

# City of Memphis



TENNESSEE

A C WHARTON, JR.  
MAYOR

June 1, 2010

The Honorable Jim Strickland, Chairman  
Personnel, Intergovernmental & Annexation Committee  
City Hall - Room 514  
Memphis, TN 38103

Dear Chairman Strickland:

Subject to Council approval, it is my recommendation that:

***Rick Masson***

be reappointed to the Memphis Light, Gas and Water Commission with a term expiring June 30, 2013.

I have attached biographical information.

Sincerely,

A handwritten signature in black ink, appearing to read "ACW", is written over the typed name and title of the Mayor.

A C Wharton  
Mayor

ACW/lar

c: Council Members



# City of Memphis

## BIOGRAPHICAL INFORMATION APPOINTMENT TO BOARD/COMMISSION

### BOARD/COMMISSION

Name: Rick Masson Race C M X F

E-Mail Address: RickMasson@yahoo.com Fax 901-213-3843

Profession/Employer: Shelby Farms Park Conservancy

Business Address: 500 North Pine Lake Dr Zip 38134 Phone: 901-767-7276

Education: BA Economics, MS Accounting University of Memphis

Name of Spouse: Carla Number of Children: 2

Home Address: 505 Tennessee St, 605 Phone: 901-4612468

City: Memphis State: TN Zip: 38103

I certify that I am a resident of the City of Memphis (Unincorporated areas and surrounding counties are not considered). Yes  or No  If yes, how long? 56+yrs

Professional Organization/Associations: City Parks Alliance, Center for Economic Education

Other Organizations/Association: Board of Directors for Triumph Bank

Other Interests: Biking

Signature Rick Masson Date 5/26/10

## Rick Masson

Mr. Rick Masson was appointed Executive Director of the Shelby Farms Park Conservancy in July 2008. In this role Mr. Masson is responsible for the management and oversight of Shelby Farms Park. He previously served as Executive Director of the Plough Foundation and as the Chief Administrative Officer and Finance Director for the City of Memphis. Mr. Masson earned a Master of Science degree in Accounting and a Bachelor of Arts degree in Economics from the University of Memphis. Mr. Masson is a lifelong Memphian and serves as a Commissioner of Memphis, Light, Gas, and Water Utility and serves as a founding Director of Triumph Bank.

**MEMPHIS LIGHT, GAS & WATER COMMISSION**

**5 Member Board**

**Oath of Office Required**

**3 Year Term**

<b>Brittenum, Dedrick</b>	<b>M/B</b>	<b>07-30-11</b>	<b>3yr. Term</b>
<b>Cobbins, Darrell</b>	<b>M/B</b>	<b>10-30-10</b>	<b>3yr. Term</b>
<b>Evans, V. Lynn</b>	<b>F/B</b>	<b>10-30-10</b>	<b>3yr. Term</b>
<b>Masson, Rick</b>	<b>M/W</b>	<b>06-30-10</b>	<b>3yr. Term</b>
<b>Wishnia, Steven</b>	<b>M/W</b>	<b>11-01-10</b>	<b>3yr. Term</b>

**Barbara Swearengen Ware (City Council Liaison)**



# City of Memphis



TENNESSEE

A C WHARTON, JR.  
MAYOR

June 1, 2010

The Honorable Jim Strickland, Chairman  
Personnel, Intergovernmental & Annexation Committee  
City Hall - Room 514  
Memphis, TN 38103

Dear Chairman Strickland:

Subject to Council approval, it is my recommendation that:

***Cathy Simmons (Joint Appointment)***

be reappointed to the Memphis and Shelby County Downtown Parking Authority with a term expiring December 31, 2015.

I have attached biographical information.

Sincerely,

A handwritten signature in black ink, appearing to read "A C Wharton", is written over a large, stylized circular flourish or scribble.

A C Wharton  
Mayor

ACW/lar

c: Council Members



# City of Memphis

## BIOGRAPHICAL INFORMATION APPOINTMENT TO BOARD/COMMISSION

Downtown Parking Authority  
BOARD/COMMISSION

Name: Cathy Simmons Race Caucasian M F X

E-Mail Address: cathys@legacywealth.com Fax (901) 758-9007

Profession/Employer: CCO/Legacy Wealth Management

Business Address: 6800 Poplar Avenue, Ste. 101  
Memphis, TN Zip 38138 Phone: (901) 758-9006

Education: MBA/Marketing 1988; BS/Business Administration 1985

Name of Spouse: Thomas W. Volinchak Number of Children: -0-

Home Address: 6673 Old Ivy Cove Phone: (901) 590-4698

City: Memphis State: TN Zip: 38119

I certify that I am a resident of the City of Memphis (Unincorporated areas and surrounding counties are not considered). Yes x or No \_\_\_\_\_ If yes, how long? 37 yrs.

Professional Organization/Associations: Financial Planning Assoc.; Estate Planning Council; Planned Giving Council; Mid-South Assoc. of Contingency Planners

Other Organizations/Association: Investment Advisor Association; The Vinings HOA

Other Interests: Adjunct Faculty - CBU

Signature Cathy Simmons Date 1/28/2010

# Cathy Simmons

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- Summary** Investment and leadership professional with a strong background in private wealth management and regulatory compliance working in fast paced dynamic environments. Excellent communication and presentation skills with the ability to execute a variety of projects simultaneously.
- Professional Experience**
- Legacy Wealth Management**  
**Chief Compliance Officer**  
**Certified Financial Planner™** August 1, 2000 to present
- Plan, execute and implement the firm's compliance processes and procedures.
  - Various management responsibilities that include performance appraisals, job descriptions, work flow analysis, coaching, recruitment and training of new staff; mergers and acquisitions.
- American Express Financial Advisors Inc.**  
**Financial Advisor** August 1991 to July 31, 2000  
Various positions
- District Manager** 1994 to 1999  
**Quality of Advice Leader** 1994 to 1999  
**Client Service Model Leader** 1995 to 1999  
**Client Assignment Leader** 1996 to 1999  
**First Year Advisor Leader** 1997 to 1999  
**Veteran Advisor Leader** 1998 to 1999
- Education** University of Memphis Memphis, TN
- MBA/Marketing 1988
  - BS/Business Administration 1985
- Licenses and Certificates** CFP® Certification July 2000  
Currently pursuing the IACCP<sup>SM</sup> Certification
- Additional Training**
- Advanced training in charitable and planned giving by Renaissance Inc. of Indianapolis, IN
  - Media relations training by MBRK Inc. of Dallas, TX
  - Advanced risk management training by American Express
  - Seminar presentation training by American Express
- Technology**
- Microsoft Office (including Excel, Word, PowerPoint)
  - Advent AxyS
  - Bloomberg
- Professional Memberships**
- Member Financial Planning Association
  - Member Mid-South Association of Contingency Planners
  - Member Estate Planning Council
  - Member Planned Giving Council
- Civic Activities**
- Member Nazrudin
  - Treasurer CCC DPA Board
  - Member CCC Budget and Finance Committee
  - Member Investment Advisor Association's Government Relations Committee Washington DC
  - 2007 Graduate of the Leadership Memphis Executive Program
  - Adjunct Faculty Christian Brothers University

**MEMPHIS AND SHELBY COUNTY DOWNTOWN PARKING  
AUTHORITY**

**7 Member Board**

**(3) City & (3) County (1) Joint Appointment**

**6 Year Term**

<b>B. Lane Carrick (City)</b>	<b>M/W</b>	<b>12-31-09</b>	<b>6yr. Term</b>
<b>Odell Horton, Jr. (City)</b>	<b>M/B</b>	<b>12-31-10</b>	<b>6yr. Term</b>
<b>John Stokes (City)</b>	<b>M/W</b>	<b>12-31-09</b>	<b>6yr. Term</b>
<b>Cathy Simmons (Joint)</b>	<b>F/W</b>	<b>12-31-09</b>	<b>6 yr. Term</b>





## Memphis City Council Summary Sheet

- This item is a Resolution to amend Chapter 25, Code of Ordinances, City of Memphis, so as to increase the City contribution allowable under Section 25-71 and Section 25-171
- Initiating Party: Finance Division
- This Resolution changes an existing Ordinance
- This Resolution does not require a new contract or amends an existing contract
- This Resolution does not require any expenditure of funds

**ORDINANCE NO.:** \_\_\_\_\_

**AN ORDINANCE TO AMEND CHAPTER 25, CODE OF  
ORDINANCES, CITY OF MEMPHIS, SO AS TO INCREASE  
THE CITY CONTRIBUTION ALLOWABLE UNDER SECTION  
25-71 AND SECTION 25-171**

**SECTION 1. BE IT ORDAINED BY THE COUNCIL OF THE CITY OF MEMPHIS,**  
that Chapter 25, Code of Ordinances, City of Memphis, be and the same is hereby amended by adding  
Subsection (a) under Section 25-71 to read as follows:

**Sec. 25-71. City contributions.**

(a) Effective July 1, 2010, at the end of each month, the comptroller shall determine the aggregate amount  
of the compensation of all participants on which the employee contributions for such month are calculated.  
The City shall pay into the trust fund as its contribution the sum of (1) and (2), where:

(1) Is a certain percentage of the aggregate amount of compensation each month to be known as the  
"current service contribution," to provide the City's part of the disability retirement allowances, the death  
benefits, and those portions of the retirement benefits to be granted on account of current service; and

(2) Is a certain percentage of the aggregate amount of compensation each month to be known as the  
"accrued liability contribution."

