

# Chicago Public Schools Policy Manual

**Title:** EXTEND THE REMEDIAL PROGRAM FOR MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISE PARTICIPATION IN GOODS AND SERVICES

**Section:** 401.18

**Board Report:** 16-1207-PO2

**Date Adopted:** December 7, 2016

**Policy:**

## **THE CHIEF EXECUTIVE OFFICER RECOMMENDS:**

That the Board extend the Remedial Program for Minority and Women-Owned Business Enterprises Participation in Goods and Services Contracts, as amended and attached hereto, until December 31, 2021.

**HISTORY:** In 2007, the Board undertook a review of the then-existing affirmative action remedial plan adopted in 1991. Following this review, the Board determined that implementation of various race-neutral and gender-neutral measures would help the District's goods and services program to overcome barriers and assist in the growth and development of financially stable M/WBE's. In order to implement these measures, the Board adopted the current Remedial Program for Minority and Women-Owned Business Enterprises Participation in Goods and Services (the "Program") with a term commencing March 1, 2007 and ending December 31, 2012 (Board Report 07-0228-PO1). This was later extended through June 30, 2013 (Board Report 12-1219-RS2). Following a 2013 independent evaluation of availability and utilization of minority and women-owned goods and services 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 goods and services marketplace through a variety of race-and gender-neutral measures had not been sufficient. Accordingly, the Board extended the Program with a term commencing July 1, 2013 and ending December 31, 2016 (Board Report 13-0626-PO1).

**PURPOSE:** Following a 2016 independent evaluation of availability and utilization of minority and women-owned goods and services vendors for the Chicago Public Schools, the Board has determined that the steps taken to date to ameliorate the effects of racial and gender discrimination in the goods and services marketplace have been insufficient. 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 goods and services marketplace.

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

**DESCRIPTION:** The Program will continue to: (1) apply to all goods and services contracts required by the Board to be awarded through competitive procurement, (2) operate the same annual Aspirational Goals for M/WBE participation in all goods and services contracts 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 contracts, and (4) authorize OBD to specify certain goods and services 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.

The Board of Education of the City of Chicago



**REMEDIAL PROGRAM  
FOR  
MINORITY AND WOMEN OWNED BUSINESS ENTERPRISE  
PARTICIPATION  
IN  
GOODS AND SERVICES CONTRACTS**

**Effective**

***[January 1, 2017]***

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**REMEDIAL PROGRAM FOR  
MINORITY AND WOMEN OWNED BUSINESS ENTERPRISE  
PARTICIPATION IN GOODS AND SERVICES CONTRACTS**

**POLICY STATEMENT**

This Remedial Program for Minority and Women Owned Business Enterprises (“Program”) is continued by the Chicago Board of Education (the “Board”), upon the 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 procurement of goods and services 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 (“M/WBE”) Participation in January 1991 (“1991 Plan”). The 1991 Plan was adopted following the District’s review of a Report Concerning Consideration and Adoption of the Revised Remedial Plan for Minority and Women Business Enterprise Economic Participation (“Report”). The Report included extensive Discrimination Findings (“Findings”) that examined the barriers faced by M/WBEs in the construction, purchasing, and professional service industries. At the same time, the Board adopted a Resolution that set forth its rationale for developing the 1991 Plan. The Resolution specifically references the Findings, which indicated the following:

