

PROPOSED SUBSTITUTE TO FILE 16-0189 (6-29-2016)

Sponsored by: Toni Preckwinkle, President, Forest Preserve District of Cook County Board of Commissioners

PROPOSED ORDINANCE AMENDMENT

1-8-5b: SUBDIVISION II—CONSTRUCTION ORDINANCE

- A. *Short Title; Incorporation of Provisions.* This subdivision may be known and cited as the "Forest Preserve District of Cook County Public Works Minority- and Women-Owned Business Enterprise Ordinance" ~~and may be cited as such.~~
- B. *Preface and Findings.*
1. The findings set forth in Subdivision I Section B of this Section 1-8-5 are incorporated herein by this reference.
 2. On July 11, 2012, the Governor of Illinois signed a new law allowing the District to establish provisions to address the underutilization of ~~M/WBE~~WBEs with respect to construction Contracts.
 3. The District seeks to provide a level playing field and equal access for all prime contractors and subcontractors to participate in Public Works Contracts;
 4. In the absence of authority to establish the type of provisions referenced via the Program to Public Works Contracts, the District has witnessed a significantly low level of participation by M/WBEs in its Public Works Contracts and, thus, the District has been a passive participant in a discriminatory marketplace without the application of M/WBE goals.
- C. *Policy and Purpose.* It is hereby found, determined and declared that the purpose of this Ordinance is to ensure the full and equitable participation of ~~Minority and Women-Owned Business Enterprises~~Local Small Businesses owned by Economically Disadvantaged M/WBEs in the District's procurement process as both prime contractors and subcontractors in the District's construction contracts. The District is committed to a policy of preventing discrimination in the award of, or participation in, construction contracts and has recommended appropriate narrowly tailored remedies to address past discrimination and eliminate potential discrimination with respect to District contract awards.
- D. *Applicability.* This subdivision shall apply to all construction contracts funded in whole or in part by ~~County~~District funds, regardless of the sources of other funds; provided that any contract with respect to which a goal for Minority-Owned Business Enterprise or Women-Owned Business Enterprise participation is inconsistent with or prohibited by State or Federal law shall be exempt from the goals included in this subdivision.
- E. *Definitions.* The following terms shall have the following meanings:
1. *Affiliate of a person or entity* means a person or entity that directly or indirectly through one (1) or more intermediaries, controls or is controlled by, or is under common control with, the person or entity. In determining Affiliation, the District shall consider all appropriate factors, including common ownership, common management, and contractual relationships.
 2. *Annual ~~Participation~~ Aspirational Goals* mean the targeted levels of participation established by the District for the annual aggregate participation of MBEs and WBEs in District construction contracts.

3. Applicant means a person who submits documents and information seeking certification, continued certification, or re-certification as an MBE or WBE to Cook County's Office of Contract Compliance.
4. Business means a sole proprietorship, partnership, corporation, limited liability company, Joint Venture or any other business or professional entity.
45. Certified or Certification means registration of the Minority Business Enterprise or Women's Business Enterprise status of a business in the County's Directory of Minority Business Enterprises and Women's Business Enterprises or registration as a minority or women owned business by a reciprocal agency acceptable to the County.
6. Certified Firm means a firm that has been ~~registered~~accepted by the County as ~~a certified MBE or WBE~~Certified.
57. Commercially Useful Function means responsibility for the execution of a distinct element of the work of the contract, as described in subsection K.(4) of this Subdivision.
8. Contract Compliance Administrator or CCA means the Forest Preserve District Contract Compliance Administrator.
69. Contract Compliance Director or CCD means the Cook County Contract Compliance Director. The CCD also shall be empowered to act as, or assist, the CCA with respect to the functions of the CCA referenced herein.
710. Contractor means any Business that seeks to enter into a construction contract with the District, other than for professional services, and includes all partners and Affiliates Business.
- ~~8. Commercially Useful Function means 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 partner.~~
- ~~9. Director or CCD means the Contract Compliance Director.~~
- ~~10~~11. District means the Forest Preserve District of Cook County and its participating Using Department.
- ~~11~~12. District's Marketplace means the six-county region, currently the counties of Cook, DuPage, Kane, Lake, McHenry and Will.
- ~~12. Doing Business means having a physical location from which to engage in for profit activities in the scope(s) of expertise of the Business.~~
13. Economically Disadvantaged means ~~an individual with~~ having a Personal Net Worth less than two million dollars (\$2,000,000.00), indexed annually for the Chicago Metro Area Consumer Price Index for Urban Wage Earners and Clerical Workers, published by the U.S. Department of Labor, Bureau of Labor Standards, beginning January 20142008.
- ~~14. Expertise means demonstrated skills, knowledge or ability to perform in the field of endeavor in which certification is sought by the Business as defined by normal industry practices, including licensure where required~~
- ~~15. Good Faith Efforts means actions undertaken by a Contractor to achieve an MBE or WBE goal, which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the Program's~~such goals.
- ~~16~~15. Joint Venture means an association of two (2) or more Businesses proposing to perform a for profit business enterprise. Joint Ventures must have an agreement in writing specifying the

