

June 28, 2023

**EXTEND AND AMEND THE REMEDIAL PROGRAM FOR MINORITY AND WOMEN-OWNED  
BUSINESS ENTERPRISE PARTICIPATION IN CONSTRUCTION SERVICES**

**THE CHIEF EXECUTIVE OFFICER RECOMMENDS:**

That the Board extend and amend the Remedial Program for Minority and Women-Owned Business Enterprises Participation in Construction Projects, as amended, which is attached hereto for a period of five years, until December 31, 2028.

**HISTORY:**

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

Additional research and data collection to prepare for the disparity report required an extension of the policy set forth to expire December 31, 2021. The policy was extended through June 30, 2023, to be renewed on July 1, 2023, and expire December 31, 2028.

**PURPOSE:**

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

**PROGRAM EXTENSION TERM:**

The Program is extended, as amended herein, for the period commencing July 1, ~~2017~~2023 and ending December 31, ~~2024~~2028.

**DESCRIPTION:**

The Program will continue to: (1) apply to all construction projects required by the Board to be awarded through competitive bid (currently \$10,000 and above), (2) operate the same annual Aspirational Goals for M/WBE participation in all district-wide construction projects of 30% to qualified Minority-owned Business Enterprises and 7% to qualified Women-owned Business Enterprises, (3) authorize the Office of Business Diversity (OBD) to establish Contract Specific Goals for individual construction projects, ~~and~~ (4) authorize OBD to specify certain construction projects to be let without M/WBE participation goals in order to evaluate the marketplace, and (5) provide cited goals for individual prime contractors.

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

The Board of Education of the City of Chicago



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

**Effective**

***[July 1, 2023]***

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

**POLICY STATEMENT**

This ~~Program~~ Remedial Program for Minority and Women Owned Business Enterprises (“Program”) is continued by the Chicago Board of Education (the “Board”), upon the recommendation of the Chief Executive Officer (“CEO”), based upon (1) the Board’s findings that it has been a passive participant in discriminatory practices against racial and ethnic minorities and women in the procurement of goods and services industry in Chicago, and that it has a compelling interest in remedying that passive discrimination, and (2) its desire to continue narrowly tailored remedies to address that compelling interest in order to promote equitable opportunity to compete for contracts for provision of construction services

**I. FINDINGS**

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

harassment; discrimination by lending institutions and other sources of capital; reduced opportunities for minority and women subcontractors to bid or quote to majority Prime Contractors; exclusion from and discriminatory treatment by the construction trade unions; exclusion from business and professional networks critical to entrepreneurial success; and discrimination by surety bonding companies, insurance companies and other entities that are integral to the contracting marketplace.

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

- “Unbundling” or down-sizing contracts, to facilitate participation by smaller businesses
- Providing longer bid lead times

**1.15** The focus groups conducted by the consultant confirm that M/WBEs continue to face barriers to participation in the Board procurement process for goods and services. Specifically, the findings from the focus groups demonstrate that those barriers continue to exist include:

- Difficulty obtaining public sector prime contracts;
- Difficulty obtaining bonding and insurance;
- Difficulty securing subcontracting opportunities in the public sector;
- Difficulty obtaining contracts in the private sector; and
- Difficulty working with vendors who use M/WBE information for purposes of securing a bid or putting together a proposal submission and who do not ultimately utilize the services of the M/WBEs

**1.16** The impacts for the CPS Program consultant interviewed 101 individuals about their experiences and solicited suggestions for change. A review of the interviews occurred on several dates in December 2021. The focus group information and the related reports from expert consultants further demonstrates that the following race- and gender-neutral measures help the narrow tailoring aspect of a race-conscious preferential procurement program and must be used to overcome those barriers and assist in the growth and development of financially stable M/WBEs:

- Improving the timeliness of payments
- Creating a small and local business target market program
- Implementing contract specific subcontracting goals
- “Unbundling” or downsizing contracts to facilitate participation by smaller businesses, such as M/WBEs
- Providing longer bid lead times

**1.17** The disparity ratio is based on weighted availability. The courts have held that disparity results must be analyzed to determine whether the results are “significant”. There are two distinct methods to measure a result’s significance. First, a “large” or “substantively significant” disparity is commonly defined by courts as utilization that is equal to or less than 80% of the availability measure. A substantively significant disparity supports the inference that the result may be caused by the disparate impacts of discrimination.<sup>1</sup> Second, statistically significant disparity means that an outcome is unlikely to have occurred as the result of random chance alone. The greater the statistical significance, the smaller the probability that it resulted from random chance alone.<sup>2</sup> A more in-depth discussion of statistical significance is provided in Chapter IV and Appendix C of the Disparity Report.

**1.158** Based upon a thorough review of the results of the Board’s 1991 Remedial Plan; the evidence presented and findings made at the BAGC trial; the information presented to the City Council and its consequent decision to revise the City of Chicago’s ordinance; other recent judicial decisions regarding the constitutional standards for affirmative action programs; information presented during the April 2006 CPS focus groups and compiled in a report by Collette Holt; and a report entitled, “Availability and Utilization of Minority- and Women-Owned Businesses in the Procurement Activities of the Chicago Public Schools,” prepared by Dr. David G. Blanchflower, Professor of Economics Dartmouth College, the Board adopted in July 2006 under Board Report 06-0726-PO9 a Business Diversity Program for Construction Projects (the “Program”) which was later amended by the Board in May 2007 under Board Report 07-0523-PO1.

<sup>1</sup> See U.S. Equal Employment Opportunity Commission regulation, 29 C.F.R. §1607.4(D) (“A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.”).

<sup>2</sup> A chi-square test – examining if the utilization rate was different from the weighted availability – was used to determine the statistical significance of the disparity ratio.

