objective, such as a prime contract. The resulting business entity has additional resources and capacity, enhancing its ability to compete for larger awards. A joint venture is generally characterized by shared ownership, shared returns and risks, and shared governance. In a joint venture, the prime managing partner holds 51% or more interest in the business. Partner(s) hold less than 51% interest but in most cases, not less than 20%.

- (bb) *Marketplace* means the geographic area as defined by the City's most current Disparity Study.
- (cc) *Mayor* means the Mayor of the City of Fort Worth, Texas.
- (dd) *Mentor Protégé Program* means the mentor protégé program described more fully in §20-369, below.
- (ee) *Minority Individual* means a person who is a member of any of the following:
- (1) *Black Americans* means persons having origins in any of the Black racial groups of Africa;
 - (2) *Hispanic Americans* means persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
 - (3) *Native Americans* means persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives, or Native Hawaiians;
 - (4) *Asian-Pacific Americans* means persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), Republic of the Northern Marianas Islands, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru, Federated States of Micronesia, or Hong Kong; and
 - (5) *Subcontinent Asian Americans* means persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka.
- (ff) *Minority-Owned Business Enterprise (MBE)* means a business entity, including but not limited to a sole proprietorship, partnership, corporation, limited liability company, association or joint venture:
- (1) which is at least fifty one percent (51%) owned by one or more Minority Individuals, or in the case of a publicly traded business, at least fifty one percent (51%) of all classes of the stock of which is owned by one or more Minority Individuals; and
 - (2) whose management, policies, major decisions and daily business operations are independently managed and controlled by one or more such more Minority Individuals.
- (gg) *Person* means a natural person or business entity, including but not limited to a sole proprietorship, partnership, corporation, limited liability company, association or joint venture.
- (hh) *Program* means the Administrative Regulations for contracts with Business Equity Firms that do not involve Subcontractors.
- (ii) *Responsive* means that a Person is in compliance with the requirements of this Article.
- (jj) *Significant Business Presence* means a Person (1) which has its principal place of business located inside the Marketplace; (2) which has its principal place of business located outside the Marketplace but has been verified to be in existence for a minimum of 24 months and from which at least 20% of the business's workforce is based in the Marketplace; or (3) which has cumulative business receipts greater than \$1,000,000 for work done in the Marketplace since January 1, 2013.
- (kk) *Solicitation* means the process of inviting companies to bid on opportunities to provide goods and services.

(ll) *Subcontractor* means any person entering into a contract with a Contractor or a higher Tier Subcontractor to directly furnish services or supplies toward the Contract.

(mm) *Tier* means the numerical level of subcontracting below the Contractor.

(nn) *Utilization Plan* means the list of Business Equity Firms that a Contractor commits will be utilized to meet the Business Equity Goal for a specific project, the scopes of the work and the dollar values or the percentages of the work to be performed.

(oo) *Vertical Construction* means the construction or remodeling of any building, structure or other improvement that is predominantly vertical, including, without limitation, buildings, the design and construction of which are governed by accepted building codes.

(pp) *Woman* means an adult person of the female gender.

(qq) *Women-Owned Business Enterprise (WBE)* means a business entity, including but not limited to a sole proprietorship, partnership, corporation, limited liability company, association or joint venture:

(1) which is at least fifty-one percent (51%) owned by one or more women, or in the case of a publicly traded business, at least fifty-one percent (51%) of all classes of the stock of which is owned by one or more women; and

(2) whose management, policies, major decisions and daily business operations are independently managed and controlled by one or more such women.

§20-367 PURPOSE AND APPLICATION.

(a) The purpose of this Article is to remedy past underutilization and provide a fair and level playing field for Business Equity Firms and to encourage the participation of Business Equity Firms to contract with the City.

(b) It is intended to promote equal opportunity and the utilization of Business Equity Firms in the City's contracting opportunities.

(c) This Article applies to any Contract awarded by the City or any of its departments, boards or commissions for work, labor, services, supplies, equipment, materials or any combination of the foregoing; specifically including but not be limited to, any purchase or lease of materials, any public work project, or contract in which public bids are not required by law.

(d) The requirements of this Article shall not apply to Emergency Contracts, however any department that procures an Emergency Contract must notify the DVIN, in writing, at the time it seeks legal approval of an Emergency Contract.

(e) Where Contracts involve the expenditure of federal or state funds, the state or federal policy related to Business Equity Firms participation may take precedence over this Article.