terms and conditions of the relationships between the partners and their relationship and responsibility to the contract.

~~17~~16. *Local Business* means a Business located within the District's Marketplace which has the majority of its regular, full time work force located within the District's Marketplace.

~~18~~17. *Local Small Business* means a Local Business which is also a Small Business.

~~19~~18. *Manufacturer* means a ~~firm~~ Person (as this term is defined below) that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.

~~20~~19. *Minority Business Enterprise or MBE* means a Business:

- a. Which is at least fifty-one (51) percent owned by one (1) or more Minority Individuals who are Economically Disadvantaged, or in the case of a publicly owned Business, at least fifty-one (51) percent of all classes of the stock of which is owned by one (1) or more such Minority Individuals;
- b. Whose management, policies, major decisions and daily business operations are independently managed and controlled by one (1) or more Minority Individuals;
- c. Which performs a Commercially Useful Function;
- d. Which is a Certified Firm; and
- e. Which is a Local Small Business.

~~21~~20. *Minority Individual* means a natural person in one (1) of the following groups:

- a. African-Americans or Blacks, which includes persons having origins in any of the Black racial groups of Africa;
- b. Hispanic-Americans, which includes persons ~~of~~ who are Mexican, Puerto Rican, Cuban, Caribbean, Dominican, Central or South American, regardless of race;
- c. Native-Americans, which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians; or
- d. Asian-Americans, which includes persons whose origins are in any of the original peoples of the Far East Asia, Southeast Asia, the islands of the Pacific or the Northern Marianas, or the Indian Subcontinent; or
- e. Individual members of other groups, including, but not limited to, Arab-Americans, found by the District to be ~~socially disadvantaged~~ 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 the District's ~~marketplace or to do business with the District~~ Marketplace.

~~22~~21. *Owned* means having all of the customary incidents of ownership, including the right of disposition, and sharing in all of the risks, responsibilities and profits commensurate with the degree of ownership.

~~23~~22. *Person(s)* or ~~Persons~~ person(s) means any ~~individual~~ natural person, corporation, partnership, Joint Venture, trust, association, limited liability company, sole proprietorship or other legal entity.

~~24~~23. *Personal Net Worth* means the net value of the assets of an individual after total liabilities are deducted. An individual's ~~personal net worth~~ Personal Net Worth does not include the individual's ownership interest in an ~~applicant~~ Applicant or other ~~District certified~~ Certified MBE

or WBE, provided that the other ~~firm~~Certified MBE or WBE is certified by a governmental agency that meets the District's eligibility criteria or the individual's equity in his or her primary place or residence. As to assets held jointly with his or her spouse, an individual's ~~personal net worth~~Personal Net Worth includes only that individual's share of such assets. An individual's ~~net worth~~Personal Net Worth also includes the present value of the individual's interest in ~~any vested pension plans~~, individual retirement 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, and shall not include future payments receivable from a pension or Social Security.

~~25~~24. *Program* means the ~~Program established by the~~Public Works Minority- and Women-Owned Business Enterprise ~~Ordinance~~program established in this Subdivision.

