

PROPOSED ORDINANCE AMENDMENT

MINORITY-AND WOMAN-OWNED BUSINESS ENTERPRISE AMENDMENTS IN ACCORDANCE WITH DISPARITY STUDY

BE IT ORDAINED, by the Cook County Board of Commissioners, that Chapter 34, Finance, Article IV. Procurement Code, Division 8. Minority-And Woman-Owned Business Enterprises Subdivision I. General Provisions, Sections 34-260 through 34-283 and Subdivision II. Participation in Cook County Public Works Contracts., Sections 34-285 through 34-300.2 of the Cook County Code is hereby amended as Follows:

DIVISION 8. MINORITY- AND WOMAN-OWNED BUSINESS ENTERPRISES

Subdivision I. General Provisions

Sec. 34-260. Short title.

This Subdivision shall be known and may be cited as the 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 Division 8.

Sec. 34-261. Preface and findings.

- (a) The County has heretofore adopted a Minority and Woman-Owned Business Enterprise Ordinance to ensure that small businesses owned by economically disadvantaged minorities and women are provided full and equal opportunity to participate in Contracts.
- (b) The Supreme Court of the United States in *City of Richmond v. Croson*, 488 U.S. 469 (1989), has enunciated certain standards which are necessary to maintain effective affirmative action programs in compliance with constitutional requirements.
- (c) The County continues to be committed to implementing an affirmative action program associated with small businesses owned by economically disadvantaged minorities and women in conformance with the United States Supreme Court's decision in *City of Richmond v. Croson* and other relevant law.
- (d) In furtherance of this commitment, the Board and the President of the Board, supported by County staff, professionals, and consultants, conducted an investigation to determine whether and to what degree:
 - (1) There continues to be discrimination in County Procurements and in the award of and participation in contracts in the metropolitan County economy;
 - (2) Such discrimination or the effects thereof has denied and continues to deny small and economically disadvantaged minority- and women's -owned business enterprises equal opportunity to participate in such Procurements and contracts;
 - (3) Small businesses owned and managed by economically disadvantaged minorities and women in the County Marketplace experience disparate negative impacts in terms of participating in public and private transactions, including, but not limited to, transactions with the County, those private enterprises with whom it does business, and other private enterprises;
 - (4) Small, economically disadvantaged businesses owned and managed by minorities and women in the County Marketplace experience reduced earnings;
 - (5) The formation of businesses owned and managed by minorities and women in the County Marketplace is disproportionately low;

- (6) There continues to be a chronic lack of wealth, business loans, and financial liquidity among the County's minority communities and among minorities who own and operate their own small businesses;
- (7) The disproportionate levels of poverty among minorities in the County and any of the foregoing elements detrimentally affect the County's efforts to protect and promote public safety, health and welfare, and to identify the appropriate affirmative action steps to be taken to eliminate any such discrimination, obstacles, and poverty and their continuing effects.
- (e) Minority- and women-owned small businesses continue to be awarded prime contracts and subcontracts in dollar amounts that are disproportionately lower than the availability of such businesses willing and able to perform Contracts.
- (f) The County's procurement practices in the past have contributed to the above identified underutilization of minority, and women small businesses on contracts and subcontracts.
- (g) Minority- and women-owned small businesses continue to be disadvantaged by discriminatory practices in the local construction industry and economy when competing for contracts and in seeking subcontracting opportunities on such contracts.
- (h) The County was a passive participant in the discriminatory practices of businesses which discriminate against minority- and women-owned businesses by entering into contracts with such discriminating businesses.
- (i) Despite the County's good faith efforts and implementation of previous affirmative action programs, minority- and women-owned small businesses remain at a competitive disadvantage in competing for contracts and subcontracts.
- (j) Race and gender-neutral measures or affirmative action programs without numerical goals have not and are not likely to eliminate the competitive disadvantage of minority- and women-owned small businesses in participating in contracts due to discrimination in the local economy.
- (k) The numerical goals for the participation of minority and women's businesses in Contracts are commensurate with the availability of minority- and women-owned 's businesses willing and able to perform County work.
- (l) The reduction of such discrimination in the local economy will help reduce the disproportionate levels of poverty among minorities in the County and positively affect the County's efforts to protect and promote public safety, health, and welfare.
- (i) The County has a compelling interest in preventing discrimination and desires to reaffirm its commitment to full and fair opportunities for all firms to participate in its construction contracts.

Sec. 34-262. Policy and purpose.

Based on the foregoing findings, the policy and purpose of this division are as follows:

- (a) It is the continuing public policy of the County to strive to achieve the full and equitable participation of local small businesses owned by economically disadvantaged minorities and women in the County's procurement process as both prime contractors and subcontractors.
- (b) The County is committed to a policy of preventing and reducing discrimination in making Procurements, and eliminating arbitrary barriers to participation in Procurements by all persons, regardless of race, sex, or ethnicity.
- (c) To offset the effects of negative disparate impacts on small businesses owned and ~~managed~~ controlled 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 grossly disproportionate levels of poverty among minorities in the County, the purpose of this

Division is to establish and implement goals for participation of PCEs in Procurements, in compliance with all applicable laws.

