

**AMEND BOARD REPORT 06-0726-PO9**  
**ADOPT A NEW REMEDIAL PROGRAM FOR MINORITY AND WOMEN-OWNED BUSINESS**  
**ENTERPRISE PARTICIPATION IN CONSTRUCTION PROJECTS**

**THE CHIEF EXECUTIVE OFFICER RECOMMENDS:**

That the Board adopt a new Remedial Program for Minority and Women-Owned Business Enterprises Participation in Construction Projects (the "Program") which is attached hereto. The Program will become effective August 1, 2006.

That the Board adopt amendments to section 7.1 of the Program to authorize retainage amounts to ensure contractor performance and compliance with contract requirements. The amended Program is attached hereto.

**HISTORY:** The Board's current affirmative action program, the Minority and Women Business Enterprises ("M/WBE") Plan for Goods and Services Contracts was adopted in 1991 ("1991 Plan"). At the same time, the Board adopted a Resolution that set forth its rationale for developing the Plan. Specifically, after weighing the evidence related to discrimination against Black, Hispanic, Asian and Women-owned businesses in the construction, purchasing, 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 a race/gender group and an industry and that to remedy the discrimination and resulting competitive disadvantages suffered by those businesses, it was necessary to adopt the 1991 Plan. The 1991 Plan addressed the requirements and procedures for monitoring the compliance of M/WBE goals for goods / services contracts and construction projects.

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 found a strong basis in evidence to support a narrowly tailored, remedial affirmative action program in City construction contracting. Following this revision, the Board reviewed its own affirmative action remedial plan and determined that it was necessary to develop a new program that is similar to the City of Chicago's program and that focuses on affirmative action which will help extinguish discrimination towards M/WBE in the construction industry.

**PURPOSE:** The Board has determined that it has a compelling interest in preventing its construction projects from returning to the near monopoly-domination by white male firms that existed before 1991. Additionally, the Board has concluded that although it has undertaken since 1991 a variety of race- and gender-neutral measures, such programs have not been sufficient to ameliorate the effects of racial and gender discrimination in the construction marketplace. Accordingly, the attached Program is adopted to serve the Board's compelling interest in not being a passive participant in the discriminatory Chicago construction market and to create measures that remain narrowly tailored to accomplish that interest.

**DESCRIPTION:** The new Program reflects the current organizational structure at the Board and administration of the Program; establishes a timeframe for assessment and for reporting on the Program's objectives and progress and enhances the Program to reflect current practice in affirmative action programs that help extinguish discrimination toward M/WBEs when working on construction projects.

The attached Program will apply for all Board construction contracts valued over \$10,000. The attached plan outlines:

1. The construction contracts that are subject to the plan;
2. How the goals for M/WBE participation will be determined and measured;

3. The Office of Business Diversity's administrative responsibilities in monitoring activity under the new program;
4. The allocation of responsibilities for all aspects of the Program;
5. Methods of fulfillment of contract specific goals for M/WBE participation;
6. Methods of demonstrating program compliance in bid documents; and
7. Recommended sanctions for non-compliance.

The principal components of the Program include:

1. A sunset provision that requires the Program to be reviewed and provides that it will expire in 2011 unless there is a finding that the remedial purposes of the Program have not been fully achieved and that there continues to be a compelling interest in tailoring narrow remedies to redress discrimination against M/WBEs.
2. The assignment of responsibility to the Chief Executive Officer for overall implementation of the Program.
3. The assignment of various responsibilities to the Office of Business Diversity related to the administration, enforcement and monitoring of the Program. The Office of Business Diversity will submit annual reports to the Board on the progress being made towards elimination of discrimination in the procurement of good and services through this Program and any possible modifications for improvement.
4. A requirement that the Office of Business Diversity submit quarterly and annual reports to the Board concerning M/WBE participation and implementation of the Program.
5. A requirement that as a condition of payment from the Board, any Prime Contractor or Supplier must provide proof of payment to subcontractors for the prior payment request received. This requirement seeks to address slow payment to subcontractors which ultimately has an adverse effect on the sustainability of small M/WBE firms that subcontract on Board construction projects.
6. A set of race and gender neutral measures designed to ensure that a non-biased relationship can be created with all firms.
7. A set of non-restrictive affirmative action measures which highlight the non-restrictive methods used to alleviate the effects of discrimination.
8. A process for the establishment of aspirational and flexible contract specific goals. The process begins with a Goal Committee that will compile and analyze available data to derive aspirational goals, review existing goals and create new contract specific goals based on the capacity of M/WBEs in the marketplace and the Board's purchasing history and characteristics. Goals will be expressed as percentages by fraction of the total dollar amount of transactions.
9. A sheltered market program under which certain transactions will be reserved for competitive bidding amongst the M/WBEs.
10. The addition of minority and women owned firms with Class II certification in an effort to increase the amount of M/WBEs eligible to participate in the Program.
11. The expansion of methods firms can use to fulfill specific goals, including indirect participation, programs for public school students and joint ventures.
12. The inclusion of retainage requirements whereby CPS will retain 10% of the contract amount until work is 50% complete in accordance with accepted performance measures at which time the retention is reduced to 5%.

