

## PROPOSED SUBSTITUTE TO FILE 16-0204 (6-29-2016)

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

### PROPOSED ORDINANCE AMENDMENT

#### 1-8-5a: SUBDIVISION I—GENERAL PROVISIONS.

- A. *Short Title.* This Subdivision shall be known and may be cited as the "Forest Preserve District of Cook County Minority- and Women-Owned Business Enterprise General Ordinance." This Subdivision is applicable to all Contracts, except Public Works Contracts, which are governed by Subdivision II of this Section 1-8-5.
- B. *Preface and Findings.*
1. ~~Currently,~~ Prior to an 2012 amendment to the Enabling Act of the Forest Preserve District of Cook County (the "District") ~~does~~, 70 ILCS 810/0.01 et seq., which authorized the District to establish procedures to comply with State and federal regulations concerning affirmative action and the use of small businesses or businesses owned by minorities or women in construction and procurement contracts, the District did not have an ordinance specifically crafted to address the underutilization of Minority- and Women-Owned Business Enterprises (M/WBEs) and barriers to the full and fair participation of M/WBEs in District prime contracts and subcontracts.
  2. M/WBEs have contributed significantly to the economic development of the community, and played a similar role in increasing employment, including that of minorities.
  3. M/WBEs may be awarded prime contracts and subcontracts in dollar amounts that are disproportionately lower than the availability of such businesses to perform Forest Preserve District contracts.
  4. In 1988, Cook County adopted a Minority- and Women-Owned Business Enterprises Ordinance establishing an affirmative action program to ensure the full and equitable participation of M/WBEs in the County's procurement process as both prime contractors and subcontractors.
  5. In 1993, Cook County amended its Minority- and Women-Owned Business Enterprises Ordinance to include specific minority and women participation goals in construction contracts.
  6. The affirmative action program for construction projects set goals of thirty (30) percent minority-owned participation and ten (10) percent women-owned participation on all County construction projects in order to remedy ongoing discrimination and the effects of past discrimination against women and members of minority groups, so as not to be a passive participant in such discrimination.
  7. This program as it relates to construction projects was declared unconstitutional in *Builders Association of Greater Chicago v. Cook County*, 123 F.Supp.2d 1087 (N.D. Ill. 2000), and a permanent injunction was entered against the program preventing the County from setting minority and women participation goals in County construction projects.
  8. The district court's holding was affirmed in *Builders Association of Greater Chicago v. Cook County*, 256 F.3d 672(7th Cir. 2001).
  9. The County complied with the permanent injunction and ceased setting M/WBE goals on County construction projects in early 2001, causing an immediate and drastic reduction in M/WBE construction prime contract and subcontract participation.

10. Evidence presented at trial in *Builders Association of Greater Chicago v. City of Chicago*, 298 F.Supp.2d 725 (N.D. Ill. 2003) and *Northern Contracting, Inc. v. Illinois Department of Transportation*, 2005 U.S. Dist. LEXIS 19868 (N.D. Ill. Sept. 8, 2005) established that there is strong evidence of the effects of past and current discrimination against M/WBEs in the construction industry in the Chicago area.
11. The trial court's decision was affirmed in *Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715 (7th Cir. 2007).
12. In 2005, the County commissioned a review of the utilization of M/WBEs in its construction contracts since the injunction.
13. The results of this review were presented to the County in a 2006 Report titled, "Review of Compelling Evidence of Discrimination Against Minority- and Women-Owned Business Enterprise in the Chicago Area Construction Industry and Recommendations for Narrowly tailored Remedies for Cook County, Illinois" (Cook County 2006 Report).
14. The Report concluded that there is extensive evidence of discrimination against M/WBEs in the Chicago area construction marketplace, and the participation of M/WBEs in the County's construction prime contracts and subcontracts is below the availability of such firms.
15. The Report recommended, among other initiatives, the establishment of an interim ordinance to remedy the underutilization of M/WBEs in the County's construction contracts and ensure that the County is not passively participating in discrimination against Minority- and Women-Owned Business Enterprises in the Chicago area construction marketplace.
16. In response to the Cook County 2006 Report the County adopted a Minority- and Women-Owned Business Enterprise Construction Interim Ordinance in 2007.
17. In 2006, the Illinois State Toll Highway Authority commissioned a study for the availability of Disadvantaged Business Enterprises (DBEs) in its geographic and procurement markets, to ensure that its DBE program was narrowly tailored as required by constitutional standard, which found 19.56% DBE availability in construction, 19.36% DBE availability in construction-related professional services, and that DBE utilization had steadily increased from 2.40% in 2004 to 24.72% in 2010.
18. The County commissioned a new report, entitled "The Status of Minority- and Women-Owned Business Enterprises Relevant to Construction Activity In and Around Cook County, Illinois" (Cook County 2010 Study).
19. The Cook County 2010 Study made recommendations for a revised M/WBE program for construction contracting, emphasizing the establishment of project-specific goals, implementation of race- and gender-neutral measures, and enhancements to data gathering, implementation and performance monitoring of the program.
20. In 2010 the U.S. Department of Justice produced a report to Congress, entitled "Compelling Interest for Race- and Gender-Conscious Federal Contracting Programs: An Update to the May 23, 1996 Review of Barriers to Minority- and Women-Owned Businesses," that updated the original basis for the U.S. Department of Transportation's DBE program and concluded that discriminatory barriers continue to impede the ability of M/WBEs to compete with other firms on a fair and equal footing in government contracting markets.
21. Based upon this evidentiary record, the District ~~concludes~~concluded that in the absence of affirmative action remedies for both procurement and construction contracts, the District will likely be a passive participant in discrimination against M/WBEs.