The percentages under (1) and (2) above shall be no less than six and zero tenths (6.0) percent of the  
compensation of all participants of this 1948 plan, as set forth in this section.

**SECTION 2. BE IT FURTHER ORDAINED,** that Chapter 25 is further amended by adding  
Subsection (a) under Section 25-171, to read as follows:

**Sec. 25-171. City contributions.**

(a) Effective July 1, 2010, at the end of each month, the comptroller shall determine the aggregate amount  
of the compensation of all participants on which the employee contributions for such month are calculated.  
The City shall pay into the trust fund as its contribution the sum of (1) and (2), where:

(1) Is a certain percentage of the aggregate amount of compensation each month to be known as the  
"current service contribution," to provide the City's part of the disability retirement allowances, the death  
benefits, and those portions of the retirement benefits to be granted on  
account of current service; and

(2) Is a certain percentage of the aggregate amount of compensation each month to be known as the  
"accrued liability contribution."

The percentages under (1) and (2) above shall be no less than six and zero tenths (6.0) percent of the

compensation of all participants of the 1978 plan, as set forth in this section 25-171(a).

**SECTION 3. BE IT FURTHER ORDAINED,** 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 the Mayor in writing by the Comptroller, and become effective as otherwise provided by law.

\_\_\_\_\_  
Harold Collins  
Chairman of Council

ATTEST:

\_\_\_\_\_  
Patrice Thomas  
Comptroller



## Memphis City Council Summary Sheet

- This item is an Ordinance to amend Chapter 25, Code of Ordinances, City of Memphis, so as to increase pension benefits allowable under Section 25-95 and Section 25-195
- Initiating Party: Finance Division
- This Ordinance changes an existing Ordinance
- This Ordinance does not require a new contract or amends an existing contract
- This Ordinance does not require any expenditure of General funds. However, the City's Pension Fund will be impacted as follows:
  - Increase In Pension Plan Liabilities: \$13,236,000
  - Increase in Pension Plan Annual Contribution: \$ 1,042,000

ORDINANCE NO.: \_\_\_\_\_

**AN ORDINANCE TO AMEND CHAPTER 25, CODE OF  
ORDINANCES, CITY OF MEMPHIS, SO AS TO INCREASE  
PENSION BENEFITS ALLOWABLE UNDER SECTION  
25-95 AND SECTION 25-195 .**

**SECTION 1. BE IT ORDAINED BY THE COUNCIL OF THE CITY OF MEMPHIS,**  
that Chapter 25, Code of Ordinances, City of Memphis, be and the same is hereby amended by adding  
Subsection (w) under Section 25-95 to read as follows:

- (w) Effective July 1, 2010, the following additional increases shall take effect:
- (1) Members who retired prior to 1996 shall receive an increase in the amount of one and one half percent (1.5%) of their present allowance.
  - (2) Members who retired during the years 1996 through 2001 shall receive an increase in the amount of one percent (1%) of their present allowance.
  - (3) Members who retired during the years 2001 through 2008 shall receive an increase in the amount of one half percent (.5%) of their present allowance.

**SECTION 2. BE IT FURTHER ORDAINED,** that Chapter 25 is further amended by adding  
Subsection (w) under Section 25-195, to read as follows:

- (w) Effective July 1, 2010 the following additional increases shall take effect:
- (1) Members who retired between the period of July 1, 1980 through December 31, 1995 shall receive an increase in the amount of one and one half percent (1.5%) of their present allowance.
  - (2) Members who retired during the years 1996 through 2001 shall receive an increase in the amount of one percent (1%) of their present allowance.
  - (3) Members who retired during the years 2001 through 2008 shall receive an increase in the amount of one half percent (.5%) of their present allowance.

**SECTION 3. BE IT FURTHER ORDAINED,** 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 the Mayor in writing by the Comptroller, and become effective as  
otherwise provided by law.

\_\_\_\_\_  
Harold Collins  
Chairman of Council

ATTEST:

\_\_\_\_\_  
Patrice Thomas  
Comptroller



PricewaterhouseCoopers LLP  
10 Tenth Street, Northwest  
Suite 1400  
Atlanta, GA 30309-3851  
Telephone (678) 419 1000  
Facsimile (678) 419 1239

April 9, 2010

Ms. Patrice Thomas  
City Comptroller  
City of Memphis  
125 North Main St., Room 348  
Memphis, Tennessee 38103-2080

Re: Retirement Plan COLA

Dear Patrice:

As requested, we have determined the effect of the cost-of-living adjustment (COLA) for current retirees on the City's retirement plan obligations under three different scenarios. The results of our analysis are shown in the attached exhibit. The increased contributions required to fund these liabilities are based on a 30 year amortization period.

	Increase in Plan Liabilities	Increase in Annual Contribution
1.0%, 2.0%, and 3.0% Benefit Increases	\$26,473,000	\$2,085,000
1.0%, 1.0%, and 1.0% Benefit Increases	\$12,944,000	\$1,020,000
0.5%, 1.0%, and 1.5% Benefit Increases	\$13,236,000	\$1,042,000

Our calculations are based upon generally accepted actuarial methods and the data and assumptions utilized in the most recent valuation of the plan. These calculations were performed at the City's request and do not represent a recommendation of PricewaterhouseCoopers LLP.

This document was not intended or written to be used, and it cannot be used, for the purpose of avoiding U.S. federal, state or local tax penalties.

The undersigned are members of the Society of Actuaries and the American Academy of Actuaries and meet the "General Qualification Standards" for rendering an actuarial opinion relating to pension plans.

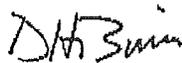
Ms. Patrice Thomas  
April 9, 2010  
Page 2

If you have any questions, or would like us to evaluate other alternatives, please let us know.

Sincerely,



Jerrold Dubner  
Associate of the Society of Actuaries  
Member, American Academy of Actuaries



Donald H. Burris  
Associate of the Society of Actuaries  
Member, American Academy of Actuaries

Attachments

cc: Roland McElrath (w/attachments)  
James Stokes (w/attachments)



## Memphis City Council Summary Sheet Instructions

1. Resolution re-allocates and appropriates \$98,260.00 in funds received from the Tennessee Board of Regents for the Central Avenue Safety Improvements Project (PW04029) to the Architect/Engineer line from the Construction line.
2. This re-allocation is at the request of the Public Works Division. The scope of this project has been revised by the University of Memphis which lowers the construction cost of the project. These funds will be used to design the revised scope.
3. The re-allocation/appropriation of these funds does not change any standing City Ordinance or Resolution.
4. This re-allocation/appropriation of funds will be reflected as a contract amendment to the Central Avenue Safety Improvements design contract.
5. This re-allocation/appropriation does not require the expenditure of City funds. These funds have been provided by the Tennessee Board of Regents.

## RESOLUTION

**WHEREAS**, the Council of the City of Memphis did include U of M Crosswalk, project number PW04029 as part of the Fiscal Year 2010 Capital Improvement Budget; and

**WHEREAS**, it is necessary to amend the Fiscal Year 2010 Capital Improvement Budget by transferring an allocation of \$98,260.00 in State Grant Funds, provided by the Tennessee Board of Regents, from Contract Construction to Architecture and Engineering, in U of M Crosswalk, project number PW04029 to design the revised scope of the project.

**NOW, THEREFORE, BE IT RESOLVED** by the Council of the City of Memphis that the Fiscal Year 2010 Capital Improvement Budget be amended by transferring an allocation of \$98,260.00 in State Grant Funds from Contract Construction to Architecture and Engineering, in U of M Crosswalk, project number PW04029.



## Memphis City Council Summary Sheet

Resolution appropriating Construction Funds for PW01092 South Third at West Holmes Intersection

1. This resolution provides for the addition of a left turn lane on South Third in the vicinity of West Holmes and Air view. As part of this project, West Holmes will be realigned to provide better sight lines for turning vehicles.
2. This project was initiated by the Engineering Division, included in the Public Works Division Capital Budget and is being administered by the Engineering Division.
3. This project involves a new construction contract.
4. The funds being appropriated were included in the FY 2010 Capital Improvement Budget.

