ORDINANCE NO: 5632

AN ORDINANCE TO AMEND PART I, ARTICLE VI, DIVISION 5 OF THE CODE OF ORDINANCES KNOWN AS "THE EQUAL BUSINESS OPPORTUNITY PROGRAM"; CONSISTENT WITH CERTAIN FINDINGS OF THE 2016 "MINORITY AND WOMEN BUSINESS ENTERPRISE PROCUREMENT PROGRAM" DISPARITY STUDY AND LEGAL ANALYSIS REPORT AND OTHER DATA RELATIVE TO THE BUSINESS OPPORTUNITIES AVAILABLE TO MINORITY AND WOMEN OWNED BUSINESSES IN THE MEMPHISMETROPOLITAN STATISTICAL AREA (MSA)

WHEREAS, a study of available data from fiscal years 2010 through 2014, including data maintained by the City of Memphis and other public agencies, data gathered from a survey of businesses in the Memphis MSA, and other commercially available data regarding the economic opportunities available to businesses in the Memphis MSA was conducted by Griffin and Strong, P.C. under the direction of Rodney K. Strong, Esq., concluding in the City of Memphis Minority and Women Business Enterprise Program Disparity Study and Legal Analysis (the "Disparity Study"); and

WHEREAS, the purpose of conducting this study was to determine whether there is a disparity in the economic opportunities available to Minority-owned and Women-owned businesses seeking contracting opportunities in the Memphis MSA, such that is can be inferred that the City of Memphis is an active or passive participant in past or present discrimination; and

WHEREAS, the Disparity Study identified statistically significant disparities in the use of, and percentage of dollars paid to, Minority-owned and Women-owned businesses in the Memphis MSA when compared to similarly situated white male-owned firms, which were the result of discrimination on the basis of race, gender and ethnicity; and

WHEREAS, the Disparity Study specifically identified statistically significant disparities in the utilization of minority and women owned businesses and in the number and percentage of awards by the city despite being equally likely to submit bids; and

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WHEREAS, the Disparity Study specifically identified evidence showing minorities and women continued to be substantially underutilized in the private marketplace; and

WHEREAS, the Disparity Study specifically identified evidence showing minority and women owned businesses are more likely to be new entrants to the Memphis market; and

WHEREAS, the Disparity Study specifically identified evidence showing minority owned businesses are more likely to face financing barriers; and

WHEREAS, these statistical and anecdotal findings taken as a whole give rise to an inference of continued discrimination and/or the continuing effect of past discrimination against minorities and women in business transactions in the Memphis Metropolitan Statistical Area. The foregoing findings on the private sector lead us to conclude that the City of Memphis has a strong basis in evidence to take narrowly tailored measures to ensure that it is not a passive participant in a private scheme of discrimination against women and minorities as prime or subcontractors; and

WHEREAS, the Disparity Study demonstrates that a program by the City of Memphis to reinforce and support outreach efforts to open contracting opportunities to all businesses will promote equal opportunity for all businesses regardless of race, gender or ethnicity, eliminate the discrimination suffered by minority and women-owned businesses, and ensure that the City of Memphis is not a passive participant in ongoing private sector discrimination in the Memphis MSA; and

WHEREAS, the Memphis City Council, through the Economic Development and Tourism Committee, received the Disparity Study on August 23, 2016; and

WHEREAS, a public hearing was conducted on August 23, 2016 regarding the Disparity Study; and

WHEREAS, specific, recorded evidence, including a comparison with the results of the 2010 Disparity Study conducted by Griffin & Strong, P.C., adduced that minority and women-owned businesses continue to experience real and verifiable discrimination by race, gender and ethnicity in the conduct of commerce in the Memphis MSA; and

WHEREAS, the City of Memphis desires to do businesses only with those contractors who offer equal business opportunities for contracting work or services, without regard to business ownership by race, gender or ethnicity, and who do not tolerate or practice discrimination in contracting or subcontracting work or services in their private and public business activities; and

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

NOW THEREFORE,

SECTION 1. BE IT ORDAINED BY THE COUNCIL OF THE CITY OF MEMPHIS, That Part I, Article 6, Division 5 of the Code of Ordinances, City of Memphis, Sections 6-92-1 through 6-92-7, known as the "Equal Business Opportunity Program", Ordinance #5384, be amended as follows:

1. **All references to the Office of Contract Compliance or "OCC" shall be replaced with**

Office of Business Diversity & Compliance or "OBDC", respectively.