22. Based upon the experiences of other local governments and other entities and the trial records in *BAGC v. Chicago* and *Northern Contracting v. Illinois DOT*, race- and gender-neutral measures have not and are not likely to eliminate the competitive disadvantage of M/WBEs in participating in District contracts due to discrimination in the local economy.

C. *Policy and Purpose.*

- ~~1.~~ It is the continuing public policy of the District to strive to achieve the full and equitable participation of Local Small Businesses owned by Economically Disadvantaged minorities and women in the District's procurement process as both prime contractors and subcontractors.
2. The District is committed to a policy of preventing and reducing discrimination in the award of or participation in District contracts and eliminating arbitrary barriers to full participation in such contracts by all persons regardless of race, ethnicity or sex.
- ~~23.~~ It is the District's desire to affirm its commitment to full and fair opportunities for all firms to participate in its procurement and construction contracts.
- ~~34.~~ The District's procurement practices in the past may have contributed to the above identified underutilization of M/WBEs on District contracts.
- ~~45.~~ To offset the effects of negative disparate impacts on Small Businesses owned and managed by Economically Disadvantaged minorities and women with respect to public and private transactions; reduced earnings among County-based Small Businesses owned by minorities and women; reduced business formation among County-based minorities and women; a chronic lack of wealth and financial liquidity among the County's minority communities; the obstacles and hindrances in obtaining business loans faced by County-based Small Businesses owned by minorities and women; the underutilization of regionally-based Small Businesses owned by minorities and women in public and private-sector business; and the disproportionate levels of poverty among minorities in the County, the purpose of this Division is to establish and implement goals for participation of M/WBEs in procurements, in compliance with all applicable laws.
6. The numerical goals for the participation of M/WBEs in District contracts are commensurate with the availability of M/WBEs to perform District work as established by the evidentiary record.
- ~~557.~~ The District may undertake additional efforts to gather evidence relevant to its compelling interest in remedying discrimination in its geographic and procurement markets and narrowly tailoring any race- and gender-conscious remedies to that evidence.

D. *Definitions.* The following words, terms and phrases, when used in this Subdivision I shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning. Additional terms applicable to Subdivision II are set forth in such subdivision.

- ~~1. Annual Participation Goals means the targeted levels of participation established by the District for the annual aggregate participation of MBEs and WBEs in procurement contracts.~~
- ~~21.~~ 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. 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.
3. Broker means a Person who or which neither manufactures the supplies, equipment or goods supplied ~~nor~~ owns or operates a store, warehouse or other establishment (and related distribution equipment) in which it maintains, consistent with industry standards, an inventory of

the supplies, equipment or goods, ~~materials or supplies~~ required for performance of the ~~Contract~~ contract for sale in the normal course of business. A Broker provides no substantial service other than acting as a conduit between his or her supplier and his or her customer.

