Ordinance No. 5366

AN ORDINANCE TO CREATE THE "SMALL BUSINESS ENTERPRISE PROGRAM" ORDINANCE IN ORDER TO PROMOTE THE ECONOMIC WELFARE OF THE PEOPLE OF THE CITY OF MEMPHIS; TO PROMOTE FULL AND EQUAL BUSINESS OPPORTUNITY FOR ALL PERSONS DOING BUSINESS WITH THE CITY OF MEMPHIS; TO PROMOTE COMMERCE BY ASSISTING SMALL BUSINESS ENTERPRISES (SBEs) TO ACTIVELY PARTICIPATE IN THE CITY OF MEMPHIS' PROCUREMENT PROCESS;

WHEREAS, the City of Memphis desires to be proactive in ensuring that economic opportunities in the Memphis Metropolitan Statistical Area (MSA) are equally available to all individuals or businesses, including minority and women-owned businesses, regardless of race, gender or ethnicity; and

WHEREAS, SBEs represent 89% of the businesses in the United States and 30% of the business revenue nationwide, according to the United States Bureau of Census; and

WHEREAS, in the Memphis Metropolitan Statistical Area, 73% of establishments have less than 10 employees and 94% of establishments have less than 50 employees, according to the United States Bureau of Census; and

WHEREAS, the City of Memphis is committed to providing SBEs with assistance in gaining access to technical training; and

WHEREAS, the City of Memphis is committed to providing SBEs with assistance in gaining access to capital and financing; and

WHEREAS, the City of Memphis is committed to providing SBEs with assistance in gaining access to bonding for contracts; and

WHEREAS, the City of Memphis is committed to providing SBEs with assistance with identifying and gaining access to a broad array of business markets; and

WHEREAS, the City of Memphis is committed to making sure businesses make efforts to contract with SBEs; and

WHEREAS, the City of Memphis has determined that it is necessary to use its purchasing and contracting functions to ensure competitive opportunities for all businesses; and

WHEREAS, the City recognizes the necessity for periodic review of and reporting on the implementation and operation of this division to ensure that it continues to effectuate competitive opportunities for all businesses;

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NOW, THEREFORE,

SECTION 1. BE IT ORDAINED BY THE COUNCIL OF THE CITY OF MEMPHIS, That Chapter ___, Code of Ordinances, City of Memphis, be amended so as to create the following:

Small Business Enterprise Opportunity Program

A. Short Title.

This division shall be known as the "City of Memphis's Small Business Enterprise Program."

B. Definitions.

The following words, terms and phrases, when used in this division, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Memphis MSA shall mean the geographical area consisting of the following counties: Shelby, Fayette, Tipton, Desoto, Marshall, Tate, Tunica, and Crittendon.

Bid shall mean a quotation, proposal, sealed bid or offer to perform or provide labor, materials, supplies or services to the City for a price on an Eligible Project, or for an Eligible Project that generates revenue for the City.

Bidder shall mean any individual, sole proprietorship, partnership, joint venture, or corporation that submits a Bid to the City.

Certification or Recertification shall mean official recognition and approval by the Office of Contract Compliance that a business meets the qualification criteria of a Small Business Enterprise, as set forth in this Division. Certification or recertification relates to qualifications regarding ownership, control, and the applicant's economic disadvantage, not the quality of the service or product.

City shall mean the City of Memphis.

Commercially Useful Function: For the purpose of determining whether a Business Enterprise is performing a Commercially Useful Function, the Office of Contract Compliance (OCC) shall consider all of the facts in the record, viewed as a whole, including without limitation the following:

(1) A SBE performs a Commercially Useful Function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved.

(2) To perform a Commercially Useful Function, the SBE must be responsible, with respect to material and supplies used on the contract, for negotiating price,

determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself.

(3) To determine whether a SBE is performing a Commercially Useful Function, OCC will evaluate the amount of work subcontracted by the SBE, industry practices regarding subcontracting, whether the amount the SBE is to be paid under the contract is commensurate with the work it its actually performing, the SBE credit claimed for its performance of the work, and other relevant factors.

(4) A SBE does not perform a Commercially Useful Function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of SBE participation. In determining whether an SBE is such an extra participant, OCC will examine similar transactions, particularly those in which SBEs do not participate.

Contract shall mean and include any agreement between the City and a person or business enterprise to provide or procure labor, materials, equipment, supplies and services to, for or on behalf of the City. A "contract" shall include an agreement between the city and a person or business enterprise to perform professional architectural and engineering services, construction related services or fund the performance of such services, non-professional services and/or goods. Except as otherwise specifically defined in this section, a "contract" does not include: (1) awards made by the City to a non-profit entity which the City offers assistance, guidance, or supervision on a project or program and the recipient of the grant award uses the grant monies to provide services to the community; (2) sales transactions where the City sells its personal or real property; (3) a loan transaction where the City is acting as a debtor or a creditor; (4) lease and franchise agreements; (5) agreements to use City real property; or, (6) gifts of materials, equipment, supplies or services to the City.

Contractor shall mean a prime contractor or vendor on a City contract.

Control or *controlled*: For the purpose of determining whether the owner or owners of a potential SBE (as used in this definition, "SBE-Owner", which shall denote one or more owners) Controls the potential SBE, OCC shall consider all of the facts in the record, viewed as a whole, including without limitation the following:

(1) For a SBE-Owner to be deemed to Control, the potential SBE must be independent. An independent business enterprise is a business whose viability does not depend on its relationship with another firm or firms.

(a) In determining whether a potential SBE is independent, OCC will scrutinize the SBE's relationships with other firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.

(b) OCC will consider whether present or recent employer/employee relationships between the SBE-Owner and other firms or persons

associated with other firms compromise the independence of the potential SBE.

(c) OCC will examine the potential SBE's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential SBE.

(d) In considering factors related to the independence of a potential SBE, OCC will consider the consistency of relationships between the potential SBE and other firms with normal industry practice.