~~26~~25. *Project Specific Goals* means the Goals established for a particular project or contract based upon the availability of MBEs or WBEs in the scopes of work of the Project.

~~27~~26. *Public Works* means all fixed works constructed or demolished by the District, or paid for wholly or in part out of public funds administered by the District. Public Works as defined herein includes all projects financed in whole or in part with bonds, grants, loans, or other funds made available by or through federal or State government, or local government. Public Works includes any maintenance, repair, assembly, or disassembly work performed on equipment whether owned, leased, or rented. ~~the County. Public Works does not include projects undertaken by the owner at an owner-occupied single-family residence or at an owner-occupied unit of a multifamily residence. Public Works includes any maintenance, repair, assembly, or disassembly work performed on equipment whether owned, leased, or rented.~~

~~28~~27. *Public Works Contracts* means ~~Contracts~~contracts for ~~all fixed works constructed or demolished by the District, or paid for wholly or in part out of public funds administered by the District~~Public Works.

~~29~~28. *Purchasing Agent* means the Purchasing Agent of the District.

~~30~~29. *Regular Dealer* means a ~~firm~~Person that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business. To be a Regular Dealer, the ~~firm~~Person must be an established, regular Business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question. A ~~firm~~Person may be a Regular Dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business if the ~~firm~~Person both owns and operates distribution equipment for the products. Any supplementing of a ~~Regular Dealer's~~Person's distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis. Packagers, manufacture representatives, or other persons who arrange or expedite transactions are not Regular Dealers.

~~31~~30. *Small Business* means a small business as defined by the U.S. Small Business Administration, pursuant to the business size standards found in 13 CFR Part 121, relevant to the scope(s) of work the ~~firm~~Person seeks to perform on ~~District~~ contracts. A ~~firm~~Person is not an eligible small business enterprise in any calendar fiscal year in which its gross receipts, averaged over the ~~firm's~~Person's previous five (5) fiscal years, exceed the size standards of 13 CFR Part 121.

~~32~~31. *Socially Disadvantaged* means ~~a Minority Individual or Woman who has~~having been subjected to racial, ethnic or gender prejudice or cultural bias within American society because of ~~his or her~~ identity as a member of a group and without regard to individual qualities. ~~Social disadvantage must stem, stemming~~ from circumstances beyond the ~~individual's~~relevant person's

control. A Socially Disadvantaged ~~individual~~ natural person must be a citizen or lawfully admitted permanent resident of the United States.

~~32. 33.~~ Using Department means the department ~~of~~ as defined by the District responsible for initiating the procurement process.

~~33. 34.~~ Utilization Plan means ~~the list~~ a plan for utilization of MBEs and M/WBEs that the Bidder/Proposer commits will be utilized, the scopes described in subsection L. of the work and the dollar values or the percentages of the work to be performed. this Subdivision.

~~35. 34.~~ Woman means a natural person of the female gender.

~~36~~ 35. Woman-Owned Business Enterprise or WBE means a Business:

- a. Which is at least fifty-one (51) percent owned by one (1) or more Women who are Economically Disadvantaged, or in the case of a publicly owned Business, at least fifty-one (51) percent of all classes of the stock of which is owned by one (1) or more such Women;
- b. Whose management, policies, major decisions and daily business operations are independently managed and controlled by one (1) or more such Women;
- c. Which performs a Commercially Useful Function;
- d. Which is a Certified Firm; and
- e. Which is a Local Small Business.

F. *Program Administration.*

1. ~~The CCA, who shall report to in conjunction with the General Superintendent~~ District's Purchasing Agent and the President of the Board of Commissioners of Forest Preserve District of Cook County CCD, shall administer the Program, whose. The duties of the CCA shall include:

- a. Formulating, proposing and implementing rules and regulations for the development, implementation and monitoring of the Program.
- b. ~~Providing information and assistance to MBEs and WBEs relating to District procurement practices and procedures, bid specifications, requirements, goals and prerequisites.~~ M/WBEs and Small Businesses relating to the Program, serving as a liaison to community, contractor, professional and supplier groups, and serving as a liaison to various other associations and organizations.
- c. ~~Establishing uniform procedures and criteria for accepting certifications of~~ Verifying that Persons as M/WBEs by interested in participating in the County of Cook Program are Certified and monitoring the City of Chicago, and maintaining a directory of Certified Firms. M/WBEs maintained by Cook County.
- d. ~~Establishing Project Specific Goals in collaboration with the User~~ Using Department based upon the availability of M/WBEs to provide the supplies, materials and equipment or services required by the contract.
- e. Evaluating Contractors' achievement of Project Specific Goals and Good Faith Efforts to meet Project Specific Goals.
- ff. Cooperating with and providing assistance to Using Departments to facilitate participation by M/WBEs in procurements.
- g. Reviewing, approving, and, if necessary, rejecting Utilization Plans for achievement of Project Specific Goals; evaluating the extent to which the goals were achieved.

- h. Working with Using Departments to monitor contracts to ensure prompt payments to MBEs and WBEs and compliance with Project Specific Goals and commitments, including gathering data to facilitate such monitoring.
 - gi. Receiving, reviewing, and acting upon complaints and suggestions concerning the Program.
 - hj. Collecting data to evaluate the Program and other District contracting initiatives.
 - ik. Monitoring the Program and the District's progress towards its Annual ~~Participation~~ Aspirational Goals. The CCA shall report on a quarterly and annual basis to the General Superintendent and the President on the administration and operations of the Program.
 - l. Impose sanctions and penalties as described in Subsection N.
2. The Using Departments that receive appropriate delegation for project management, contract management, and/or construction and/or design contract responsibility shall have the following duties and responsibilities with regard to the Program:
- a. Assisting the CCA with setting Project Specific Goals.
 - b. Assisting in the identification of available MBEs and WBEs, and providing other assistance in meeting the Project Specific Goals.
 - c. Performing other activities to support the Program.
 - d. Gathering and maintaining prime contracting and subcontracting data for those contracts which they manage.
 - e. Submitting subcontracting data as required to the ~~CCD~~ or CCA.
3. Intergovernmental Agreement ~~Between~~ between District and County. The ~~Forest Preserve District of Cook County~~ shall provide staff and/or reimbursement to Cook County as set out in an intergovernmental agreement for the CCD to also act as, or assist, the CCA.
- G. *Race- and Gender-Neutral Measures to Ensure Equal Opportunities for all Contractors and Subcontractors.* The District has adopted and shall continue to develop and use measures to facilitate the participation of all firms in District construction contracting activities. These measures shall include, but are not limited to:
- 1. Arranging solicitation times for the presentations of bids, quantities, specifications, and delivery schedules to facilitate the participation of interested firms;
 - 2. Segmenting, structuring or issuing contracts to facilitate the participation of MBEs, WBEs and other Small Businesses;
 - 3. Providing timely information on contracting procedures, bid preparation and specific contracting opportunities;
 - 4. Providing assistance to Businesses in overcoming barriers such as difficulty in obtaining bonding and financing;
 - 5. Holding pre-bid conferences, where appropriate, to explain the projects and to encourage Contractors to use all available qualified firms as subcontractors;
 - 6. Adopting prompt payment procedures, including, requiring by contract that prime Contractors promptly pay subcontractors;
 - 7. Reviewing retainage, bonding and insurance requirements to eliminate unnecessary barriers to contracting with the District;