- ~~34.~~ Business means a sole proprietorship, partnership, corporation, limited liability company, Joint Venture or any other business or professional entity.
- ~~5.~~ 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 (~~"M/WBE Directory"~~) or registration as a minority or women owned business by a reciprocal agency acceptable to the County.
- ~~46.~~ Certified Firm means a firm that has been accepted by the County as Certified.
- ~~7.~~ Commercially Useful Function shall have the meaning set forth in subsection J. of this Subdivision.
- ~~58.~~ 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 general contract with the District, other than for construction, and includes all partners and Affiliates Business.
- ~~11.~~ Contract Specific Goals means the goals established under this Subdivision that are based upon relevant factors including, but not limited to, the availability of MBEs or WBEs in the scopes of work of the ~~Project~~ project.
- ~~812.~~ District means the Forest Preserve District of Cook County and its participating Using Department.
- ~~13.~~ District Marketplace means the six-county region, currently the counties of Cook, DuPage, Kane, Lake, McHenry and Will.
- ~~914.~~ 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 ~~2011~~ 2008.
- ~~1015.~~ Expertise means demonstrated skills, knowledge or ability to perform, as defined by normal industry practices, including licensure where required, in a field.
- ~~11.~~ Good Faith Efforts ~~shall have the meaning set forth in this Subdivision.~~
- ~~1216.~~ 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 such goals.
- ~~17.~~ Joint Venture means an association ~~formed by~~ of two (2) or more ~~Persons (as this term is defined below) to carry out a single~~ Businesses proposing to perform a for profit business enterprise, ~~for which purpose they combine their expertise, property, capital, efforts, and skills. 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.~~

- ~~13~~18. *Local Business* means a Business located within the ~~District's~~District Marketplace which has the majority of its regular, full time work force located within the ~~District's~~District Marketplace.
- ~~14~~19. *Local Small Business* means a Local Business which is also a Small Business.
- ~~15~~20. *Manufacturer* means a 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 ~~for a Procurement~~under the contract and of the general character described by the specifications.
- ~~16~~21. *Minority Business Enterprise* or *MBE* means a Business:
- 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;
  - Whose management, policies, major decisions and daily business operations are independently managed and controlled by one (1) or more Minority Individuals;
  - Which performs a Commercially Useful Function;
  - Which is a Certified Firm; and
  - Which is a Local Small Business.
- ~~17~~22. *Minority Individual* means ~~an individual~~a natural person in one (1) of the following groups:
- African-Americans or Blacks, which includes persons having origins in any of the Black racial groups of Africa;
  - Hispanic-Americans, which includes persons ~~of~~who are Mexican, Puerto Rican, Cuban, Caribbean, Dominican, Central or South American, regardless of race;
  - Native-Americans, which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians; or
  - 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
  - ~~Other~~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.
- ~~18~~23. *Owned* means having all of the customary incidents of ownership, including the right of disposition, and ~~the sharing in all of the risks, responsibilities~~ and profits commensurate with the degree of ownership ~~interest~~.
- ~~19~~24. *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.
- ~~20~~25. *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 Certified MBE or WBE, provided that the other ~~Person~~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 a spouse, an individual's Personal Net Worth includes only that individual's share of such assets. An individual's 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.

~~24~~26. *Program* means the Minority- and Women-Owned Businesses Enterprise General Program established in this ~~division, and shall include the Public Works Participation Program~~ Subdivision.

~~22. Program Goals means the goals set forth in subsection H. of this Subdivision.~~

~~23~~27. *Program Goals* mean the targeted levels of participation established by the District for the periodic aggregate participation of MBEs and WBEs in District non-construction contracts

28. *Public Works* means all fixed works constructed or demolished by the ~~County~~District, or paid for wholly or in part out of public funds administered by the ~~County~~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 ~~the County local government.~~ "Public Works" includes any maintenance, repair, assembly, or disassembly work performed on equipment whether owned, leased, or rented. "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.~~

~~24~~29. *Public Works Contracts* means contracts for Public Works.

30. *Purchasing Agent* means the Purchasing Agent of the District.

~~25~~31. *Regular Dealer* means a 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 for under the Procurement 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 Person must be an established ~~business~~regular Business that engages, as its principal business and under its own name, in the ~~Procurement~~purchase and sale or lease of the products in question. A 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 Person both owns and operates distribution equipment for the products. Any supplementing of ~~such Person's~~ a Person's distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis. Packagers, ~~manufacturer~~manufacture representatives, or other Persons who arrange or expedite transactions are not Regular Dealers.

~~26~~32. *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 Person seeks to perform on ~~Contracts~~contracts. A Person is not an eligible small business enterprise in any calendar fiscal year in which its gross receipts, averaged over the Person's previous five (5) fiscal years, exceed the size standards of 13 CFR Part 121.

~~27~~33. *Socially Disadvantaged* means ~~an individual 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.

~~28~~34. *Using Department* means the department ~~within~~as defined by the District responsible for initiating the procurement process.

~~29~~35. *Utilization Plan*" means a plan for utilization of M/WBEs described in subsection J. of this Subdivision.

~~30~~36. *Woman* means a natural person of the female gender.

~~31~~37. *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.