(2) A potential SBE must not be subject to any formal or informal restrictions which limit the customary discretion of the SBE-Owner. There can be no restrictions through corporate charter provisions, by-law provisions, contracts or any other formal or informal devices (e.g., cumulative voting rights, voting powers attached to different classes of stock, employment contracts, requirements for concurrence by persons other than the SBE-Owner, conditions precedent or subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights) that prevent the SBE-Owner, without the cooperation or vote of any other individual, from making any business decision of the business enterprise. This paragraph does not preclude a spousal co-signature on documents.

(3) The SBE-Owner must possess the power to direct or cause the direction of the management and policies of the business enterprise and to make day-to-day as well as long-term decisions on matters of management, policy and operations.

(a) A SBE-Owner must hold the highest officer position in the company (e.g., chief executive officer or president).

(b) In a corporation, the SBE-Owner must control the board of directors.

(c) In a partnership, the SBE-Owner must serve as a general partner, with control over all partnership decisions.

(4) Individuals who are not the SBE-Owner may be involved in an SBE as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not, however, possess or exercise the power to control the business enterprise, or be disproportionately responsible for the operation of the business enterprise.

(5) The SBE-Owner may delegate various areas of the management, policymaking, or daily operations of the business enterprise to other participants in the firm. Such delegations of authority must be revocable, and the SBE-Owner must retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the SBE-Owner in the business enterprise's overall affairs must

be such that OCC can reasonably conclude that the SBE-Owner actually exercises control over the business enterprise's operations, management, and policy.

(6) The SBE-Owner must have an overall understanding of, and managerial and technical competence and experience directly related to the type of business in which the business enterprise is engaged and the business enterprise's operations. The SBE-Owner is not required to have experience or expertise in every critical area of the business enterprise's operations, or to have greater experience or expertise in a given field than managers or key employees. The SBE-Owner must have the ability to intelligently and critically evaluate information presented by other participants in the business enterprise's activities and to use this information to make independent decisions concerning the business enterprise's daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the business enterprise is insufficient to demonstrate control.

(7) If state or local law requires the owner of a particular type of firm to have a particular license or other credential, then the SBE-Owner of that type of firm must possess the required license or credential in order to be deemed in Control. If state or local law does not require an owner to have such a license or credential, OCC will not deny certification solely on the ground that the SBE-Owner lacks the license or credential. However, OCC may take into account the absence of the license or credential as one factor in determining whether the SBE-Owner actually controls the firm.

(8) OCC may consider differences in remuneration between the SBE-Owner and other participants in the business enterprise in determining whether the SBE-Owner Controls the business enterprise. Such consideration shall be in the context of the duties of the persons involved, normal industry practices, the business enterprise's policy and practice concerning reinvestment of income, and any other explanations for the differences proffered by the business enterprise. OCC may determine that a business enterprise is controlled by its SBE-Owner although the SBE-Owner's remuneration is lower than that of some other participants in the business enterprise. In a case where someone other than the SBE-Owner formerly controlled the business enterprise, and the SBE-Owner now controls it, OCC may consider a difference between the remuneration of the former and current owner of the business enterprise as a factor in determining who Controls the business enterprise, particularly when the former owner remains involved with the business enterprise and continues to receive greater compensation than the current SBE-Owner.

(9) In order to be viewed as "Controlling" a business enterprise, a SBE-Owner cannot engage in outside employment or other business interests that conflict with the management of the business enterprise or prevent the SBE-Owner from devoting sufficient time and attention to the affairs of the business enterprise to control its activities. For example, absentee ownership of a business and part-time work in a full-time firm are not viewed as constituting Control. However, an SBE-Owner

could be viewed as "Controlling" a part-time business that operates only on evenings and/or weekends, if the SBE-Owner controls the business enterprise when it is operating.

(10) An SBE-Owner may control a business enterprise even though one or more of the SBE-Owner's immediate family members participate in the business enterprise as a manager, employee, owner, or in another capacity. Except as otherwise provided in this paragraph, OCC must make a judgment about the control the SBE-Owner exercises vis-à-vis other persons involved in the business enterprise as it does in other situations, without regard to whether or not the other persons are immediate family members. If OCC cannot determine that the SBE-Owner--as distinct from the family as a whole--controls the business enterprise, then the SBE-Owner has failed to carry her/his burden of proof concerning control, even though s/he may participate significantly in the business enterprise's activities.

Day or Days shall refer to calendar days.

Economically Disadvantaged Person shall mean a person whose personal net worth does not exceed $750,000, excluding the individual's primary residence and the business enterprise owned by the individual(s) for which the owner(s) is seeking SBE certification from the City.

Eligible Project shall mean:

(1) Any City contract with a participation goal attached as identified by the Contract Compliance Officer, excluding sole source procurement, emergency procurement, and contracts governed by 49 CFR Parts 23 and 26.

(2) For purposes of this Division, contract or project "value" shall mean either the expenditure of funds by the City, or the generation of revenue for the City by a contractor as a direct result of a City contract.

Joint venture shall mean an association of two or more persons, partnerships, corporations, or any combination of them, established to carry on a single business activity that is limited in scope and duration. The agreement establishing the joint venture, partnership or other multi-entity relationship shall be in writing. Further, participation in a joint venture shall be based on the sharing of real economic interest in the venture and shall include proportionate control over management, interest in capital acquired by the joint venture and interest in earnings.

Office of Contract Compliance (OCC) shall mean the Office of Contract Compliance in the City of Memphis.

Owned or *ownership:* In determining whether a potential SBE is Owned by one or more Economically Disadvantaged Persons, OCC will consider all of the facts in the record, viewed as a whole, including without limitation the following:

(1) OCC shall deem the Owner of a business enterprise to be whoever possesses at least 51 percent of the business enterprise. There may be more than one Owner.

(a) In the case of a corporation, such individual(s) must possess at least 51 percent of the each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding.