## RESOLUTION

**WHEREAS**, the Council of the City of Memphis approved S Third / W Holmes Inters, project number PW01092 as part of the Fiscal Year 2010 Capital Improvement Budget; and

**WHEREAS**, bids were taken on April 16, 2010 for street repairs at S. Third to Holmes with the lowest complying bid of four being \$998,598.22 submitted by Ferrell Paving; and

**WHEREAS**, it is necessary to appropriate \$1,078,487.00 funded by G O Bonds – General for S Third / W Holmes Inters, project number PW01092 for street repairs as follows:

<b>Contract Amount</b>	<b>\$998,599.00</b>
<b>Project Contingencies</b>	<b><u>\$ 79,888.00</u></b>
<b>Total Amount</b>	<b>\$1,078,487.00</b>

**NOW, THEREFORE, BE IT RESOLVED** by the Council of the City of Memphis that there be and is hereby appropriated the sum of **\$1,078,487.00** funded by G O Bonds – General, chargeable to the FY10 Capital Improvement Budget and credited as follows:

<b>Project Title</b>	<b>S Third / W Holmes Inters</b>
<b>Project Number</b>	<b>PW01092</b>
<b>Amount</b>	<b>\$1,078,487.00</b>

## **Cable and Video Public Rights-of-Way Use and Encroachment Ordinance**

**WHEREAS**, the City, pursuant to its Charter, Tennessee statutes and decisions, is granted complete control over its streets and public rights-of-way (“PROW”) within the municipal boundaries of the City as established by its Charter and annexation ordinances adopted from time to time by the Memphis City Council; and,

**WHEREAS**, the City acting in its governmental capacity has the authority to regulate the use of its PROW in order to protect the health, safety and general welfare of the inhabitants of the City;

**WHEREAS**, the Competitive Cable and Video Services Act (the “Act”) granted to cable and video service providers the absolute discretion to choose whether to utilize either a state-issued certificate of franchise authority or a local franchise, but expressly required such cable and video service providers to abide by the rights-of-way ordinances and resolutions of municipalities in which the service is provided as well as any applicable state laws or rules;

**WHEREAS**, the City acting in its governmental capacity has the authority to regulate the use of its PROW in order to protect the health, safety and general welfare of the inhabitants of the City; and

**WHEREAS**, the Act preserved the existing powers of the City to promote the health, safety and welfare of its communities and its citizens, including the authority to regulate, during the permitting process, the installation and placement of video or cable facilities for the purpose of addressing the aesthetic concerns of the community.

**NOW, THEREFORE**, in consideration of the foregoing and the mutual promises contained herein, the parties agree as follows:

1. ***DEFINITIONS.***

“Act” shall mean Competitive Cable and Video Services Act , Tenn. Code Ann § 7-59-301, *et seq.*

“Permittee” shall mean a cable or video service Provider who has obtained or who is required to obtain a state or local franchise authority to provide cable or video service over a cable system or video service network facility.

"Chief Administrative Officer or CAO" shall mean the CAO of the City of Memphis, or the person designated by the Mayor to carry out the duties and responsibilities of the Chief Administrative Officer. Chief Administrative Officer shall also mean the person under the

CAO's management and control designated by the CAO to administer the provisions of this Ordinance.

"City Engineer" shall mean the position of City Engineer created by the City Charter or a successor position, or an acting City Engineer or the designee of the City Engineer.

"City Property." All real property owned by the City, other than Public Rights-of-Way as that term is defined herein, and all other property held in a proprietary capacity by the City, which are not subject to right-of-way licensing and franchising as provided in this Agreement.

"City Requirements." All laws, rules, regulations, policies and directives of general application of the City, in effect at present or to be adopted in the future by the City Council, pursuant to its police powers or otherwise, or promulgated by the Mayor in the furtherance of his executive and contractual powers, provided same is consistent with Federal and State law.

"Facilities." All facilities of any kind placed in, on or above the Public Rights-of-Way by Cable Permittee.

"Person" An individual, corporation, association, partnership, joint venture, or other entity specifically including private utility, public utility.

"Public Rights-of-Way" The surface, the air space above the surface, and the area below the surface of any public street, highway, lane, path, alley, sidewalk, boulevard, drive, bridge, tunnel, easement or similar property in which the City holds any property interest (fee title, easement or otherwise) or exercises any rights of management or control and which, consistent with the purposes for which it was acquired or dedicated, may be used for the installation and maintenance of Person's Facilities.

"Utility Infrastructure" All City electric utility distribution poles, transmission structures, ducts and all other City owned or operated transmission structures, distribution conduit, building entry conduit, utility tunnels, manholes, vaults, radio towers, other radio equipment, fiber optic cable capacity and active communications capacity, together with all appurtenant facilities.

"Video service" means the provision of video programming through wireline or telecommunications facilities located, at least in part, in the public rights-of-way without regard to delivery technology, including Internet protocol technology or any other technology.

#### **SECTION 1. DECLARATION OF AUTHORITY.**

The City of Memphis has been delegated, as proprietor, the entire control over the streets, alleys, thoroughfares and rights-of-way located within its corporate limits by the General Assembly pursuant to Chapter 11 of the Acts of 1879 and subsequent Acts, all of which were preserved by Section 17 of the City's Home Rule Charter. In addition the City possesses police

powers to regulate the use of its streets, alleys, thoroughfares, rights-of-way and public places for the protection of the health, safety and welfare of its citizens.

**SECTION 2. AUTHORITY NOT EXCLUSIVE.**

Ordinance and the authority conferred in this Ordinance is not exclusive. All Persons shall respect the rights and property of the City and other authorized users of the Public Rights-of-Way. Except as otherwise required by applicable law, by agreement and request of the Cable Permittee disputes between Cable Permittee and parties other than the City over the use, of the Public Rights-of-Ways may be submitted to the City for resolution. Decisions rendered by the City shall be final and binding.

**SECTION 3. PERMITS REQUIRED.**

3.1 Permits Required – each Cable or Video Provider shall not construct, reconstruct, or relocate Cable, Telecommunication or Video Facilities (or parts thereof) within the Public Rights-of-Way or on City Property unless authority has been obtained in accordance with other applicable City Ordinances.

3.2 Installations on City Property and Private Property - No cable line, wire, amplifier, converter, or other piece of equipment owned by a Cable or Video Provider shall be installed by any such Provider on any City property or private property without first securing the written permission of the City or property owner and/or lawful occupant of any property involved.

3.3 Permit and Inspection Charges. All permit and inspection charges related to a Cable or Video Provider's construction in the Public Rights-of-Way shall be paid by the Cable or Video Provider as they are usual and customarily assessed by the City Engineer.

**SECTION 4. CONSTRUCTION OF CABLE OR VIDEO PROVIDER'S FACILITIES.**

4.1 Obligations of Cable Permittee Regarding the Public Rights-of-Way.

- (a) Compliance with Law. Cable Permittee is explicitly subject to the police powers of the City, any other governmental powers, and the City's rights as a property owner under state and federal laws. All work done by Cable or Video Provider in connection with the construction, expansion, reconstruction, maintenance or repair of its facilities in the Public Rights-of-Way shall be subject to and governed by all City Requirements, and applicable federal and state rules and regulations. Cable or Video Provider shall place certain facilities underground when required by applicable City Requirements. For this Section, the term "Cable or Video Provider" shall also mean a Person who controls or manages physical transmission

facilities, and all appurtenant equipment, installed in the Public Rights-of-Way.

- (b) Upon request, Cable or Video Provider shall provide the City timely information as to all matters in connection with or affecting the construction, reconstruction, removal, maintenance, operation and repair of facilities performed by Cable or Video Provider in the Public Rights-of-Way.
- (c) Construction Work Regulation, Maintenance and Underground Facilities Use.

(1) All excavations and other construction in the Public Rights-of-Way shall be performed in accordance with all applicable City Requirements, including the obligation to use trenchless technology whenever possible. Furthermore, all such construction shall be undertaken so as to minimize interference with the use of public and private property and in accordance with any direction given by the City under the police and regulatory powers of the City.

(2) A Cable or Video Provider may be required by the City to attach portions of their facilities to poles or duct trench space maintained by any other person or entity authorized by the City to the extent reasonable. A Cable or Video Provider shall not be required to attach its facilities to the poles or duct trench space of any other person or entity authorized by the City if it can be shown to the City's satisfaction that such Cable or Video Provider shall be subjected thereby to increased risks of interruption to its service or to increased liability for accidents, or unreasonably delay construction or availability of service, or if the facilities of such other person or entity are not of the character, design and construction required by, or are not being maintained in accordance with current practice, or are not available to the Cable or Video Provider on reasonable terms, including, without limitation, a reasonable fee.

(3) In furtherance of the public interest in safety, health and public welfare and to facilitate the safe management of Public Rights-of-Way, the construction, expansion, reconstruction, excavation, use, maintenance and operation of Cable or Video Provider 's Facilities and property shall be subject to all generally applicable City Requirements as determined by the City Engineer.

(4) In addition to any other City Requirements, except in an emergency, fourteen (14) days prior to the commencement of construction

which involves any alteration to the surface or the sub-surface of the Public Rights-of-Way, to the extent generally required, Cable or Video Provider shall furnish the City Engineer (or such other officials as the City may designate from time to time) with construction plans and maps showing the routing of any new construction and construction plans. Cable or Video Provider shall not commence construction until the plans and drawings have been approved in writing by the City Engineer. Such approval shall not be unreasonably withheld or delayed.

(5) Upon request by written notice of the City, a Cable or Video Provider shall promptly remove and abate any facility that is declared an emergency by the City. A Cable or Video Provider and the City shall cooperate to the extent possible to assure continuity of service during the removal. If any Cable or Video Provider, after notice, fails or refuses to act, the City may remove or abate the same, at the sole cost and expense of such Cable or Video Provider which shall be promptly paid to the City, all without compensation or liability for damages to the Cable or Video Provider.

(6) Upon completion of initial or any subsequent construction work, Cable or Video Provider shall promptly restore the Public Rights-of-Way in accordance with applicable City Requirements. Cable or Video Provider may excavate only for the construction, installation, expansion, repair, removal, and maintenance of all or a portion of its Facilities.

(7) Except in an emergency, Cable or Video Provider shall not excavate any pavement in any public alley or street or significant amounts of any unpaved Public Rights-of-Way without first complying with all applicable City Requirements.