8. Collecting information from all prime Contractors on District construction contracts detailing the bids received from all subcontractors for District construction contracts and the expenditures to subcontractors utilized by prime Contractors on District construction contracts;
 9. At the discretion of the District, letting a representative sample of District construction contracts without goals, to determine MBE and WBE utilization in the absence of goals;
 10. Maintaining information on all firms bidding on District prime contracts and subcontracts; and
 11. Referring complaints of discrimination to the appropriate authority, for investigation.
- H. *Program Eligibility.* Only Businesses that meet the criteria as defined by the CCD for the County of Cook, for certification as a MBE or WBE may participate in the Program.
- I. *Annual Aspirational Goals.* The Annual Aspirational Goals for the utilization of MBEs and WBEs on District construction contracts and subcontracts shall be twenty-four (24) percent for MBEs and ten (10) percent for WBEs.
- J. *Project Specific Goals.* The CCA, following the compilation and stringent review of the most current data that is feasibly and practicably available relative to the availability of MBEs and WBEs who have the capacity to successfully supply the relevant goods and services, and in consultation with the Using Department, shall establish Project Specific Goals for construction—Contracts based upon the availability of at least three (3) MBEs and three (3) WBEs to perform the anticipated subcontracting functions of the project and the District's utilization, which shall be incorporated into each bid and RFP. No goal shall be treated as a quota nor shall it be used to discriminate against any Person on the basis of MBEs and WBEs to date race, color, national origin, religion or sex.
- K. *Counting MBE and WBE Participation.*
1. The entire amount of that portion of a contract that is performed by the MBEs or WBEs own forces shall be counted, including the cost of supplies and materials obtained by the MBE or WBE for the work of the contract, and supplies purchased or equipment leased by the MBE or WBE (except supplies and equipment the MBE or WBE purchases or leases from the prime Contractor or the prime Contractor's Affiliate).
 2. The entire amount of fees or commissions charged by a MBE or WBE for providing a bona fide service, such as professional, technical, consultant or managerial services, or for providing bonds or insurance specifically required for the performance of a contract, shall be counted, provided the fee is reasonable and not excessive as compared with fees customarily charged for similar services.
 3. When a MBE or WBE performs as a participant in a Joint Venture, 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 is performed by the MBE or WBE with its own forces and for which it is separately at risk, shall be counted.
 4. Only expenditures to a MBE or WBE that is performing a Commercially Useful Function shall be counted. To determine whether a MBE or WBE is performing a Commercially Useful Function, the District will evaluate the amount of work subcontracted, industry practices, whether the amount the MBE or WBE 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 MBE or 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. A MBE or 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 MBE or WBE participation. If a MBE or

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 perform a Commercially Useful Function. When a MBE or WBE is presumed not to be performing a Commercially Useful Function, the Certified Firm may present evidence to rebut this presumption.

5. One hundred (100) percent of the cost of the materials or supplies obtained from a MBE or WBE Manufacturer or Regular Dealer shall be counted. One hundred (100) percent of the fees or transportation charges for the delivery of materials or supplies required on a job site shall be counted only if the payment of such fees is a customary industry practice and are commensurate with fees customarily charged for similar services.
6. ~~If a firm ceases to be a Certified Firm for any reasons associated with malfeasance, fraud or other reason than graduation from the factors set forth in Subsection N. Sanctions and Penalties, an M/WBE Construction Program ceases to be Certified during its performance on a contract procurement, the dollar value of work performed under a contract with that firm M/WBE after it has ceased to be certified~~ Certified shall not be counted. If for other reasons not associated with malfeasance, fraud or other factors set forth in Subsection N. Sanctions and Penalties, an M/WBE ceases to be Certified during its performance on a procurement, the dollar value of work performed under a contract with that M/WBE after it has ceased to be Certified shall be counted for the remaining term of the contract.
7. In determining achievement of Project Specific Goals, the participation of a MBE or WBE shall not be counted until that amount has been paid to the MBE or WBE.