(b) In the case of a partnership, such individual(s) must possess at least 51 percent of each class of partnership interest. Such Ownership must be reflected in the business enterprise's partnership agreement.

(c) In the case of a limited liability company, such individual(s) must possess at least 51 percent of each class of member interest.

(2) OCC must find that the individual(s) ownership is real, substantial, and continuing, going beyond pro forma ownership of the business enterprise as reflected in ownership documents. The individual(s) must enjoy the customary incidents of ownership, and share in the risks and profits commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements.

Small Business Enterprise (SBE) shall mean a firm with its headquarters and/or principal office located in the city of Memphis which is an independent and continuing enterprise for profit, performing a Commercially Useful Function, which is Owned and Controlled by one or more Economically Disadvantaged persons, and for which the gross revenues or number of employees averaged over the past three years, inclusive of any affiliates as defined by 13 C.F.R. Sec. 121.103, does not exceed the size standards as defined pursuant to 13 C.F.R. §121. In addition, the net worth of each owner of an SBE cannot exceed $750,000, excluding each owner's primary residence which may be located in the Memphis MSA and the business enterprise for which the owner(s) is seeking SBE certification from the City.

SBE Status shall mean whether a firm meets the qualification criteria of a Small Business Enterprise, as set forth in this Division.

Supplier shall mean a warehouser or manufacturer of materials, supplies or equipment which contracts directly with a Bidder to provide such materials, supplies or equipment on an Eligible Project which involves a trade or service. For purposes of measuring the total contract dollars awarded or paid to suppliers on Eligible Projects, only amounts paid to suppliers of goods customarily and ordinarily used based upon standard industry or trade practices shall be counted.

C. Statement of Policy.

It is the purpose of this Small Business Enterprise program to promote the economic welfare of the people of the City of Memphis, to promote full and equal business opportunity for all persons doing business with the City of Memphis, and to promote commerce by assisting SBEs to

actively participate in the City's procurement process. SBEs represent 89% of the businesses in the United States and 30% of the business revenue nationwide, according to the United States Bureau of Census. Also, according to the United States Bureau of Census, in the Memphis Metropolitan Statistical Area, 73% of establishments have less than 10 employees and 94% of establishments have less than 50 employees. The City of Memphis has set a goal of 25% for the Small Business Enterprise Program. This is consistent with the federal SBE goal of 25% and lower than the availability of SBEs in the marketplace. Although the goal is 25%, we encourage participation greater than 25%.

D. Duties of the Office of Contract Compliance

Under this division, the Office of Contract Compliance shall have the following authority and duties for the implementation of the Small Business Enterprise Program under this Division:

(1) Administration and enforcement of this division and of the Disadvantaged Business Enterprise program.

(2) Establishment of written procedures, informal guidelines, and forms as may be necessary to effectuate this division.

(3) Monitoring compliance with the requirements of this division.

(4) Certification of businesses as SBEs in accordance with the standards set forth in this division.

(5) Development of databases to be maintained as a public record of certified SBEs.

(6) Investigation of alleged violations of this division, and the issuance of written statements following any determination of such investigation, stating the reasons therefore and any penalty to be imposed.

(7) Collaborating with the various city departments to ensure maximum outreach to SBEs.

(8) Determination of whether any of the penalties set forth in section [insert] should be applied to a business.

(9) Attendance at pre-bid, pre-proposal, pre-construction and pre-work conferences.

(10) Provision to business entities of all forms, applications, documents and papers necessary to comply with this division.

(11) Provision of information to potential Bidders, upon request by the potential Bidder, which shall include names and contact information of certified SBEs, to reinforce and support outreach efforts by potential Bidders.

(12) Notification by certified mail that a Bidder who has bid on and who otherwise would have been awarded a contract has the right to appeal a determination of noncompliance with this division, said appeal to be determined by the OCC within seven calendar days of receipt of the notice of noncompliance.

(13) Notification by certified mail that an applicant who has been denied certification as an SBE has the right to appeal such determination, said appeal to be determined by the OCC within seven calendar days of receipt of the notice of such determination.

(14) Notification to the Purchasing Agent of any determination of noncompliance with this division, and of any appeal from any such determination.

(15) Monitoring, for data gathering and informational purposes, utilization of SBEs on Eligible Projects.

(16) Maintenance of documents, forms, records or data regarding this program as provided in this division including: (a) documents, forms, records or data regarding the dollar amounts subcontracted to or expended for services performed by subcontractors and suppliers on Eligible Projects, including the SBE Status of each subcontractor and supplier; and (b) documents, forms, records or data regarding certified SBEs.

(17) Development and implementation of outreach and assistance programs to promote equal contracting opportunities for all businesses that wish to do business with the City, regardless of SBE Status.

E. Small Business Assistance

The Office of Contract Compliance shall act as a resource for information on Small Business Enterprises. The Office of Contract Compliance shall also undertake to raise the consciousness of SBEs about City business opportunities and provide information on taking advantage of the program benefits. Further, the City of Memphis shall provide the following assistance to Small Business Enterprises:

(1) Access to Training – Technical Assistance.

The Office of Contract Compliance in conjunction with the Renaissance Business Center shall act as a resource for technical assistance. The office shall collect, organize and disseminate information regarding available technical assistance providers in the Memphis market area.

(2) Capital – Financing Assistance.

The Office of Contract Compliance in conjunction with the Renaissance Business Center shall act as a resource for financial assistance. The office shall collect, organize and disseminate information regarding available capital or financing sources in the Memphis.

(3) Bonding Assistance

The Office of Contract Compliance in conjunction with the Renaissance Business Center shall provide SBEs with information regarding bonding including, providing a list of qualified service providers that supply bonding services.

(4) Access to Markets.