- 1.169** Based upon a thorough review of the foregoing information (supra, at sections 1.1 – 1.15); other recent judicial decisions regarding the constitutional standards for affirmative action programs; recent national and localized demographic evidence; recent labor and employment statistics, including national and local statistics, generally, as well as those specific to the construction industry; and the November, 2011 report entitled “Availability and Utilization of Minority- and Women-Owned Businesses for the Chicago Public Schools,” prepared by Dr. David G. Blanchflower, Professor of Economics Dartmouth College, the Board adopted in December 2011 under Board Report 11-1214-PO1 a Remedial Program for Minority and Women Owned Business Enterprise Participation in Construction Projects (the “Program”) which built upon the 1991 Plan. The Program was authorized for a period beginning January 1, 2012 until December 31, 2016.
- 1.1720** Based upon a thorough review of the foregoing information (supra, at sections 1.1 – 1.16); relevant judicial decisions regarding the constitutional standards for affirmative action programs; recent national and localized demographic evidence; recent labor and employment statistics; including national and local statistics, generally, as well as those specific to the construction industry; and the October 2016 report entitled “An Evaluation of the Chicago Public Schools Minority- and Women-Owned Businesses Program in Construction” prepared by Dr. David G. Blanchflower, Professor of Economics, Dartmouth College, the Board hereby continues the Program as specified herein.
- 1.21** Additional extension of the Remedial program is relevant using methodology for the new study, which embodies the principles of *City of Richmond v. Croson*, Seventh Circuit Court of Appeals case. In this Study, the consultants and researchers determined CPS’ utilization of M/WBEs on CPS contracts during fiscal years 2016 through 2020; the availability of these firms as a percentage of all firms in CPS’ geographic and industry market areas; and any disparities between the CPS’ utilization of M/WBEs and M/WBE availability. Consultants and researchers further analyzed disparities in the Chicago Metropolitan Area and the wider Illinois economy, where affirmative action is rarely practiced, to evaluate whether barriers continue to impede opportunities for minorities and women when remedial intervention is not imposed. Consultants and researchers also gathered qualitative data about the experiences of minority- and woman-owned firms in obtaining CPS contracts and associated subcontracts. Based on these findings, consultants and researchers evaluated the M/WBE Program for conformance with constitutional standards and national best practices for government contracting affirmative action programs.
- 1.22** Update Program Administration Policies and Procedure. While the current Program has produced admirable results, these revisions can strengthen CPS’ efforts and legal sensibility of the program. The disparity report outlines the metrics to adopt. CPS defines this as “as products or services that cannot be identified in the direct fulfillment of CPS contracts”.

The Program documents to reflect actual practice. For example, requests for waivers of contract goals are reviewed by OBD, not the Waiver Committee, that is established in the documents.

Acceptable certifications to agencies whose criteria meet the federal judicial test that a firm must be small and owned by a majority of socially and economically disadvantaged individuals. In practice, this means a limit on the size of the firm’s annual gross receipts and on the personal net worth of the minority or woman owner(s). While the program documents refer to the personal net worth limitation imposed by the City of Chicago on eligibility for its M/WBE program for construction contracts, CPS also accepts certifications from the State of Illinois Business Enterprise Program, which sets an extremely high size limit and imposes no personal net worth limit. All acceptable certifications must be reviewed for conformance with constitutional standards to meet standards of the MBE and WBE Certifications.

Asian-Pacific Indian, Asian-Americans, Indigenous, and Native-Americans are presumptively socially and economically disadvantaged for purposes of Program inclusion. They must be eligible to meet goal credit if they are certified by a recognized agency.

The policy and procedures for a bidder to submit its good faith efforts (“GFE”) to meet a contract goal. These must include:

1. The bidder must make GFE the same as one that met the goal, even if the proposed participation is zero. Vendors must report in writing the request for waivers and provide evidence for reasons they believed waivers or reductions of the contract goal(s) will not be approved and therefore they do not bid on contracts where they might fall short of the goal(s).
2. The board is following the judicially approved, and industry accepted, best practices for defining and reviewing GFE submissions. The USDOT DBE program is an excellent model. This program does not operate as a quota system or quota limits. The policy revisions reflect that prime vendors, suppliers, distributors is not a quota program and does not operate as such.
3. OBD will develop and disseminate written procedures to appeal program decisions, such as the failure to make GFE to meet a contract goal. This will comport with basic procedural due process standards. The disparity report references the USDOT program provisions can provide a starting point for drafting these additions, and edits for GFE.
4. The Board will provide a short period after bid or proposal submission to submit documents supporting the Utilization Plan. All MBE and WBE participation must list participation on the Plan with the bid or proposal, but the Letter(s) of Intent (“LOIs”), certification letters, requests for reduction of the goal(s) and accompanying GFE, etc., must be submitted up to 48 hours after bid or proposal submission.
5. The Board will continue to follow the best practices on substitution of certified firms during contract performance, vendor performance audit, as described in the USDOT DBE program regulations The Board, District, CPS, does not operate the remedial program as a quota.

## II. DEFINITIONS

- 2.1 **Affiliate:** A person or entity that directly or indirectly through one or more intermediaries’ controls or is controlled by, or is under common control with, the person or entity. In determining whether persons or entities are affiliates, the Board shall consider all appropriate factors, including common ownership, common management and contractual relationships. Affiliates shall be considered together in determining whether a firm is a small business enterprise.
- 2.2 **Appeals Process:** The process for review of Program compliance and waiver decisions made by the Office of Business Diversity in accordance with the Program.
- 2.3 **Area of Specialty:** The description of an MBE’s or WBE’s activity that has been determined by the Chief Procurement Officer to be most reflective of the firm’s claimed specialty or expertise. Each MBE and WBE letter of certification contains a description of the firm’s Area of Specialty. Credit toward the Contract Specific Goals is limited to the participation of MBE/WBE firms performing within their Area of Specialty. The City does not make any representation concerning the ability of any MBE or WBE to perform work within its Area of Specialty. It is the responsibility of the Bidder or Contractor to determine the capability and capacity of MBEs and WBEs to perform the work proposed.
- 2.4 **Board Report:** A document presented to the Board at its monthly meeting which reports to the Board Members information necessary to make a knowledgeable decision regarding a transaction or matter that requires Board approval or acceptance. In general, a Board Report is required i) when money is received, ii) when money is spent, or iii) for agreements in which no money is received or spent but which commits the Board to responsibilities beyond its normal business obligations
- 2.5 **Chicago Board of Education (“Board”) or the District:** The body politic and corporate, known as the “Board of Education of the City of Chicago” and also known as Chicago Public Schools (“CPS”) or School District 299.