(f) The provisions of this Article shall be liberally construed for the accomplishment of its policies and purposes.

(g) Narrowly tailored goals shall be established in the areas of procurement and contracting.

(h) A Business Equity Goal may be set on a Contract-by-Contract basis based on the type of work or services to be performed, or goods to be acquired and the availability of Business Equity Firms in the Marketplace.

(i) All required notifications under this Article must be made to the DVIN at the following email address: DVIN_BEOffice@fortworthtexas.gov.

§20-368 BUSINESS EQUITY GOAL SETTING

(a) A Business Equity Goal should be set by DVIN for the entire scope of work on a Contract.

(b) A Business Equity Goal shall be expressed in terms of a percentage of the total dollar value of each Contract awarded by the City.

(c) Except as stated otherwise herein, a Business Equity Goal shall be established for all Contracts where Business Equity Firms exist within the Marketplace.

(d) DVIN shall set a Business Equity Goal for Community Facilities Agreements, Infrastructure Construction Agreements, and any other agreement relating to the construction of public infrastructure or a public building when the City's participation in the agreement is \$1,000,000.00 or more in City Funds.

(e) If City Funds are used in conjunction with state or federal grants or allocations, the City shall not set a Business Equity Goal for Community Development Block Grants, HOME programs, or other projects that include federal funds except where the City is mandated to set goals by state or federal requirements.

(f) A Business Equity Goal may be established for tax abatement agreements and Chapter 380 grant agreements if allowed by and in accordance with the most recently adopted Tax Abatement Policy and Chapter 380 Grant Agreement Policy.

(g) The City will count a Business Equity Firm's self-performance towards meeting a Business Equity Goal.

§20-369 JOINT VENTURES AND MENTOR-PROTÉGÉ.

(a) Joint Ventures. Where it is economically feasible, the establishment of Joint Ventures to ensure prime contracting opportunities for Business Equity Firms on certain Solicitations is encouraged. The factors used to evaluate economic feasibility, include, but are not limited to, the estimated dollar value of the Solicitation, the scope of work, the duration of the work, the complexity of the work, the availability of potential Business Equity Firm joint venture partners in the relevant market area and the nature of the work.

(1) When the City uses a procurement method other than lowest responsible bidder, the City may, at its discretion, designate a particular Solicitation as a “Joint Venture Preferred” Solicitation.

(2) A prospective Joint Venture partner shall state within its proposal or its statement of qualifications information that specifies the role and extent of the Business Equity Firm Joint Venture partner(s) involvement. Such information shall include, but is not limited to:

- i. The name of the Business Equity Firm Joint Venture partner(s) that will participate on the project.
- ii. The percentage of prime contract dollars attributable to the services to be provided by the Business Equity Firm Joint Venture partner; and, as appropriate the total dollar value of the services to be provided.
- iii. A description of the work that each Business Equity Firm Joint Venture partner shall be responsible for performing under the terms of the Joint Venture agreement.

(3) The prospective Joint Venture partner must also submit a “Joint Venture Eligibility Form.” DVIN will review the “Joint Venture Eligibility Form” and will have final approval, as to whether the proposed Joint Venture conforms to the DVIN’s definition of a Joint Venture.

(4) The Joint Venture shall ensure that, at a minimum, the following items are addressed in the formation and governance of the Joint Venture:

- i. The initial capital investment of each Joint Venture partner;
- ii. The proportional allocation of profits and losses to each Joint Venture partner;
- iii. The sharing of the right to control the ownership and management of the Joint Venture;
- iv. Actual participation of the Joint Venture partners on the project;
- v. The method of and responsibility for accounting;
- vi. The method by which disputes are resolved; and
- vii. Any additional or further information required by the DVIN as set forth in this Article, bid documents and/or otherwise.

(b) Mentor Protégé Program.

(1) The Mentor Protégé Program is designed to foster relationships between Contractors and underutilized Business Equity Firms. The objective of the Mentor Protégé Program is to provide professional guidance and support to the protégé (which must be a Business Equity Firm) in order to facilitate protégé growth and development and increase the number of Contracts and subcontracts awarded to Business Equity Firm.

(2) The mentor-protégé relationship is intended to be mutually beneficial because it allows mentors to utilize their protégés to fulfill Business Equity Goals when bidding on Contracts. It is advantageous to build a partnership prior to a Solicitation or Contract award to establish confidence in performance.