The Office of Contract Compliance will work to facilitate access to markets for SBEs. The Office of Contract Compliance will work with the Office of Planning & Development (OPD) and other development entities to connect eligible businesses to City, State and Federal programs that promote investment and encourage employment, including but not limited to, the various hub zone, enterprise zone, and tax allocation districts. The Office of Contract Compliance may monitor in conjunction with OPD SBE involvement in procurement opportunities generated by OPD.

F. City-Maintained Records and Reports.

The effectiveness of this program will be measured by a review of data indicating prime, subcontractor and Supplier awards to SBEs. Program effectiveness measurements will also include efforts by the City of Memphis staff to provide prime contracting opportunities for SBEs. In order to ensure the effective tracking of these efforts, the following shall be done:

(1) Each contractor shall continuously maintain, compile, and provide to the Office of Contract Compliance, monthly, information relating to its use of SBEs on the City project. This information shall include without limitation the following information for each of the SBE subcontractors and Suppliers utilized by the Contractor on the City project: a description of the categories of contracts awarded to SBEs; the dollar value of contracts awarded to SBEs; and contact information for the SBEs. Additionally, the Contractor shall provide information regarding its progress toward attaining the SBE goal on the City project.

(2) Within thirty (30) days after the end of a contract in which there was an SBE goal, each contractor shall provide the OCC with a report that summarizes the outcome of the project information, including without limitation: the identity of and contact information for each SBE to whom the contractor has awarded a subcontract or Supplier agreement; the type of work performed or supplies provided by each subcontractor/Supplier; the dollar value of each of the subcontracts/ Supplier

agreements; and the total percentage of the value of the City contract subcontracted to SBE subcontractors and/or Suppliers.

(3) The Purchasing Department shall provide the OCC with information regarding every City contract on which the prime contractor is an SBE or on which an SBE is part of a joint venture or mentor protégé team serving as the prime contractor. The information shall include the name and contact information of the SBE, the type of contract, and the dollar value of the contract.

(4) The OCC shall prepare a consolidated report based on a compilation and analysis of the reports submitted by each contractor and information from the Purchasing Department regarding the City's use of SBE's as prime contractors. The consolidated report will identify and assess the awards to SBEs of City contracts, prime contractors' use of SBE subcontractors and Suppliers, prime contractors' progress in achieving SBE subcontract goals, and other SBE development and contracting efforts. Specifically, the OCC will maintain records and prepare reports showing:

(a) Awards to SBE subcontractors and Suppliers, including names of contractors and subcontractors, nature of the work/services performed, and the percentage of SBE participation per contract. The City of Memphis will obtain regular reports from prime contractors on their progress in meeting contractual SBE commitments;

(b) Specific efforts by Contractors to identify and award contracts to SBEs;

(c) Copies of direct mailings by Contractors to SBEs;

(d) City contracts awarded to SBE's or prime contractors in which an SBE was a joint venture partner or part of a mentor protégé team. This information shall include without limitation the name and contact information of the SBEs, the type of contract, and the dollar value of the contract.

(e) Pre-bid conference information as it relates to the Small Business Enterprise Program;

(f) Requests for assistance from SBEs interested in bidding/proposing on City of Memphis contracts and subcontracts;

(g) Workshops, seminars and training programs conducted for SBEs; and

(h) Efforts to assist SBEs in acquiring bonding and insurance.

(4) The OCC will submit annual SBE Participation reports to the Council. These reports shall include a summary of the information described above, plus an

analysis of the total dollar value of City contracts/subcontracts awarded to SBEs during the preceding year, categorized by prime contracting dollars, subcontracting dollars, and Supplier dollars. The percentage of the total dollar value of these contracts that was awarded to SBEs during the preceding year shall also be provided.

G. Small Business Enterprise Program Goals and Counting Procedures

(1) The Contract Compliance Officer in conjunction with the Purchasing Agent will set a 25% SBE subcontracting goal for each specific prime contract with subcontracting and/or Supplier possibilities, but shall have the authority to reduce or eliminate such SBE goal on a contract-by contract basis based upon the type of contract, the type of subcontracting work that will be required, and the availability of SBE's therefore. Every Bidder on an Eligible Project shall be required to submit, with its Bid submission, the names, address, certification numbers, if applicable, of certified SBEs or firms that have applied for SBE certification at the time of the Bid submission, and any other information required by the OCC as set forth in the project's solicitation documents.

(2) SBE participation is counted as follows:

(a) Once a firm is certified as a SBE, the total dollar value of the subcontractor of Supplier contract awarded to the SBE by the Contractor is counted toward the applicable SBE goal. However, if a firm who is listed on the contract as having its SBE certification pending has its certification denied, or if an SBE fails to be recertified during the term of the contract, or if an SBE is decertified during the term of the contract, the dollar value of the contract awarded to that SBE cannot be counted toward the applicable SBE goal;

(b) The City will count toward its SBE goal a portion of the total dollar value of a contract with a joint venture equal to the percentage of the ownership and contractual commitment to the SBE partner in the joint venture.

(c) The City will count toward the SBE goal a portion of the total dollar value of a contract with a mentor protégé team equal to the percentage of the project self performed by the SBE member of the team.

(d) The City will count toward its SBE goal only expenditures to SBEs that perform a Commercially Useful Function in the work of the contract.

(e) The City will count toward its SBE goals the following expenditures to SBE firms that are not Suppliers:

i. The fees or commissions charged for providing a bona fide service, such as professional, technical, consultant or managerial services and

assistance in the procurement of essential personnel, facilities, equipment, materials or supplies required for performance of the contract, provided that the fee or commission is determined by the City to be reasonable and not excessive as compared with fees customarily allowed for similar services.

ii. The fees charged for delivery of materials and supplies required on a job site (but not the cost of the materials and supplies themselves) when the hauler, trucker, or delivery service is not also the manufacturer of, or a regular dealer in, the materials and supplies, provided that the fee is determined by the City to be reasonable and not excessive as compared with fees customarily allowed for similar services. The fees or commissions charged for providing any bonds or insurance specifically required for the performance of the contract, provided that the fee or commission is determined by the City of Memphis to be reasonable and not excessive as compared with fees customarily allowed for similar services.