E. *Race- and Gender-Neutral Measures to Implement the Program.* The District has adopted and shall continue to develop and use race- and gender-neutral measures to facilitate the participation of all firms in the procurement process. These measures include, but are not limited to, the following:

1. Establishing schedules for submitting Bids and Quotations with adequate time frames for identifying and contacting M/WBEs qualified to participate in the ~~Procurement~~procurement;
2. Segmenting ~~Procurements~~procurements 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. Holding pre-Bid conferences, where appropriate, to explain the projects and to encourage Contractors to use available qualified M/WBEs;
5. Reviewing retainage, bonding and insurance requirements to eliminate unnecessary barriers to contracting with the District;
6. Collecting information from all Contractors detailing the Bids or proposals received from all subcontractors for ~~Procurements~~procurements and the expenditures to M/WBEs;
7. At the discretion of the CCA, in cooperation with the Purchasing Agent, periodically entering into a procurement process without Program Goals or ~~Project~~Contract Specific Goals in order to determine MBE and WBE utilization in the absence of such goals;
8. Referring complaints of discrimination to Cook County's Commission on Human Rights, or other appropriate authority, for investigation.

F. *Program Administration.*

1. The CCA, in conjunction with the District's Purchasing Agent and the CCD, shall administer the Program. 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 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. Verifying that Persons interested in participating in the Program ~~have M/WBE certifications from the County of Cook and/or the City of Chicago, are Certified~~ and monitoring the directory of Certified M/WBEs maintained by Cook County.
  - d. Establishing Contract Specific Goals, in collaboration with the Using Department, based upon the availability of M/WBEs to provide the supplies, materials and equipment or services required by the ~~Contract~~contract.
  - e. Monitoring ~~Contracts~~contracts to evaluate compliance with Contract Specific Goals and commitments.
  - f. Cooperating with and providing assistance to Using Departments to facilitate participation by M/WBEs in ~~Procurements~~procurements.
  - g. Reviewing, approving, and, if necessary, rejecting Utilization Plans for achievement of Contract Specific Goals, evaluating the extent to which goals were achieved.
  - h. Monitoring contracts to ensure compliance with subsection O. of this Subdivision, Prompt Payment of M/WBEs.
  - i. Receiving, reviewing, and acting upon complaints and suggestions concerning the Program.
  - j. Evaluating the effectiveness and utility of the Program.
  - k. Monitoring the Program and the District's progress towards the Program Goals.
  - l. Impose sanctions and penalties as described in Subsection R.
2. The CCA shall report to the Contract Compliance ~~committee~~Committee on an annual basis, or as requested by the Contract Compliance Committee, information regarding the administration of the Program and ~~its~~ progress toward achieving the Program Goals.
  3. Using Departments shall cooperate with the CCA in the administration of the Program, specifically including assisting the CCA with setting Contract Specific Goals and assisting in the identification of available MBEs and WBEs.
  4. Intergovernmental Agreement 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. *Contract Compliance Committee.* The Contract Compliance Committee ("CCC") shall be a Standing Committee of the Board, consisting of seven (7) members of the Board selected as set forth in Title 1, Chapter 5, Section 1-5-2 of the Code. The CCC shall review procedures, proposed modifications to the Program or this Section 1-8-5, and complaints as referred by the CCA or the Purchasing Agent.
- H. *Program Goals.*
1. The District aspires to the following annual Program Goals: A goal of twenty-five (25) percent of the annual total dollar amount of ~~Contracts~~contracts other than Public Works Contracts to MBEs, and ten (10) percent of the total dollar amount of such ~~Contracts~~contracts to WBEs.
  2. 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 CCD, the Purchasing Agent and the Using Agency/Department shall establish Contract Specific Goals for each ~~Contract. In establishing a Contract Specific Goal, the CCA~~contract, which shall consider

~~the availability of sufficient Certified MBEs and WBEs be incorporated into each bid notice and Request for the supplies, materials and equipment or services required as part of the Procurement Proposals.~~ No goal shall be treated as a quota nor shall it be used to discriminate against any Person on the basis of race, color, national origin, religion or sex.