(3) DVIN shall serve as a sponsor for the Mentor Protégé Program. Companies interested in joining the Mentor Protégé Program should contact DVIN to search a list of potential Business Equity Firm protégés that may provide complementary services, and supply chain opportunities.

(4) DVIN may prioritize protégé businesses in critical areas of City procurement or Contract needs.

(5) DVIN will consider the following criteria for selection of a mentor in the Mentor Protégé Program:

- i. The mentor must be registered with the City of Fort Worth;
- ii. Previous mentoring experience and or successful prior work history;
- iii. The mentor must have been in operation for at least five years;
- iv. Ability to provide developmental guidance in areas identified by the protégé; and
- v. "Good Standing" in doing business with the City of Fort Worth and regional partners.

(6) DVIN will consider the following criteria for selection of a protégé in the Mentor Protégé Program:

- i. Eligibility and willingness become a Business Equity Firm, as defined herein;
- ii. Business in operation for at least one year;
- iii. Desire to participate with a mentoring firm;
- iv. Ability to work with DVIN in identifying the type of guidance needed for business development; and
- v. "Good Standing" in doing business with the City of Fort Worth and regional partners.

§20-370 CONTRACT AWARD COMPLIANCE PROCEDURES

(a) Any Contract that is required to publicly bid work in accordance with the use of City Funds must follow the rules in this Article, including the requirement to publicly advertise all Contracts for at least 21 days before opening any bids.

(b) All Bidders seeking to enter into a Contract with the City shall be registered as a vendor with the City.

(c) For a low bid procurement, the lowest bidder shall submit a Utilization Plan no later than 2pm on the 3rd business day after bids are opened detailing all Subcontractors the Contractor intends to utilize in its performance of a Contract. Contractors that are Business Equity Firms may count their self-performed services towards meeting a Business Equity Goal.

(d) For a Best Value procurement, all bidders who wish to be considered for evaluation scoring shall submit a Utilization Plan by 2pm on the 3rd business day after the bids are opened detailing all Subcontractors the Contractor intends to utilize in its performance of a Contract. Contractors that are Business Equity Firms may count their self-performed services towards meeting a Business Equity Goal.

(e) Non-compliance. If the lowest bidder for a low bid procurement or any bidder for a Best Value procurement does not timely submit its Utilization Plan with the required documents, that bidder will be deemed non-responsive. For a low bid procurement, the City will notify the next lowest bidder who shall then submit a Utilization Plan with required documents no later than 2 pm on the 3rd business day after the bidder receives notification. This process will be followed until a bidder submitting the required documents is selected.

(f) A bidder who was previously debarred must apply to DVIN for reinstatement in order for its bid to be considered.

(g) Good Faith Effort. Where the Bidder cannot achieve the Business Equity Goal, the Bidder must provide proof of having made Good Faith Efforts to meet the Business Equity Goal. Good Faith Effort requirement means an honest and conscientious effort by the Bidder to explore all available options to achieve, to the maximum extent practical to meet the Business Equity Goal.

(1) Compliance with each of the following steps shall satisfy the Good Faith Effort requirement absent mere pro forma efforts or proof of fraud, misrepresentation, or intentional discrimination by the Bidder:

i. List each and every opportunity for Subcontractors for the completion of a Contract. On Combined Projects list each opportunity for Subcontractors through the 2nd Tier.

ii. Obtain a current list (dated not more than six (6) months old prior to the bid open date) of Business Equity Firms from the DVIN.

iii. Solicit participation from Business Equity Firms, within the Subcontractor areas previously listed, at least ten calendar days prior to bid opening, exclusive of the day the bids are opened. Both Business Equity Firms and non-Business Equity Firms must receive the same Solicitation for each area of opportunity. The three methods identified below are acceptable for soliciting participation, and each selected method must be applied to the applicable contract. The Bidder may meet the Good Faith Effort requirement by making at least one successful contact with a Business Equity Firm using either (i) email, (ii) fax, or (iii) telephone. The Bidder

may also meet the Good Faith Effort requirement by documenting, in the manners detailed below, that at least two attempts were made using two of the three following methods:

1. Email: a copy of the sent confirmation to each Business Equity Firm with the date and time of the email printed directly from the email system for proper documentation. If an email is returned as undeliverable, then that "undeliverable message" received must be printed directly from the email system for proper documentation.

2. Fax: a copy of sent confirmation to each Business Equity Firm with the date and time printed directly from the facsimile for proper documentation. If a fax is returned as undeliverable, then that "undeliverable confirmation" received must be printed directly from the fax for proper documentation.