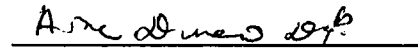
Reviewed for Consideration:

  
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Barbara Eason-Watkins  
Chief Education Officer


Noted:

  
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John Maiorca  
Chief Financial Officer

Respectfully Submitted:

  
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Arne Duncan  
Chief Executive Officer

Approved as to Legal Form: 

  
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Patrick J. Rocks  
General Counsel

Board of Education of the City of Chicago



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

*July 2006*  
*Revised - May 2007*

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

This Program is adopted 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 adopt 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 It has been 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 hereby adopts the following Business Diversity Program for Construction Projects (the "Program").

**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 CEO shall designate one or more individuals to convene on an as needed basis to review Program compliance and waiver decisions made by the Office of Business Diversity in accordance with the Program. These individuals shall make recommendations to the CEO, who will render the final decisions.
- 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 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) awarded by the Board for the construction, rehabilitation, repair or improvement of any building, sidewalk, alley, other structure or infrastructure, and any other construction-related procurement over \$10,000.00.
- 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 over \$1,000,000.
- 2.8 **Disadvantaged Business Enterprise (DBE):** A socially and economically disadvantaged business that is certified as a Disadvantaged Business Enterprise by the City of Chicago (the "City") or any other Class II certification entity. Only a DBE's participation on federally funded contracts will count towards participation in this Program.
- 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 definition of “minority” contained in the City of Chicago’s M/WBE ordinance:

(a) any individual in the following racial or ethnic groups, members of which are rebuttably presumed to be socially disadvantaged:

- (i) African-Americans or Blacks, which includes persons having origins in any of the Black racial groups of Africa;
- (ii) 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 indicating that they are socially 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 Enterprise. Such certification shall designate the race or ethnicity of the firm’s ownership.

**2.13 M/WBE:** A collective term used when the context includes both MBEs and WBEs.

**2.14 Office of Business Diversity (OBD):** The department with primary responsibility for administering and monitoring The Program at the Board.

**2.15 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.

**2.16 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.

**2.17 Women-owned Business Enterprise (WBE):** A business that is certified as a Women- owned Business Enterprise.

**2.18 Workforce Projections:** The projected number of individuals identified by race, gender and skill levels needed to complete the scope of work for the construction project.

### III. EFFECTIVE DATES

**3.1** The Program for Construction Projects is effective as of August 1, 2006, and on that date shall supersede entirely the program adopted on February 1, 1991 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 August 1, 2006.

**3.2** This revised Program shall be reviewed no later than five years from August 1, 2006, and shall expire December 31, 2011, 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 article, 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**

The OBD, Department of Procurement and Contracts and School Support Services will establish Contract Specific Goals for M/WBE participation for all contracts over \$1 million dollars.

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

The CEO shall designate one or more individuals to convene on an as needed basis to review Program compliance and waiver decisions made by the OBD in accordance with the Program. These individuals shall make recommendations to the CEO, who will render the final decisions.

##### **4.4 School Support Services Responsibilities**

The OBD is the principal implementation and management office for the Program. The Office of School Support Services 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 the School Support Services 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.

##### **4.5 OBD Responsibilities**

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

- a. Enforcing Program rules.
- b. Submitting quarterly reports to the Board, CEO, Department of Procurement and Contracts and School Support Services, which include data on M/WBE participation as it relates to commitments made 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; and recommendations for improvements in Program implementation.

- c. Submitting an annual report to the Board, CEO, Department of Procurement and Contracts and School Support Services on its administration of the Program, its Progress in meeting the Aspirational Goals, and any recommendations it may have for improving the Program.
- d. Assuring that M/WBEs are informed of CPS contracting opportunities.
- e.. Providing M/WBEs information and assistance related to CPS procurement practices and procedures, and bid specifications, requirements and prerequisites.
- f.. Providing interested Prime Construction Contractors or Suppliers with information regarding M/WBE directories.
- g. Providing training and assistance to CPS staff and other interested persons on Program objectives and requirements.
- h.. Establishing "Contract Specific Goals" for any contracts over \$1,000,000.
- i. Monitoring contracts to ensure compliance with Contract Specific Goals, contractual commitments and Program objectives.
- j. Determining whether contractors have made Good Faith Efforts.
- k. Reviewing and facilitating the resolution of issues concerning the Program.
- l. 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.
- m. Providing information to M/WBEs about City-sponsored small business loan programs and other programs providing access to capital to M/WBEs.
- n. Promoting the Program through appropriate means in order to attract qualified M/WBEs.
- o. Acting as a voting member on all diversity compliance issues during evaluation process time.
- p. Reviewing waiver requests and decide whether to grant or deny the request in accordance with the procedures of the Program.