L. *Contract Pre-Award Compliance Procedures.*

1. For all solicitations, the bidder/proposer shall submit a Utilization Plan detailing all subcontractors from which the Contractor solicited bids or quotations, and if Project Specific Goals have been established, its achievement of the Goals or its Good Faith Efforts to do so. The Utilization Plan shall be due at the time the bid proposal is due. In the event a bid or proposal leads to a contract with the District, the Utilization Plan as approved by the CCA shall be incorporated as a material commitment as between the Contractor and all relevant M/WBEs, and the Contractor and the District.
2. Any agreement between a Contractor and a MBE or WBE in which the Contractor requires that the MBE or WBE not provide subcontracting quotations to other Contractors is prohibited.
3. Parties submitting bids or proposals may in all instances request a partial or full waiver of one or more established Project Specific Goals for M/WBE participation. Where the Contractor cannot achieve the Project Specific Goal(s), the ~~CCD or~~ CCA will determine whether the Contractor has made Good Faith Efforts to meet the Goal(s). In making this determination, the CCA will consider, at a minimum, whether the Contractor's efforts to ~~Contractor has:~~
 - a. ~~Solicit~~ Solicited through all reasonable and available means (e.g., attendance at pre-bid meetings, advertising and written notices) the interest of all MBEs and WBEs certified in the scopes of work of the contract. The Contractor shall provide interested MBEs and WBEs with timely, adequate information about the plans, specifications, and requirements of the contract to allow MBEs and WBEs to respond to the solicitation. The Contractor must follow up initial solicitations with interested MBEs and WBEs.
 - b. ~~Select~~ Selected portions of the work to be performed by MBEs and WBEs in order to increase the likelihood that the Project Specific Goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate MBE and WBE participation, even when the Contractor would otherwise prefer to perform these work items with its own forces. It is the Contractor's responsibility to make a portion

of the work available to MBEs and WBEs and to select those portions of the work or material needs consistent with the availability MBEs and WBEs to facilitate their participation.

- c. ~~Negotiate~~Negotiated in good faith with interested MBEs and WBEs. Evidence of such negotiation includes the names, addresses, and telephone numbers of MBEs and WBEs that were contacted; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and why agreements could not be reached with MBEs and WBEs. The Contractor may not reject MBEs and WBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. That there may be some additional costs involved in finding and using MBEs and WBEs is not in itself sufficient reason for a Contractor's failure to meet the Project Specific Goals, as long as such costs are reasonable. The ability or desire of a Contractor to perform the work of a contract with its own organization does not relieve it of the responsibility to make Good Faith Efforts on all scopes of work that could be subcontracted.
 - d. ~~Make~~Made efforts to assist interested MBEs and WBEs in obtaining bonding, lines of credit, or insurance as required by the District or the prime Contractor, where appropriate; provided, however, that such efforts shall not be inconsistent with the requirement that the M/WBE be responsible for actually obtaining and paying for such items.
 - e. ~~Make~~Made efforts to assist interested MBEs and WBEs in obtaining necessary equipment, supplies, materials, or related assistance or services, where appropriate; provided, however, that such efforts shall not be inconsistent with the requirement that the M/WBE be responsible for actually obtaining and paying for such items.
 - f. ~~Use~~Used the services of the CCA, available minority/women community organizations, minority/women contractors' groups, government sponsored minority/women business assistance offices and other appropriate organizations to provide assistance in the recruitment and placement of MBEs and WBEs.
 - g. Maintained or committed to establish and maintain a mentor-protégé agreement with one or more M/WBEs that is enforceable and that, in the judgment of the CCA, has performance standards and outcomes that are clearly established and effective in terms of assisting the M/WBE in acquiring additional skills, experience, and relationships helpful to the long-term success of the M/WBE.
- 4. In determining whether a Contractor has made Good Faith Efforts, the performance of other Contractors in meeting the Project Specific Goals may be considered. For example, when the apparent successful Contractor fails to meet the Project Specific Goals but others meet it, it may be reasonably questioned whether, with additional reasonable efforts, the apparent successful Contractor could have met the Project Specific Goals. Similarly, if the apparent successful Contractor fails to meet the Project Specific Goals, but meets or exceeds the average MBE or WBE participation obtained by other Contractors, this may be evidence that the apparent successful Contractor made Good Faith Efforts.
 - 5. A signed letter of intent from each listed MBE or WBE, describing the work, materials, equipment or services to be performed or provided by the MBE or WBE and the agreed upon dollar value shall be due at the time of bid proposal or within three (3) days after such submission.
 - 6. The CCA shall timely review the Utilization Plan before award, including the scope of work and the letters of intent from MBEs and WBEs. The CCA may request clarification in writing of items listed in the Utilization Plan, provided such clarification shall not include the opportunity to augment listed participation or Good Faith Efforts.