3. Telephone: a call log that identifies each Business Equity Firm contacted with the phone number, name of individual contacted, time, date and outcome of each phone call.

iv. Provide plans and specifications or information regarding the location of plans and specifications which shall be communicated to all Business Equity firms in each Subcontractor area.

v. Attach a copy of the Solicitation sent to the Business Equity firm identifying the instructions on how to obtain plans and specifications for this Solicitation.

vi. Submit documentation of any Business Equity Firm whose quotes were rejected. The documentation submitted should be in the form of an affidavit, include a detailed explanation of why the Business Equity firm was rejected and any supporting documentation the Bidder wishes to be considered by the City. In the event of a bona fide dispute concerning quotes, the Bidder will provide for confidential review of any relevant documentation by City personnel.

vii. All communications from the Bidder to potential Business Equity Firms shall be documented and submitted to the City.

(2) In making a Good Faith Effort determination, DVIN will also consider, at a minimum, the Bidder's efforts to:

i. Solicit through all reasonable and available means (*e.g.*, attendance at pre-bid meetings, advertising and written notices) the interest of all Business Equity Firms in the scopes of work of the Contract. The Bidder shall provide interested Business Equity Firms with timely, adequate information about the plans, specifications, and requirements of the Contract to allow such firms to respond to the Solicitation. The Bidder must follow up initial Solicitations with interested Business Equity Firms.

ii. Select portions of the work to be performed by Business Equity Firms in order to increase the likelihood that the Business Equity Goal will be achieved. This includes, where appropriate, breaking out Contract work items into economically feasible units to facilitate participation, even when the Bidder would otherwise prefer to perform these work items with its own forces. It is the Bidder's responsibility to make a portion of the work available to Business Equity Firms and to select those portions of the work or material needs consistent with the availability of such Business Equity Firms to facilitate their participation.

iii. Negotiate in good faith with interested Business Equity Firms. Evidence of such negotiation includes the names, addresses, and telephone numbers of Business Equity Firms that were contacted; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and why agreements could not be reached. The Bidder may not reject Business Equity Firms without sound reasons based on a thorough investigation of their capabilities. That there may be some additional costs involved in finding and using Business Equity Firms is not in itself sufficient reason for a Bidder's failure to meet the Business Equity Goal, as long as such costs are reasonable.

iv. The performance of other Bidders in meeting the Business Equity Goal may be considered. For example, when the apparent successful Bidder fails to meet the Business Equity Goal but others meet it, it may be reasonably questioned whether, with additional reasonable efforts, the apparent successful Bidder could have met the Business Equity Goal.

(h) A signed letter of intent from each listed Business Equity Firm describing the work, materials, equipment or services to be performed or provided by the Business Equity Firm and the agreed upon dollar value shall be due at the time specified in the Solicitation.

(i) If DVIN determines that a Good Faith Effort was not made, the Bidder shall be disqualified from that specific bid.

(j) Exclusive Contract and Non-Compete Agreement. A Bidder or Contractor may not require a Business Equity Firm to enter into an exclusive contract or non-compete agreement that restricts a Business Equity Firm's ability to grow and build capacity in the Marketplace unless the Business Equity Firm demonstrates to DVIN that an exclusive contract or non-compete agreement with a Bidder or Contractor will result or has resulted in the growth of the Business Equity Firm's capacity in the Marketplace and the Business Equity Firm freely consents to the contract or agreement.

(k) Bid Protest and Procedure. In accordance with City general purchasing policies, Bidders have certain rights to protest a bid award. The protesting Bidder must submit a protest, in writing, in accordance with those general purchasing policies.

(l) If a Bidder, Contractor, Subcontractor, or Business Equity Firm desires to make an allegation of discrimination based on a protected class in the City's award of a Contract, they shall submit such allegation, in writing, to DVIN before the performance of the Contract. DVIN shall refer such allegation to the City Human Resources Labor Relations Unit for investigation.

§20-371 CONTRACT ADMINISTRATION PROCEDURES

(a) Upon award of a Contract by the City that includes a Business Equity Goal, such Business Equity Goal becomes a covenant of performance by the Contractor in favor of the City.

(b) Contracts shall incorporate the Ordinance and this Article by reference, and shall provide that the Contractor's violation of the Ordinance and this Article shall constitute a breach of such Contract and may result in Debarment in accordance with the procedures outlined in this Article.