- 2.6 Chief Procurement Officer or CPO:** The Chief Procurement Officer of the Chicago Public Schools or their designee.
- 2.7 Certification Letter:** A letter issued by the City of Chicago, Cook County, or any other local government agencies, municipalities, federal, and state acknowledging that a Bidder is certified as a Minority-owned Business Enterprise (“MBE”) and/or a Women-owned Business Enterprise (“WBE”) in a specialized area.
- 2.8 Commercially Useful Function:** Responsibility for the execution of a distinct element of the work of the contract which is carried out by actually performing, managing, and supervising the work involved, or fulfilling responsibilities as a joint venture. Evidencing the responsibilities and risks of a business owner such as negotiating the terms of (sub)contracts, taking on a financial risk commensurate with the contract or its subcontract, responsibility for acquiring the appropriate lines of credit and/or loans, or fulfilling responsibilities as a joint venture partner as described in the joint venture agreement.
- 2.59 Construction Contract or Transaction:** Any contract, purchase order or agreement (other than a lease of real property) for the construction, rehabilitation, repair or improvement of any building, sidewalk, alley, other structure or infrastructure, and any other construction-related procurement required by the Board to be bid.
- 2.610 Contractor:** Any person or business entity that seeks to enter into a construction contract with the Board, and includes all partners, affiliates and joint ventures of such person or entity.
- 2.711 Contract Specific Goals:** The subcontracting goals for Minority Business Enterprise (MBE) and Women Business Enterprise (WBE) participation established for a particular contract based upon the availability of MBEs and WBEs to perform the anticipated scopes of work of the contract, and the Board’s progress towards meeting its aspirational goals. Contract Specific Goals shall be established for all contracts. The subcontracting goals for M/WBE participation established for a particular contract based upon the availability of M/WBEs to perform the anticipated scopes of work of the contract, and CPS’ progress towards meeting the aspired goals.
- 2.12 Construction Contracts MBE/WBE Participation Goals** CPS’ overall goals are to award not less than 30 percent of the annual dollar value of all contracts for construction, facilities, maintenance, and architectural services, engineering, and other construction projects to qualified MBEs and 7 percent of the annual dollar value of such Contracts to qualified WBEs. These goals have exclusions: (a). Utilities Supply of Electricity and Gas (b.) Tuition-based programs or tuition payments to other educational institutions (c.) Intergovernmental agreements (d). Information Technology license agreements for hardware and software of a proprietary nature (e). Grant-funded contracts where vendor is named or stipulated in the grant
- 2.813 Economically Disadvantaged:** An individual whose personal net worth is less than ~~\$2,000,000.00~~ \$2,491,482.03, adjusted annually for inflation, such annual adjustment to begin January 2022, based on the Consumer Price Index – Urban Wage Earners and Clerical Workers (Chicago All Items) published by the United States Bureau of Labor Statistics. This economic disadvantage threshold has been set forth with the certifying agency of the City of Chicago.
- 2.914 Good Faith Efforts:** Actions undertaken by a contractor to achieve a contract specific goal that, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program’s requirements.
- 2.4015 Joint Venture:** An association of two or more persons or entities, or any combination of types of business enterprises and persons numbering two or more, proposing to perform a single for-profit business enterprise, in which each joint venture partner contributes property, capital, efforts, skill and knowledge, and in which the MBE or WBE is responsible for a distinct, clearly defined portion of the work of the contract and whose share in the capital contribution, control, management, risks, and profits of the joint venture is equal to its ownership interest. Partners to a joint venture must have a written agreement specifying the terms and conditions of the relationships between them and their relationship and responsibilities to the contract.

**2.4116 Minority:** The Board adopts the following definition of “minority”:

- a. any individual in the following racial or ethnic groups, members of which are rebuttably presumed to be socially and economically disadvantaged:
  1. African-Americans or Blacks, which includes persons having origins in any of the Black racial groups of Africa;
  2. Hispanics or Latinx, which includes persons of Spanish culture with origins in Mexico, South or Central America Latin America or the Caribbean islands, regardless of race; and
- b. individual members of other groups, including but not limited to Asian-Americans, Asian-Pan-Pacific-Indian-Americans, Arab-Americans and Native-Americans, who have submitted an affidavit to the City, County of Cook or other governmental agency as determined by their identification indicating that they are socially and economically disadvantaged by having suffered racial or ethnic prejudice or cultural bias within American society, without regard to individual qualities, resulting in decreased opportunities to compete in Chicago area markets or to do business with the Board.

**2.4217 Minority Business Enterprise (MBE):** A business that is certified as a Minority Owned Business by the City of Chicago (the “City”), County of Cook or such other government entity recognized by OBD, which has determined that the management, policies, major decisions and daily business operations are independently managed and controlled by one or more Economically Disadvantaged minority persons. OBD reserves the right to make its own determination as needed.

**2.4318 M/WBE:** A collective term used in the context to include both MBEs (Minority Owned Business Enterprise) and WBEs (Women Owned Business Enterprise).

**2.4419 Office of Business Diversity (OBD):** The department with primary responsibility for administering and monitoring the M/WBE Program to ensure inclusion of qualified M/WBE companies on CPS contracts.

**2.4520 Owner’s Representative:** Consists of Construction Manager, Program Manager, Project Manager, and Design Manager.

**2.21 Non-Construction Contracts:** MBE/WBE Participation Goals CPS’ overall goals are to award not less than 30 percent of the annual dollar value of all contracts for goods and services other than construction to qualified MBEs and 7 percent of the annual dollar value of such Contracts to qualified WBEs. These goals have exclusions: (a). Utilities Supply of Electricity and Gas (b.) Tuition-based programs or tuition payments to other educational institutions (c.) Intergovernmental agreements (d). Information Technology license agreements for hardware and software of a proprietary nature (e). Grant-funded contracts where vendor is named or stipulated in the grant

**2.4622 Personal Net Worth:** The net value of the assets of an individual after total liabilities are deducted. An individual's personal net worth does not include the individual's ownership interest in an applicant or other MBE or WBE or the individual's equity in ~~his or her~~ their primary place of residence. As to assets held jointly with ~~his or her~~ their spouse, an individual's personal net worth includes only that individual's share of such assets. An individual's net worth also includes the present value of the individual's interest in any vested pension plans, Individual Retirement Accounts, 401(k) accounts, or other retirement savings or investment programs less the tax and interest penalties that would be imposed if the asset were distributed at the present time. Pursuant to government agencies and certifying agencies the standard of qualifying as an MBE and WBE, personal net worth shall not exceed \$2,491,482.03 effective as the date of the policy publishing. This is the policy of the certification program for the City of Chicago. Other certifying agencies do not have limits of net worth. The disparity report of November 2022 recommends construction companies’ network is not limited to the threshold set by the City of Chicago. The metric of net worth is in compliance with the Federal Government.

**2.1723 Prime Construction Contractor or Supplier:** A person or entity that enters into a contract, purchase order or agreement with the Board to provide goods and/or services.