- I. *Program Eligibility.* Only Businesses that meet the criteria as determined by the CCD for the County of Cook, for certification as a MBE or WBE may participate in the Program.
- J. *Utilization Plan; Commercially Useful Function.*
  1. *Utilization Plan Required.* The Purchasing Agent shall include in ~~Contract Documents~~contract documents for ~~Contracts~~contracts covered by this Division, a requirement that a Utilization Plan be submitted from a bidder or proposer that either: (i) commits to M/WBE participation equal to or greater than the applicable ~~Program Goals or Contract Specific Goals~~, or (ii) requests a waiver of all or a portion of a ~~Program Goals or Contract Specific Goals~~ based on the ~~bidder's~~bidder's or proposer's ~~good faith efforts~~Good Faith Efforts to meet the goals. The Utilization Plan shall be in such form and contain such information as is required by the CCA. Failure to include a Utilization Plan will render the submission not ~~Responsive~~responsive. 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 between the Contractor and all relevant M/WBEs and the Contractor and the District. The CCA shall review and either approve or reject the Utilization Plan. For purposes of ~~evaluation~~evaluating a Utilization Plan, only M/WBEs which perform a Commercially Useful Function shall be considered.
  2. *Commercially Useful Function.* To be considered in meeting Goals, a M/WBE must perform a Commercially Useful Function, ~~as determined pursuant to subsection K.~~ "Commercially Useful Function" means the performance of a distinct element of work required for the ~~Procurement~~procurement, with the requisite skill and ~~expertise~~Expertise.
    - a. In the case of a ~~Procurement~~procurement of goods or equipment, ordering from a manufacturer or distributor for delivery directly to the Using ~~Agency~~Department is not a Commercially Useful Function; provided, however, that to the extent such practice is consistent with normal industry practices, ~~an~~a M/WBE subcontractor may enter into second tier subcontracts. However, if ~~an~~a M/WBE Contractor or subcontractor subcontracts a significantly greater portion of the work of the ~~Contract~~contract than would be expected on the basis of normal industry practices, the M/WBE shall be presumed not to be performing a Commercially Useful Function.
    - b. In the case of a ~~Procurement~~procurement of services, a Person which subcontracts with another Person to perform the services required does not perform a Commercially Useful Function unless such Person also performs significant supervisory or management responsibilities. A Broker does not fulfill a Commercially Useful Function. In the case of a Joint Venture partner, each Joint Venture partner must perform a Commercially Useful Function.
  3. M/WBE does not perform a Commercially Useful Function if its role is limited to that of an extra participant in the ~~Contract~~contract through which funds are passed in order to obtain the appearance of M/WBE participation.
  4. When ~~an~~a M/WBE is presumed not to be performing a Commercially Useful Function, the Certified M/WBE and the Person seeking to include that M/WBE in its Utilization Plan, may present evidence to rebut this presumption.
  5. Once a Utilization Plan has been approved, the Contractor cannot make changes to the Utilization Plan, including substituting M/WBEs named in the Utilization Plan, without the prior written

approval of the CCA, Purchasing Agent and the Using Department. The CCA shall promulgate procedures for changes to the Utilization Plan. 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.

K. *Methods to Achieve Goals and Compliance.* A Person may achieve the applicable Contract Specific Goals in any one (1) or more of the methods set forth below. The same M/WBE, whether as a contractor, subcontractor or supplier, ~~cannot~~may not be utilized duplicatively as ~~both~~ a MBE and a WBE on the same ~~Contract~~contract.

1. *M/WBE as Prime Contractor.* An MBE or WBE may count its own participation toward the achievement of the applicable MBE or WBE goal. Such M/WBE will be required to meet the other ~~goal~~goals by another method described herein. If a WBE is also a MBE, such WBE's participation may count toward either the MBE or WBE Goal but not both.
2. *Joint Venture with One or More M/WBE.* Where a Person engages in a Joint Venture with one (1) or more M/WBEs, the Utilization Plan shall include a written agreement ~~providing~~containing at least the information set forth in this Subsection. The CCA shall consider the following in determining whether the proposed Utilization Plan satisfies the Program Goals based upon such written Joint Venture agreement and the Utilization Plan.
  - a. Each Joint Venture partner's initial capital investment;
  - b. The extent to which ~~the each~~ M/WBE's proposed participation in the performance of the ~~Contract~~contract constitutes a Commercially Useful Function;
  - c. Whether the ~~M/WBE's share~~relevant M/WBE shares in the risks and profits of the Joint Venture ~~is~~are proportional to their ownership interest;
  - d. Whether the relevant M/WBE will have duties, responsibilities, management ~~Control~~control and risk with respect to the Joint Venture in proportion to its ownership interest.
3. *Subcontracting.* A Person may achieve the Contract Specific Goals by means of subcontracting with, or purchasing from one (1) or more M/WBEs.