(8) Within one hundred twenty (120) days of completion of each segment of Cable or Video Provider's Cable, Telecommunications or Video Facilities, the Cable or Video Provider shall supply the City with a complete set of "as built" drawings for that segment in a format to be prescribed by the City Engineer. The Cable or Video Provider shall provide the City a complete set of "as-built" drawings every six (6) months incorporating any changes to Cable or Video Provider's Facilities in the Public Rights-of-Way, in a format to be prescribed by the City Engineer. Cable or Video Provider shall also obtain the City's approval before any relocation of Cable or Video Provider's Facilities in the Public Rights-of-Way. Such approval shall not be unreasonably withheld. In addition, Cable or Video Provider shall provide annually to the City a map of its Facilities to the extent any changes have occurred in Facilities in the

#### Public Rights-of-Way.

(9) Each Cable or Video Provider shall participate in the Tennessee One-Call (Area Utility Coordination) ("TNN One-Call") meetings and coordinate all new construction with the TNN One-Call. Every Cable or Video Provider's Facilities shall bear identification marks as may be established by the TNN One-Call, to the extent such Facilities are installed after the TNN One-Call establishes such identification marks.

#### 4.2 Work by Others, Construction by Abutting Owners and Alterations to Conform with Public Improvements.

(a) The City reserves the right to lay and permit to be laid, sewer, gas, water, and other pipe lines or cables and conduits, and to do and permit to be done, any underground and overhead work, and any attachment, restructuring or changes in aerial facilities that may be deemed necessary or proper by the City in, across, along, over or under any public street, alley or right-of-way occupied by Cable or Video Provider , and to change any curb or sidewalk or the grade of any street. In permitting such work to be done, the City shall not be liable to any Cable or Video Provider for any damages not directly caused by the willful misconduct or gross negligence of the City; provided, however, that nothing herein shall relieve any other person or entity, including any contractor, subcontractor, or agent from liability for damage to Cable or Video Provider 's facilities.

(b) In the event that, during the term of the Agreement, the City authorizes abutting landowners to occupy space under the surface of any public street, alley, or right-of-way, such grant to an abutting landowner shall be subject to the rights herein granted to a Cable or Video Provider . In the event that the City shall close or abandon any Public Right-of-Way, which contains any portion of Cable or Video Provider's facilities, any conveyance of land contained in such closed or abandoned Public Right-of-Way shall be subject to the rights herein granted.

(c) During the term of all Agreements, each Cable or Video Provider shall be liable for the acts or omissions of any entity used by Cable or Video Provider (including an Affiliate) when such entity is involved directly or indirectly in the construction and installation of Cable or Video Provider 's facilities to the same extent as if the acts or omissions of such entity were the acts or omissions of a Cable or Video Provider .

(d) Relocation or Removal of Facilities: Within one hundred twenty (120) days following written notice from the City, the Cable or Video

Provider shall, at their expense, temporarily or permanently remove, relocate, change or alter the position of any of their facilities or Facilities that are in the Public Rights-of-Way whenever the City shall have determined that such removal, relocation, change or alteration is reasonably necessary for:

(i) The construction, repair, maintenance or installation of any City or other public improvement in or upon the Public Rights-of-Way; or

(ii) The operations of the City or City affiliated governmental entities, to include, but not be limited to, the Memphis Transit Authority, and Memphis Light, Gas, and Water Division (so long as it is municipally owned) in or upon the Public Rights-of-Way.

(iii) This subsection 4.2(d) does not apply as to any private, non-governmental third party or other governmental entities unaffiliated with the City requesting relocation or removal of Facilities in the Public Rights-of-Way.

**SECTION 5. INSTALLATION STANDARDS APPLICABLE TO ALL TELECOMMUNICATIONS**

**FACILITIES.**

5.1 A permit for cable, telecommunications and video facilities within the public right-of-way shall comply with the following installation standards:

(a) The cable, telecommunications and video facility shall be colored to blend with other streetscape or surrounding features to the extent feasible.

(b) In the event the parkway and/or roadway, where approved, adjacent the applicant's cable, telecommunications and video facility is disturbed or altered in the process of installation, the applicant shall restore the parkway and/or roadway to the condition in which it existed prior to installation.

(c) No modifications to above-ground or at-grade cable, telecommunications and video facility, including those related to size, color, and shape of the housing, may be made by the applicant without first having obtained approval from the City Engineer.

- (d) Where feasible, as new technology becomes available, the applicant shall place an existing or proposed above-ground cable, telecommunications or video facility below ground.
- (e) There shall be no more than one above-ground cable, telecommunications or video facility per each residential frontage.
- (f) In residential districts where a cable, telecommunications or video facility is proposed adjacent to a corner lot, the facility shall be located along the side yard and not on the primary frontage of a residence, if feasible.
- (g) To the extent feasible, the area surrounding the telecommunications facility shall be maintained with landscaping or alternate screening. The landscaping shall be irrigated and of a sufficient height and density to screen the facility from the public sidewalk and parkway.
- (h) The applicant shall obtain the City Engineer's approval of a tree protection plan prepared by a Certified Arborist for the installation of any cable, telecommunications or video facility located within the canopy of a street tree, or a protected tree on private property, or within a minimum of a ten foot radius of the base of such a tree. Depending on site specific criteria (e.g. location of tree, size and type of tree etc.), a radius greater than 10 feet may be required by the City Engineer.
- (i) No cable, telecommunications or video facility may be illuminated unless specifically required by the Federal Aviation Administration or other governmental agencies.
- (j) At the discretion of the City Engineer, the applicant may be required to provide an authorization to permit the City to hire an independent, qualified consultant to evaluate any technical aspect of a proposed wireless cable, telecommunications or video facility, including, but not limited to, issues involving radio frequency emissions, alternative designs, and alternative sites. Any authorization for this purpose shall include a deposit to cover all reasonable costs associated with the consultation. Any proprietary information disclosed to the City or the consultant is deemed not to be a public record, and shall remain confidential and not to be disclosed to any third party without the express consent of the applicant, unless otherwise required by law.

5.2 Protect Structures - In connection with the construction, maintenance, repair or removal of the System, the Cable or Video Provider shall, at its own cost and expense, protect any and all existing structures and improvements, including landscaping and trees belonging to the City, and all designated historical landmarks, as well as all other structures within any

designated historical district. The Cable or Video Provider shall obtain the prior approval of the City before altering or crossing any water main, sewerage or drainage system, or any other municipal, state or federally-owned structure in the streets required because of the presence of the System in the Streets. Any such alteration shall be made by the Cable or Video Provider at its sole cost and expense, and in a manner prescribed by the City. The Cable or Video Provider shall be liable, at its own cost and expense, to replace or repair and restore to serviceable condition in a manner as may be specified by the City, any street or any municipal, state or federally-owned structure involved in the construction of the System that may become disturbed or damaged as a result of any work thereon by or on behalf of the Cable or Video Provider pursuant to its franchise.

5.3 Erection, Removal and Use of Poles - No poles shall be erected by Cable or Video Provider without prior approval of the City with regard to location, height, types and any other pertinent aspect. However, no location of any pole or wire-holding structure of Cable or Video Provider shall give rise to a vested interest, and such pole or structures shall be removed or modified by Cable or Video Provider at its own expense whenever the City determines that the public convenience would be enhanced thereby. Approval under this section shall require the prior written approval of the City Engineer, who shall not unreasonably withhold his approval. Such location height, types and any other pertinent aspect shall be approved if in compliance with the requirements of this and other applicable ordinances. The City Engineer shall not unreasonably delay or deny permission to Cable or Video Provider to proceed with construction. Any denial must be in writing specifying the reasons for the denial. Any denial may be appealed to City Council or to a third party hearing examiner at the City's discretion, if a written request to appeal is submitted within ten days of the denial.

5.4 Upon request of the City or other authority of competent jurisdiction, Cable or Video Provider shall remove and abate any portion of the System or any facility that is dangerous to life or property, and in case Cable or Video Provider, after ten (10) days written notice from the City Engineer, fails or refuses to act, the City may remove, relocate or abate the same, at the sole cost and expense of Cable or Video Provider, all without compensation or liability for damages to Cable or Video Provider; provided, however, Cable or Video Provider may recover damages sustained by it from any person other than the City who relocates, removes or abates any such Cable or Video Provider facility negligently or without the City Engineer giving ten (10) days written notice to Cable or Video Provider authorizing such other person to relocate or remove Cable or Video Provider's facilities on behalf of the City.

#### SECTION 6. MOVING WIRES.

The City may, at any time, in case of fire, disaster or other emergency, as determined by the City in its reasonable discretion, cut or move any other optical fibers, wires, cable, amplifiers, appliances, or other parts of the System in the streets or in City buildings, in which event the City shall not be liable therefor to the Cable or Video Provider. Cable or Video Provider shall be given prior telephonic notice to the extent practicable under the circumstances.

**SECTION 7. TEMPORARY REMOVAL OF FACILITIES FOR DEMOLITION OF BUILDINGS.**

Upon the request of a person holding a permit issued by the City for the moving or demolition of a building, and at least ten 10 days notice, Cable or Video Provider shall temporarily raise, lower or removing its facilities to permit the removal or demolition of such building. The expense of such temporary removal, raising or lowering of facilities shall be paid by the person requesting the same and Cable or Video Provider shall have the authority to require such payment in advance; provided, however, that no payment (direct or indirect) shall be required of the City.