  - M/WBEs in these industries faced significant institutional challenges not faced by their majority-owned competitors;
  - The District underutilized M/WBEs, despite the fact that M/WBEs appeared to be available to provide construction, purchasing of goods, and professional services for the District; and
  - Governmental and private discrimination in the Chicago metropolitan area caused M/WBEs to suffer competitive disadvantages in forming and operating viable businesses.
- 1.2** The Resolution specifically indicated that, after weighing the evidence, including the Findings, related to discrimination against Black, Hispanic, Asian, and Women-owned businesses in the construction, purchasing of goods, and professional services industries, the Board determined that there was a sufficient basis for and a compelling interest in the adoption of a remedial plan encompassing each of those combinations of race, ethnic, and gender groups and industries and that to remedy the discrimination and resulting competitive disadvantages suffered by those businesses, it was necessary to adopt the 1991 Plan.
- 1.3** The 1991 Plan addressed the requirements and procedures for monitoring the compliance of M/WBE goals for both goods and services contracts and construction projects and provided measures to assist M/WBEs in the Chicago Public Schools’ (“CPS”) procurement of goods and services. 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 alleviate the effects of discrimination. The plan further mandated flexible goals for M/WBE participation on particular contracts for overall CPS annual spending. Waivers were available for prime contractors unable to meet the goals.
- 1.4** In April 2006 and again in October 2006, the Board advertised and convened public focus groups, facilitated by an expert, Colette Holt, to address whether, and if so, to what extent, barriers exist to M/WBE participation in the CPS procurement process of goods and services. A review of information presented during the April and October 2006 CPS focus groups, and written reports that set forth the findings from the focus groups, reveal the existence of past and

current discriminatory practices that disadvantage racial and ethnic minorities and women seeking to enter into CPS prime contracts and subcontracts for goods and services.

- 1.5** The focus groups conducted by Ms. Holt confirm that M/WBEs continue to face barriers to participation in the CPS procurement process for goods and services. Specifically, the findings from the focus groups demonstrate that those barriers include:
- Difficulty obtaining public sector prime contracts
  - Difficulty obtaining bonding and insurance
  - Difficulty securing subcontracting opportunities in the public sector
  - Difficulty obtaining contracts in the private sector
  - Difficulty working with vendors who use M/WBE information for purposes of securing a bid or putting together a proposal submission and who do not ultimately utilize the services of the M/WBEs
- 1.6** A review of the April 2006 focus group information and the related reports from expert Colette Holt further demonstrates that the following race- and gender-neutral measures help the narrow tailoring aspect of a race-conscious preferential procurement program and should be used to overcome those barriers and assist in the growth and development of financially stable M/WBEs:
- Improving the timeliness of payments
  - Creating a small and local business target market program
  - Implementing contract specific subcontracting goals
  - “Unbundling” or downsizing contracts to facilitate participation by smaller businesses, such as M/WBEs
  - Providing longer bid lead times
- 1.7** Based upon a thorough review of information presented during the April and October 2006 CPS focus groups and the written reports submitted by expert Colette Holt, the Board adopted in February 2007 under Board Report 07-0228-PO1 a Remedial Program for Minority And Women Owned Business Enterprise Participation in Goods and Services Contracts (the “Program”) which built upon the 1991 Plan. The Program authorized for a period beginning March 1, 2007 until December 31, 2012 and was later extended until June 30, 2013 under Board Report 12-1219-RS2.
- 1.8** Based upon a thorough review of the foregoing information (supra, at sections 1.1 – 1.7); 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 goods and services industries; and the May 17, 2013 report entitled “*Availability and Utilization of Minority- and Women-Owned Businesses in Goods and Services for the Chicago Public Schools*” prepared by Dr. David G. Blanchflower, Professor of Economics Dartmouth College, the Board adopted in June 2013 under Board Report 13-0626-PO1 a Remedial Program for Minority And Women Owned Business Enterprise Participation in Goods and Services Contracts (the “Program”) which built upon the 1991 Plan. The Program was authorized for a period beginning July 1, 2013 until December 31, 2016.
- 1.9** Based upon a thorough review of the foregoing information (supra, at sections 1.1 – 1.8); 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 goods and services industries; and the October 2016 report entitled “*Availability and Utilization of Minority- and Women-Owned Businesses in Goods and Services for the Chicago Public Schools*” 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 (“Board”) 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 venture.
- 2.5 Contract Specific Goals:** The subcontracting goals for M/WBE participation established for a particular contract based upon the availability of M/WBEs to perform the anticipated scopes of work of the contract, and CPS’ progress towards meeting the aspired goals.
- 2.6 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.
- 2.7 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.
- 2.8 Goods or Services Contract or Transaction:** Any Board procurement of goods or services from a non-CPS-employee (other than for construction, rehabilitation and repairs of CPS buildings) and any other non-construction-related procurements required by Board Rules to be bid or awarded pursuant to a competitive process.
- 2.9 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. Joint ventures must have an agreement in writing specifying the terms and conditions of the relationships between the partners and their relationship and responsibilities to the contract.
- 2.10 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.