L. *Request for a Total or Partial Waiver of the Contract Specific Goals; Good Faith Efforts.*

1. Parties submitting bids or proposals may in all instances request a partial or full waiver of one or more established Contract Specific Goals for M/WBE participation. In reviewing a request for a partial or total request for waiver of a Contract Specific Goal, the CCA shall determine whether a Person has made good faith effortsGood Faith Efforts to meet the applicable Goals and to what extent the waiver request should be granted. In determining whether a Person has made ~~good faith efforts~~Good Faith Efforts, the CCA will consider whether the Person has ~~taken the following actions:~~
- a. Reviewed lists of M/WBEs maintained by Cook County and other State and local governments and agencies to identify qualified M/WBEs for solicitation for Bids;
- b. Divided ~~Procurement~~procurement requirements into small tasks or quantities. This shall include, where appropriate, whether the person has broken out ~~Contract~~contract work items into economically feasible units, consistent with the availability of M/WBEs, to facilitate M/WBE participation, even when the Contractor would otherwise prefer to perform these work items with its own forces;
- c. Adjusted any insurance requirements imposed by the Person seeking M/WBEs, or otherwise assisted M/WBEs in obtaining any required insurance, where economically feasible, to encourage participation by M/WBEs;

- d. Made timely attempts to contact M/WBEs providing the type of supplies, equipment, goods or services required for the ~~Procurement~~procurement; and provided them with a convenient and timely opportunity to obtain and review all information concerning the ~~Procurement~~procurement necessary to enable such M/WBE to respond;
  - e. Followed up on initial contacts of M/WBEs to determine if they are interested participating in the ~~Procurement~~procurement;
  - f. ~~Negotiate~~Negotiated in good faith and on a timely basis with M/WBEs to enable them to participate in the ~~Procurement~~procurement. Evidence of such negotiation includes the names, addresses, and telephone numbers of M/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. The Contractor may not reject M/WBEs as being unqualified without sound reasons. That there may be some additional costs involved in finding and using M/WBEs is not in itself sufficient reason for a Contractor's failure to meet the Goals, as long as such costs are reasonable;
  - g. ~~Make~~Made efforts to assist interested M/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;
  - h. ~~Establish~~Established delivery schedules which will encourage participation by M/WBEs, where the requirements of the ~~Procurement~~procurement permit;
  - i. ~~Use~~Used the services and assistance of the ~~CCD's or CCA's~~CCA and the District's staff, the Small Business Administration, the Office of Minority Business Enterprises of the U.S. Department of Commerce;
  - j. Timely ~~notify~~notified appropriate community and minority and women's business organizations identified as assist agencies of the opportunity for participation in the ~~Procurement~~procurement.
  - k. Established and/or maintained a mentor-protégé agreement with one or more M/WBEs that is enforceable and that, in the judgement 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.
2. In determining whether a Bidder or Respondent has made Good Faith Efforts, the levels of participation by M/WBEs set forth in Utilization Plans submitted by other Persons for the same ~~Procurement~~procurement may be considered. For example, if the apparent successful Bidder or Respondent fails to meet the Contract Specific Goals, but meets or exceeds the average M/WBE participation obtained by other Bidders or Respondents, this may be evidence that the apparent successful Bidder or Respondent made Good Faith Efforts.
  3. Where the District requires professional services, the District must be able to call upon those professionals whose particular training and experience are most beneficial to the District.
    - a. The District ~~sets~~aspires to an annual goal of thirty-five (35) percent aggregate M/WBE participation for the total professional services and consulting services utilized by the District.
    - b. A Utilization Plan shall be required, and if a waiver or partial waiver is requested, "good faith" efforts shall be demonstrated as set forth in this subsection L.; provided, however, that such Persons shall not be required to attempt to subcontract with M/WBEs if subcontractors

would not typically be utilized for the type of ~~Procurement~~procurement. In such cases, the Person shall document the reasons for not subcontracting in a waiver request.

- c. The Contractor will endeavor to maximize use of M/WBEs for supplies, equipment, goods or services for such Contractor's business operations not specifically for the ~~Procurement~~procurement.
- d. If such Person is required to have or has an affirmative action plan and goals, such plan and goals shall be submitted with their Utilization Plan. The CCA shall compare such plan and goals with the Person's actual affirmative action achievements and such achievements may be considered by the District in future ~~Procurements~~procurements.

44. Mentor/protégé agreements. Where a contractor enters into mentor/protégé agreement with a M/WBE to improve or develop certain aspects of the business of the M/WBE, the CCA shall evaluate the effect of such agreement as a factor in determining Good Faith Efforts. The mentor/protégé agreement may provide for the contractor to assist the M/WBE in such areas as technical aspects of the M/WBE's business, improving financial management, or providing on-the-job training. To constitute Good Faith Efforts, the mentor/protégé agreement shall satisfy the following requirements.

