

December 7, 2016

**EXTEND THE REMEDIAL PROGRAM FOR MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISE PARTICIPATION IN CONSTRUCTION PROJECTS****THE CHIEF EXECUTIVE OFFICER RECOMMENDS:**

That the Board extend the Remedial Program for Minority and Women-Owned Business Enterprises Participation in Construction Projects, as amended, which is attached hereto for a period of five years.

**HISTORY:** In 2006, the Board undertook a review of the then-existing affirmative action remedial plan adopted by the Board in 1991. Following this review, the Board determined that implementation of various race-neutral and gender-neutral measures would help the construction procurement program to overcome barriers and assist in the growth and development of financially stable M/WBE's. These measures included the following: improving the timing of payments; unbundling or down-sizing contracts to facilitate participation by smaller businesses; and providing longer bid lead times. It was also determined that increased attainment of M/WBE participation would result from the following: setting contract specific goals on projects; accepting governmental M/WBE certifications from certifying agencies; and the Office of Business Diversity to serve as voting members on the evaluation teams for all required Board construction bid solicitations. Following this review, the Board adopted a Remedial Program for Minority and Women-Owned Business Enterprises Participation in Construction Projects (the "Program") with a term commencing August 1, 2006 and ending December 31, 2011 (Board Report 06-0726-PO9). The Program was later amended by the Board on May 23, 2007 (Board Report 07-0523-PO1) to authorize retainage amounts to ensure contractor performance and compliance with contract requirements. Following a 2011 independent evaluation of availability and utilization of minority and women-owned construction vendors for the Chicago Public Schools, the Board determined that the steps it had taken since 1991 to ameliorate the effects of racial and gender discrimination in the construction marketplace had not sufficient. Accordingly, the Board extended the Program with a term commencing January 1, 2012 and ending December 31, 2016 (Board Report 11-1214-PO1).

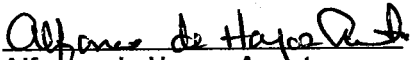
**PURPOSE:** Following a 2016 independent evaluation of availability and utilization of minority and women-owned construction vendors for the Chicago Public Schools, the Board has determined that the steps it has taken since 1991 to ameliorate the effects of racial and gender discrimination in the construction marketplace through a variety of race-and gender-neutral measures have not been sufficient. As a result, the Board has further determined that the Program should therefore be extended by creating measures narrowly tailored to serve the Board's compelling interest in not being a passive participant in the discriminatory Chicago construction marketplace.

**PROGRAM EXTENSION TERM:** The Program is extended, as amended herein, for the period of five years commencing January 1, 2017 and ending December 31, 2021.

**DESCRIPTION:** The Program will continue to: (1) apply to all construction projects required by the Board to be awarded through competitive bid (currently \$10,000 and above), (2) operate the same annual Aspirational Goals for M/WBE participation in all district-wide construction projects of 30% to qualified Minority-owned Business Enterprises and 7% to qualified Women-owned Business Enterprises, (3) authorize the Office of Business Diversity (OBD) to establish Contract Specific Goals for individual construction projects, and (4) authorize OBD to specify certain construction projects to be let without M/WBE participation goals in order to evaluate the marketplace.

The Program is being updated to continue in accordance with legal requirements, to reflect the Board's current organizational structure and practice, and to clarify various provisions. These amendments are included on the attachment.

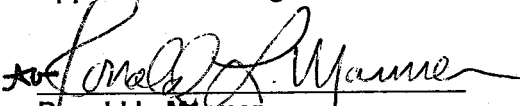
Approved for Consideration:

  
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Respectfully submitted:

  
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Approved as to Legal Form:

  
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Board of Education of the City of Chicago



**REMEDIAL PROGRAM  
FOR  
MINORITY AND WOMEN-OWNED BUSINESS  
ENTERPRISE PARTICIPATION  
IN  
CONSTRUCTION PROJECTS**

*[Effective January 1, 2017]*

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**REMEDIAL PROGRAM FOR  
MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISE  
PARTICIPATION IN CONSTRUCTION PROJECTS**

This Program is continued by the Chicago Board of Education (the "Board"), upon recommendation of the Chief Executive Officer ("CEO"), based upon (1) the Board's findings that it has been a passive participant in discriminatory practices against racial and ethnic minorities and women in the construction industry in Chicago, and that it has a compelling interest in remedying that passive discrimination, and (2) its desire to continue narrowly tailored remedies to address that compelling interest.