(c) The Contractor shall provide a list of all Subcontractors to be used in the performance of the Contract, and detailed Subcontractor information to the City with each request for payment submitted to the City or as otherwise directed by the DVIN.

(d) The DVIN shall monitor Subcontractor participation and Business Equity Goal attainment during the course of the Contract.

(e) The DVIN shall have full and timely access to view the Contractor's relevant books and records relating to each specific Contract with the City to determine the Contractor's compliance with its commitment to Business Equity Firm participation and the status of any Business Equity Firms performing any portion of the Contract. The DVIN shall not record, maintain copies, or disclose industry or trade secrets of a Contractor or Vendors books and records in its execution of this duty. This provision shall be in addition to, and not a substitute for, any other provision allowing inspection of the Contractor's records by any officer or official of the City for any purpose.

(f) Business Equity Firm Subcontractor Substitution.

(1) The Contractor shall not make changes to the Utilization Plan or substitute Business Equity Firms named in the Utilization Plan without the prior written approval of the DVIN. Unauthorized changes or substitutions shall be a violation of this Article and a breach of Contract, and may constitute grounds for rejection of the bid or cause termination of an executed Contract for breach, the withholding of payment and/or subject the Contractor to certain sanctions.

(2) A Contractor shall not substitute a Business Equity Firm Subcontractor or perform the work designated for a Business Equity Firms with its own forces unless and until approval has been received in writing by the DVIN.

(3) The facts supporting the request for substitution of a Business Equity Firm must not have been known nor reasonably should have been known by the Contractor before the submission of the Utilization Plan.

(4) Bid Shopping as a part the substitution of a Business Equity Firm is prohibited.

(5) The Contractor must negotiate in good faith with the Business Equity Firm Subcontractor to resolve any issues between the Contractors and Business Equity Firm Subcontractor. Where there has been a mistake or disagreement about the scope of work, the Business Equity Firm can be substituted only where an agreement cannot be reached for a reasonable price for the corrected scope of work.

(6) Substitutions of the Business Equity Firm Subcontractor shall be permitted only after submission of a request for Subcontractor substitution in the Business Equity Management System and only on the following bases:

- i. Unavailability after receipt of reasonable notice to proceed;
- ii. Failure of performance;
- iii. Financial incapacity;
- iv. Refusal by the Subcontractor to honor the bid or proposal price;
- v. Mistake of fact or law about the elements of the scope of work of a Solicitation where agreement upon a reasonable price cannot be reached;
- vi. Failure of the Subcontractor to meet insurance, licensing or bonding requirements; or
- vii. The Subcontractor's withdrawal of its bid or proposal.

(7) The DVIN's final decision whether to permit or deny the proposed substitution, and the basis of any denial, shall be communicated to the Contractor and Business Equity Firm Subcontractor in writing within seven (7) business days of receipt of the request for substitution in the Business Equity Management System.

(8) Where the Contractor has established the basis for the substitution to the satisfaction of the City, the Contractor shall make Good Faith Efforts to fulfill the Utilization Plan. The Contractor may seek the assistance of the City in obtaining a new Business Equity Firm.

(9) If the Business Equity Goal cannot be reached and Good Faith Efforts have been made, the Contractor may substitute with a non-Business Equity Firm.

(g) Contract Amendment / Change Order. The Contractor shall comply with the provisions of this Article with respect to any contract amendments, change orders, or extra work orders.

(1) If a Contract has been assigned a Business Equity Goal and requires a reduction in work or additional work through a change order, contract amendment or other mechanism, the Contractor shall notify DVIN.

(2) If the Contract amendment, change order, or extra work adds work to a project that is already being performed by a Business Equity Firm, such firm shall be given the opportunity to perform the additional work.

(3) If the amendment, change order, or extra work adds work that like or similar work is not already being performed by a Business Equity Firm and the amount of such additional work is greater than or equal to \$100,000.00, the Contractor shall comply with Good Faith Effort requirements of this Article (exclusive of the time requirements stated therein) with respect to such additional work.

(4) A Contractor may submit an Acceptance of Previous Commitment Form (APCF) for contract amendments and change orders in which the Contractor agrees to the original Business Equity Goal for the project, inclusive of any prior change orders or amendments

(h) Prior to Contract Closeout, the DVIN shall evaluate the Contractor's fulfillment of the Business Equity Goal, considering all approved substitutions, terminations and changes to the Contract's scope of work. If the City determines that Good Faith Efforts to meet the Business Equity Goals were not made, or that fraudulent misrepresentations have been made, or any other breach of the Contract or violation of this Article has occurred, a remedy or sanction may be imposed, as provided in this Article.