(3) Sheltered Market

The OCC in consultation with the Purchasing Department will designate certain procurements as sheltered market procurement opportunities, which will only be open for competition by and between SBEs.

(a) Contracts of $2,500 - $100,000. Under the sheltered market program, every acquisition of goods or services that has an anticipated dollar value between $2,500 and $100,000 is automatically reserved exclusively for small businesses, except for those contracts pertaining to street projects, as described in the **CIP budget**. The Contract Compliance Officer and the Purchasing Agent may agree to exclude any procurement in this category from the sheltered market at their joint discretion. The sheltered market procurement requirement will only apply when there is a reasonable expectation that offers will be obtained from three or more SBEs that are competitive in terms of market prices, quality, and delivery. If only one acceptable offer is received from a responsible SBE, the sheltered market procurement will be withdrawn and the product or service, if still needed, will be solicited on an unrestricted basis.

(b) Contracts over $100,000: In addition, the Contract Compliance Officer and Purchasing Agent may agree to designate any contract over $100,000 for SBEs, except for those contracts pertaining to street projects, pertaining to Public Works construction, or other projects for which a sheltered market would conflict with State Law. The sheltered market designation shall be made only when there is a reasonable expectation that Bids will be obtained from at least three responsible SBEs and that the award will be made at a fair market price.

i. Partial Sheltered Market Procurements: A sheltered market procurement of a single acquisition or a class of acquisitions may be total or partial. The Contract Compliance Officer and the Purchasing Agent may designate a portion of an acquisition as sheltered market procurement, except for construction.

(d) To obtain sheltered market procurement, an SBE must perform at least a given percentage of the contract. This provision limits the amount of subcontracting an SBE may enter into with other firms when performing these types of contracts. The provisions are as follow:

i. Construction: For general and heavy construction contractors, at least 15 percent of the cost of the contract, not including the cost of materials, must be performed by the SBE prime contractor with its own employees. For special trade construction, such as plumbing, electrical, or tile work, this requirement is 25 percent.
ii. Manufacturing: At least 50 percent of the cost of manufacturing, not including the cost of materials, must be performed by the SBE prime contractor
iii. Services: At least 50 percent of the contract cost for personnel must be performed by the SBE prime contractor's own employees.

H. Certification as a Small Business Enterprise

(1) A business seeking certification as an SBE must submit a central certification agency as designated by the City of Memphis on the prescribed form, affirming under penalty of perjury that the business qualifies as an SBE. In order to qualify as an SBE, the potential SBE owner must meet the following requirements:

(a) Demonstrate that the firm's gross revenues or number of employees averaged over the past three years, inclusive of any affiliates as defined by 13 C.F.R. §121.103, does not exceed the see standards as defined pursuant to Section 13 C.F.R. 121;

(b) Submit a certification of the personal net worth of each owner of the firm;

(c) Demonstrate that the net worth of each owner does not exceed $750,000, exclusive of principal residence and the value of the owner's interest in the certified SBE;

(d) Demonstrate that the SBE owner(s) listed on the certification application "Own" and "Control" the business;

(e) Demonstrate that it is or will be performing a commercially useful function; and

(f) Demonstrate that it is located in the city of Memphis.

(g) Demonstrate that the principal owner maintains a residence in the Memphis MSA.

(2) The Office of Contract Compliance or a central certification agency may also, if it deems it necessary, perform an on site review of the potential SBE Owner's business prior to approving an application for certification.

(3) A firm that is denied certification may not reapply for certification for a period of twelve (12) months from the date of the denial.

(4) Firms certified by other government agencies will be required to be certified under this Program regardless of previous certification.

(5) When a firm which has previously been designated a SBE exceeds either the size standard or the owner's net worth provision, it will be deemed to have graduated from the SBE Program with no right of reentry.

(a) Graduation procedures. Any interested party may request an evaluation of an M/WBE firm. That evaluation will be performed at the time of the recertification for the MWBE. Upon recertification, a firm will be evaluated for graduation from the program. Once the OCC has been notified by the certifying agency that the firm has exceeded the size standards established by the NAICS, the following steps will be followed:

i. Notification. The OCC shall issue a letter of notification to the firm detailing its intent to graduate the firm from the program. The letter of notification shall set forth findings, based on the facts and in accordance with law and regulations, for every material issue relating to the basis of the program graduation with specific reasons for each finding.

ii. Appeal. The firm will be allowed 45 days from the date of the letter to appeal the decision. To appeal the decision, the firm must submit in writing to the OCC information which would explain why the proposed basis of graduation is not warranted. Upon receipt of the appeal, the OCC will notify the firm in writing of the receipt of the appeal.

iii. Review. If the firm appeals its graduation from the program within the requisite 45 days, the appeal will be reviewed by a committee composed of the Director of Finance, Purchasing Agent, and City

Engineer. Within 15 days of receipt of the appeal, a written decision will be issued to the firm by the committee via the OCC.

iv. Post Graduation. After the effective date of firm's graduation from the program as provided for herein, a firm is no longer eligible to participate in or receive assistance from the MWBE Program. However, such firm is obligated to complete previously awarded contracts and/or subcontracts, including any priced bids that may be exercised. Upon graduation there will be no right of reentry.

I. Recertification

Once certified as an SBE by the Office of Contract Compliance, the certification is valid for a period of two years from the date the City certified the applicant as an SBE. Prior to the expiration of the two year period, a business that desires to be recertified by the City shall:

(1) File an application to renew with the central certification agency as designated by the City of Memphis; and

(2) Meet the requirements specified in this section for certification as an SBE.