**I. FINDINGS**

- 1.1** The Board adopted a Remedial Plan for Minority and Women Business Enterprise Economic Participation in January 1991. The Plan provided measures to assist Minority and Women Business Enterprises in the procurement of goods and services by the Board. The benefits of the Plan were provided to Black, Hispanic, Asian and Women-owned firms whose principal place of business was within the six-county Chicago metropolitan area. The Plan provided for race-neutral remedial measures and for non-restrictive affirmative action measures, to be used to the extent effective in alleviating the effects of discrimination. The Plan mandated the establishment of specific goals for M/WBE participation on Board contracts, including construction, and waivers were available for Prime Contractors unable to meet the goals.
- 1.2** On May 26, 2004, the City of Chicago adopted a revised affirmative action program for its construction contracting procedures to remedy ongoing discrimination and the effects of past discrimination. The Chicago City Council, after considering evidence presented to the Budget Committee, including evidence elicited at trial in *Builders Association of Greater Chicago (BAGC), v. City of Chicago* No. 96 C 1122 (N.D. Ill.), during May and June 2003; statistical evidence of continuing discrimination against Blacks, Hispanics and women in the Chicago construction marketplace, which was not available during the BAGC trial; the report of the Mayoral Task Force on MBE/WBE; anecdotal evidence of discrimination against minorities and women in the Chicago construction marketplace; the testimony of experts and anecdotal witnesses; as well as written reports and submissions, found a strong basis in evidence to support a narrowly tailored, remedial affirmative action program in City construction contracting.
- 1.3** While the City Council found that the City has made substantial progress in its efforts to ameliorate discrimination in its own construction contracting practices, private companies that contract on public projects continue to discriminate against minorities and women. As a result of this discrimination, the City has been a passive participant in a system of discrimination against minorities and women in the Chicago construction marketplace, and absent remedial programs, would continue to be a passive participant in such a system.
- 1.4** During the BAGC trial, the court heard strong evidence that: (a) past and current discriminatory practices continue to place racial and ethnic minorities and women in positions of social and economic disadvantage, limiting opportunities for them to form and control construction businesses, as well as reducing the level and availability of employment opportunities for minorities and women in trade unions which serve the Chicago construction marketplace; (b) such current and past discriminatory practices, and the continuing effects of such discrimination, have impeded the growth and success of the businesses which minorities and women do form, as well as the level and availability of employment opportunities in the construction trade unions; and (c) these discriminatory practices include direct and indirect racial, ethnic and gender slurs and harassment; discrimination by lending institutions and other sources of capital; reduced opportunities for minority and women subcontractors to bid or quote to majority Prime Contractors; exclusion from and discriminatory treatment by the construction trade unions; exclusion from business and professional networks critical to entrepreneurial success; and discrimination by surety bonding companies, insurance companies and other entities that are integral to the contracting marketplace.

- 1.5 In the *BAGC* case, Judge James B. Moran held that the City has a compelling interest in implementing a remedial race- and gender-conscious affirmative action program in the Chicago construction market, but that its 1990 ordinance was not sufficiently narrowly tailored as applied to construction in 2003.
- 1.6 There is ample availability of ready, willing and able minority- and women-owned firms to participate in Board and private-sector construction contracting and subcontracting opportunities.
- 1.7 Minority and women workers' participation in the Chicago construction marketplace declined from 1980 to 1990.
- 1.8 Other jurisdictions, including Cook County, Illinois, have experienced drastic reductions in minority and women business participation after terminating race and gender-conscious remedial measures.
- 1.9 Private companies that contract on public projects continue to discriminate against minorities and women and financial institutions that provide necessary funding to minority and women contractors continue to maintain lending practices that have a disparate discriminatory impact on minorities and women. As result of this discrimination, the Board has been a passive participant in a system of discrimination against minorities and women in the Chicago construction marketplace, and in the absence of programs to eliminate such discrimination, would continue to be a passive participant in such a system.
- 1.10 The Board has a compelling interest in preventing its construction projects from returning to the near monopoly-domination by white male firms that existed before 1991.
- 1.11 Although the Board has undertaken since 1991 a variety of race- and gender-neutral measures, such as reducing bid deposit requirements and simplifying documentation required by procurement departments, such programs have not been sufficient to ameliorate the effects of racial and gender discrimination in the construction marketplace.
- 1.12 Evidence at the *BAGC* trial demonstrated that flexible race- and gender-conscious remedial measures do not overly burden construction firms owned by majority males.
- 1.13 In April 2006, CPS convened a series of focus groups during which various representatives from business enterprises discussed their beliefs regarding the Chicago construction market. The findings from the CPS focus groups indicate that barriers to participation in the Chicago construction market still exist for Minority and Women Business Enterprises entering into CPS contracts. Those barriers, as reported by focus group participants, include:
  - Perceptions and stereotypes about the competence of M/WBEs and higher performance standards set for M/WBEs
  - Race, ethnicity and gender makes it difficult to obtain work as Prime Contractors on public sector projects
  - Race, ethnicity and gender makes it difficult to obtain work as Prime Contractors or subcontractors on private sector projects
- 1.14 In July 2006, the Board determined that implementation of various race-neutral measures would help the procurement program to overcome those barriers and assist in the growth and development of financially stable M/WBEs, including the following measures: (See Section V for more detail)
  - Improving the timing of payments
  - "Unbundling" or down-sizing contracts, to facilitate participation by smaller businesses
  - Providing longer bid lead times

- 1.15 Based upon a thorough review of the results of the Board's 1991 Remedial Plan; the evidence presented and findings made at the *BAGC* trial; the information presented to the City Council and its consequent decision to revise the City of Chicago's ordinance; other recent judicial decisions regarding the constitutional standards for affirmative action programs; information presented during the April 2006 CPS focus groups and compiled in a report by Collette Holt; and a report entitled, "Availability and Utilization of Minority- and Women-Owned Businesses in the Procurement Activities of the Chicago Public Schools," prepared by Dr. David G. Blanchflower, Professor of Economics Dartmouth College, the Board adopted in July 2006 under Board Report 06-0726-PO9 a Business Diversity Program for Construction Projects (the "Program") which was later amended by the Board in May 2007 under Board Report 07-0523-PO1.
- 1.16 Based upon a thorough review of the foregoing information (*supra*, at sections 1.1 – 1.15); other recent judicial decisions regarding the constitutional standards for affirmative action programs; recent national and localized demographic evidence; recent labor and employment statistics, including national and local statistics, generally, as well as those specific to the construction industry; and the November, 2011 report entitled "*Availability and Utilization of Minority- and Women-Owned Businesses for the Chicago Public Schools*," prepared by Dr. David G. Blanchflower, Professor of Economics Dartmouth College, the Board adopted in December 2011 under Board Report 11-1214-PO1 a Remedial Program for Minority and Women Owned Business Enterprise Participation in Construction Projects (the "Program") which built upon the 1991 Plan. The Program was authorized for a period beginning January 1, 2012 until December 31, 2016.
- 1.17 Based upon a thorough review of the foregoing information (*supra*, at sections 1.1 – 1.16); relevant judicial decisions regarding the constitutional standards for affirmative action programs; recent national and localized demographic evidence; recent labor and employment statistics; including national and local statistics, generally, as well as those specific to the construction industry; and the October 2016 report entitled "*An Evaluation of the Chicago Public Schools Minority- and Women-Owned Businesses Program in Construction*" prepared by Dr. David G. Blanchflower, Professor of Economics, Dartmouth College, the Board hereby continues the Program as specified herein.