- 2.11 Minority 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.
- 2.12 M/WBE:** A collective term used when the context includes both MBEs and WBEs.
- 2.13 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.
- 2.14 Prime Vendor or Supplier:** A person or entity that enters into a contract, purchase order or agreement with the Board to provide goods and/or services.
- 2.15 Office of Business Diversity (OBD):** The department with primary responsibility for administering and monitoring the M/WBE Program to ensure inclusion of qualified M/WBE companies on CPS contracts.
- 2.16 Subcontractor or Supplier:** A person or entity that enters into a Goods and/or Services related contract with a Prime Vendor to provide goods or services pursuant to a contract between the Prime Vendor and CPS.
- 2.17 Women 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 Goods and Services Projects is continued effective as of January 1, 2017 and on that date shall supersede entirely the program adopted in June, 2013. 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 readdress discrimination against M/WBEs, so that the Board will not function as a passive participant in the discriminatory goods and services 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 goods and services contracts to qualified MBEs and seven percent (7%) of the annual dollar of all goods and services contracts to qualified WBEs.

##### **4.2 Contract Specific Goals**

The OBD, the Department of Procurement and the user department will establish Contract Specific Goals for M/WBE participation for eligible contracts for goods and services required by Board Rules to be bid or awarded pursuant to a competitive process. A list of transactions for which M/WBE participation is not achievable or is limited will be posted on OBD's website.

##### **4.3 Appeals Process**

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

##### **4.4 OBD Responsibilities**

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

- a. Promulgating administrative rules and regulations for the Program and enforcing with Prime Vendors or Suppliers.
- b. Submitting annual Program evaluation reports to the Board, CEO or his or her designees, and the Department of Procurement which include the following: data on M/WBE performance as it relates to commitments in bid/proposal 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/proposal specifications, requirements and prerequisites.
- e. Providing interested Prime Vendors or Suppliers of goods and services 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 issues concerning the Program with Prime Vendors or Suppliers, subcontractors and CPS departments.
- k. Collecting data to evaluate the Program, including data on Prime Vendors and Suppliers and subcontractor bids/proposals and awards of CPS contracts. 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 it can meet its Aspirational Goals. These measures may include, but are not limited to:

- a. provision of timely information on contracting procedures, bid/proposal preparation, and specific contracting opportunities.
- b. arrangement of solicitation times for the presentation of bids/proposals, quantities, specifications, and delivery schedules to facilitate the participation of interested vendors, suppliers and subcontractors.
- c. simplification of bid/proposal submission requirements and documentation required by the user departments and the Department of Procurement.
- d. unbundling contracts, where appropriate, to facilitate the participation of smaller businesses.
- e. review of bonding and insurance requirements to eliminate unnecessary barriers to contracting with the Board, consistent with the Board's interest in financial security.
- f. reduction in bid deposit requirements or arrangements for a standing bid deposit to cover multiple procurements.
- g. closing out of goods and services contracts in a timely manner.
- h. adoption of prompt payment procedures that require Prime Vendors and Suppliers to agree in writing to promptly pay subcontractors.
- i. holding of pre-bid/proposal conferences, where appropriate, to explain the projects and to encourage Prime Vendors and Suppliers to use small business enterprises as

subcontractors. On larger contracts, conducting pre-bid/proposal conferences between potential contractors and pre-qualified M/WBEs to promote joint ventures and subcontractor and supplier relationships.