**SECTION 8. REMOVAL OF CITY PROPERTY.**

No property of the City is to be removed from the right-of-way, including signage on utility poles, without prior written approval from the City.

**SECTION 9. RESERVATION OF RIGHTS.**

The City reserves the right to exercise its police powers to modify, vacate or transfer any right-of-way in use by Cable or Video Provider for a public purpose. At Cable or Video Provider's own risk, the City has the predominant right to use its right-of-way in the placement, maintenance and repair of sewers, water mains and other public utility franchises or to relocate or remove Cable or Video Provider's System where the City determines that the public convenience and/or necessity would be enhanced or for any other public purpose, including, but not limited to the use of any Public Right-of-Way used by Cable or Video Provider for public purposes. The permits referred to in Section 4 may be amended or revoked in whole or in part by the issuing department whenever such action is necessary or advisable for a public purpose. Cable or Video Provider shall make no claims for costs or damages against the City by reason of such removal or relocation. Upon 30 days written notice to Cable or Video Provider of partial or complete revocation of such permit from the City Engineer, Cable or Video Provider shall remove, modify, replace or relocate its facilities as required at its own expense. In the event Cable or Video Provider does not remove, modify, replace or relocate its facilities as required by said notice within thirty (30) days as aforesaid, the City Engineer may cause the same to be done at Cable or Video Provider's expense and all expenses incurred or damages paid by the City on account of such action shall be paid by Cable or Video Provider on demand. Cable or Video Provider shall remove, replace or modify, at its own expense, the installation of any of its facilities as may be deemed necessary by any other appropriate governmental authority to meet such authority's proper responsibilities. In the event the City exercises its predominant right to use any Public Right-of-Way used by Cable or Video Provider for a public purpose, the City shall reasonably cooperate with Cable or Video Provider in finding an alternate site for any telecommunications facilities removed and in avoiding disruption to Cable or Video Provider's cable,

telecommunications or video system to the extent not reasonably required by the City. In an emergency, as determined by the City Engineer, the City may order Cable or Video Provider to remove or relocate its facilities within forty-eight (48) hours. If the City exercises any of its rights pursuant to this Section, Cable or Video Provider shall have the option, upon notice to the City Engineer, of abandoning the portion of its cable, telecommunications or video system to be so removed or relocated and deleting such portion from the Public Right-of-Way.

Notwithstanding the above, in the event Cable or Video Provider provides documentary support that the time allowed for removal or relocation of facilities as required by this Section are inadequate in the reasonable judgment of the City Engineer, the City Engineer may grant additional time, but not to exceed 180 days.

#### **SECTION 10. ABANDONMENT OF RIGHT-OF-WAY.**

In the event that the City shall close or abandon any public street, alley or right-of-way, which contains any portion of Cable or Video Provider's system, any conveyance of land contained in such closed or abandoned public street, alley, highway or right-of-way shall be subject to the rights herein granted.

#### **SECTION 11. RELOCATION OF THE SYSTEM.**

11.1 New Grade or Lines - If the grades or lines of any street on which Cable or Video Provider's System is placed are changed at any time during the term of the Franchise of the Cable or Video Provider, then the Cable or Video Provider shall, at its own cost and expense and upon the request of the City, protect or promptly alter or relocate the System, or any part thereof, so as to conform with such new grades or lines. In the event that the Cable or Video Provider refuses or neglects to so protect, alter, or relocate all or part of the System, the City shall have the right to break through, remove, alter or relocate such part of the System, without any liability to the City, and the Cable or Video Provider shall pay to the City the costs incurred in connection with such breaking through, removing, altering or relocating.

11.2 Relocation of Right-of-Way - Wherever a Public Right-of-Way or other public property is being constructed, paved (whether or not such paving is part of a more extensive improvement project), resurfaced, relocated or otherwise altered or improved (including, but not limited to, the installation of sidewalk, curb, gutter, drainage facilities, water mains, or sewer mains, traffic signals or trees), Cable or Video Provider shall, within ninety (90) days of written notice from the City Engineer, and at no cost (direct or indirect) to the City, remove or relocate any Cable or Video Provider facility located within the Public Right-of-Way or public property or perform such work as it deems necessary for the extension of new facilities, except that Cable or Video Provider may recover from any other person other than the City who relocates any such Cable or Video Provider facility without ninety (90) days written notice from the City Engineer authorizing such other person to relocate or remove Cable or Video Provider's facilities. The relocation or extension of new facilities shall be to a location approved by the City. Failure to

obtain the City's approval of the location of facilities relocated under this section will be considered a forfeiture under Section 31 of this Ordinance. Cable or Video Provider shall be responsible for any damage it causes to property, including damage to trees and other landscaping, as a result of the relocation or removal of facilities.

11.3 Time Limit - Liquidated Damages - Failure of Cable or Video Provider to remove or relocate the facility to a location approved by the City within ninety (90) days of the City's written notice shall entitle the City to recover liquidated damages from Cable or Video Provider. The liquidated damages for failure to remove or relocate a facility shall not exceed \$250.00 per diem.

If Cable or Video Provider believes it will be unable to complete the relocation within ninety (90) days from receipt of notice from the City, Cable or Video Provider shall explain the reasons for its inability in detail and the City and Cable or Video Provider shall attempt to agree on an alternate schedule, subject, however, to the City's right to finally determine the schedule and liquidated damages, as long as Cable or Video Provider's explanation is not unreasonable, Cable or Video Provider shall be excused, unless the City is subject to construction delay claims which exceed this amount.

#### **SECTION 12. SUSPENSION OR REVOCATION OF CONSTRUCTION PERMIT.**

The City Engineer may suspend or revoke any permit issued by the City or take any action he deems reasonably necessary, including the stopping of work, should Cable or Video Provider violate the terms of said permit, until said violation has been corrected to the City Engineer's reasonable satisfaction. The City Engineer shall not unreasonably suspend or revoke any permit. Any suspension or revocation must be in writing specifying the reasons for the suspension or revocation. Any suspension or revocation may be appealed to City Council or to a third party hearing examiner at the City's discretion, if a written request to appeal is submitted within ten days of the suspension or revocation.

#### **SECTION 13. TREE TRIMMING.**

13.1 Upon ten days written notice, the Cable or Video Provider may trim trees or other vegetation owned by the City or encroaching upon the Public Rights-of-Way to prevent their branches or leaves from touching or otherwise interfering with its wires. All trimming or pruning shall be at the sole cost of the Cable or Video Provider .

13.2 The Cable or Video Provider may contract for said trimming or pruning services with any person approved by the City prior to the rendering of said services.

#### **SECTION 14. PERFORMANCE BONDS AND DAMAGES.**

14.1 Considering the extent of any work to be performed in the Public Rights of Way the City Engineer may require a Cable or Video Provider to file with the City Engineer a performance bond in favor of the City for such amount as the City Engineer may reasonable determine necessary to protect the City's interest in the Public Right of Way. The corporate surety on such bond will be authorized to do business in Tennessee and acceptable to the City Attorney. The bond shall be maintained throughout any construction and any reconstruction period and until such time as determined by the CAO.

14.2 In the event Cable or Video Provider fails to comply with any law, ordinance or regulation governing use of Public Rights-of-Way or fails to properly construct Cable or Video Provider 's Facilities, there shall be recoverable, jointly and severally, from the Cable or Video Provider or from principal and surety of its bond, any damages or loss suffered by the City as a result, including the full amount of any compensation, indemnification, or cost of removal or abandonment of any property of Cable or Video Provider, plus a reasonable allowance for attorney fees, including the City's legal staff, and costs.

14.3 The City may, upon completion of construction or reconstruction of the Facilities as approved by the CAO, waive or reduce the requirement of Cable or Video Provider to maintain bonds. However, the City may require a performance and payment bond to be posted by Cable or Video Provider for any construction subsequent to the completion of the initial Facilities, in a reasonable amount and upon such terms as determined by the CAO.

14.4 The bond shall contain the following endorsement: "It is hereby understood and agreed that this bond may not be canceled by the surety nor the intention not to renew be stated by the surety until thirty (30) days after receipt by the City Attorney, by registered mail, a written notice of such intent to cancel or not to renew."

#### SECTION 15. *INSURANCE.*

15.1 Each Cable or Video Provider shall comply with the following:

- (a) Each Cable or Video Provider shall obtain and maintain in full force and effect throughout the term of the Agreement insurance with an insurance company licensed to do business in the State of Tennessee and acceptable to the City designated by its representative. All companies will be required to be rated A-VI or better by A.M. Best or A or better by Standard and Poors. Each Cable or Video Provider shall furnish the City with proof of such insurance so required at the time of making the initial application for a permit. The City reserves the right to review these insurance requirements during the effective period of any cable or video franchise agreement, and to reasonably adjust insurance coverage and their limits when deemed necessary and prudent by the City's designated representative, based upon changes in statutory law, court decisions, or the claims history of the industry or the Cable or Video Provider .

(b) The CAO shall be entitled, upon request and without expense, to receive copies of certificates of insurance evidencing coverage stated above. The CAO also may make any reasonable requests for deletion, revision or modification of particular policy terms, conditions, limitations or exclusions, except where policy provisions are established by law or regulation binding upon either City or a Cable or Video Provider or upon the underwriter for any of such policies. Upon request for deletion, revision or modification by the CAO, Cable or Video Provider shall exercise reasonable efforts to accomplish the changes and shall pay the cost thereof.