**2.24 Sited Goals:** Contract-Specific Goals – that are contractually agreed upon and executed above or below the district’s aspirational goals of 30% MBE and 7% WBE for participation to be established for the term of the contract.

**2.1825 Subcontractor, ~~or Supplier~~ or Distributor:** A person or entity that enters into a Goods and/or Services related contract with a Prime Vendor to provide goods or services pursuant to a contract between the Prime Vendor and CPS. Refers to a company that owns, operates, or maintains a store, warehouse or other establishment in which materials, supplies, articles or equipment are bought, kept in stock and regularly sold or leased to the public in the usual course of business. A regular distributor or supplier is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials or supplies required for performance of the Contract are bought, kept in stock, and regularly sold to the public in the usual course of business. To be a regular distributor the firm must engage in, as its principal business and in its own name, the purchase and sale of the products in question. A regular distributor in such bulk items as steel, cement, gravel, stone, and petroleum products need not keep such products in stock if it owns or operates distribution equipment.

**2.1926 Women Business Enterprise (WBE):** A business that is certified and awarded the certification WBE as a Women Owned Business Enterprise by the City of Chicago (the “City”), County of Cook or such other government entity recognized by OBD, which has determined that the management, policies, major decisions and daily business operations are independently managed and controlled by one or more Economically Disadvantaged women. OBD reserves the right to make its own determination as needed.

### III. EFFECTIVE DATES

**3.1** The Business Diversity Program for Construction Projects is continued effective as of ~~January 1, 2017~~ June 30, 2023 and on that date shall supersede entirely the program adopted in ~~December 2014~~ July 1, 2023. Existing contracts will adhere to the compliance standards outlined in contracts dated prior to January 1, ~~2017-2022~~.

**3.2** This Program shall be reviewed no later than five years from January 1, ~~2017-2027~~ and shall expire December 31, ~~2021-2028~~ unless the Board finds that its remedial purposes have not been fully achieved and it continues to have a compelling interest in tailoring narrow remedies to readdress discrimination against M/WBEs, so that the Board will not function as a passive participant in the discriminatory goods and services marketplace in Chicago.

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

#### 4.1 Aspirational Goals

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

#### 4.2 Contract Specific Goals

OBD, Department of Procurement and Facilities, Engineering, and ITS (IT Services) will establish Contract Specific Goals for M/WBE participation for all Construction Contracts required by the Board to be bid. OBD may recommend to the CPO that certain contracts be excluded from the program so as to allow OBD to assess the availability of MWBE participation in the absence of program requirements. The assessment and audit will determine if the market can provide MWBE participation at the aspirational goals of 30% qualified MBE and 7% WBE. In the event that the

CPO approves this request, OBD shall audit contract data to determine MWBE participation levels and also assess MWBE availability levels in that market.

#### **4.3 Appeals Process**

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

#### **4.4 Facilities Responsibilities**

Facilities duties with regard to this Program shall include:

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

#### **4.5 OBD Responsibilities**

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

- a. Enforcing Program regulations with Prime Construction Contractors or Suppliers, Subcontractors and CPS Departments.
- b. Submitting annual Program evaluation reports to the Board, CEO or ~~his or her~~ their designee, and the Department of Procurement and Facilities which include the following: data on M/WBE performance as it relates to commitments in bid packages versus the actual utilization of M/WBEs on contracts; a discussion of OBD efforts to administer the Program, implement current initiatives and resolve problems with Program implementation; progress in meeting the Aspirational Goals, and recommendations for improvements in Program implementation.
- c. Assuring that M/WBEs are informed of CPS contracting opportunities.
- d. Providing M/WBEs with relevant information and assistance related to CPS procurement practices and procedures, and bid specifications, documentation requirements and prerequisites.
- e. Providing interested Prime Construction Contractors or Suppliers with information regarding M/WBE directories
- f. Providing training and assistance to CPS staff and other interested persons on Program objectives and requirements.
- g. Establishing "Contract Specific Goals".
- h. Monitoring contracts to ensure compliance with Contract Specific Goals, contractual commitments and Program objectives.
- i. Determining whether contractors have made Good Faith Efforts.
- j. Reviewing and facilitating the resolution of dispute issues concerning the Program with Prime Construction Contractors or Suppliers, Subcontractors and CPS departments.
- k. Collecting data to evaluate the Program, including data on Prime Contractors, consultants, suppliers and subcontractor bids and awards of CPS projects. Periodically reviewing this data to ensure that the Board continues to have a compelling interest in remedying discrimination, and that the measures it has chosen remain narrowly tailored to accomplish that interest.
- l. Upon request, provide information to M/WBEs about City-sponsored small business loan programs and other programs providing access to capital to M/WBEs.
- m. Promoting the Program through appropriate means in order to attract qualified M/WBEs.

- n. Acting as a voting member on all diversity compliance issues during evaluation process time.
- o. Establishing a process to review waiver requests and make determination to grant or deny the request in accordance with the procedures of the Program.
- p. Requesting the assistance of other public and private agencies and organizations in referring to M/WBEs.

## V. RACE AND GENDER-NEUTRAL MEASURES

**5.1** The Board shall implement race-and gender-neutral measures to the greatest extent feasible to facilitate the participation of M/WBEs in its contracting activities, so that it can meet its Aspirational Goals. These measures may include, but are not limited to the following:

- a. provision of timely information on contracting procedures, bid/proposal preparation, and specific contracting opportunities.
- b. arrangement of solicitation times for the presentation of bids/proposals, quantities, specifications, and delivery schedules to facilitate the participation of interested vendors, suppliers and subcontractors.
- c. simplification of bid/proposal submission requirements and documentation required by the user departments and the Department of Procurement.
- d. unbundling contracts, where appropriate, to facilitate the participation of smaller businesses.
- e. review of bonding and insurance requirements to eliminate unnecessary barriers to contracting with the Board, consistent with the Board's interest in financial security.
- f. reduction in bid deposit requirements or arrangements for a standing bid deposit to cover multiple procurements.
- g. closing out of goods and services contracts in a timely manner.
- h. adoption of prompt payment procedures that require Prime Vendors and Suppliers to agree in writing to promptly pay subcontractors.
- i. holding of pre-bid/proposal conferences, where appropriate, to explain the projects and to encourage Prime Vendors and Suppliers to use small business enterprises as subcontractors. On larger contracts, conducting pre-bid/proposal conferences between potential contractors and pre-qualified M/WBEs to promote joint ventures and subcontractor and supplier relationships.
- j. letting a representative sample of Board goods and services contracts without goals to determine MBE and WBE utilization in their absence.
- k. limitation of the self-performance of Prime Vendors and Suppliers, where appropriate.
- l. advertisement of invitations to bid/propose and about the existence and purposes of the Program in minority, women's, and small business media, when appropriate.
- m. collection of information from all Prime Vendors and Suppliers which includes all bids/proposals received from prospective subcontractors and payments to subcontractors.
- n. provision of technical assistance concerning Board procurement policies and procedures.
- o. leveraging of the Board's relationships with bonding, insurance, and financial companies to encourage those institutions to aid M/WBEs and other small Prime Vendors or Suppliers.
- p. referral of complaints of discrimination against M/WBEs to appropriate authorities for investigation and resolution.
- q. developing and maintaining a list of diverse, qualified and pre-approved vendors for certain contracts for goods and services.
- r. contacting private sector organizations and non-profit groups engaged in economic development activities and M/WBE trade and commercial associations, and soliciting their assistance in obtaining M/WBE participation.
- s. seeking recommendations of additional M/WBEs from private industry M/WBE programs, organizations, associations, chambers, and from local government agencies.

## VI. CONTRACT AWARD PROCESS

### 6.1 Bid/Proposal Specifications

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

- a. A description of the Program, including the requirement of an approved M/WBE Plan; the requirements related to achieving the goals and counting MBE or WBE participation towards meeting the goals; if the goals are not met, the requirement of documentation of the contractor's Good Faith Efforts to achieve the goals, including the Good Faith Efforts of MBEs and WBEs to achieve the goal for which they do not qualify; and a requirement that the contractor commit to the expenditure of at least the dollar value of the Contract Specific Goals with one or more MBEs and one or more WBEs or make Good Faith Efforts to do so. This commitment may be met by the contractor's status as an MBE or WBE, a joint venture with one or more MBEs or WBEs as Prime Contractor (to the extent of the MBE's or WBE's participation in such joint venture), subcontracting a portion of the work to one or more MBEs or WBEs, purchasing materials or services for the work from one or more MBEs or WBEs, or by any combination of the foregoing;
- b. A requirement that where the vendor cannot achieve the Contract Specific Goals, it must document its Good Faith Efforts to do so.
- c. All Firms with full waivers must complete a survey with Form 104 (Vendor Diversity Profile).
- d. Onboarding all firms must complete all OBD Forms thoroughly without any omission. Those forms include but not exclusive to:  
Form 100 - Bidder Information (Proposed MBE|WBE)  
Form 101 - Compliance Summary Form  
Form 102 - Joint Venture  
Form 103A – Letter Of Intent (LOI)  
Form 103B - Professional Service Affidavit  
Form 104 - Vendor Diversity Profile  
Form 105 - Request for Waiver Form  
Form 106 - Student Internships (not a mandated form)

### 6.2 M/WBE Compliance Proposal

- a. The Department of Procurement will specify M/WBE participation requirements as special conditions in invitations for bids and bid documents. These specifications will include a listing of all documentation that must be submitted with the bid or proposal and a description of the reporting requirements applicable during the contract period. All solicitation and contract documents will also stipulate that the requirements of the M/WBE Plan become part of each contract between CPS and the Prime Construction Contractor or Supplier.
- b. For all solicitations, the Contractor shall submit an M/WBE Compliance Proposal identifying all M/WBE and non-M/WBE subcontractors from which the Contractor solicited bids or quotations, and detailing its plan to achieve the Contract Specific Goals or its Good Faith Efforts to do so. MBEs and WBEs proposed by the Contractor must be certified by the City of Chicago and/or any other governmental certifying agencies as of the date of bid ~~submit~~ submission. The M/WBE Compliance Proposal shall be due at the time and in the manner set out in the solicitation documents.
- c. OBD has the authority to review any proposals or bids submitted by vendors and make recommendations to the CPO regarding their respective compliance with this policy. The

CPO shall consider the OBD's recommendation and has discretion to accept it, reject it, or request an amended bid or quotation.

- d. Any agreement between a Prime Construction Contractor or Supplier and an M/WBE in which the Prime Construction Contractor or Supplier requires that the M/WBE not provide subcontracting quotations to other Prime Construction Contractor or Suppliers is prohibited.
- e. The M/WBE Compliance Proposal must demonstrate that each MBE or WBE will perform a Commercially Useful Function.

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

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

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

- a. Where the Contractor cannot achieve the Contract Specific Goals, OBD will determine whether the Prime Construction Contractor or Supplier has made Good Faith Efforts to do so.
- b. A Contractor may also submit to OBD a written request for reduction or waiver of the obligations created under the M/WBE Plan or related requirements. Any such request must be accompanied by documentation evidencing the Prime Construction Contractor or Supplier's Good Faith Efforts.
- c. OBD has the discretion to approve or deny a request for a waiver. Approval of a waiver may be conditioned upon the agreement to undertake additional Good Faith Efforts as specified by OBD.
- d. In making the determination of Good Faith Efforts, OBD will consider, at a minimum, the Contractor's efforts to:
  1. solicit through reasonable and available means (e.g., attendance at pre-bid meetings, advertising and written notices) the interest of MBEs and WBEs that have the capability to perform the work of the contract and/or that are certified in the scopes of the contract work; to make this solicitation within sufficient time to allow the M/WBEs to respond; and to take appropriate steps to follow up initial solicitations with interested M/WBEs;