## II. DEFINITIONS

- 2.1 **Affiliate:** A person or entity that directly or indirectly through one or more intermediaries controls or is controlled by, or is under common control with, the person or entity. In determining whether persons or entities are affiliates, the Board shall consider all appropriate factors, including common ownership, common management and contractual relationships. Affiliates shall be considered together in determining whether a firm is a Small Business Enterprise.
- 2.2 **Appeals Process:** The process for review of Program compliance and waiver decisions made by the Office of Business Diversity in accordance with the Program.
- 2.3 **Chicago Board of Education or the District:** The body politic and corporate, known as "the Board of Education of the City of Chicago" and also known as Chicago Public Schools ("CPS") or School District 299.
- 2.4 **Commercially Useful Function:** Responsibility for the execution of a distinct element of the work of the contract which is carried out by actually performing, managing, and supervising the work involved, or fulfilling responsibilities as a joint venturer.
- 2.5 **Construction Contract or Transaction:** Any contract, purchase order or agreement (other than a lease of real property) for the construction, rehabilitation, repair or improvement of any building, sidewalk, alley, other structure or infrastructure, and any other construction-related procurement required by the Board to be bid.

- 2.6 Contractor:** Any person or business entity that seeks to enter into a construction contract with the Board, and includes all partners, affiliates and joint ventures of such person or entity.
- 2.7 Contract Specific Goals:** The subcontracting goals for Minority Business Enterprise (MBE) and Women Business Enterprise (WBE) participation established for a particular contract based upon the availability of MBEs and WBEs to perform the anticipated scopes of work of the contract, and the Board's progress towards meeting its aspirational goals. Contract Specific Goals shall be established for all contracts.
- 2.8 Economically Disadvantaged:** An individual whose personal net worth is less than \$2,000,000.00, adjusted annually for inflation, such annual adjustment to begin January 2017, based on the Consumer Price Index – Urban Wage Earners and Clerical Workers (Chicago All Items) published by the United States Bureau of Labor Statistics.
- 2.9 Good Faith Efforts:** Actions undertaken by a contractor to achieve a contract specific goal that, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program's requirements.
- 2.10 Joint Venture:** An association of two or more persons or entities, or any combination of types of business enterprises and persons numbering two or more, proposing to perform a single for-profit business enterprise, in which each joint venture partner contributes property, capital, efforts, skill and knowledge, and in which the MBE or WBE is responsible for a distinct, clearly defined portion of the work of the contract and whose share in the capital contribution, control, management, risks, and profits of the joint venture is equal to its ownership interest. Partners to a joint venture must have a written agreement specifying the terms and conditions of the relationships between them and their relationship and responsibilities to the contract.
- 2.11 Minority:** The Board adopts the following definition of "minority":
- a. any individual in the following racial or ethnic groups, members of which are rebuttably presumed to be socially and economically disadvantaged:
    1. African-Americans or Blacks, which includes persons having origins in any of the Black racial groups of Africa;
    2. Hispanics, which includes persons of Spanish culture with origins in Mexico, South or Central America or the Caribbean islands, regardless of race; and
  - b. individual members of other groups, including but not limited to Asian-Americans, Arab-Americans and Native-Americans, who have submitted an affidavit to the City, County of Cook or other governmental agency as determined by OBD, indicating that they are socially and economically disadvantaged by having suffered racial or ethnic prejudice or cultural bias within American society, without regard to individual qualities, resulting in decreased opportunities to compete in Chicago area markets or to do business with the Board.
- 2.12 Minority-owned Business Enterprise (MBE):** A business that is certified as a Minority Owned Business by the City of Chicago (the "City"), County of Cook or such other government entity recognized by OBD, which has determined that the management, policies, major decisions and daily business operations are independently managed and controlled by one or more Economically Disadvantaged minority persons. OBD reserves the right to make its own determination as needed.
- 2.13 M/WBE:** A collective term used when the context includes both MBEs and WBEs.
- 2.14 Office of Business Diversity (OBD):** The primary responsibility of the office is to administer and monitor the M/WBE Program to ensure inclusion of qualified M/WBE companies on CPS contracts.