(i) Contract Payment Procedures.

(1) For vertical construction Contracts, the Contractor shall submit an invoice at least monthly and the City will pay the invoice as required by the Texas Prompt Payment Act (Tex. Gov't. Code, Chap. 2251) or any successor statute. The Contractor shall pay Subcontractors as required by the Texas Prompt Payment Act or any successor statute. The Contractor's failure to make payments as provided by state law shall, in addition to any other remedies provided by law, authorize the City to withhold future payments and/or reject future bids from the Contractor until compliance with this Article is attained.

(2) For horizontal construction Contracts, procedures will be established to ensure that all progress payments are made twice a month and that Subcontractors are paid in accordance with the provisions of the Texas Prompt Payment Act (Tex. Gov't. Code, Chap. 2251) or any successor statute. A Contractor's failure to make payments as required by state law shall, in addition to any other remedies provided by state law, authorize the City to withhold future payments and/or reject future bids from the Contractor until compliance with this Article is attained.

(3) For all other Contracts, the Contractor shall pay Subcontractors as required by the Texas Prompt Payment Act (Tex. Gov't. Code, Chap. 2251) or any successor statute. The Contractor's failure to make payments as provided by state law shall, in addition to any other remedies provided by law, authorize the City to withhold future payments and/or reject future bids from the Contractor until compliance with this Article is attained.

(j) Payment Compliance Procedures.

(1) Contractors shall report receipt of all payments from the City in the Business Equity Management System related to Contracts for which a Business Equity Goal was established within 30 days of receipt of such payment.

(2) Contractors shall report all payments made to each Business Equity Firm utilized by the Contractor as a Subcontractor related to Contracts for which a Business Equity Goal was established within 30 days of making such payment.

(3) Business Equity Firm Subcontractors shall confirm the accuracy and date of all payments made by Contractors related to Contracts for which a Business Equity Goal was established in the City's Business Equity Management System within 30 days of receipt of payment.

(4) If prompted by the City's Business Equity Management System, Contractors and Business Equity Firm Subcontractors shall confirm notice and receipt of all payments.

(5) The Contractor shall notify each Business Equity Firm Subcontractor that does not confirm receipt of payment from the Contractor of its responsibility to do so in the City's Business Equity Management System and provide proof of such notification to DVIN.

(k) Contract Close-Out Procedure. At the completion of a Contract, the following procedures shall be followed by the Contractor. The Program contains further requirements of City departments for close-out procedures.

(1) The Contractor shall submit a Notice of Final Payment in the Business Equity Management System.

(2) The Contractor shall work with DVIN to correct any discrepancies in payments made under a Contract.

(3) If DVIN determines that the Contractor failed to meet the Business Equity Goal and the City made no changes that impacted the Contractor's ability to meet the Business Equity Goal, it shall be considered a breach of the Contract and DVIN may impose sanctions in accordance with this Article.

(l) Counting Business Equity Firm's Participation.

(1) In order for a Business Equity Firm to count toward a Business Equity Goal, such firm must be Certified at the time of bid submission. Business Equity Firms that are scheduled to become Certified in an additional NAICS area during execution of the Contract may count participation towards the Business Equity Goal for the additional certified work upon notifying DVIN with proof of such certification prior to completion of the work under the Contract.

(2) The entire amount of that portion of a Contract that is performed by the Business Equity Firm's workforce shall be counted toward a Business Equity Goal, including the cost of supplies and materials obtained for the work performed by the Business Equity Firm's workforce.

(3) The entire amount of fees or commissions charged for providing a bona fide service, such as professional, technical, consultant or managerial services, or for providing bonds or insurance specifically required for the performance of a Contract, shall be counted toward the Business Equity Goal, provided the fee is reasonable and not excessive as compared with fees customarily charged for similar services.

(4) When a Business Equity Firm performs as a participant in a Joint Venture, only the portion of the total dollar value of the Contract equal to the distinct, clearly defined portion of the work of the Joint Venture's Contract that is performed by the Business Equity Firms with its own forces and for which it is separately at risk, shall be counted toward the Business Equity Goal.