J. Decertification of Small Business Enterprise

(1) The City of Memphis may decertify the SBE for any of the following reasons:

(a) Changes in the firm's circumstances since the certification of the firm that render the firm unable to meet the eligibility standards;

(b) Information or evidence that was not available to the City at the time the firm was certified that, if available, would have resulted in a denial of certification;

(c) Information that was concealed or misrepresented by the firm in connection with the certification application or review conducted by the City;

(d) A change in the certification standard or requirements of the City since the certification of the firm;

(2) Prior to taking formal action, the City staff shall provide the business with written notice of the proposed revocation. During the pendancy of the proceeding, the SBE firm's certification shall remain valid. The Office of Contract Compliance staff shall then prepare a recommendation regarding the proposed revocation for review and approval by the Chief Operating Officer. If approved by the Chief Operating Officer, the OCC shall issue an Initial Notice of Decertification to the SBE owner by certified mail. The SBE may appeal the Initial Notice of Decertification within seven (7) days of the receipt of the Initial Notice of Decertification. If the SBE owner fails to appeal the Initial Notice of

Decertification within the time period set forth in this section, the decertification shall be final and take effect immediately.

(3) If the OCC decertifies an SBE proposed to work, or currently working, on a contract, the decertified SBE's participation on the contract may no longer be counted toward fulfillment of the City's SBE goals. If the contractor no longer meets the City's SBE goals after the decertification of the former SBE, the contractor shall be required, within thirty (30) days after notification by the Office of Contract Compliance, to demonstrate good faith efforts to substitute the decertified SBE. Failure to demonstrate good faith efforts to substitute a decertified SBE will result in the Bidder being declared non-responsive, if done prior to the award of the contract, or the contractor being held in default of the contact, if done after the award of the contract.

K. Certification Reviews

In addition to reviewing firms for cause, the Office of Contract Compliance will conduct random certification reviews of certified SBEs by auditing them to verify that the information submitted by a business is accurate, and that the business remains eligible after certification has been granted. Certification is subject to revocation if it is determined that a business no longer qualifies as an SBE under the terms of this program. Certification reviews may be conducted for any business for which the Office of Contract Compliance determines a certification review is warranted. Businesses subject to certification reviews must provide the Office of Contract Compliance with any information requested to verify the certification eligibility of the business.

L. Appeals.

(1) *Determination of noncompliance.* A responsible bidder that is determined to be non-responsive to the requirements of this division, and that otherwise would have been awarded a contract, as determined in consultation with the Purchasing Agent, shall receive a written determination by the Contract Compliance Officer, via certified mail, setting forth the reasons for the determination of non-responsiveness.

(2) *Denial of certification as an SBE.* Upon a denial of certification as an SBE, the Office of Contract Compliance Officer shall notify the affected party in writing, via certified mail, setting forth the reasons for the denial of certification.

(3) *Time for filing notice of appeal.* Any business that has been denied certification as an SBE, or against whom a final determination of non-responsiveness to the requirements of this division has been made by the Office of Contract Compliance Officer, may appeal the final determination of non-responsiveness or denial of SBE certification by filing a notice of appeal with the Contract Compliance Officer in writing within seven calendar days of receipt of the notice of the final determination of noncompliance or denial of certification.

(4) *Posting of appeal security.* Any Bidder that files an appeal to a final determination of non-responsiveness by the Office of Contract Compliance must, at the time of filing, post security in the amount of one percent (1 %) of the financial offer of the Appellant. If the Contract Compliance Hearing Officer upholds the determination of the Office of Contract Compliance, he or she shall assess against the Appellant reasonable attorneys' fees and other administrative costs incurred by the City in reviewing and responding to the appeal. If the City is represented by its law department, such fees and costs will be calculated at the hourly rate of each attorney participating in the review and response to the appeal set forth in each attorney's most recent City paycheck times the number of hours worked by such participating attorneys on the appeal. If the city is represented by outside counsel, such fees and costs will be calculated at the billing rates of the firm's attorneys, plus all out of pocket costs of the firm concerning the appeal. Within fifteen (15) days of ruling against the Appellant, the Contract Compliance Hearing Officer, in consultation with the City's law department and outside counsel, if any, will calculate the City's cost in reviewing and responding to the appeal and will apply the Appellant's bond or certified check to the costs. Any remaining balance of the bond or certified check will be returned to the Appellant.

(5) *Notice of hearing date and hearing.* Within three calendar days of receipt of a notice of appeal from an aggrieved party, excluding official holidays, the Contract Compliance Officer shall forward the notice to the contract compliance hearing officer.

(6) *Exhaustion of Administrative Remedies.* A protestor shall be required to exhaust its administrative remedies before filing suit in any State or Federal court based on a determination of non- responsiveness or denial of certification by the OCC rendered pursuant to the City's Small Business Enterprise Ordinance.

(7) *Duties of Contract Compliance hearing officer.* The duties of the contract compliance hearing officer shall be as follows:

(a) The contract compliance hearing officer shall have exclusive jurisdiction to determine all appeals arising under this Division.

(b) The contract compliance hearing officer shall set a hearing date not more than seven (7) calendar days from the date of receipt of the notice of appeal from the Contract Compliance Officer, excluding official holidays. The hearing officer shall cause notice of the hearing to be served upon all parties by certified U.S. mail. Such notice shall set forth with particularity the decision being appealed by the aggrieved business and shall include the hearing date, time and place.

(c) At the hearing, all parties shall be provided a fair and impartial hearing and shall be allowed to produce any and all evidence in either party's possession concerning the final determination of non-responsiveness with the requirements of this division, or the denial of certification as an SBE.

(8) *Decision.* Within seven calendar days after conclusion of the hearing, excluding official holidays, the contract compliance hearing officer shall make a written decision on the appeal, which decision shall affirm, alter or reverse the final determination of non-responsiveness or the denial of certification by the office of contract compliance. The hearing officer shall decide whether the final determination of non-responsiveness or the denial of certification being appealed was in accordance with the law in existence at the time that the Bidder was found to be non-responsive, at the time that certification was denied, or at the time the penalties were imposed.