- 2.15 **Owner's Representative:** Consists of Construction Manager, Program Manager, Project Manager, and Design Manager.
- 2.16 **Personal Net Worth:** The net value of the assets of an individual after total liabilities are deducted. An individual's personal net worth does not include the individual's ownership interest in an applicant or other MBE or WBE or the individual's equity in his or her primary place of residence. As to assets held jointly with his or her spouse, an individual's personal net worth includes only that individual's share of such assets. An individual's net worth also includes the present value of the individual's interest in any vested pension plans, Individual Retirement Accounts, 401(k) accounts, or other retirement savings or investment programs less the tax and interest penalties that would be imposed if the asset were distributed at the present time.
- 2.17 **Prime Construction Contractor or Supplier:** A person or entity that enters into a construction-related contract, purchase order or agreement with the Board to perform services.
- 2.18 **Subcontractor or Supplier:** A person or entity that enters into a construction-related contract with a Prime Construction Contractor to provide goods or services pursuant to a contract between the Prime Construction Contractor and CPS.
- 2.19 **Women-owned Business Enterprise (WBE):** A business that is certified as a Women Owned Business by the City of Chicago (the "City"), County of Cook or such other government entity recognized by OBD, which has determined that the management, policies, major decisions and daily business operations are independently managed and controlled by one or more Economically Disadvantaged women. OBD reserves the right to make its own determination as needed.

### III. EFFECTIVE DATES

- 3.1 The Business Diversity Program for Construction Projects is continued effective as of January 1, 2017 and on that date shall supersede entirely the program adopted in December 2011, for all contracts, renewals and extensions entered into on or after the effective date. Existing contracts will adhere to the compliance standards outlined in contracts dated prior to January 1, 2017.
- 3.2 This Program shall be reviewed no later than five years from January 1, 2017 and shall expire December 31, 2021 unless the Board finds that its remedial purposes have not been fully achieved and it continues to have a compelling interest in tailoring narrow remedies to redress discrimination against M/WBEs, so that the Board will not function as a passive participant in the discriminatory construction marketplace in Chicago.

### IV. ADMINISTRATION, MONITORING, AND REVIEW OF THE PROGRAM

#### 4.1 Aspirational Goals

Upon the effective date of this Program, the annual Aspirational Goals shall be to award thirty percent (30%) of the annual dollar value of all construction contracts to qualified MBEs and seven percent (7%) of the annual dollar of all construction contracts to qualified WBEs.

#### 4.2 Contract Specific Goals

OBD, Department of Procurement and Facilities will establish Contract Specific Goals for M/WBE participation for all Construction Contracts required by the Board to be bid.



#### 4.3 Appeals Process

The CAO or his or her designee shall have the authority to create rules or guidelines reviewing any appeals authorized under this policy.

#### 4.4 Facilities Responsibilities

Facilities duties with regard to this Program shall include:

- a. Promulgating administrative rules to implement the provisions of the Program.
- b. Forecasting procurement opportunities annually.
- c. Supervising and evaluating staff in Facilities to ensure that they are implementing the Program.
- d. Recommending methods to increase M/WBE participation and diminish the burdens of achieving M/WBE compliance, while still meeting Aspirational Goals.
- e. Identifying and correcting any problems with OBD's implementation of the Program.
- f. Including M/WBEs on solicitation mailing lists.
- g. addressing M/WBE compliance questions with Prime Construction Contractors or Suppliers, Subcontractors and CPS Departments.

#### 4.5 OBD Responsibilities

OBD is the principal CPS office responsible for administering and monitoring the Program. OBD's duties shall include:

- a. Enforcing Program regulations with Prime Construction Contractors or Suppliers, Subcontractors and CPS Departments.
- b. Submitting annual Program evaluation reports to the Board, CEO or his or her designee, and the Department of Procurement and Facilities which include the following: data on M/WBE performance as it relates to commitments in bid packages versus the actual utilization of M/WBEs on contracts; a discussion of OBD efforts to administer the Program, implement current initiatives and resolve problems with Program implementation; progress in meeting the Aspirational Goals, and recommendations for improvements in Program implementation.
- c. Assuring that M/WBEs are informed of CPS contracting opportunities.
- d. Providing M/WBEs with relevant information and assistance related to CPS procurement practices and procedures, and bid specifications, documentation requirements and prerequisites.
- e. Providing interested Prime Construction Contractors or Suppliers with information regarding M/WBE directories.
- f. Providing training and assistance to CPS staff and other interested persons on Program objectives and requirements.
- g. Establishing "Contract Specific Goals".

- h. Monitoring contracts to ensure compliance with Contract Specific Goals, contractual commitments and Program objectives.
- i. Determining whether contractors have made Good Faith Efforts.
- j. Reviewing and facilitating the resolution of dispute issues concerning the Program with Prime Construction Contractors or Suppliers, Subcontractors and CPS departments.
- k. Collecting data to evaluate the Program, including data on Prime Contractors, consultants, suppliers and subcontractor bids and awards of CPS projects. Periodically reviewing this data to ensure that the Board continues to have a compelling interest in remedying discrimination, and that the measures it has chosen remain narrowly tailored to accomplish that interest.
- l. Upon request, provide information to M/WBEs about City-sponsored small business loan programs and other programs providing access to capital to M/WBEs.
- m. Promoting the Program through appropriate means in order to attract qualified M/WBEs.
- n. Acting as a voting member on all diversity compliance issues during evaluation process time.
- o. Establishing a process to review waiver requests and make determination to grant or deny the request in accordance with the procedures of the Program.
- p. Requesting the assistance of other public and private agencies and organizations in referring M/WBEs.