- a. The M/WBE performs a Commercially Useful Function;
- b. The agreement shall be included in the Utilization Plan; and
- c. The agreement clearly defines the respective responsibilities of the contractor and the M/WBE and includes specific, measurable goals to be attained by both parties through the performance of the agreement. In order to be a factor in establishing best efforts, the mentor/protégé agreement must be for a reasonable period of time.

5. The CCA may grant a total or partial waiver based upon the following criteria:

- a. There are not sufficient M/WBEs capable of providing the supplies, equipment, goods or services required for the ~~Procurement~~procurement;
- b. The ~~Procurement~~procurement cannot reasonably be divided;
- c. The price required by potential M/WBEs is more than ten (10) percent above competitive levels; and
- d. Any other factor relating to ~~good faith efforts~~Good Faith Efforts as set forth in the Person's Utilization Plan.
- e. 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. *Calculating M/WBE Participation.* In calculating a M/WBE's participation, only dollar amounts commensurate with a M/WBE's performance of a Commercially Useful Function may be counted.

- 1. The dollar value of that portion of a ~~Procurement~~procurement that is performed by the ~~M/WBEs~~WBE's own forces shall be counted, including the cost of supplies, materials and equipment furnished by the M/WBE for the ~~Procurement~~procurement, whether purchased or leased (except to the extent purchased or leased from the Contractor or the Contractor's Affiliate).
- 2. The dollar amount of fees or commissions charged by a M/WBE for providing a bona fide service, such as professional, technical, consultant, managerial, insurance brokerage or surety services,

shall be counted, provided the fee is reasonable and not excessive as compared with fees customarily charged for similar services.

3. When ~~an~~ M/WBE is a Joint Venture partner, only the dollar value of the distinct, clearly defined work performed by the M/WBE with its own forces shall be counted.
4. ~~Only the dollar value must be commensurate with the work the M/WBE actually performs. 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.
55. Only the dollar amount actually paid to the M/WBE shall be counted toward the participation of a M/WBE.
6. One hundred (100) percent of the cost of the supplies, equipment or goods obtained from a M/WBE Manufacturer or Regular Dealer shall be counted.
67. One hundred (100) percent of the fees or transportation charges for the delivery of supplies, equipment, materials or goods shall be counted only if the payment of such fees is a customary industry practice and such fees are commensurate with fees customarily charged for similar services.
78. ~~If for reasons associated with malfeasance, fraud or other factors set forth in Subsection R. Sanctions and Penalties, an M/WBE ceases to be Certified during its performance on a Procurement~~ procurement, the dollar value of work performed under a ~~Contract~~ contract with that ~~Person~~ M/WBE after it has ceased to be Certified shall not be counted.
8. ~~Only~~ If for other reasons not associated with malfeasance, fraud or other factors set forth in Subsection R. Sanctions and Penalties, an M/WBE ceases to be Certified during its performance on a procurement, the dollar amount actually paid to the M/WBE value of work performed under a contract with that M/WBE after it has ceased to be Certified shall be counted toward for the remaining term of the participation of a M/WBE contract.

N. *Review of Contract Performance.*

1. *Compliance with Utilization Plan.* The CCA shall review the ~~Contractor's~~ Contractor and M/WBE compliance with its Utilization Plan as necessary during the performance of the ~~Contract~~ contract. The CCA may establish such requirements for periodic Contractor and M/WBE reporting on compliance with its Utilization Plan as the CCA determines appropriate and necessary. A Contractor and M/WBE shall be required to provide any additional requested compliance documentation within fourteen (14) days of request by the CCA.
  - a. If the CCA determines that the Contractor or M/WBE has failed to comply with ~~its~~ a Utilization Plan and has failed to provide a cure accepted by the CCA in his or her discretion,

the CCA shall notify the Purchasing Agent of such failure. The Purchasing Agent shall then send notice of default to the Contractor or M/WBE, or both, and the Contractor and M/WBE shall have such time to cure the default as is provided in the ~~Contract~~contract. If no such period is provided, the Contractor or M/WBE, as the case may be, shall have ten (10) days to cure such default. For purposes of this section, providing a plan for bringing the ~~Contract~~contract into compliance with the Utilization Plan may constitute a cure; if compliance cannot reasonably be achieved within the applicable cure period; and if compliance is achieved in accordance with such plan.