- j. letting of a representative sample of Board goods and services contracts without goals to determine MBE and WBE utilization in their absence.
- k. limitation of the self-performance of Prime Vendors and Suppliers, where appropriate.
- l. advertisement of invitations to bid/propose 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 Vendors and Suppliers which includes all bids/proposals received from prospective subcontractors and 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 Vendors 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. CONTRACT AWARD PROCESS**

### **6.1 Bid/Proposal Specifications**

The Department of Procurement shall insert within the specifications for each contract which is let through competitive bidding or other competitive procurement 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 vendor'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 vendor 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 vendor'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 vendor 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 insert within the specifications M/WBE participation requirements as special conditions in invitations for bids, requests for proposals, quotations and all relevant documents. These specifications will include a listing of all M/WBE documentation that must be submitted with the bid or proposal and will describe 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 conditions of the contract between CPS and the Prime Vendor or Supplier.
- b. For all solicitations, the Prime Vendor or Supplier must submit an M/WBE Compliance Proposal detailing all M/WBE and non-M/WBE subcontractors from which the Prime Vendor or Supplier solicited bids or proposals, and its plan to achieve Contract Specific Goals or its Good Faith Efforts to do so. M/WBEs proposed by the Prime Vendor or Supplier must be certified by the City of Chicago and/or any other governmental certifying agencies as of the date of the bid/proposal submittal. The M/WBE Compliance Proposal shall be due at the time and in the manner set out in the solicitation documents.
- c. The OBD Director 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 Vendor or Supplier and a M/WBE in which the Prime Vendor or Supplier requires that the M/WBE not provide subcontracting quotations to other Prime Vendors 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 Program Compliance Proposal**

- a. Prior to contract award, OBD shall timely review of the M/WBE Program 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 Program Compliance Proposal, provided such clarification shall not lead to a decrease listed M/WBE participation.
- b. If OBD determines that the M/WBE Program Compliance Proposal demonstrates that the Contract Specific Goals indicated in the bid/proposal specifications have been achieved or Good Faith Efforts made, OBD shall recommend that the vendor's or supplier's bid/proposal be deemed responsive during the evaluation process to the Department of Procurement.
- c. If the M/WBE Program Compliance Proposal fails to meet the Contract Specific Goals indicated in the bid/proposal specifications, OBD will review its Good Faith Efforts to do so. If OBD determines that a vendor/supplier did not make sufficient Good Faith Efforts, OBD shall communicate its finding to the Department of Procurement and propose that the vendor's/supplier's bid/proposal be deemed to be non-responsive. A vendor/supplier 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 Prime Vendor or Supplier cannot achieve the Contract Specific Goals, OBD will determine whether the Prime Vendor or Supplier has made Good Faith Efforts to do so.
- b. A Prime Vendor or Supplier 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 Vendor's 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 efforts of a Prime Vendor or Supplier to:
  1. solicit through all reasonable and available means (e.g., attendance at pre-bid/proposal meetings, advertising and written notices) the interest of all M/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 Prime Vendor or Supplier 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 Contract Specific 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/proposals 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 Prime Vendor or Supplier 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 Prime Vendor or Supplier;

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 Vendor 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 Vendor or Supplier for goods and services in M/WBE business development activities such as those contemplated by the Program.

#### **6.5 Contract Award**

Upon acceptance of a bid, proposal or quotation, the Department of Procurement shall notify the successful bidder/proposer. A Prime Vendor's or Supplier's M/WBE proposal, including the clarifications requested by OBD, shall, upon a contract award, be incorporated into the contract.

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

#### **7.1 Payment Procedures**

As a condition of each payment request, the Prime Vendor or Supplier shall provide proof of payment in a format specified by CPS, listing all M/WBE and non- M/WBE Subcontractors used in the performance of the contract. The Prime Vendor or Supplier shall pay each Subcontractor within 30 days of payment by the Board or as otherwise negotiated between the Prime Vendor or Supplier and the Subcontractor. OBD shall monitor sub-contractor participation during the course of the contract and shall have reasonable access to all contract-related documentation held by the Prime Vendor or Supplier for goods and services.