7. If the CCA determines that the Utilization Plan demonstrates that the Project Specific Goals have been achieved or Good Faith Efforts made, with the concurrence of the Using Department, the CCA and Using Department shall recommend award to Purchasing Department.
8. If the CCA finds that a Contractor did not make sufficient Good Faith Efforts, the CCA shall communicate this finding to the Purchasing Department and recommend that the bid/proposal be rejected. A Contractor may protest this determination pursuant to the County's bid protest procedures.
9. The CCA shall from time to time, by way of seminars and internet-based communications, make available to the business community such information and documents as will assist the community in understanding the manner in which a full or partial waiver may be requested, and the manner in which such a request may be supported. In addition, the CCA shall make representatives available to confer on the subject of waivers with parties who plan on submitting particular bids or proposals.

M. *Contract Administration Procedures.*

1. Upon award of a contract by the District that includes Project Specific Goals; the Project Specific Goals become covenants of performance by the Contractors and incorporated in the contract.
2. The Contractor shall provide a listing of all subcontractors to be used in the performance of the contract, and detailed subcontractor information to the District with each request for payment submitted to the District or as otherwise directed by the District. The CCA and the Using Department shall monitor subcontractor participation during the course of the contract. The District shall have full and timely access to the 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 MBE and WBE participation and the status of any MBE or WBE performing any portion of the contract. This provision shall be in addition to, and not a substitute for, any other provision allowing inspection of the Contractor's records by any officer or official of the District for any purpose.
3. The Contractor cannot make changes to the Utilization Plan or substitute MBEs or WBEs named in the Utilization Plan without the prior written approval of the CCA, in consultation with the Purchasing Agent and the Using Department. Unauthorized changes or substitutions shall be a violation of this subdivision and a breach of contract, and 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 Contractor to contract penalties or other sanctions.
 - a. All requests for changes or substitutions of a MBE or WBE Subcontractor(s) named in the Utilization Plan shall be made to the CCA, Purchasing Agent and the Using Department in writing, and shall clearly and fully set forth the basis for the request. A Contractor shall not substitute a MBE or WBE subcontractor or perform the work designated for a MBE or WBE subcontractor with its own forces unless and until the CCA, ~~Purchasing Agent~~ in consultation with the Purchasing Agent and Using Department, approves such substitution in writing. A Contractor shall not allow a substituted subcontractor to begin work until the ~~Director~~ CCA, Purchasing Agent and the Using Department have approved the substitution.
 - b. The facts supporting the request must not have been known nor reasonably should have been known by either party before the submission of the Utilization Plan. Bid shopping is prohibited. The Contractor must negotiate with the MBE or WBE subcontractor to resolve the problem. Where there has been a mistake or disagreement about the scope of work, the MBE or WBE can be substituted only where an agreement cannot be reached for a reasonable price for the correct scope of work.

- c. Substitutions of the subcontractor shall be permitted only on the following bases:
 - (i) Unavailability after receipt of reasonable notice to proceed.
 - (ii) Failure of performance.
 - (iii) Financial incapacity.
 - (iv) Refusal by the subcontractor to honor the bid or proposal price.
 - (v) 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.
 - (vi) Failure of the subcontractor to meet insurance, licensing or bonding requirements; or
 - (vii) The subcontractor's withdrawal of its bid or proposal.
- d. The final decision whether to permit or deny the proposed substitution, and the basis of any denial, shall be communicated to the parties in writing by the CCA.
- e. Where the Contractor has established the basis for the substitution to the satisfaction of the District, the Contractor shall make Good Faith Efforts to fulfill the Utilization Plan. The Contractor may seek the assistance of the CCA in obtaining a new MBE or WBE. If the Project Specific Goal(s) cannot be reached and Good Faith Efforts have been made, the Contractor may substitute with a non-Certified Firm.
- f. If the District requires the substitution of a MBE or WBE subcontractor listed in the Utilization Plan, the Contractor shall undertake Good Faith Efforts to fulfill the Utilization Plan. The Contractor may seek the assistance of the CCA in obtaining a new MBE or WBE subcontractor. If the Goal(s) cannot be reached and Good Faith Efforts have been made, the Contractor may substitute with a non-Certified Firm.
- 4. If a Contractor plans to hire a subcontractor on any scope of work that was not previously disclosed in the Utilization Plan, the Contractor shall obtain the approval of the CCA to modify the Utilization Plan and must make Good Faith Efforts to ensure that MBEs and WBEs have a fair opportunity to bid on the new scope of work.
- 5. Changes to the scopes of work shall be documented by the Using Department at the time they arise, to establish the reasons for the change and the effect on achievement of the MBE or WBE goal.
- 6. Prior to contract closeout, the CCA shall evaluate the Contractor's fulfillment of the contracted goals, taking into account all approved substitutions, terminations and changes to the contract's scope of work. If the District determines that Good Faith Efforts to meet the MBE or WBE commitments were not made, or that fraudulent misrepresentations have been made, or any other breach of the contract or violation of this subdivision, a remedy or sanction may be imposed, as provided in the contract.