- b. If a Contractor or M/WBE fails to provide any documentation required by the CCA, the CCA shall notify the ~~CPO~~Purchasing Agent of such failure. The Purchasing Agent shall then send notice of default to the Contractor or M/WBE, and the Contractor or M/WBE shall have such time to cure the default as is provided in the ~~Contract~~contract. If no such period is provided, the Contractor shall have ten (10) days to cure such default.
2. *Bid and Target Market Programs.* To address more specifically the barriers to M/WBE participation as prime Contractors in District work, the CCA may recommend to the Purchasing Agent to institute the following special M/WBE bidding provisions, following determination of the appropriateness of such provisions.
- a. In connection with the award of a ~~Contract~~contract subject to competitive bidding on which a M/WBE has bid and where the M/WBE is bidding on the item in question for the first time; and has never successfully bid on a Forest Preserve District of Cook County purchasing contract, the CCA may, at the opening of the bids on the item, compare the M/WBE Bid with the lowest Bid, and, if the M/WBE's Bid is closely competitive as defined by guidelines to be established by the CCA with that of lowest actual Bids, direct the Purchasing Agent to declare the M/WBE the successful Bidder. A M/WBE may use this procedure only once to become the successful Bidder on any particular item. Thereafter, the M/WBE must be totally competitive in terms of price to be the successful Bidder.
  - b. The Contract Compliance Administrator shall develop and coordinate a target market program as follows:
    - (i) The CCA shall review the availability of M/WBEs providing various goods and services and shall identify for inclusion in a potential program for bidding among M/WBE Persons certain commodity areas with sufficient M/WBE availability to ensure that the District receives a competitive price. The CCA shall report his/her findings and recommendations to the Contract Compliance Committee;
    - (ii) Upon a determination by the CCA that such a program is advisable for any particular commodity procurement; the CCA will institute the following procedures:
      - (a) The CCA will notify the Purchasing Agent of identification of those commodity codes appropriate for a target market program;
      - (b) To the extent practicable, the Purchasing Agent, with the aid of the CCA, shall divide procurement in the designated commodity areas into economically feasible sizes to facilitate Bids or offers from M/WBEs and shall designate contracts to be offered under the target market program;
      - (c) The Purchasing Agent shall offer M/WBEs the opportunity to bid on such contracts in a limited competition;
      - (d) All standard District rules for bidding will then become effective and, provided that at least three (3) M/WBEs Bid or make an offer on the contract, the lowest Responsive and Responsible Bidder among the M/WBEs will receive the contract;

- (e) In the event less than three (3) M/WBEs Bid or make an offer on the ~~Contractcontract~~ or if there is no Responsive Bid or offer received from a Responsible M/WBE, the Purchasing Agent shall rebid the ~~Contractcontract~~ not subject to the target market program.
- (iii) Participation in the target market program shall be limited to Minority Business Enterprises, Women's Business Enterprises and Joint Ventures consisting exclusively of Minority Business Enterprises, Women's Business Enterprises or both. The M/WBE Contractor on a target market ~~Contractcontract~~ may subcontract up to forty-nine (49) percent of the dollar value of the target market ~~Contractcontract~~ to subcontractors who are not Minority Business Enterprises or Women's Business Enterprises.
- O. *Prompt Payment of Firms.* If an invoice from a Contractor includes payment for supplies, equipment, goods or services furnished by a M/WBE, Contractor shall pay such M/WBE for such supplies, equipment, goods or services within fourteen (14) days after receipt of payment from the District. The CCA shall investigate any complaint or charge of excessive delay in payment, and shall report the results of such investigations to the Contract Compliance Committee and to the District Comptroller. Failure of Contractor to comply with this Section shall constitute a material breach of the ~~Contractcontract~~.
- P. *Reporting and Review.* The CCA shall report to the Board on an annual basis with respect to the following:
1. The percentage of the total dollar amount of ~~Procurementsprocurements~~ for such year actually received by M/WBEs;
  2. The number of MBEs and WBEs available for participation in ~~Procurementsprocurements~~, by category;
  3. An evaluation of the effectiveness of this division in ensuring equitable participation by M/WBEs in ~~Procurementsprocurements~~;
  4. An assessment of the continuing need for the Program;
  5. Identification of any enforcement problems; and
  6. Any recommendations with respect to modifying or improving the Program, including discontinuing or modifying Program Goals in those cases where Minority Business Enterprises and Women's Business Enterprises no longer are disadvantaged by the effects of discrimination in their participation in ~~Procurementsprocurements~~.
- Q. *Prohibited Provisions.* 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.
- ~~RR.~~ *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 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 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. Failed in bad faith to fulfill Contract Specific Goals, thereby materially breaching the contract; or
  - c. 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 R (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.).

S. *Review and Sunset.*

1. On or before the sunset date of this Ordinance, the District shall review new evidence to determine whether it has a compelling interest in continuing narrowly tailored remedies to redress discrimination against M/WBEs so that the District will not function as a passive participant in a discriminatory marketplace.
2. This Ordinance shall sunset on or before June 30, ~~2016~~2021.