2. Section 6-92-1, Part C, shall be deleted and replaced with the following:

C. Adoption of the findings and conclusions of the Griffin and Strong, P.C. Report. The city council adopts the findings, recommendations, and conclusions of the Griffin and Strong, P.C. Report dated August 2016 (referred to in this chapter as the "GSPC report").

3. Section 6-92-1, Part D, the definition of Contract compliance officer (COO) shall be deleted and replaced with the following:

Contract compliance officer (CCO) means the Director of the Office of Business Diversity and Compliance, or the city official appointed by the Mayor to specifically manage designated sections of the program authorized by this chapter.

4. Section 6-92-1, Part E, Administrative Authority; powers and duties, sub-section 2(e), shall be deleted and replaced with the following:

e. Maintenance of documents, forms, records or data regarding this program as provided in this division, including documents, forms, records or data regarding the dollar amounts subcontracted to or expended for services performed by subcontractors and suppliers on all City of Memphis projects, including the race and gender ownership of each subcontractor and supplier, and documents, forms, records or data regarding certified AABEs, HBEs, ABEs, NABEs and WBEs.

5. Section 6-92-1, Part E, Administrative Authority; powers and duties, sub-section 2(r), shall be deleted and replaced with the following:

r. Collect data on diversity plans and outcomes from all boards, commissions and quasi governmental agencies, City of Memphis funded non-profits or grantees on a quarterly basis.

6. Section 6-92-1, Part F, shall be deleted and replaced with the following:

F. *Certification.*

1. For purposes of contracting with the city under this program, a minority or woman owned business enterprise must be located within the Memphis MSA (Crittenden County in Arkansas (AR), Desoto, Marshall, Tate, and Tunica Counties in Mississippi (MS), and Fayette, Shelby and Tipton Counties in Tennessee (TN).

2. For purposes of contracting with the city under this program, a minority or woman owned business enterprise must be certified as such by a city-approved central certification agency or any other certification agency deemed appropriate by the Office of Business Diversity & Compliance.

3. Reciprocal certification may be accepted by the Office of Business Diversity & Compliance as follows:

a. Submission of a current Shelby County LOSB certificate and sworn Affidavit testifying to annual revenues no greater than $250,000.00, for all industries except construction, engineering, architecture, or technology enterprises; and

b. Verification by OBDC staff of minority or woman owned status; and

c. Proof of registration with OBDC through B2GNow and City of Memphis Purchasing Office.

7. Section 6-92-1, Part G, shall be deleted and replaced with the following:

G. *Graduation clause.* Certified AABEs, HBEs, ABEs, NABEs, or WBEs shall be deemed graduated from being certified as AABEs, HBEs, ABEs, NABEs, or WBEs when the MWBE has sales that exceed the average sales for the industry for five consecutive years, as determined by the federal tax return for that firm and the NAICS codes designated by the Small Business Administration. Small business size standards are as outlined in 13 CFR 121. If an MWBE is engaged in more than one industry, then its graduation level shall be determined by a weighted average of sales for all industries in which the MWBE is engaged. The Office of Business Diversity & Compliance will continue to ensure that African Americans, Hispanics, Asians, Native Americans and women are not discriminated against in the procurement process, whether or not such companies are eligible for certification as MWBEs.