(c) All insurance certificates will contain the following required provisions:

(i) Name the City and its officers, employees, board members and elected representatives as additional insureds (as the interests of each insured may appear) as to all applicable coverage;

(ii) Provide for thirty (30) days notice to the City for cancellation, non-renewal, or material change;

(iii) Provide for notice to both the CAO and the City Secretary by certified mail; and

(iv) Provide that all provisions of the Agreement, as amended, concerning liability, duty, and standard of care, including the Indemnity Section, shall be underwritten by contractual coverage sufficient to include such obligations within applicable policies, subject to policy terms and conditions.

#### **SECTION 16. COMPLIANCE WITH LAWS; SEVERABILITY.**

16.1 Notwithstanding any other provisions of this Ordinance to the contrary, each Cable or Video Provider shall at all times comply with all applicable laws and regulations of the Federal, state, county and city governments and all administrative agencies thereof, including but not limited to judicial orders; provided, however, that if any such Federal, state, city, or county law or other applicable regulation shall require the Cable or Video Provider to perform any service, or shall prohibit the Cable or Video Provider from performing any service, in conflict with any law or regulation of the City, then as soon as possible following knowledge thereof, the Cable or Video Provider shall notify the City of the point of conflict believed to exist between such regulation or law and the laws or regulations of the City.

16.2 If any provision of this Ordinance or any related agreement is held by any court or by any Federal, state, or county agency of competent jurisdiction to be invalid as conflicting with

any Federal, state or county law, rule or regulation now or hereafter in effect, or is held by such court or agency to be modified in any way in order to conform to the requirements of any such law, rule or regulation, said provision shall be considered as a separate, distinct and independent part of this Ordinance, and such holding shall not affect the validity and enforceability of all other provisions hereof or thereof. In the event that such law, rule or regulation is subsequently repealed, rescinded, amended or otherwise changed, so that the provision hereof or thereof which had been held invalid or modified is no longer in conflict with the law, rules and regulations then in effect, said provision shall thereupon return to full force and effect and shall thereafter be binding on the parties hereto, provided that the City shall give the Cable or Video Provider sixty (60) days' written notice of such change before requiring compliance with said provision.

16.3 This Ordinance shall be enforceable to the fullest extent possible in accordance with its terms even if any subsection, sentence, clause, phrase, term, provision, condition, covenant or portion thereof is held invalid or unenforceable by a court of competent jurisdiction.

**SECTION 17. TAXES AND PERMIT FEES.**

Nothing contained in this Ordinance shall be construed to exempt the Cable or Video Provider from any tax levy, permit fee or assessment which is or may be hereafter lawfully imposed on all entities engaged in the same business as the Cable or Video Provider, or as are generally applicable in the City or State.

**SECTION 18. SEVERABILITY.**

If any section, subsection, sentence, clause, phrase, term, provision, condition, covenant or portion of this Ordinance is for any reason held invalid or unenforceable by any court of competent jurisdiction, the remainder of this Ordinance shall not be affected thereby, but shall be deemed as a separate, distinct and independent provision, and such holding shall not affect the validity of the remaining portions hereof, and each remaining section, subsection, sentence, clause, phrase, term, provision, condition, covenant and portion of this Ordinance shall be valid and enforceable to the fullest extent permitted by law.

**SECTION 19. ENACTMENT CLAUSE.**

Be it further ordained, 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 the Mayor in writing by the comptroller, and become effective as otherwise provided by law.



## Memphis City Council Summary Sheet

### Resolution for the Botanic Garden Major Maintenance PK08023

- This item is a Resolution seeking approval to appropriate \$100,000 for miscellaneous repairs and maintenance funded from the Parks 2010 CIP Budget.
- The initiating party is the Division of Park Services.
- This Resolution does not change any existing Ordinance nor Resolution.
- An agreement contract between the City of Memphis and the Memphis Botanic Garden Foundation has been drafted and is in process of being executed. A construction contract will not be required.
- This Resolution may require an expenditure of funds up to \$100,000 for construction.

**RESOLUTION**

**WHEREAS**, the Council of the City of Memphis did approve Botanic Garden Major Maintenance CIP Project Number PK08023 as part of the Fiscal Year 2010 Capital Improvement Budget; and

**WHEREAS**, the Council of the City of Memphis did allocate \$100,000 in PK08023 in Fiscal Year 2010 for miscellaneous repairs and maintenance; and

**WHEREAS**, the contract with the Memphis Botanic Garden Foundation is in the process of being executed; and

**WHEREAS**, the Division of Park Services desires to appropriate funds within the Fiscal Year 2010 budget year prior to contract execution and

**NOW, THEREFORE, BE IT RESOLVED**, by the Council of the City of Memphis that there be and is hereby appropriated \$100,000 funded by G.O. Bonds – General and chargeable to the Fiscal Year 2010 Capital Improvement Budget, with said appropriation being credited as follows:

Project Title:	Botanic Garden Major Maintenance
Project Number:	PK08023
Amount:	\$100,000.00



## Memphis City Council Summary Sheet

This is an Ordinance requesting to create the Small Business Enterprise (SBE) Program.

- The proposed document is an Ordinance to create the Small Business Enterprise (SBE) Program for the purposes of promoting the economic welfare of the small businesses located within the city of Memphis by awarding at least 25% of City contracting and purchase order dollars to locally owned small businesses.
- This is an Ordinance put forth by the Law Division, Office of Contract Compliance.
- This Ordinance is new. The administration, by and through the Law Division, has determined that such an amendment is allowable under the Code.
- This transaction requires the approval of the full City Council and proper adoption of the requisite readings.
- No expenditure of funds is required under this Ordinance.



## **City of Memphis Small Business Enterprise (SBE) Program**

The City of Memphis Small Business (SBE) Program is now being established with the goal of awarding at least 25% of City contracting and purchase order dollars to locally owned small businesses.

Qualifications to obtain SBE status are listed below:

1. Principal office must be located within the city of Memphis;
2. Firm owned by resident of: Shelby, Fayette, Tipton, Desoto, Marshall, Tate, Tunica, and Crittendon counties
3. Firm must have a Shelby County and Tennessee business license;
4. Proof of Shelby County Personal Property Taxes and all other necessary local business operational taxes inherent to businesses in Shelby County are appropriately paid;
5. Size threshold designated by SBA standards

**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;

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 is 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 warehouse 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 pendency 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 contract, 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.



## Memphis City Council Summary Sheet

Resolution to accept grant funds in the amount of \$1,215,600.00 from the State of Tennessee for the In-Service Training Program for training of 2,026 commissioned officers.

- This item is a resolution to appropriate funding for FY2010.
- Police Services is receiving grant funds from the State of Tennessee.
- There is no change to existing ordinance.
- No contracts are required.
- This is a Budget Resolution for funding Police In-Service.

## RESOLUTION

**WHEREAS**, the Memphis Police Division receives State monies for In-Service Training for Commissioned Officers; and

**WHEREAS**, the 2,026 Memphis Police Commissioned Officers have successfully completed their In-Service Training at a unit price per Officer of \$600.00 for a total of \$1,215,600.00; and

**WHEREAS**, it is necessary for the Memphis Police Division to accept State monies for In-Service Training for Commissioned Officers; and

**WHEREAS**, it is necessary to appropriate Special Revenue funding of \$1,215,600.00 in the Fiscal Year 2010 Operating Budget for the Police In-Service Training.

**NOW, THEREFORE, BE IT RESOLVED** by the Council of the City of Memphis that the Special Revenue for the Police In-Service Training be accepted and appropriated in the Fiscal Year 2010 Operating Budget and that such funds be appropriated as follows:

### Fiscal Year 2010 Special Revenue Police In-Service Training

Revenues:

In-Service State Grant	<u>\$1,215,600.00</u>
Total Special Revenues	\$1,215,600.00

Expenditures:

Personnel	<u>\$1,215,600.00</u>
Total Expenditures	\$1, 215,600.00



## Memphis City Council Summary Sheet Instructions

Please provide a brief summary of the item, in bullet form, not to exceed one page:

1. This resolution is to appropriate funds for the City of Memphis Anti Blight Strategy for Fiscal Year July 1, 2009 through June 30, 2010.
2. Community Enhancement is the initiating party
3. This is not a change to an existing ordinance or resolution
4. This does not require a new contract nor does it amend existing contracts
5. This resolution does not require budget amendments

## **RESOLUTION**

**WHEREAS**, the City of Memphis Anti-Blight Strategy includes a financial commitment from the City of Memphis of approximately Twenty Five Million Dollars (\$25,000,000.00) over a five year period to fund this project to remove slum and blight; and

**WHEREAS**, the Council of the City of Memphis, by and through its division of Community Enhancement has approved funding in the Fiscal Year 2010 Capital Improvement Budget in the amount of Nine Million Dollars and 00/100 (\$9,000,000.00), to fund Memphis Anti-Blight Strategy; and

**WHEREAS**, Five Million Five Hundred Thousand Dollars and 00/100 (\$5,500,000.00) is designated towards specific projects identified by Community Enhancement Division and Three Million Five Hundred Thousand Dollars (\$3,500,000.00) is identified for “Other” project(s); and

**WHEREAS**, the Community Enhancement Division will refer to the Council of the City of Memphis for any Housing and Community Development project(s) identified as “Other” that require demolishing in an amount over One Hundred Thousand and 00/100 (\$100,000.00).