**V. RACE- AND GENDER-NEUTRAL MEASURES**

- 5.1. The Board shall implement race-and gender-neutral measures to the greatest extent feasible to facilitate the participation of M/WBEs in its contracting activities, so that it can meet its Aspirational Goals. These measures may include, but are not limited to the following:
- a. provision of timely information on contracting procedures, bid preparation and specific contracting opportunities;
  - b. arrangement of solicitation times for the presentation of bids, quantities, specifications, and delivery schedules so as to facilitate the participation of interested contractors and subcontractors;
  - c. simplification of bid submission requirements and documentation required by Facilities;
  - d. unbundling contracts, where appropriate, so as to facilitate the participation of smaller businesses.
  - e. review of bonding, insurance and retainage requirements to eliminate unnecessary barriers to contracting with the Board, consistent with the Board's interest in financial security.
  - f. reduction of bid deposit requirements, or arrangements for a standing bid deposit to cover multiple procurements.
  - g. closing out of construction contracts in a timely manner.
  - h. adoption of prompt payment procedures that require Prime Construction Contractors or Suppliers to agree in writing to promptly pay subcontractors.

- i. holding of pre-bid conferences to explain the projects and to encourage contractors to use small business enterprises as subcontractors.
- j. letting of a representative sample of Board construction contracts without goals to determine MBE and WBE utilization in their absence.
- k. limitation of the self-performance of Prime Contractors or Suppliers, where appropriate.
- l. advertisement of invitations to bid and about the existence and purposes of the Program in minority, women's and small business media, when appropriate.
- m. collection of information from all Prime Construction Contractors or Suppliers which includes all bids received from prospective Subcontractors and the payments to Subcontractors.
- n. provision of technical assistance concerning Board procurement policies and procedures.
- o. leveraging of the Board's relationships with bonding, insurance and financial companies to encourage those institutions to aid M/WBEs and other small Prime Construction Contractors or Suppliers.
- p. referral of complaints of discrimination against M/WBEs to appropriate authorities for investigation and resolution.
- q. developing and maintaining a list of diverse, qualified and pre-approved vendors for certain contracts for goods and services.
- r. contacting private sector organizations and non-profit groups engaged in economic development activities and M/WBE trade and commercial associations, and soliciting their assistance in obtaining M/WBE participation.
- s. seeking recommendations of additional M/WBEs from private industry M/WBE programs and from local government agencies.

## **VI. BID APPROVAL PROCESS**

### **6.1 Bid Specifications**

The Department of Procurement shall insert within the specifications for each contract which is let through competitive bidding, and which has Contract Specific Goals:

- a. a description of the Program, including the requirement of an approved M/WBE Plan; the requirements related to achieving the goals and counting MBE or WBE participation towards meeting the goals; if the goals are not met, the requirement of documentation of the contractor's Good Faith Efforts to achieve the goals, including the Good Faith Efforts of MBEs and WBEs to achieve the goal for which they do not qualify; and a requirement that the contractor commit to the expenditure of at least the dollar value of the Contract Specific Goals with one or more MBEs and one or more WBEs or make Good Faith Efforts to do so. This commitment may be met by the contractor's status as an MBE or WBE, a joint venture with one or more MBEs or WBEs as Prime Contractor (to the extent of the MBE's or WBE's participation in such joint venture), subcontracting a portion of the work to one or more MBEs or WBEs, purchasing materials or services for the work from one or more MBEs or WBEs, or by any combination of the foregoing;

- b. a requirement that where the contractor cannot achieve the Contract Specific Goals, it must document its Good Faith Efforts to do so.

## **6.2 M/WBE Compliance Proposal**

- a. The Department of Procurement will specify M/WBE participation requirements as special conditions in invitations for bids and bid documents. These specifications will include a listing of all documentation that must be submitted with the bid or proposal and a description of the reporting requirements applicable during the contract period. All solicitation and contract documents will also stipulate that the requirements of the M/WBE Plan become part of each contract between CPS and the Prime Construction Contractor or Supplier.
- b. For all solicitations, the Contractor shall submit an M/WBE Compliance Proposal identifying all M/WBE and non-M/WBE subcontractors from which the Contractor solicited bids or quotations, and detailing its plan to achieve the Contract Specific Goals or its Good Faith Efforts to do so. MBEs and WBEs proposed by the Contractor must be certified by the City of Chicago and/or any other governmental certifying agencies as of the date of bid submittal. The M/WBE Compliance Proposal shall be due at the time and in the manner set out in the solicitation documents.
- c. OBD has the authority to propose to the Department of Procurement that any bid or quotation that does not include an appropriate M/WBE Compliance Proposal be rejected by the Department of Procurement.
- d. Any agreement between a Prime Construction Contractor or Supplier and an M/WBE in which the Prime Construction Contractor or Supplier requires that the M/WBE not provide subcontracting quotations to other Prime Construction Contractor or Suppliers is prohibited.
- e. The M/WBE Compliance Proposal must demonstrate that each MBE or WBE will perform a Commercially Useful Function.

## **6.3 OBD Review and Approval of M/WBE Compliance Proposal**

- a. Prior to the contract award, OBD shall timely review the M/WBE Compliance Proposal, including the scope of work and the letters of intent from M/WBEs. OBD may request clarification in writing of items listed in the M/WBE Compliance Proposal, provided such clarification shall not lead to a decrease listed M/WBE participation.
- b. If OBD determines that the M/WBE Compliance Proposal demonstrates that the Contract Specific Goals indicated in the bid specifications have been achieved or Good Faith Efforts have been made, OBD shall recommend that the Contractor's bid be deemed responsive and propose award during the evaluation process to Facilities and Department of Procurement.
- c. If the M/WBE Compliance Proposal fails to meet the Contract Specific Goals indicated in the bid specifications, OBD will review its Good Faith Efforts to do so. If OBD determines that a Contractor did not make sufficient Good Faith Efforts, OBD shall communicate its finding to Facilities and Department of Procurement and propose that the Contractor's bid be deemed to be non-responsive. A Contractor may protest this determination by filing a written appeal in accordance with the Appeals Process within fourteen (14) business days of receipt of OBD's determination, stating the grounds for such appeal and including all relevant information and documentation.