(9) *Notice of decision.* Within seven calendar days after conclusion of the hearing, excluding official holidays, the contract compliance hearing officer shall issue written notice of the decision on the appeal to all parties. The notice of the decision shall be sent to all parties by certified U.S. mail and shall set forth the reasons for the decision.

(10) *Appeal.* The decision of the hearing officer shall be binding on all parties, subject to the right of appeal to the Chief Administrative Officer or its designee.

M. Small Business Enterprise Directory

The City will create an SBE Directory that lists SBEs categorized by types of firms to facilitate identifying businesses with capabilities relevant to a particular specification. Each business listing will contain the business name, contact person, address, phone number, legal structure of the business, and details concerning the company's business specialties. North American Industrial Classification System (NAICS) Codes will be identified for each company. The Office of Contract Compliance will continuously update and maintain the directory on the computer and on hard copy. In compiling this directory, the Office of Contract Compliance will identify and certify as many SBEs as possible that perform the types of work or provide the types of supplies needed by the City. The City will maintain and have available an updated SBE Directory and source list(s) for each bid/proposal solicitation to facilitate identifying SBEs working in areas relevant to general contracting requirements and to particular solicitations.

N. Procedures to Ensure That SBEs Have an Equitable Opportunity to Compete for Contracts and Subcontracts

(1) Procedures to Ensure Opportunities

The City of Memphis shall utilize the following measures to ensure maximum practicable opportunities for SBE participation on City contracts:

(a) Assist SBE in obtaining insurance and surety bonds where necessary in the performance of contracts, including but not limited to:

i. Packaging contracts so that dollar amounts do not require bonding;

ii. Encouraging prime contractors to waive bonding or assist SBE subcontractors in obtaining bonding;

iii. Encouraging staged bonding where feasible, when bonding is carried over from one project stage to the next; and

iv. Relaxing bonding requirements for projects less than $100,000;

(b) Encourage the formation of joint ventures between SBEs. The OCC will also assist prime contractors in identifying interested SBEs for subcontracts;

(c) Provide information on the City of Memphis's organization and contractual needs and offer instructions on bid specifications, procurement policy, procedures, and general bidding requirements;

(d) Provide specifications and requests for proposals to the SBE community in a timely manner to allow SBEs adequate time to develop responsible and responsive Bids. In instances where the cost of obtaining specifications or requests for proposal is prohibitive, copies of the material will be made available at no charge to SBE development agencies;

(e) Establish prorated payment and delivery schedules where feasible, to minimize cash flow problems faced by small firms. The City will provide guidance to SBE contractors regarding maintenance of positive flow in order that current obligations can be met;

(f) Hold pre-bid conferences to explain SBE requirements as well as forms that must be submitted with a Bid;

(g) Permit bidders to review and evaluate successful bid documents of similar procurements and use debriefing sessions to explain why certain bids were unsuccessful;

(h) Provide projected procurement information and contracting schedules through the office of contract compliance and other outreach efforts;

(i) Conduct internal information workshops to inform and acquaint the City staff with the goals and objectives of the City of Memphis's Small Business Enterprise Program, and to sensitize them to the challenges faced by SBEs;

(j) Maintain records showing specific efforts to identify and award contracts to SBEs and establish a monitoring system to ensure that all contractors, subcontractors, consultants, and vendors comply with contract specifications related to SBE utilization; and

(k) Inform SBEs of bid notices and specifications related to their capability by placing bid notices in major local newspapers and other periodicals. Bid notices will also be sent to local trade associations, technical assistance agencies, economic development groups, and SBEs with capabilities that may be relevant to the bid notice as identified by the City of Memphis's SBE data bank. Bid specifications will be made available to SBE contractor associations and technical assistance agencies. Lists of potential firms bidding as primes will also be made available to SBEs.

(2) Direct Assistance to SBEs

In addition to the procedures set forth above, the Office of Contract Compliance shall also undertake special measures to assist SBEs in overcoming barriers to participation on City contracts. This assistance will be offered directly by the City, as well as by City-referral to other assistance agencies with established, comprehensive, and continuous SBE development programs. Businesses requiring management and technical assistance will be identified through a questionnaire, through personal experience with these businesses, and through requests for assistance. The Office of Contract Compliance will offer the following direct assistance to SBEs:

(a) Provide counseling and training sessions for SBEs. City staff will be available to interested business representatives to explain (in detail) instructions for preparation of bid specifications, the City's procurement policies, procedures and general bid requirements. The SBE Program Officer will coordinate and follow-up all requests for assistance to insure that all necessary information was provided.

(b) Provide coordination and referral to existing business development organizations.

(c) Sponsor intensive workshops and training sessions on identified SBE problem areas, i.e., pricing and estimating, joint venture formation, accounting principles, marketing, etc.

O. Methods by Which the City Will Require Contractors and Subcontractors to Comply With Applicable SBE Requirements

The City's staff is available to assist contractors and subcontractors in implementing this program. As a standard procedure, such assistance includes:

(1) Clearly setting forth the City of Memphis's SBE goals in all the City of Memphis solicitations;

(2) Attending pre-proposal/bid conferences to explain the City's SBE Program;

(3) Identifying certified SBEs in the City of Memphis's database and providing a list of available, certified SBEs upon request;

(4) Providing Plan holder lists and Pre-bid sign-in sheets made available to interested SBEs upon request.

(5) Remaining available to assist Bidders in developing their SBE Programs.

(6) Monitoring SBE participation levels on projects throughout the duration of a contract. Contractors violating contract provisions regarding SBE participation are subject to the sanctions set forth in Section Q below.

P. Means To Ensure That Competitors Make Good Faith Efforts to Meet SBE Contract Goals

(1) For all contracts for which SBE contract goals have been established, the Bidder shall be required to submit SBE participation information to the City of Memphis. The award of the contract will be conditioned upon satisfaction of the requirements established by the City. The Bidder shall submit, with its bid submission, the following information:

(a) The name, address and certification number, if applicable, of the SBE firm(s) that will participate in the contract;

(b) The description of the work each named SBE will perform; and

(c) The dollar amount of participation by each named SBE firm.