**NOW THEREFORE, BE IT RESOLVED**, by the Council of the City of Memphis that FY2010 Capital Improvement Budget be and is hereby amended by appropriating an allocation of Nine Million Dollars and 00/100 (\$9,000,000.00) funded by G.O. Bonds with the Division of Community Enhancement Anti-Blight Strategy, project number CE01068 for expenses related to slum and blight

<b>Anti-Blight</b>	<b>\$9,000,000</b>
<b>CIP Project Number: CE01068</b>	<b>G.O. Bonds</b>



## Memphis City Council Summary Sheet Instructions

Resolution requesting acceptance of funds from the University of South Florida to reimburse previously incurred Travel expenses during Fiscal Year 2010

- This item is a resolution to accept funds reimbursement.
- The Executive Division is requesting this on behalf of the Office of Youth Services and Community Affairs.
- At this time there are no impacts to any prior Resolutions or Ordinances.
- At this time there are no contract or grant implications or impacts.
- The aforementioned action requires a budget amendment to accept and appropriate the Revenue funds from the University of South Florida.

## RESOLUTION

WHEREAS, the City of Memphis via the Office of Youth Services and Community Affairs will receive proceeds in the amount of Three Thousand Forty Seven Dollars and Thirty Cents (\$3,047.30) from the University of South Florida; and

WHEREAS, the Office of Youth Services and Community Affairs would like to reimburse the General Fund for travel expenses previously incurred; and

WHEREAS, it is necessary to amend the Fiscal Year 2010 Operating Budget to accept the reimbursement funds;

NOW, THEREFORE, BE IT RESOLVED, by the Council of the City of Memphis that the University of South Florida proceeds in the amount of Three Thousand Forty Seven Dollars and Thirty Cents (\$3,047.30) be hereby accepted by the City of Memphis.

BE IT FURTHER RESOLVED, that the Fiscal Year 2010 Operating Budget be and is hereby amended by appropriating the Revenues and the Expenditures for the Office of Youth Services and Community Affairs in the amount of Three Thousand Forty Seven Dollars and Thirty Cents (\$3,047.30).

### Revenue

University of South Florida	\$3,047.30
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### Expense

Travel	\$3,047.30
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## CITY COUNCIL RESOLUTION

**WHEREAS**, The area known as Fischer Steel located in Cordova is faced with increasing development pressures; and

**WHEREAS**, nearby residents are concerned about future development in Fischer Steel; and

**WHEREAS**, Fischer Steel is located immediately across Trinity Road from Shelby Farms Park; and

**WHEREAS**, citizens of the City of Memphis and Shelby County are devoted to protection and future improvement of this beautiful and expansive park; and

**WHEREAS**, there is also great interest in protecting the vicinity of Shelby Farms Park from incompatible uses and overly tall buildings that could interfere with the beautiful views around the park; and

**WHEREAS**, interested citizens attended a multi-day Charrette which led to the formation of a future vision and guiding principles for future development in Fischer Steel; and

**WHEREAS**, the plan for implementing the vision includes recommendations for a comprehensive rezoning with designations of street frontages and adoption of a height map which will be presented for approval by the Land Use Control Board and the Memphis City Council soon after the approval of the Unified Development Code.

**NOW THEREFORE BE IT RESOLVED THAT**, the Memphis City Council directs the Memphis and Shelby County Office of Planning and Development to present the Fischer Steel Plan for adoption by the Memphis City Council.

**BE IT FURTHER RESOLVED THAT**, the Fischer Steel plan will not be subject to the current moratorium on new plans initiated by OPD prior to adoption of the Unified Development Code.



## Memphis City Council Summary Sheet

### Amendatory Bond Resolution

- Resolution amending resolutions authorizing and providing with respect to the issuance of bonds the caption of the capital projects resolution is hereby amended by deleting “Eighty Million Dollars (\$80,000,000)” and inserting in lieu thereof “Eighty-Five Million Dollars (\$85,000,000)”.
- Resolution amending resolutions authorizing and providing with respect to the issuance of bonds the caption of the refunding resolution is hereby amended by deleting “One Hundred Sixty-Eight million dollars (\$168,000,000) and inserting in lieu thereof “One Hundred Seventy-Five million dollars (\$175,000,000)”.
- The initiating party is the Division of Finance.
- This Amendatory Bond Resolution does change any existing Resolutions relative to the authorized amount of debt to be issued, as stated above.
- The Amendatory Bond Resolution does not require new contracts, or amends an existing contract.
- This resolution will provide funding for FY '11 CIP Projects.
- This resolution will restructure FY '11 and FY '12 Debt Service Payments without extending the original maturity of the debt.

## RESOLUTION

### RESOLUTION AMENDING RESOLUTIONS AUTHORIZING AND PROVIDING WITH RESPECT TO THE ISSUANCE OF BONDS

BE IT RESOLVED by the Council of the City of Memphis, Tennessee, as follows:

SECTION 1. Findings and Determinations. (a) This Council on May 11, 2009, adopted a resolution entitled "RESOLUTION OF THE COUNCIL OF THE CITY OF MEMPHIS, TENNESSEE, AUTHORIZING THE ISSUANCE, SALE AND DELIVERY OF NOT TO EXCEED EIGHTY MILLION DOLLARS (\$80,000,000) PRINCIPAL AMOUNT OF CITY OF MEMPHIS, TENNESSEE, GENERAL IMPROVEMENT BONDS, SERIES 2010C, FOR THE PURPOSE OF FINANCING VARIOUS PUBLIC WORKS PROJECTS OF THE CITY; MAKING PROVISION FOR THE RAISING ANNUALLY BY SUCH CITY OF A SUM SUFFICIENT TO PAY, AS THE SAME SHALL BECOME DUE, THE PRINCIPAL OF AND PREMIUM, IF ANY, AND INTEREST ON SUCH BONDS; PRESCRIBING THE FORM AND CERTAIN DETAILS OF SUCH BONDS; AUTHORIZING AND PROVIDING FOR THE NEGOTIATED SALE OF SUCH BONDS; APPROVING THE FORM OF PURCHASE AGREEMENT FOR SUCH BONDS; APPROVING THE PREPARATION AND DISTRIBUTION OF A PRELIMINARY OFFICIAL STATEMENT RELATING TO SUCH BONDS AND APPROVING THE FORM THEREOF; AUTHORIZING AND APPROVING AN OFFICIAL STATEMENT IN CONNECTION WITH THE ISSUANCE OF SUCH BONDS; AND AUTHORIZING CERTAIN OTHER MATTERS WITH RESPECT TO THE ISSUANCE OF SUCH BONDS" (the "Capital Projects Resolution").

(b) This Council on May 25, 2010, adopted a resolution entitled "RESOLUTION OF THE COUNCIL OF THE CITY OF MEMPHIS, TENNESSEE, AUTHORIZING THE ISSUANCE, SALE AND DELIVERY OF NOT TO EXCEED ONE HUNDRED SIXTY-EIGHT MILLION DOLLARS (\$168,000,000) PRINCIPAL AMOUNT OF CITY OF MEMPHIS, TENNESSEE, GENERAL IMPROVEMENT BONDS FOR THE PURPOSE OF REFUNDING CERTAIN OUTSTANDING GENERAL IMPROVEMENT BONDS, SERIES 2010D, OF THE CITY; MAKING PROVISION FOR THE RAISING ANNUALLY BY SUCH CITY OF A SUM SUFFICIENT TO PAY, AS THE SAME SHALL BECOME DUE, THE PRINCIPAL OF AND PREMIUM, IF ANY, AND INTEREST ON SUCH BONDS; PRESCRIBING THE FORM AND CERTAIN DETAILS OF SUCH BONDS; AUTHORIZING AND PROVIDING FOR THE NEGOTIATED SALE OF SUCH BONDS; APPROVING THE FORM OF PURCHASE AGREEMENT FOR SUCH BONDS; APPROVING THE PREPARATION AND DISTRIBUTION OF A PRELIMINARY OFFICIAL STATEMENT RELATING TO SUCH BONDS AND APPROVING THE FORM THEREOF; AUTHORIZING AND APPROVING AN OFFICIAL STATEMENT IN CONNECTION WITH THE ISSUANCE OF SUCH BONDS; APPROVING THE FORM AND AUTHORIZING THE EXECUTION AND DELIVERY OF A REFUNDING TRUST AGREEMENT AND APPOINTING THE TRUSTEE THEREUNDER; AND AUTHORIZING CERTAIN OTHER MATTERS WITH RESPECT TO THE ISSUANCE OF SUCH BONDS" (the "Refunding Resolution").

(c) It is necessary and desirable to amend certain provisions of the Capital Projects Resolution and the Refunding Resolution.

SECTION 2. Amendments of Capital Projects Resolution. (a) The caption of the Capital Projects Resolution is hereby amended by deleting “EIGHTY MILLION DOLLARS (\$80,000,000)” and inserting in lieu thereof “EIGHTY-FIVE MILLION DOLLARS (\$85,000,000)”.

(b) Section 2(a) of the Capital Projects Resolution is hereby amended by deleting “Eighty Million Dollars (\$80,000,000)” and inserting in lieu thereof “Eighty-Five Million Dollars (\$85,000,000)”.