**6.4 Good Faith Efforts to Meet Contract Specific Goals and Waiver Requests**

- a. Where the Contractor cannot achieve the Contract Specific Goals, OBD will determine whether the Prime Construction Contractor or Supplier has made Good Faith Efforts to do so.
- b. A Contractor may also submit to OBD a written request for reduction or waiver of the obligations created under the M/WBE Plan or related requirements. Any such request must be accompanied by documentation evidencing the Prime Construction Contractor or Supplier's Good Faith Efforts.
- c. OBD has the discretion to approve or deny a request for a waiver. Approval of a waiver may be conditioned upon the agreement to undertake additional Good Faith Efforts as specified by OBD.
- d. In making the determination of Good Faith Efforts, OBD will consider, at a minimum, the Contractor's efforts to:
  1. solicit through reasonable and available means (e.g., attendance at pre-bid meetings, advertising and written notices) the interest of MBEs and WBEs that have the capability to perform the work of the contract and/or that are certified in the scopes of the contract work; to make this solicitation within sufficient time to allow the M/WBEs to respond; and to take appropriate steps to follow up initial solicitations with interested M/WBEs;
  2. provide interested M/WBEs adequate information about the plans, specifications and requirements of the contract, including addenda, in a timely manner to assist them in responding to the solicitation;
  3. negotiate in good faith with interested M/WBEs that have submitted bids. Documentation of negotiation must include the names, addresses and telephone numbers of M/WBEs that were solicited; the date of each such solicitation; a description of the information provided about the plans and specifications for the work selected for subcontracting; and evidence as to why agreements could not be reached with M/WBEs to perform the work. A Contractor may not use the fact that additional costs may be involved in soliciting and using M/WBEs as a reason for failing to meet the goals, as long as such additional costs are reasonable;
  4. not reject M/WBEs as being unqualified without sound reasons based upon a thorough investigation of their capabilities. The M/WBEs' standing within its industry, membership in specific groups, organizations, or associations, or its political or social affiliations are not legitimate reasons for rejecting or failing to solicit bids to meet the goals;
  5. make a portion of the work available to M/WBE subcontractors and suppliers and to select those portions of the work or material consistent with the available M/WBE subcontractors and suppliers, to facilitate meeting the goals;
  6. select portions of the work to be performed by M/WBEs in order to increase the likelihood that the goals will be met. This includes, where appropriate, subcontracting work items into economically feasible units to facilitate M/WBE participation, even when the contractor might otherwise prefer to perform these work items with its own workforce;
  7. assist interested M/WBEs in obtaining bonding, lines of credit or insurance as required by the Board or the contractor;

8. assist interested M/WBEs in obtaining necessary equipment, supplies, materials or related assistance or services;
9. effectively use the services of OBD, minority or women community organizations; minority or women contractors' groups; local, state and federal minority or women business assistance offices; and other organizations to provide assistance in the recruitment and placement of M/WBEs;
10. implement a strategy for the training, employment, or continuing education of present or former CPS students. The proposed program must involve substantial numbers of students and commit Prime Construction Contractor or Supplier resources; meet significant training, employment or continuing education objectives and be feasible and effective;
11. provide technical assistance to increase M/WBEs' self-sufficiency, competitiveness and profitability;
12. donate objectively measurable resources to M/WBE business development or participate in M/WBE business development activities;
13. demonstrate through objective evidence the consistent use of M/WBEs as suppliers or vendors on work not related to CPS;
14. demonstrate participation with M/WBEs in private sector joint ventures that would not otherwise occur or the participation of the Prime Construction Contractor or Supplier for goods and services in M/WBE business development activities such as those contemplated by the Program.

#### **6.4.1 Student Initiatives**

As appropriate the Board, will require the Prime Construction Contractor or Supplier to participate in various initiatives designed to provide opportunities to current CPS students and CPS graduates. Such initiatives include, but are not limited to, internships and job shadowing for current students and an Apprenticeship Initiative for CPS graduates that would secure employment for minorities and women workers in specific trades and permit those workers to obtain hours that would count toward an apprentices' sponsorship into a trade or labor organization.

#### **6.5 Contract Award**

Upon acceptance of a bid or quotation, the Department of Procurement shall send a Notice of Award to the successful bidder. Such successful bidder shall send all required contract documentation to OBD. A Contractor's M/WBE Compliance Proposal, including the clarifications requested by OBD, shall, upon a contract award, be incorporated into the contract.