(2) If the SBE participation submitted by the bidder does not meet the SBE contract goals, the bidder must submit with its bid submission evidence demonstrating that "good faith efforts" were made to meet the goals. The City will review documents submitted at the time of bid, and make its determination of good faith efforts based on those submitted documents. Additional submissions will not be permitted. To determine sufficient "good faith efforts" to meet the SBE contract goal, a bidder/proposer shall document the steps it has taken to obtain SBE participation, including but not limited to the following:

(a) Attendance at a pre-bid meeting, if any, scheduled by the City to inform SBEs of subcontracting opportunities under a given solicitation;

(b) Advertisement in general circulation media, trade association publications, and other media for at least fifteen (15) days before bids or proposals are due;

(c) Written notification to SBEs that their interest in the contract is solicited;

(d) Efforts made to select portions of the work proposed to be performed by SBEs in order to increase the likelihood of achieving the stated goal;

(e) Good faith efforts to negotiate with SBEs for specific subcontracts, including at a minimum:

i. The names, addresses, and telephone numbers of SBEs that were contacted;

ii. A description of the information provided to SBEs regarding the plans and specifications for portions of the work to be performed;

iii. A statement of why additional agreements with SBE were not reached;

iv. Concerning each SBE, the SBE contacted but rejected as unqualified, and the reasons for the Bidder's conclusion; and

v. Efforts made to assist the SBEs contacted that needed assistance in obtaining bonding or insurance required by the competitor or the City.

(f) To determine whether a competitor that has failed to meet SBE goals may be awarded the contract, the City will determine whether the efforts the Bidder made to obtain SBE participation were "good faith efforts." Efforts that are merely pro forma are not "good faith efforts" to meet the goals. In order to award a contract to a Bidder that has failed to meet SBE contract goals, the Office of Contract Compliance will determine whether the Bidder actively and aggressively made efforts to meet the City's SBE goals. A bidder making a good faith effort would consider a number of factors in negotiating with subcontractors, including SBE 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 SBEs is not in itself sufficient reason for a bidder's failure to meet the contract SBE goal, as long as such costs are reasonable. Also, the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make good faith efforts. Prime contractors are not, however, required to accept higher quotes from SBEs if the price

difference is excessive or unreasonable. In determining whether a bidder has made good faith efforts, the Office of Contract Compliance will take into account the performance of other bidders in meeting the contract. For example, when the apparent successful bidder fails to meet the contract goal, but others meet it, the Office of Contract Compliance may reasonably raise the question of whether, with additional reasonable efforts, the apparent successful bidder could have met the goal. If the apparent successful bidder fails to meet the goal but meets or exceeds the average SBE participation obtained by other bidders, the City may view this, in conjunction with other factors, as evidence of the apparent successful bidder having made good faith efforts. Competitors that fail to meet SBE goals and fail to demonstrate "good faith efforts" shall be deemed non-responsive to the City's SBE requirements and shall not be eligible to be awarded the contract.

(g) To ensure that all obligations under contracts awarded to SBEs are met, the City shall review the contractor's SBE involvement efforts during the performance of the contract. The contractor shall bring to the attention of the City any situation in which regularly scheduled progress payments are not made to SBE subcontractors.

Q. Penalties for Noncompliance.

A Contractor who fails to comply with any portion of this Division, and whose failure to comply continues for a period of 30 calendar days after the Contractor receives written notice of such noncompliance from the Director of the Office Contract Compliance, shall be subject to any or all of the following penalties:

(1) Withholding of ten percent of all future payments for the Eligible Project until the Office of Contract Compliance determines that the Contractor is in compliance with this Division.

(2) Withholding of all future payments under the Eligible Project until it is determined that the Contractor is in compliance with this division.

(3) Cancellation of the Eligible Project.

(4) Refusal of all future contracts or subcontracts with the City for a minimum of one year and a maximum of five years from the date upon which this penalty is imposed.

R. Outreach to SBEs

The City of Memphis considers information dissemination and communication with SBEs as an integral part of the City's SBE Program. As a part of its outreach program, the Office of Contract Compliance will solicit input from representatives of SBEs, trade

associations and community organizations. This input will serve several important functions, including:

(1) Providing information to identify additional SBE firms;

(2) Assisting in refining SBE Program goals and procedures; and

(3) Providing an independent assessment of the effectiveness of the City's SBE Program.

S. **Procedures to Require That Participating SBEs Are Identified By Name by Competitors for Contracts**

The City shall indicate, in solicitations for contracts that provide opportunities for SBE participation, goals for the use of SBE firms. Solicitations shall require all Bidders to submit a written assurance of meeting the goals in their bids or proposals. Bids must also include a proposed schedule of SBE participation that lists the names of SBE subcontractors, a description of the work each is to perform, and the dollar value of each proposed SBE subcontract. If the SBE participation does not meet the SBE contract goals, the Bidders must submit sufficient information and evidence demonstrating that the Bidder made good faith efforts to meet the goals.

Bidders are required to submit this information with their Bids and Bidders are so informed at the time of solicitation. Agreements between a Bidder and a SBE in which the SBE promises not to provide subcontracting quotations to other Bidders shall be prohibited.

T. **Severability**

If any provision of this Division or any application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this article which can be given effect without the invalid provisions or applications, and are to this end declared to be severable.

THE FOREGOING ORDINANCE
5366 PASSED
1st Reading 6-22-10
2nd Reading 7-06-10
3rd Reading 7-20-10

Approved _____ Chairman of Council

Date Signed: _____

Approved: _____ Mayor, City of Memphis

Date Signed: _____

I hereby certify that the foregoing is a true copy, and said document was adopted by the Council of the City of Memphis as above indicated and approved by the Mayor.

_____ Comptroller