2. provide interested M/WBEs adequate information about the plans, specifications and requirements of the contract, including addenda, in a timely manner to assist them in responding to the solicitation;
3. negotiate in good faith with interested M/WBEs that have submitted bids. Documentation of negotiation must include the names, addresses and telephone numbers of M/WBEs that were solicited; the date of each such solicitation; a description of the information provided about the plans and specifications for the work selected for subcontracting; and evidence as to why agreements could not be reached with M/WBEs to perform the work. A Contractor may not use the fact that additional costs may be involved in soliciting and using M/WBEs as a reason for failing to meet the goals, as long as such additional costs are reasonable;
4. not reject M/WBEs as being unqualified without sound reasons based upon a thorough investigation of their capabilities. The M/WBEs' standing within its industry, membership in specific groups, organizations, or associations, or its political or social affiliations are not legitimate reasons for rejecting or failing to solicit bids to meet the goals;
5. make a portion of the work available to M/WBE subcontractors and suppliers and to select those portions of the work or material consistent with the available M/WBE subcontractors and suppliers, to facilitate meeting the goals;
6. select portions of the work to be performed by M/WBEs in order to increase the likelihood that the goals will be met. This includes, where appropriate, subcontracting work items into economically feasible units to facilitate M/WBE participation, even when the contractor might otherwise prefer to perform these work items with its own workforce;
7. assist interested M/WBEs in obtaining bonding, lines of credit or insurance as required by the Board or the contractor;
8. assist interested M/WBEs in obtaining necessary equipment, supplies, materials or related assistance or services;
9. effectively use the services of OBD, minority or women community organizations; minority or women contractors' groups; local, state and federal minority or women business assistance offices; and other organizations to provide assistance in the recruitment and placement of M/WBEs;
10. implement a strategy for the training, employment, or continuing education of present or former CPS students. The proposed program must involve substantial numbers of students and commit Prime Construction Contractor or Supplier resources; meet significant training, employment or continuing education objectives and be feasible and effective;
11. provide technical assistance to increase M/WBEs' self-sufficiency, competitiveness and profitability;
12. donate objectively measurable resources to M/WBE business development or participate in M/WBE business development activities;
13. demonstrate through objective evidence the consistent use of M/WBEs as suppliers or vendors on work not related to CPS;
14. demonstrate participation with M/WBEs in private sector joint ventures that would not otherwise occur or the participation of the Prime Construction Contractor or Supplier for goods and services in M/WBE business development activities such as those

contemplated by the Program.

#### **6.4.1 Student Initiatives**

As appropriate the Board, will require the Prime Construction Contractor or Supplier to participate in various initiatives designed to provide opportunities to current CPS students and CPS graduates. Such initiatives include, but are not limited to, internships and job shadowing for current students and an Apprenticeship Initiative for CPS graduates that would secure employment for minorities and women workers in specific trades and permit those workers to obtain hours that would count toward an apprentices' sponsorship into a trade or labor organization. Work-based learning (WBL) provides students with the opportunity to engage and interact with industry experts (employers, postsecondary institutions), while learning to demonstrate essential employability and technical skills necessary for today's workforce. This can be facilitated through, but not limited to, the following ideas: (a) Alignment of Classroom and Workplace Learning (b) Include in-depth and hands-on work experiences (either on site or through simulated/virtual methods), with activities ranging from career awareness and exploration to career preparation and training (c) Offer training for mentors on providing students with industry specific support; general career and education guidance; personal and professional growth; and a caring, emotional connection. (d) Opportunities for students enrolled in a registered apprenticeship program to earn postsecondary credit toward a certificate or degree, as applicable.

#### **6.5 Contract Award**

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

##### **6.5.1 Contract Specific Goals and Contract Modifications**

1. The MBE and WBE Contract Specific Goals established at the time of contract bid shall also apply to any modifications to the Contract after award. That is, any additional work and/or money added to the Contract must also adhere to these Special Conditions requiring Contractor to (sub)contract with MBEs and WBEs to meet the Contract Specific Goals. a. Contractor must assist the Construction Manager or user Department in preparing its "proposed contract modification" by evaluating the subject matter of the modification and determining whether there are opportunities for MBE or WBE participation and at what rates. b. Contractor must produce a statement listing the MBEs/WBEs that will be utilized on any contract modification. The statement must include the percentage of utilization of the firms. If no MBE/WBE participation is available, an explanation of good faith efforts to obtain participation must be included.

2. The Chief Procurement Officer or CPO designee shall review each proposed contract modification and amendment that by itself or aggregated with previous modification/amendment requests, increases the contract value by ten percent (10%) of the initial award, or \$50,000, whichever is less, for opportunities to increase the participation of MBEs or WBEs already involved in the Contract.

### **VII. Contract Performance Procedures**

#### **7.1. Facilities Responsibilities**

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

- a. Every contract shall include a standard contract provision that:
  1. permits the Board to terminate the contract:
    - i. upon the disqualification of the Prime Construction Contractor or Suppliers as an MBE or WBE, if that contractor's status as MBE or WBE was a factor in the award of the contract

- and the contractor misrepresented that status; and
- ii. upon the disqualification of any MBE or WBE, if the subcontractor's or supplier's status as an MBE or WBE was a factor in the award of the contract, and the Prime Construction Contractor or Supplier misrepresented the status of the subcontractor or supplier. If Facilities or OBD determines that the contractor was not involved in any such misrepresentation, then that contractor shall discharge the disqualified subcontractor or supplier and make good faith efforts to engage a qualified MBE or WBE replacement.
2. allows OBD and/or Facilities, with or without other District staff and with or without notice,
    - i. to conduct on-site inspections of any performance site or place of business of any Prime Construction Contractor or Supplier, to determine whether the contractor has complied with its obligations; and
    - ii. to access any contractor's books and records including, without limitation, payroll records, tax returns and records and books of account, to determine the Prime Construction Contractor or Supplier's compliance with its commitment to M/WBE participation and the status of any MBE or WBE performing any portion of the contract.
  3. requires Prime Construction Contractors or Suppliers:
    - i. to maintain records on the utilization of subcontractors and fulfillment of the M/WBE Compliance Plan, and to retain those records for eight years after the Board's final acceptance of the work;
    - ii. to report to OBD at a minimum quarterly, or upon request, all expenditures to achieve compliance;
    - iii. to obtain prior written approval from OBD before changing MWBE commitments or substituting M/WBE subcontractors;
    - iv. to promptly pay all subcontractors for work actually performed, upon Facilities' approval of required documentation; and
    - v. to provide a sworn statement with each payment request, listing all M/WBE and non-M/WBE subcontractors used in the performance of the contract, and providing proof of payment to subcontractors from prior payments received by the Prime Construction Contractor or Supplier. Proof of payment shall be in the form of canceled checks to the subcontractor, a sworn statement from the subcontractor verifying receipt of payment or another format specified by OBD.
  4. requires approval or ratification of all change orders by the Board in accordance with Board Rules, including that:
    - i. no change orders shall be authorized that exceed, individually or cumulatively, forty-nine and ninety-nine hundredth percent (49.99%) of the Base Contract Price;
    - ii. any additional work and/or change orders requested by the Prime Construction Contractor or Supplier must not affect the contractors who have already completed work on the project; and
    - iii. no change orders shall affect the Prime Construction Contractor or Supplier's obligation to make good faith efforts to meet the original M/WBE goals.
  5. requires retainage amounts to ensure the proper and complete performance of the work covered by the contract and complete compliance with the terms and conditions of the contract as follows:
    - i. the Board will retain 10% of the contract amount (including value of change orders) until work is 50% complete;
    - ii. Upon 50% completion of the contract in accordance with accepted performance measures, as specified in the contract, the retainage will be reduced to 5% of the contract amount (including value of change orders);
    - iii. The retainage amount(s) shall be retained from the various periodic payments according to a schedule specified in the contract.
    - iv. Upon 50% completion of the contract, as specified in the contract, 50% of the accrued retainage amount shall be released to the Prime Construction Contractor or Supplier.