(c) Sections 3(a) and 15 of the Capital Projects Resolution are hereby amended by deleting “16 years” and inserting in lieu thereof “26 years”

SECTION 3. Amendments of Refunding Resolution. (a) The caption of the Refunding Resolution is hereby amended by deleting “ONE HUNDRED SIXTY-EIGHT MILLION DOLLARS (\$168,000,000) and inserting in lieu thereof “ONE HUNDRED SEVENTY-FIVE MILLION DOLLARS (\$175,000,000)”.

(b) Section 1 of the Refunding Resolution is hereby amended to read as follows:

“SECTION 1. Authorization and Purpose of Bonds. There is hereby authorized to be issued, sold and delivered one or more series of general obligation bonds of the City, designated “General Improvement Bonds, Series 2010D”, each with such other or further series designation, as determined by the Director of Finance and Administration (the “Bonds”) in an aggregate principal amount not to exceed One Hundred Seventy-Five Million Dollars (\$175,000,000) for the purpose of refunding in advance of their maturities all or a portion of One Hundred Fifty-Eight Million Eight Hundred Fifteen Thousand Dollars (\$158,815,000) General Improvement Bonds of the City of the respective series, maturities, principal amounts, interest rates and redemption dates, if applicable, as set forth below (the “Refunded Bonds”):

<u>Series</u>	<u>Maturity Date</u>	<u>Principal Amount</u>	<u>Interest Rate</u>	<u>Redemption Date</u>
Ref. 1993A	August 1, 2010	\$ 3,545,000	0.00%	
Ref. 1997	August 1, 2010	\$ 1,260,000	5.60%	
Ref. 1998	July 1, 2010	\$ 1,905,000	5.50%	
Ref. 1999	October 1, 2010	\$ 6,445,000	5.25%	
	October 1, 2011	<u>3,045,000</u>	5.25	
		\$ 9,490,000		
Ref. 2001	November 1, 2010	\$ 10,920,000	5.00%	
	November 1, 2011	<u>12,885,000</u>	5.25	
		\$ 23,805,000		
2002	November 1, 2010	\$ 7,190,000	5.50%	
2003	May 1, 2011	\$ 4,485,000	4.00%	
	May 1, 2012	<u>4,660,000</u>	4.00	May 1, 2011
		\$ 9,145,000		
2004	October 1, 2010	\$ 5,200,000	5.00%	
	October 1, 2011	5,465,000	5.00	
	October 1, 2012	<u>5,745,000</u>	5.00	
		\$ 16,410,000		
2007A	April 1, 2025	\$ 8,645,000	5.00%	April 1, 2017
	April 1, 2026	9,080,000	4.75	April 1, 2017
	April 1, 2027	<u>9,510,000</u>	4.75	April 1, 2017
		\$ 27,235,000		
2008	April 1, 2011	\$ 1,845,000	3.25%	
	April 1, 2012	4,145,000	3.25	
	April 1, 2026	7,285,000	4.50	April 1, 2018
	April 1, 2027	7,615,000	4.50	April 1, 2018
	April 1, 2028	<u>7,955,000</u>	4.50	April 1, 2018
		\$ 28,845,000		
2009	April 1, 2012	\$ 1,830,000	4.00%	
	April 1, 2025	5,100,000	5.00	April 1, 2019
	April 1, 2026	5,355,000	5.00	April 1, 2019
	April 1, 2027	5,625,000	5.00	April 1, 2019
	April 1, 2028	5,905,000	4.50	April 1, 2019
	April 1, 2029	<u>6,170,000</u>	4.625	April 1, 2019
		\$ 29,985,000		
		<u>\$ 158,815,000</u>		

(c) Section 2 of the Refunding Resolution is amended by adding after “5.50% per annum” the following: “in the case of Tax-Exempt Bonds (as defined below) and 6.10% per annum in the case of Taxable Bonds (as defined below)”, and by adding at the end of said Section 2 the following sentence: “The Bonds may be issued as bonds the interest on which is excluded from gross income for Federal income tax purposes (“Tax-Exempt Bonds”), or as bonds the interest on which is included in gross income for Federal income tax purposes (“Taxable Bonds”), or in part as Tax-Exempt Bonds and in part as Taxable Bonds.”

(d) The first paragraph of Section 4 of the Refunding Resolution is hereby amended to read as follows: “Any or all of the Bonds (or portions thereof in installments of \$5,000) may first be subject to redemption at the option of the City prior to their stated maturities no later than 10-½ years after the date of delivery thereof and payment therefor, in whole at any time or in part from time to time in such order of maturity as shall be determined by the City (except that if at any time less than all of the Bonds of a given maturity are called for redemption, the particular Bonds or portions thereof shall be selected by lot, in the case of Tax-Exempt Bonds, or by lot or pro rata or a combination thereof, in the case of Taxable Bonds), at a fixed price or prices not to exceed 103%, in the case of Tax-Exempt Bonds, or at a fixed price or prices not to exceed 103% or at make-whole prices or a combination thereof, in the case of Taxable Bonds, in each case together with the interest accrued on the principal amount to be redeemed to the date fixed for the redemption thereof. The Tax-Exempt Bonds or Taxable Bonds also may be made not redeemable prior to maturity in their entirety. The redemption provisions, if any, shall be determined by the Director of Finance and Administration, subject to the foregoing limitations.”

(e) Section 8 of the Refunding Resolution is hereby amended by deleting “Bonds” and inserting in lieu thereof “Tax-Exempt Bonds”.

(f) The form of Bonds in Section 10 of the Refunding Resolution is hereby amended by adding the following after the fourth paragraph thereof:

“*[Make-Whole Optional Redemption.* The Bonds shall be subject to redemption prior to their stated maturities, at the option of the City, in whole or in part at any time on or after \_\_\_\_\_ at the “Make Whole Redemption Price.” The Make Whole Redemption Price is equal to the greater of:

[the issue price of the Bonds set forth below (but not less than 100%)] [100%] of the principal amount of the Bonds to be redeemed; or

the sum of the present value of the remaining scheduled payments of principal of and interest on the Bonds to be redeemed to the maturity date of such Bonds, not including any portion of those payments of interest accrued and unpaid as of the date on which the Bonds are to be redeemed, discounted to the date on which the Bonds are to be redeemed on a semi annual basis, assuming a 360 day year containing twelve 30 day months, at the Treasury Rate (defined below) plus \_\_\_ basis points (0. \_\_%),

plus in each case accrued interest on the Bonds to be redeemed to the redemption date.

[The issue price of the Bonds of each maturity is \_\_\_\_%]

“Treasury Rate” means, with respect to any redemption date for a particular Bond, the yield to maturity as of such redemption date of United States Treasury securities with a constant maturity (as compiled and published in the most recent Federal Reserve Statistical Release H.15 (519) that has become publicly available at least two business days prior to the redemption date, excluding inflation indexed securities, or, if such Statistical Release is no longer published, any publicly available source of similar market data) most nearly equal to the period from the redemption date to the maturity date of the Bonds to be redeemed; provided, however, that if the period from the redemption date to the maturity date is less than one year, the weekly average yield on actually traded United States Treasury securities adjusted to a constant maturity of one year shall be used.

*Extraordinary Optional Redemption.* The Bonds shall be subject to extraordinary optional redemption prior to their stated maturities, at the option of the City, upon the occurrence of an Extraordinary Event (defined below), in whole or in part at any time before \_\_\_\_\_, at the “Extraordinary Make Whole Redemption Price.” The Extraordinary Make Whole Redemption Price is equal to the greater of:

the issue price of the Bonds set forth above in “Make Whole Optional Redemption” (but not less than 100%) of the principal amount of the Bonds to be redeemed; or

the sum of the present value of the remaining scheduled payments of principal of and interest on the Bonds to be redeemed to the maturity date of such Bonds, not including any portion of those payments of interest accrued and unpaid as of the date on which the Bonds are to be redeemed, discounted to the date on which the Bonds are to be redeemed on a semi annual basis, assuming a 360 day year containing twelve 30 day months, at the Treasury Rate (defined in “Make Whole Optional Redemption” above) plus \_\_\_\_ basis points (\_\_\_\_%),

plus in each case accrued interest on the Bonds to be redeemed to the redemption date.

An “Extraordinary Event” will have occurred if the City determines that a material adverse change has occurred to Section 54AA or 6431 of the Code (as such Sections were added by Section 1531 of the American Recovery and Reinvestment Act of 2009, pertaining to “Build America Bonds”) or there is a guidance published by the Internal Revenue Service or the United States Treasury with respect to such Sections or any other determination by the Internal Revenue Service or the United States Treasury, which determination is not the result of an act or omission by the City to satisfy the requirements to receive the 35 percent cash subsidy payment from the United States Treasury, pursuant to which the City’s 35 percent cash subsidy payment from the United States Treasury is reduced or eliminated.]

[If fewer than all of the Bonds of like maturity are called for prior redemption, the particular Bonds or portions of Bonds to be redeemed will be selected by the Paying Agent pro rata as nearly as practicable in proportion to the principal amounts of the Bonds owned by each registered owner, subject to the authorized denominations applicable to the Bonds. This will be calculated based on the formula: (principal to be redeemed) x (principal amount owned by

owner) / (principal amount outstanding). In such event, the particular Bonds to be redeemed will be determined by the Paying Agent in such manner as the Paying Agent in its discretion may deem fair and appropriate.]”

SECTION 4. Effective Date. This Resolution shall take effect upon its adoption.