### **VII. CONTRACT PERFORMANCE PROCEDURES**

#### **7.1 Facilities Responsibilities**

To achieve the Contract Specific Goals, Facilities shall undertake, in addition to other measures provided herein, the following measures:

- a. Every contract shall include a standard contract provision that:
  1. permits the Board to terminate the contract:

- i. upon the disqualification of the Prime Construction Contractor or Suppliers as an MBE or WBE, if that contractor's status as MBE or WBE was a factor in the award of the contract and the contractor misrepresented that status; and
  - ii. upon the disqualification of any MBE or WBE, if the subcontractor's or supplier's status as an MBE or WBE was a factor in the award of the contract, and the Prime Construction Contractor or Supplier misrepresented the status of the subcontractor or supplier. If Facilities or OBD determines that contractor was not involved in any such misrepresentation, then that contractor shall discharge the disqualified subcontractor or supplier and make good faith efforts to engage a qualified MBE or WBE replacement.
2. allows OBD and/or Facilities, with or without other District staff and with or without notice,
  - i. to conduct on-site inspections of any performance site or place of business of any Prime Construction Contractor or Supplier, to determine whether the contractor has complied with its obligations; and
  - ii. to access any contractor's books and records including, without limitation, payroll records, tax returns and records and books of account, to determine the Prime Construction Contractor or Supplier's compliance with its commitment to M/WBE participation and the status of any MBE or WBE performing any portion of the contract.
3. requires Prime Construction Contractors or Suppliers:
  - i. to maintain records on the utilization of subcontractors and fulfillment of the M/WBE Compliance Plan, and to retain those records for eight years after the Board's final acceptance of the work;
  - ii. to report to OBD at a minimum quarterly, or upon request, all expenditures to achieve compliance;
  - iii. to obtain prior written approval from OBD before changing MWBE commitments or substituting M/WBE subcontractors;
  - iv. to promptly pay all subcontractors for work actually performed, upon Facilities' approval of required documentation; and
  - v. to provide a sworn statement with each payment request, listing all M/WBE and non-M/WBE subcontracts used in the performance of the contract, and providing proof of payment to subcontractors from prior payments received by the Prime Construction Contractor or Supplier. Proof of payment shall be in the form of cancelled checks to the subcontractor, a sworn statement from the subcontractor verifying receipt of payment or other format specified by OBD.
4. requires approval or ratification of all change orders by the Board in accordance with Board Rules, including that:
  - i. no change orders shall be authorized that exceed, individually or cumulatively, forty nine and ninety nine hundredth percent (49.99%) of the Base Contract Price;

- ii. any additional work and/or change orders requested by the Prime Construction Contractor or Supplier should not affect the contractors who have already completed work on the project; and
  - iii. no change orders shall affect the Prime Construction Contractor or Supplier's obligation to make good faith efforts to meet the original M/WBE goals.
5. requires retainage amounts to ensure the proper and complete performance of the work covered by the contract and complete compliance with the terms and conditions of the contract as follows:
- i. the Board will retain 10% of the contract amount (including value of change orders) until work is 50% complete;
  - ii. Upon 50% completion of the contract in accordance with accepted performance measures, as specified in the contract, the retainage will be reduced to 5% of the contract amount (including value of change orders);
  - iii. The retainage amount(s) shall be retained from the various periodic payments according to a schedule specified in the contract.
  - iv. Upon 50% completion of the contract, as specified in the contract, 50% of the accrued retainage amount shall be released to the Prime Construction Contractor or Supplier. Upon final completion of the contract, the balance of the accrued retainage shall be released to the Prime Construction Contractor or Supplier when not involved in ongoing change orders or performance matters.
  - v. The Prime Construction Contractor or Supplier must pay all retainage owed to each subcontractor for satisfactory completion of the subcontractor's accepted work within 10 days after the portion of the retainage amount is released by the Board.

## **7.2 OBD Responsibilities**

To achieve the Contract Specific Goals, OBD shall review and approve any written request by a Prime Construction Contractor or Supplier to substitute a M/WBE subcontractor, and shall enforce the following requirements:

- a. A Prime Construction Contractor or Supplier may not substitute a M/WBE subcontractor or perform the work designated for a subcontractor with its own workforce unless and until OBD approves such substitution in writing. A Prime Construction Contractor or Supplier shall not allow a substituted subcontractor to begin work until the substitution request has been formally approved.
- b. All requests for changes or substitutions of any M/WBE subcontractor named in the M/WBE Plan shall be made to OBD in writing, and shall clearly and fully set forth the basis for the request. Each request shall include the name, address and principal official of any proposed substitute MBE or WBE and the dollar value and scope of work of the proposed subcontract. All documentation required of the Prime Construction Contractor or Supplier for the M/WBE Plan must be attached.
- c. The facts supporting the request to change a M/WBE subcontractor must not have been known nor reasonably foreseeable by either party prior to the submission of the M/WBE Compliance Proposal. Prior to requesting a change, the Prime Construction Contractor or Supplier must negotiate with the subcontractor to resolve the problem. If requested by either party, OBD shall facilitate such a meeting. Where there has been a mistake or



disagreement about the scope of work, the M/WBE may be substituted only where an agreement cannot be reached for a reasonable price for the correct scope of work.

- d. Unauthorized changes or substitutions, including performing the work with the Prime Construction Contractor's or Supplier's own workforce may constitute grounds for rejection of the bid or proposal, cause termination of the executed contract for breach, result in the withholding of payment and/or subject the Prime Construction Contractor or Supplier to contract remedies or sanctions.
- e. The following are acceptable bases for the substitution of M/WBE subcontractors and/or suppliers:
  - 1. Unavailability after receipt of reasonable notice to proceed;
  - 2. failure of performance;
  - 3. financial incapacity;
  - 4. refusal by the subcontractor to honor the bid or proposal price;
  - 5. mistake of fact or law about the elements of the scope of work of a solicitation where agreement upon a reasonable price cannot be reached;
  - 6. decertification of the M/WBE;
  - 7. failure of the subcontractor to meet insurance, licensing or bonding requirements; or
  - 8. the subcontractor's withdrawal of its bid or proposal.
- f. The final decision on a substitution request shall be communicated in writing as soon as practicable to the affected parties. OBD may request more information or schedule an interview to clarify or mediate the problem. OBD may reject any request in its entirety or impose conditions upon any approval.
- g. A contractor may protest any determination by OBD that it has not made Good Faith Efforts by utilizing the Appeals Process.