Upon final completion of the contract, the balance of the accrued retainage shall be released to the Prime Construction Contractor or Supplier when not involved in ongoing change orders or performance matters.

- V. The Prime Construction Contractor or Supplier must pay all retainage owed to each subcontractor for satisfactory completion of the subcontractor's accepted work within 10 days after the portion of the retainage amount is released by the Board.
- VI. The Prime Construction Contractor or Supplier or Distributor must provide a full lien waiver and pay application for all projects and performance of said projects. Providing full waivers from all subcontractors.

## 7.2. OBD Responsibilities

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

- a. A Prime Construction Contractor or Supplier may not substitute a M/WBE subcontractor or perform the work designated for a subcontractor with its own workforce unless and until OBD approves such substitution in writing. A Prime Construction Contractor or Supplier shall not allow a substituted subcontractor to begin work until the substitution request has been formally approved.
- b. All requests for changes or substitutions of any M/WBE subcontractor named in the M/WBE Plan shall be made to OBD in writing, and shall clearly and fully set forth the basis for the request. Each request shall include the name, address and principal official of any proposed substitute MBE or WBE and the dollar value and scope of work of the proposed subcontract. All documentation required of the Prime Construction Contractor or Supplier for the M/WBE Plan must be attached.
- c. The facts supporting the request to change a M/WBE subcontractor must not have been known nor reasonably foreseeable by either party prior to the submission of the M/WBE Compliance Proposal. Prior to requesting a change, the Prime Construction Contractor or Supplier must negotiate with the subcontractor to resolve the problem. If requested by either party, OBD shall facilitate such a meeting. Where there has been a mistake or disagreement about the scope of work, the M/WBE may be substituted only where an agreement cannot be reached for a reasonable price for the correct scope of work.
- d. Unauthorized changes or substitutions, including performing the work with the Prime Construction Contractor's or Supplier's own workforce may constitute grounds for rejection of the bid or proposal, cause termination of the executed contract for breach, result in the withholding of payment and/or subject the Prime Construction Contractor or Supplier to contract remedies or sanctions.
- e. The following are acceptable bases for the substitution of M/WBE subcontractors and/or suppliers:
  1. Unavailability after receipt of reasonable notice to proceed;
  2. failure of performance;
  3. financial incapacity;
  4. refusal by the subcontractor to honor the bid or proposal price;
  5. mistake of fact or law about the elements of the scope of work of a solicitation where agreement upon a reasonable price cannot be reached;
  6. decertification of the M/WBE;
  7. failure of the subcontractor to meet insurance, licensing or bonding requirements;

or

8. the subcontractor's withdrawal of its bid or proposal.
- f. The final decision on a substitution request shall be communicated in writing as soon as practicable to the affected parties. OBD may request more information or schedule an interview to clarify or mediate the problem. OBD may reject any request in its entirety or impose conditions upon any approval
- g. A contractor may protest any determination by OBD that it has not made Good Faith Efforts by utilizing the Appeals Process.
- h. The OBD shall audit the Prime contracts and subcontractor payment summaries to verify remittances have been issued to the subcontractors. Prime contractor or vendor or distributor failure to issue remittance not limited to sanction, debarred, payments withheld for breach of the contract of M/WBE for 30/7 Goals or sited goals or commercially useful as negotiated or contracted.

## VIII. OBD's Determination Whether Contract Specific Goals for MWBE Participation Have Been Met

### 8.1 Payment Procedures

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

### 8.2 Records

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

### 8.3 Inspections

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

### 8.4 Substitutions

- a. The Prime Vendor or Supplier may not substitute a M/WBE subcontractor or perform the work designated for a subcontractor with its own workforce unless and until OBD approves such substitution in writing. A Prime Vendor or Supplier shall not allow a substituted subcontractor to begin work until the substitution request has been formally approved. All substitutions must be in writing in advance of any alternative work. The substitution must meet the quality and standards set forth in the contract for services or goods or construction.
- b. All requests for changes or substitutions of the subcontractor named in the M/WBE Plan shall be made to the Director of OBD in writing, and shall clearly and fully set forth the basis for the request. Each request shall include the name, address and principal official

of any proposed substitute MBE or WBE and the dollar value and scope of work of the proposed subcontract. All documentation required of Prime Vendors or Suppliers for the M/WBE Plan must be attached.

- c. The facts supporting the request to change a M/WBE subcontractor must not have been known nor reasonably foreseeable by either party prior to the submission of the Program Compliance Proposal. Prior to requesting a change, the Prime Vendor or Supplier must negotiate with the subcontractor to resolve the problem. If requested by either party, CPS shall facilitate such a meeting. Where there has been a mistake or disagreement about the scope of work, the M/WBE may be substituted only where an agreement cannot be reached for a reasonable price for the correct scope of work.
- d. Unauthorized changes or substitutions, including performing the work with the Prime Vendors' or Supplier's own workforce, may constitute grounds for rejection of the bid or proposal or cause termination of the executed contract for breach, the withholding of payment and/or subject the Prime Vendor or Supplier to contract penalties or other sanctions.
- e. The following are acceptable bases for the substitution of M/WBE subcontractors:
  1. unavailability after receipt of reasonable notice to proceed;
  2. failure of performance;
  3. financial incapacity;
  4. refusal by the subcontractor to honor the bid or proposal price;
  5. mistake of fact or law about the elements of the scope of work of a solicitation where agreement upon a reasonable price cannot be reached;
  6. decertification of the M/WBE;
  7. failure of the subcontractor to meet insurance, licensing or bonding requirements; or
  8. the subcontractor's withdrawal of its bid or proposal.
- f. OBD's final decision whether to permit or deny the proposed substitution, and the basis therefore, will be communicated as soon as practicable to the parties in writing by OBD. The OBD Executive Director may request more information, or request an interview to clarify, or mediate or mitigate the problem. OBD may approve or reject any request in its entirety, or impose conditions upon any approval.
- g. Where the Prime Vendor or Supplier has established the basis for the substitution to the satisfaction of OBD, the Prime Vendor or Supplier shall make Good Faith Efforts to fulfill the M/WBE Plan. The Prime Vendor or Supplier may seek the assistance of OBD in obtaining a new M/WBE subcontractor. If the Contract Specific Goal(s) cannot be reached and Good Faith Efforts have been made, the Prime Vendor or Supplier may upon determination by the OBD Executive Director substitute with a non-M/WBE.
- h. The Prime Vendor or Supplier may protest any determination by OBD that a vendor/supplier has not made Good Faith Efforts by utilizing the Appeals Process.