N. *Sanctions and Penalties.*

- 1. The following violations of this subdivision may result in a breach of contract:
 - a. Providing false or misleading information to the District in connection with submission of a bid, responses to requests for qualifications or proposals, Good Faith Efforts documentation, post-award compliance, or other Program operations or colluded with others to do so.
 - b. Committing any other violations of this subdivision.
- 2. A ~~Contractor~~ contractor or subcontractor is subject to withholding of payments under the contract, termination of the contract for breach, contract penalties, or being barred or deemed non-

responsive in future District solicitations and contracts as determined by the District's Purchasing Agent, if it is found to have:

- a. ~~Provided false or misleading information in connection with an application for certification or recertification~~the submission of a bid, responses to requests for qualifications or proposal, Good Faith Efforts documentation, post-award compliance, or other Program operations or colluded with others to do so;
 - b. ~~Provided false or misleading information in connection with the submission of a bid or proposal or documentation of Good Faith Efforts, post-award compliance, or other Program operations or colluded with others to do so;~~
 - eb. Failed in bad faith to fulfill ~~Project~~Contract Specific Goals, thereby materially breaching the contract; or
 - ec. Failed to comply in good faith with substantive provisions of this subdivision.
3. The CCA may refer instances of non-compliance as described in Subsection N (2)(a-c) that may warrant decertification to the CCD if any M/WBE involved was certified by Cook County, or other applicable agency if any M/WBE involved was certified by an agency other than Cook County.
4. A Contractor, MBE, WBE who fails to comply with the requirements of a Utilization Plan may be liable for a fine of \$2,500.00, and such sanction, if issued, shall apply jointly and individually to the Contractor and the relevant owner(s) of the Contractor; the MBE and the relevant owner(s) of the MBE; and/or the WBE and the relevant owner(s) of the WBE. Such fine, once imposed, may be taken, at the District's sole discretion, from any retainage or future payments due from the District to such Contractor. The determination as to whether a Contractor, MBE, or WBE has failed to comply with the requirements of a Utilization Plan shall be made by an Administrative Law Judge from the Cook County Department of Administrative Hearings pursuant to Chapter 2, Article IX, of the Cook County Code. Decisions of the Cook County Administrative Hearing Department shall be subject to review pursuant to the Illinois Administrative Act (735 ILCS 5/3-101 et seq.).

O. *Program Review and Sunset.*

1. The President and the Board of Commissioners shall receive quarterly and annual reports from the CCA detailing the District's performance under the Program.
2. The President and the Board of Commissioners will review these reports, including the Annual ~~Participation~~Aspirational Goals and the ~~County's~~District's progress towards meeting those Goals and eliminating discrimination in its contracting activities and marketplace.
3. ~~Within five (5) years after~~Prior to the effective sunset date of this ~~ordinance~~subdivision, the District will review the operation of the Program and the evidentiary basis for the Program in order to determine whether the District has a continuing compelling interest in remedying discrimination against MBEs and WBEs in its construction marketplace, and the permissible scope of any narrowly tailored remedies to redress discrimination against MBEs or WBEs so that the District will not function as a passive participant in a discriminatory marketplace.
4. This subdivision shall sunset on or before June 30, ~~2016~~2021.

(Ord. No. 12-O-12, 9-11-12)