#### **7.2 Records**

The Prime Vendor or Supplier shall maintain records of all relevant data with respect to the utilization of all subcontractors, and all other aspects of fulfillment of the M/WBE Plan requirements, including, without limitation, performance and financial documents concerning the contract; agreements and performance/payment records concerning subcontractors; payroll records; tax returns and records; and books of account. Prime Vendor or Supplier shall retain these records for at least eight years after completion of the work. The Prime Vendor or Supplier shall report monthly, or upon request, to OBD all expenditures to achieve Program compliance.

### 7.3 Inspections

OBD may, with or without notice, periodically conduct on-site inspections of any contract performance site, or the place of business of any Prime Vendor or Supplier. OBD may be assisted in such inspections by other CPS staff, and shall be entitled to reasonable access to facilities, personnel, and records related to the M/WBE Plan.

### 7.4 Substitutions

- a. The Prime Vendor 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 Vendor or Supplier shall not allow a substituted subcontractor to begin work until substitution request has been formally approved.
- b. All requests for changes or substitutions of the subcontractor named in the M/WBE Plan shall be made to the Director of 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 Prime Vendors or Suppliers 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 Program Compliance Proposal. Prior to requesting a change, the Prime Vendor or Supplier must negotiate with the subcontractor to resolve the problem. If requested by either party, CPS 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 Vendor's or Supplier's own workforce, may constitute grounds for rejection of the bid or proposal or cause termination of the executed contract for breach, the withholding of payment and/or subject the Prime Vendor or Supplier to contract penalties or other sanctions.
- e. The following are acceptable bases for the substitution of M/WBE subcontractors:
  - 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. OBD's final decision whether to permit or deny the proposed substitution, and the basis therefore, will be communicated as soon as practicable to the parties in writing by OBD. The OBD Director may request more information, or requesting an interview to clarify or mediate the problem. OBD may approve or reject any request in its entirety, or impose conditions upon any approval.
- g. Where the Prime Vendor or Supplier has established the basis for the substitution to the satisfaction of OBD, the Prime Vendor or Supplier shall make Good Faith Efforts to fulfill the M/WBE Plan. The Prime Vendor or Supplier may seek the assistance of OBD in

obtaining a new M/WBE subcontractor. If the Contract Specific Goal(s) cannot be reached and Good Faith Efforts have been made, the Prime Vendor or Supplier may upon determination by the OBD Director substitute with a non-M/WBE.

- h. The Prime Vendor or Supplier may protest any determination by OBD that a vendor/supplier 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 M/WBE Prime Vendors and Suppliers**

OBD shall count toward the Contract Specific Goal the amount paid to an MBE or WBE Prime Vendor or Supplier for self-performing work, general conditions, overhead and profit.

**8.2 MBE or WBE Subcontractors and Suppliers**

OBD shall count towards a Prime Vendor's or Supplier's Contract Specific Goal only the amount that has been paid to a 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 towards 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, installing (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 based on 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 its performance on 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.

**8.6 Contract Modifications**

The Contract Specific Goals applicable to a contract are also applicable to contract modifications. If a contract modification is within the scope of the M/WBE's subcontract performance, the dollar amount to be paid to the M/WBE must be adjusted by the Prime Vendor or Suppliers.

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

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

- a. OBD shall monitor the Prime Vendor's or Supplier's performance under the M/WBE Plan, as well as the fulfillment of any special conditions, work order goals, or other obligations by contract awardees.
- b. If the Prime Vendor or Supplier fails to fulfill its M/WBE Plan or other compliance-related contractual obligations, OBD will notify the Prime Vendor or Supplier of the deficiencies. Following notification, the Prime Vendor 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 Vendor or Supplier has complied with the obligations created under its M/WBE Plan and other related requirements. The Prime Vendor 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. Recommendation not to exercise contract renewal option
  3. Termination of the contract
  4. Debarment from future business with the Board
- b. A Prime Vendor 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 Vendor 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 Vendor or Supplier may protest the 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 area goods and services 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, subsection, paragraph, clause, provision or application shall not affect any of the remaining provisions hereof.

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**Amends/Rescinds:**

**Cross References:** 13-0626-PO1; 12-1219-RS2; 07-0228-PO1 (Rescinded 91-0130-RS1)

**Legal References:**