#### **8-18.5 MBE or WBE Prime Construction Contractors**

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

#### **8.6 MBE or WBE Subcontractors and Suppliers**

OBD shall count towards a Prime Vendor's or Supplier's Contract Specific Goal only the amount that has been paid to a MBE or WBE subcontractor or supplier.

### 8.7 Joint Ventures

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

### 8.8 Limitation to Commercially Useful Functions

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

### 8.9 Effect of Decertification

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

### 8.10 Contract Modifications

The Contract Specific Goals applicable to a contract are also applicable to contract modifications. If a contract modification is within the scope of the M/WBE's subcontractor performance, the dollar amount to be paid to the M/WBE must be adjusted by the Prime Vendor or Suppliers. All contract modifications or amendments must be in writing and agreed upon with all signatories.

## IX. NON-COMPLIANCE AND SANCTIONS

### 9.1 Determination of Non-Compliance

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

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

- ~~a. Sanctions for non-compliance may include, but are not limited to the following:~~
- ~~i. Withholding of payments under the contract~~
  - ~~ii. Recommendation to not exercise contract renewal option~~
  - ~~iii. Termination of the contract~~
  - ~~iv. Debarment from future business with the Board~~
- ~~b. A Prime Construction Contractor or Supplier may protest OBD's determination of Section 9.2 sanctions by filing a written appeal in accordance with the Appeals Process within fourteen (14) business days of receipt of OBD's determination, stating the grounds for such appeal and including all relevant information and documentation.~~
- ~~c. All debarment recommendations will be processed according to the Board's Debarment Policy.~~
- a. Failure to carry out the commitments and policies set forth herein shall constitute a material breach of the contract and may result in the termination of the contract or such remedy as Chicago Public Schools or Chicago Board of Education deems appropriate.
- b. If the Chief Procurement Officer determines, upon reviewing a particular contract, that the vendor did not meet the aspirational goals set forth in the bid documents, and further finds that the vendor has not made good faith attempts to achieve those goals through the methods described in Section 6.4 herein, the CPO shall notify the vendor that they have committed a material breach of their obligations. The CPO shall concurrently advise the vendor of the CPO's intention to seek remedies for breach, including, but not limited to the following:
- i. withholding payments from the vendor until such time as corrective action has been taken;
  - ii. voiding the contract, with the contractor being only entitled to compensation for services already rendered prior to imposition of the penalty, and/or
  - iii. imposing a penalty in the amount of the discrepancy between the amount of the commitment, as such amount may be amended through change orders or otherwise over the term of the contract, and the achieved amount may be applied to the contractor.
- The consequences provided herein shall be in addition to any other criminal or civil liability to which such entities may be subject.
- c. Prior to imposing the penalty specified by this section, the Chief Procurement Officer shall notify the contractor in writing of the fact and amount of the proposed penalty. Within 30 days of the notification, the contractor may submit a memorandum addressed to the CPO which controverts the basis or amount of the proposed penalty. The contractor may also present a detailed and verifiable plan which demonstrates good faith efforts to come into compliance. The CPO may issue a response to the contractor's memorandum which either renders a final decision or invites further submissions from the contractor.
- d. In addition to the penalty specified by this section, after a contractor's second failure to meet M.B.E./W.B.E. commitments, the Chief Procurement Officer may declare the contractor ineligible for an award of contracts for a period of up to three years, following the procedures set forth in subsections (b), (c) and (d) of this section. In determining whether to declare a contractor ineligible, the Chief Procurement Officer shall consider the contractor's record for meeting its commitments regarding M.B.E./W.B.E. participation in contracts with the Board | District | CPS.

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

- a. The following actions may be taken upon a finding that a firm has engaged in fraudulent misrepresentation, acts demonstrating a lack of business integrity, violations of statute or regulations, or has repeatedly failed to make good faith efforts as required by this Program:

1. Referral by OBD to the Board’s Office of the Inspector General (OIG) for investigation.
  2. Initiation of proceedings to debar the Prime Construction Contractor or Supplier and all persons or entities affiliated with them if warranted by an OIG investigation
  3. Reporting the debarment of any person or entity to other governmental agencies.
  4. Referral to appropriate law enforcement authorities for investigation and possible prosecution.
  5. Failure to carry out the commitments and policies set forth herein shall constitute a material breach of the contract and may result in the termination of the contract or such remedy as the Chicago Public Schools CPO and OBD Executive Director deems appropriate.
- b. The Prime Construction Contractor or Supplier may protest OBD’s determination of Section 9.3 sanctions by filing a written appeal in accordance with the Appeals Process within fourteen (14) business days of receipt of OBD’s determination, stating the grounds for such appeal and including all relevant information and documentation.

**X. REVIEW**

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

**XI. SEVERABILITY**

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

<b>Amends/Rescinds</b>	Section 401.17   Board Report 16-1207-PO1   Date Adopted December 07, 2016
<b>Cross References</b>	<p>[22-1207-RS1 (Resolution Authorizing the Extension of the Remedial Program for Minority and Women-Owned Business Enterprise Participation in Construction Projects and Goods and Services Policies) is attached to the Policy. This Resolution extended these programs for term of six months commencing January 1, 2023 and ending June 30, 2023]</p> <p>[21-1215-RS1 (Resolution Authorizing the Extension of the Remedial Program for Minority and Women-Owned Business Enterprise Participation in Construction Projects and Goods and Services Policies) is attached to the Policy. This Resolution extended these programs for term of one year commencing January 1, 2022 and ending December 31, 2022];</p> <p>13-0626-PO1; 12-1219-RS2; 07-0228-PO1 (Rescinded 91-0130-RS1)</p>

**Legal References:** 29 C.F.R. §1607.4(D); 49 C.F.R. §26.53 and Appendix A

Approved for Consideration:

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