**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 shall 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 documentation required by the Office of School Support Services;

- d. unbundling of contracts 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, where appropriate, 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, 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 contractors on CPS construction contracts, which details the bids received from all subcontractors for CPS construction contracts and the payments to subcontractors utilized by prime contractors on CPS construction contracts.
- 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.

## **VI. BID APPROVAL PROCESS**

### **6.1 Bid Specifications**

The Department of Procurement and Contracts shall insert within the specifications for each contract with an estimated value in excess of \$10,000, which is let through competitive bidding, and which has Contract Specific Goals:

- a. a description of the Program, including the requirement of an approved Compliance 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 prime contractors on Board construction contracts notify MBEs and WBEs utilized on those contracts about opportunities on contracts without affirmative action contracting goals;
- c. a requirement that where the contractor cannot achieve the contract specific goals, it must document its good faith efforts to do so.

## **6.2 Compliance Proposal**

- a. The Department of Procurement and Contracts 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 Compliance Plan become part of each contract between CPS and the Prime Construction Contractor or Supplier.
- b. For all solicitations, the Prime Construction Contractor or Supplier shall submit an M/WBE Compliance Proposal (Compliance Plan) identifying all M/WBE and non-M/WBE subcontractors from which the Prime Construction Contractor or Supplier solicited bids or quotations, and detailing its plan to achieve the Goals or its Good Faith Efforts to do so. MBEs and WBEs proposed by the Prime Construction Contractor or Supplier must be certified by the City of Chicago and/or any other governmental certifying agencies as of the date of bid submittal. The Compliance Proposal shall be due at the time and in the manner set out in the solicitation documents.
- c. On construction projects with federal funding, the use of certified DBE subcontractors will count towards fulfilling goals.
- d. The OBD Director has the authority to recommend to the Office of Procurement and Contracts that any bid or quotation that does not include an appropriate Compliance Proposal be rejected.
- e. 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.
- f. The Compliance Proposal must demonstrate that each MBE or WBE will perform a Commercially Useful Function.

## **6.3 OBD Review and Approval of Compliance Proposal**

- a. Prior to contract award, OBD shall timely review the 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 Compliance Proposal, provided such clarification shall not include the opportunity to augment listed M/WBE participation.
- b. If OBD determines that the Compliance Proposal demonstrates that the Contract Specific Goals have been achieved or Good Faith Efforts have been made, OBD shall recommend that the bidder be deemed responsive and recommend award during the evaluation process to the School Support Services and Purchasing.
- c. If the Prime Construction Contractor or Supplier fails to meet the Contract Specific Goal(s), OBD will review its Good Faith Efforts to do so. If OBD determines that a Prime

Construction Contractor or Supplier did not make sufficient Good Faith Efforts, OBD shall communicate its finding to the School Support Services and Purchasing and recommend that the bid/proposal be deemed to be non-responsive. A Prime Construction Contractor or 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.

- d. The CEO's designees for the Appeals Process shall review the OBD's determination and make a recommendation to the CEO. The CEO's decision will be final.

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

- a. Where the Prime Construction Contractor or Supplier cannot achieve the Contract Specific Goals, the OBD will determine whether the Prime Construction Contractor or Supplier has made Good Faith Efforts to do so.
- b. A Prime Construction Contractor or Supplier may also submit to the OBD Director a request for reduction or waiver of the obligations created under the Compliance Plan or related requirements. Any such request must be accompanied by documentation evidencing the Contractor or Supplier's "Good Faith Efforts."
- c. The 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. If the Prime Construction Contractor or Supplier fails to meet the goals, but meets or exceeds the average M/WBE participation obtained by other Prime Construction Contractor or Suppliers, this may be evidence of their Good Faith Efforts.
- e. In making the determination of Good Faith Efforts, OBD will consider, at a minimum, the Prime Construction Contractor or Supplier'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, as to facilitate meeting the goals;
6. make good faith efforts, despite the ability or desire of the contractor to perform the work of a contract with its own organization. A contractor who desires to self-perform the work of a contract must demonstrate good faith efforts unless the goals have been met;
7. 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, unbundling contract 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 forces;
8. make efforts to assist interested M/WBEs in obtaining bonding, lines of credit or insurance as required by the Board or the contractor;
9. make efforts to assist interested M/WBEs in obtaining necessary equipment, supplies, materials or related assistance or services;
10. 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;
11. make efforts to employ graduates of the Chicago Public Schools.