**VIII. OBD's DETERMINATION WHETHER CONTRACT SPECIFIC GOALS FOR M/WBE PARTICIPATION HAVE BEEN MET**

**8.1 MBE or WBE Prime Construction Contractors**

OBD shall count toward the Contract Specific Goal the amount paid to an MBE or WBE Prime Construction Contractor or Supplier for self-performing work, general conditions, overhead and profit. An MBE or WBE Prime Construction Contractor or Supplier must make Good Faith Efforts to meet the MBE or WBE goal for which it does not qualify, through subcontracts with other MBEs or WBEs.

**8.2 MBE or WBE Subcontractors and Suppliers**

OBD shall count toward a Prime Construction Contractor's or Supplier's Contract Specific Goal only the amount that has actually been paid to an MBE or WBE subcontractor or supplier.

**8.3 Joint Ventures**

When a M/WBE performs as a participant in a Joint Venture, OBD shall count toward the Contract Specific Goal only the portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the Joint Venture's contract that the M/WBE performs with its own workforce and for which it is separately at risk.

**8.4 Limitation to Commercially Useful Functions**

OBD shall count toward the Contract Specific Goal only expenditures to an M/WBE that is performing a Commercially Useful Function. To determine whether a firm is performing a Commercially Useful Function, OBD will evaluate the amount of work subcontracted, industry

practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing, and other relevant factors. To perform a Commercially Useful Function, the M/WBE must be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, performing installations, where applicable, and paying for the material itself. An M/WBE does not perform a Commercially Useful Function if its role is limited to that of an extra participant in the contract through which funds are passed in order to obtain the appearance of M/WBE participation. If an M/WBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice, it is presumed not to be performing a Commercially Useful Function, but it may present evidence to rebut this presumption.

#### **8.5 Effect of Decertification**

If a firm ceases to be a certified M/WBE during the course of a contract, the dollar value of work performed under a contract with that firm after it has ceased to be certified shall not be counted toward the Contract Specific Goal.

### **IX. NON-COMPLIANCE AND SANCTIONS**

#### **9.1 Determination of Non-Compliance by OBD**

- a. OBD shall monitor Prime Construction Contractor's or Supplier's performance under the Compliance Plan, as well as the fulfillment of any special conditions, work order goals or other obligations by contract awardees.
- b. If the Prime Construction Contractor or Supplier is failing to fulfill its Compliance Plan or other Compliance-related contractual obligations, OBD will notify the Prime Construction Contractor or Supplier of the deficiencies. Following notification, the Prime Construction Contractor or Supplier shall have sixty (60) days to identify how they will cure the deficiencies. If the deficiencies are not cured, OBD shall make a determination of non-compliance and recommend the imposition of sanctions.
- c. At the end of every contract, OBD shall determine at contract closeout whether a Prime Construction Contractor or Supplier has complied with the obligations created under its Compliance Plan and other related requirements. The Prime Construction Contractor or Supplier has the burden of proving compliance with all obligations and requirements.

#### **9.2 Sanctions for Non-compliance and Failure to Make Good Faith Efforts**

- a. Sanctions for non-compliance may include, but are not limited to, the following:
  1. Withholding of payments under the contract
  2. Termination of the contract
  3. Debarment from future business with the Board
- b. A Prime Construction Contractor or Supplier may protest OBD's determination of Section 9.2 sanctions by filing a written appeal in accordance with the Appeals Process within fourteen (14) business days of receipt of OBD's determination, stating the grounds for such appeal and including all relevant information and documentation.
- c. All debarment recommendations will be processed according to the Board's Debarment Policy.

**9.3 Sanctions for Fraudulent Misrepresentations, Acts Involving a Lack of Business Integrity, Violation of Statutes or Regulations, or Repeated Failures to Make Good Faith Efforts**

- a. The following actions may be taken upon a finding that a firm has engaged in fraudulent misrepresentation, acts demonstrating a lack of business integrity, violations of statute or regulations, or has repeatedly failed to make good faith efforts as required by this Program:
  - 1. Referral by OBD to the Board's Office of the Inspector General (OIG) for investigation.
  - 2. Initiation of proceedings to debar the Prime Construction Contractor or Supplier and all persons or entities affiliated with them if warranted by an OIG investigation.
  - 3. Reporting the debarment of any person or entity to other governmental agencies.
  - 4. Referral to appropriate law enforcement authorities for investigation and possible prosecution.
- b. The Prime Construction Contractor or Supplier may protest OBD's determination of Section 9.3 sanctions by filing a written appeal in accordance with the Appeals Process within fourteen (14) business days of receipt of OBD's determination, stating the grounds for such appeal and including all relevant information and documentation.

**X. REVIEW**

The Board intends to periodically review the remedies adopted herein to ensure that it continues to have a compelling interest in not being a passive participant in the discriminatory Chicago construction market and that these measures remain narrowly tailored to accomplish that interest.

**XI. SEVERABILITY**

In the event that any section, subsection, paragraph, clause, provision or application of this article shall be held invalid by any court, the invalidity of such section, paragraph, clause or provision shall not affect any of the remaining provisions hereof.