(5) Only expenditures to a Business Equity Firm that is performing a Commercially Useful Function shall be counted. To determine whether a Business Equity Firm is performing a Commercially Useful Function, the City may evaluate the amount of work subcontracted, industry practices, whether the amount the registered firm is to be paid under the Contract is commensurate with the work it is actually performing and other relevant factors. A Business Equity Firm does not perform a Commercially Useful Function if its role is limited to that of an extra participant in the Contract through which funds are passed in order to obtain the appearance of participation. When a Business Equity Firm is presumed not to be performing a Commercially Useful Function, the Contractor or Business Equity Firm may present evidence to rebut this presumption.

(6) In determining achievement of a Business Equity Goal, the participation of a Business Equity Firm shall not be counted toward the Business Equity Goal until the respective amount has been paid to the Business Equity Firm.

(7) Business Equity Firms that meet the Significant Business Presence definition and bid as a Contractor or Subcontractor may count their participation towards the goal. Acceptance is on a contract-by-contract basis.

§20-372 CONTRACT EXCEPTIONS AND WAIVERS.

(a) If a Bidder or Contractor is unable to comply with the Business Equity Goal requirements for a Contract, such Bidder or Contractor may submit one of the two forms prepared by the DVIN listed below. If the DVIN denies a request to waive a goal; the Bidder or City department may appeal that denial to the City Manager whose decision on the request shall be final.

(1) A Contractor Waiver Form may be submitted if a Bidder will perform the entire contract without Subcontractors or suppliers.

(2) A Good Faith Effort Form is submitted if the Bidder or Contractor has a subcontracting and/or supplier opportunity but was unable to meet or exceed the Business Equity Goal. The Bidder or Contractor shall submit requested documentation that demonstrates a Good Faith Effort to comply with the Business Equity Goal.

§20-373 VIOLATIONS AND SANCTIONS.

(a) Violations. If a Business Equity Firm, Bidder, Contractor, Business Equity Firm Subcontractor, Vendor, or supplier (for purposes of this Section, each referred to as an “Offender”) commits a violations of this Article (including payment processing and payment of Business Equity Firm Subcontractors) or provides false or misleading information to the City in connection with submission of a bid, responses to requests for qualifications or proposals, Good Faith Efforts documentation, post-award compliance, or commits any other violations of this Article, it may result in sanctions in accordance with this section.

(b) Payment Reporting. Failure to comply with requirements for payment reporting procedures will result in an Offender being locked out the Business Equity Management System until compliance with the Business Equity Management System is achieved.

(c) Payments Withheld. Failure to comply with the provisions of the Texas Prompt Payment Act (Tex. Gov’t. Code, Chap. 2251) or any successor statute shall authorize the City to withhold payment from the Contractor until compliance is attained. Noncompliance may impact bidder evaluation scoring on future City bid opportunities.

(d) All other violations of this Article, including persistent payment issues (reporting or payment of Subcontractors) will result in the following sanctions:

(1) Warning Letter. A formal written warning letter from DVIN that shall become part of the vendor profile and may impact bidder evaluation scoring on future City bid opportunities for up to 12 months.

(2) Non-Responsive Designation. DVIN will designate an Offender as non-Responsive if DVIN determines that an Offender is not Responsive to any requirements of this Article. This designation shall prevent Offenders from bidding on Contracts for up to 6 months or until compliance is met as determined by DVIN, whichever is earlier.

(3) 1-Year Debarment. Continued failure of an Offender to comply with this Article may result in Offender being Debarred for a period of time of not less than one (1) year.

(4) 3-Year Debarment. An Offender who intentionally and/or knowingly misrepresents material facts may be Debarred for a period of time of not less than three (3) years.

(e) Debarment Procedure.

(1) DVIN shall determine whether Debarment of an Offender is appropriate. If it decides in the affirmative, DVIN shall send a written statement of facts and a recommendation for Debarment to the City Manager. The City Manager, after consultation with DVIN and the City Attorney's Office, shall ultimately decide whether Debarment is appropriate. If the City Manager upholds DVIN's recommendation for Debarment of an Offender, the City Manager shall send a certified notice to the Offender informing them of the Debarment.

(2) An Offender that receives notification of Debarment may appeal to the Business Equity Board by giving written notice within ten (10) days from the date of receipt of notice of Debarment to the City Manager and the Business Equity Board of its request for an appeal of the Debarment.

§20-374 APPEAL.

(a) The Business Equity Board shall conduct a hearing within thirty (30) days from the date of receipt of the request for any appeal of this Article, unless the appellant requests an extension of time. The Business Equity Board will notify the appellant of the hearing time and location.