#### **6.4.1 Apprenticeship Initiatives**

For any construction project in excess of \$100,000, the Board may ask the Prime Construction Contractor or Supplier to participate in an Apprenticeship Initiative 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.

#### **6.4.2 Programs for Public School Students**

OBD will also consider granting waivers to vendors who, at the bid submission, include a strategy for the training, employment or continuing education of present or former CPS students. The purpose of this alternate method is to induce vendors to undertake such programs, which will benefit students and ultimately foster the formation of additional M/WBEs. When determining whether to grant a waiver for vendors who institute such a program for CPS students, OBD will consider the following: whether the proposed program is substantial in terms of the number of students served and the resources devoted by the private firm; that the program is significant in terms of its training, employment or continuing education objectives; and that the program is feasible and effective.

#### **6.5 Contract Award**

Upon acceptance of a bid or quotation, the School Support Services shall send a Notice of Award to the successful bidder and a Workforce Projection to OBD.

## **VII. CONTRACT PERFORMANCE PROCEDURES**

### **7.1 School Support Services Responsibilities**

To achieve the Contract Specific Goals, the School Support Services 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 contractor as an MBE or WBE, if the 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 contractor misrepresented the status of the subcontractor or supplier. If the School Support Services or OBD determines that the contractor was not involved in any such misrepresentation, then the contractor shall discharge the disqualified subcontractor or supplier and make good faith efforts to engage a qualified MBE or WBE replacement.
  2. allows the OBD, with or without notice,
    - i. to conduct on-site inspections of any performance site or place of business of any Prime Contractor or Supplier, and which provides that other Board staff may accompany OBD on this inspection to determine findings that the contractor has not complied with its obligations and has not engaged in fraudulent misrepresentation; and
    - ii. to access to contractor's books and records including, without limitation, payroll records, tax returns and records and books of account, to determine the contractor'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 Contractors or Suppliers:
    - i. to maintain records on the utilization of subcontractors and fulfillment of the Compliance Plan, and to retain those records for three years after the Board's final acceptance of the work;
    - ii. to periodically report to OBD all expenditures to achieve compliance;
    - iii. to obtain prior written approval from the OBD Director before changing MWBE commitments or substituting M/WBE subcontractors;
    - iv. upon the issuance of required certificates, to pay promptly all subcontractors the amount allowed and paid to the Prime Contractor or Supplier on account of the subcontractor's work to the extent of subcontractor's interest in the work;; 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 Contractor/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 the OBD. For example:

First and second pay requests submitted by Prime Contractor are processed by the Board and paid.

Third and all subsequent pay requests submitted by Prime Contractor include proof of payment to subcontractors listed on all previous pay requests

4. to require 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, ten percent (10%) of the Base Contract Price; and

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.

5. to require 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, the Director of OBD shall review and approve any request by a Prime 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 forces 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 Compliance 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 bidders for the Compliance 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 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 forces, may constitute grounds for rejection of the bid or proposal, cause termination of the executed contract for breach, may result in the withholding of payment and/or subject the Prime 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. OBD shall forward its approval decision on a substitution request to the Office of Student Support Services. The final decision on a substitution request shall be communicated in writing as soon as practicable to the parties. The Director may request more information or schedule an interview to clarify or mediate the problem. The Director 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 for self-performing work, general conditions, overhead and profit. An MBE or WBE Prime Construction Contractor 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 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 forces 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 the Compliance Plan, as well as the fulfillment of any special conditions, work order goals or other obligations by contract awardees. This responsibility shall extend to equal employment opportunity goals for contracts of less than \$100,000, employment opportunity goals for work orders of \$100,000 or more and the requirements of the City of Chicago Residency Program.
- b. At the end of every contract, OBD shall determine at contract closeout whether a 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.
- c. 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.

**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 the 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. The CEO's designees for the Appeals Process shall review the OBD's determination and make a recommendation to the CEO. The CEO's decision will be final. Sanctions will not be imposed until the CEO's final decision has been made.
- d. 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 Inspector General (IG) for investigation.
  - 2. Initiation of proceedings to debar the Prime Contractor or Supplier and all persons or entities affiliated with them if warranted by IG 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. Prime Construction Contractor 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.
- c. The CEO's designees for the Appeals Process shall review the OBD's determination and make a recommendation to the CEO. The CEO's decision will be final. Sanctions will not be imposed until the CEO's final decision has been made.

**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.