1. *Graduation procedures.* Any interested party may request an evaluation of an MWBE 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 Office of Business Diversity & Compliance (OBDC) 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:

   a. *Notification.* The OBDC 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.

   b. *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 OBDC information which would explain why the proposed basis of graduation is not warranted. Upon receipt of the appeal, the OBDC will notify the firm in writing of the receipt of the appeal.

   c. *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 OBDC.

2. *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.

8. Section 6-92-3, Part A, sub-section 2, shall be deleted and replaced with the following:

2. The annual MWBE goals shall be:

a. Goals for subcontracting construction:

Twenty (20) percent	Diverse
Five (5) percent	Women
Twenty Five (25) percent	Total Goal

b. Goals for prime construction:

Fifteen (15) percent	Diverse
Three (3) percent	Women
Eighteen (18) percent	Total Goal

c. Goals for architecture and engineering services:

Twenty-two (22) percent	Diverse
Seven (7) percent	Women
Twenty-Nine 29 percent	Total Goal

d. Goals for subcontracting architecture and engineering services:

Fifteen (15) percent	Diverse
Five (5) percent	Women
Twenty (20) percent	Total Goal

e. Goals for goods and supplies:

Twelve (12) percent	Diverse
One (1) percent	Women
Thirteen (13) percent	Total Goal

f. Goals for other non-professional services:

Twenty-three (23) percent	Diverse
Two (2) percent	Women
Twenty-Five (25) percent	Total Goal

g. Goals for other professional services:

Thirteen (13) percent	Diverse
Two (2) percent	Women
Fifteen (15) percent	Total Goal

9. Section 6-92-3, Part D, sub-section b, shall be deleted and replaced with the following:

b. The GSNP committee shall establish specific participation goals for each goods, supplies and non-professional services project, the cost of which is estimated to be in excess of $5,000.00. Said goals will be individual minority and women business enterprise participation goals, the sum of the individual goals not to exceed 50 percent of the total contract amount for each project.

10. Section 6-92-3, Part E, sub-section b, shall be deleted and replaced with the following:

b. The professional services committee shall review a professional services project costing $5,000 or more to determine which, from the following, is or are the best methods for ensuring MWBE participation

11. Section 6-92-6, Part C, shall be deleted and replaced with the following:

C. The CCO may require such reports, information and documentation from bidders, contractors, MWBEs, user division, head of any division, quasi-governmental agencies, city funded non-profit, grantees or office of the city as are reasonably necessary to determine compliance with the requirements of this chapter.

12. Section 6-92-7, Sub-section 18(c), shall be deleted and replaced with the following:

c. Sunset clause. The ordinance from which this chapter is derived shall sunset on June 30, 2021, unless prior to such date the city council, after conducting public hearings, finds that the purposes of this chapter have not yet been achieved, in which case it may extend the effective period of this chapter for an additional five years.

13. Sec. 6-92-1(D), Definitions, shall be amended to include the following after the definition of the terms "Minority-owned business" and "minority person:

Minority, as used herein, may be used interchangeably with *diverse* or *diversity.*

SECTION 2. BE IT FURTHER ORDAINED, that the provisions of this Ordinance are hereby severable. If any of these sections, provisions, sentences, clauses, phrases, or parts are held unconstitutional or void, the remainder of this Ordinance shall continue in full force and effect.

SECTION 3. BE IT FURTHER ORDAINED BY THE COUNCIL OF THE CITY OF MEMPHIS, that this Ordinance shall take effect from and after the date it shall have been passed by the Council, signed by the Chairman of the Council, certified and delivered to the Office of Mayor in writing by the Comptroller and become effective as otherwise provided by law.

THE FOREGOING ORDINANCE
#5632 PASSED
1st Reading 9-20-2016
2nd Reading 10-04-2016
3rd Reading 10-18-2016

Approved
Chairman of Council

Date Signed: 1 Nov 2016

Approved:
Mayor, City of Memphis

Date Signed: 11/2/16

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.

Valerie C. Snipes
Comptroller