(1) The appellant shall be afforded an opportunity to appear with counsel if they so desire, submit documentary evidence, and confront any witness that the City presents at the hearing.

(2) The Business Equity Board shall render its decision not more than thirty (30) days after the hearing and send a certified notice to the appellant.

(3) If the Business Equity Board upholds the sanctions, the appellant may appeal to the City Manager within ten (10) days from the date of receipt of the Business Equity Board's decision by giving written notice to the City Manager. The City Manager has the final determination whether to uphold the sanctions assigned by the Business Equity Board.

§20-375 SUNSET DATE

(a) This Article shall terminate on December 31, 2030 unless reauthorized by City Council.

§§20-376 - 20-382 RESERVED.

Mayor and Council Communication

DATE: 10/19/21

M&C FILE NUMBER: M&C 21-0804

LOG NAME: 08FY2021AMENDBUSINESSEQUITYORDINANCE

SUBJECT

(ALL) Adopt Ordinance to Amend Ordinance No. 24534-11-2020 and Chapter 20, Licenses and Miscellaneous Business Regulations, Article X: Business Equity Firms of the City Code to Reflect Recommendations from the 2020 Fort Worth Disparity Study and Codify Current Processes

RECOMMENDATION:

It is recommended that the City Council adopt the attached Ordinance amending Ordinance No. 24534-11-2020 and Chapter 20, Licenses and Miscellaneous Business Regulations, Article X Business Equity Firms to make certain additions and clarifications. The additions and clarifications include: (1) certain aspects of the definition section; (2) adding a penalty schedule for failure to submit the required Business Equity Firm Utilization Plan, (3) adding additional contracts that are subject to the Ordinance; (4) adding certain protest procedures for vendors; and (5) adding Payment System Compliance Procedure.

DISCUSSION:

The Department of Diversity and Inclusion ("DVIN") determined that certain changes were necessary to Ordinance No. 54531-11-2020 ("Business Equity Ordinance") passed in November 2020 that amended Chapter 20, Article X of the City Code ("Article") in order to clarify the Article and add certain terms that reflect the business processes of the City and that will continue to reduce barriers to opportunities on City contracts for Business Equity Firms. Those changes are reflected on the attached Ordinance (in both a redlined and clean version) that amends the Article. The changes includes the following:

1. Clarifying certain definitions for Business Equity Firm, City Funds, Debarment, Marketplace, and Significant Business Presence.
2. Changing the requirements for "out of Marketplace" firms to qualify as a Business Equity Firm.
3. Stating that City participation of \$1,000,000 is required to set a Business Equity Goal for agreements relating to the construction of public infrastructure or a public building, such as Community Facilities Agreements and Infrastructure Construction Agreements.
4. Stating that the City shall not set separate local Business Equity goals on Community Development Block Grants, HOME programs, or other projects that include federal funds except where the City is mandated to set goals by state or federal requirements.
5. Stating that Business Equity Goals may be established for tax abatement agreements and Chapter 380 grant agreements in accordance with the most recently adopted "Tax Abatement Policy" and "Chapter 380 Grant Agreement Policy."
6. Adding clarifying details for payment reporting in Business Equity Management System.
7. Adding clarification on Contract Compliance including 21-day bid advertisement requirement, Utilization Plans required by 2 p.m. on 3rd business day after notification of bidder selection.
8. Adding new processes to the Violations and Sanctions section including a non-responsive designation for not submitting Utilization Plan, Warning Letters, Temporary Suspension, and how Debarred vendors may apply to DVIN for reinstatement.
9. Adding clarifications the companies operating with Exclusive Contracts and Non-Compete Clauses must now show proof of growth in capacity and consent in order to qualify as a Business Equity Firm.
10. Adding clarifications to Business Equity Listings contractors can obtain a current list (dated not more than six (6) months old prior to the bid open date) of Business Equity Firms from the DVIN.
11. Providing that the bid protest procedure is aligned with City's general purchasing policy.
12. Providing that allegations of discrimination based on a protected class in the award or performance of a contract shall be submitted, in writing, to DVIN before the award of the contract or the performance of the Contract.

A Form 1295 is not required because: This M&C does not request approval of a contract with a business entity.

FISCAL INFORMATION / CERTIFICATION:

The Director of Finance certifies that approval of these recommendations will have no material effect on City funds.

Submitted for City Manager's Office by: Fernando Costa 6122

Originating Business Unit Head: Christina A. Brooks 8988

Additional Information Contact: JB Strong 7627