Sec. 34-263. Definitions.

The following words, terms and phrases, when used in this Division, shall have the meanings ascribed to them in this Section, Terms not defined in this Section are defined in Division 1 of this Procurement Code, or in Section 1-3 of the County Code. Additional terms applicable to Subdivision II are set forth in such subdivision.

Affiliate. An "Affiliate" of or a Person "Affiliated" with, a specified Person shall mean any Person that directly or indirectly through one or more intermediaries, Controls, is Controlled by, or is under common Control with, the Person Specified. Affiliates shall be considered together in determining whether a firm is a small business.

Applicant means a person who submits documents and information seeking certification, or continued certification, ~~or re-certification~~ as a PCE to the Office of Contract Compliance.

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 required for performance of the 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.

Business means a sole proprietorship, partnership, corporation, limited liability company, Joint Venture or any other business or professional entity.

Certified firm means a firm that has been accepted by the County as a certified MBE or WBE or Established Business.

Commercially Useful Function means the performance of a distinct element of work required for the Procurement, with the requisite skill and expertise.

Compliance Contract Director or "*CCD*" means the Contract Compliance Director.

Contract means any Procurement or Contract (as defined in Section 34-121) in an amount exceeding \$25,000.00.

Contractor means any business that seeks to enter into a contract with the County, and includes all partners and Affiliates Business.

Contract Specific Goals means the aspirational goals established under Section 34-267(b) that are based upon relevant factors, including, but not limited to, the availability of MBEs or WBEs relative to the scope of work of the Project.

County Marketplace means the six-county region, currently the counties of Cook, DuPage, Kane, Lake, McHenry and Will.

Disparity Study means the stringent review examining Cook County's M/WBE Program for contracts issues by Cook County Government and Cook County Health and Hospital System.

Economically Disadvantaged, with respect to an individual, means having a Personal Net Worth less than \$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 2008.

Established Business means a Local Business that is not a Small Business and was certificated as an MBE or WBE within the past 12 months:

- (1) Which is at least 51 percent owned by one or more Minority Individuals or Women, or in the case of a publicly owned business, at least 51 percent of all classes of the stock of which is owned by one or more such Minority Individuals or Women;
- (2) Whose management, policies, major decisions and daily business operations are independently ~~managed~~ owned and controlled by one or more such Minority Individuals or Women; and

- (3) Which has its principal place of business ~~and a majority of its regular, full-time workforce~~ located within the County's Marketplace.

Expertise means demonstrated skills, knowledge or ability to perform, as defined by normal industry practices, including licensure where required, in a field.

Good Faith Efforts shall have the meaning set forth in Section 34-271.

Joint Venture means an association of two or more Businesses proposing to perform a for-profit business enterprise. Joint Ventures must have an agreement in writing specifying the terms and conditions of the relationships between the partners and their relationship and responsibility to the contract.

Local Business means a Business located within the County's Marketplace ~~which has the majority of its regular, full-time work force located within the County's Marketplace.~~

Local Small Business means a Local Business which is also a Small Business.

Manufacturer means a Person that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required for a Procurement and of the general character described by the specifications.

Minority Business Enterprise or *MBE* means a Local Small Business, including a sole proprietorship, partnership, corporation, limited liability company, Joint Venture or any other business or professional entity:

- (1) Which is at least 51 percent owned by one or more Minority Individuals who are economically disadvantaged, or in the case of a publicly owned business, at least 51 percent of all classes of the stock of which is owned by one or more such Minority Individuals;
- (2) Whose management, policies, major decisions and daily business operations are independently ~~managed~~ owned and controlled by one or more such Minority Individuals; and
- (3) Which has its principal place of business ~~and a majority of its regular, full-time workforce~~ located within the County's Marketplace.

Minority Individual means an individual in one of the following groups:

- (1) African-Americans or Blacks, which includes persons having origins in any of the Black racial groups of Africa;
- (2) Hispanic-Americans, which includes persons who are Mexican, Puerto Rican, Cuban, Caribbean, Dominican, Central or South American, regardless of race;
- (3) Native-Americans, which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians; or
- (4) Asian-Americans (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
- (5) Other groups, including, but not limited to, Arab-Americans, found by the County to be socially and economically disadvantaged and to have suffered actual racial or ethnic discrimination and decreased opportunities to compete in the County's Marketplace or to do business with the County. ~~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 County's Marketplace.~~

Owned means having all the customary incidents of ownership, including the right of disposition, and the sharing in all risks and profits commensurate with the degree of ownership interest.

Person or Persons means any natural person, corporation, partnership, Joint Venture, trust, association, limited liability company, sole proprietorship or other legal entity.

Personal Net Worth means 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 business

~~that is not publicly held, or the individual's equity in any real estate and any related fixtures or furnishings. In addition, the classes of assets not subject to the calculation would also include the market value of goods such as art, furnishings, jewelry, vehicles and other non-monetary assets. Certified MBE or WBE, provided that the other Person is certified by a governmental agency that meets the County'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 net worth also does not include the value of the individual's interest in any pension plans, Individual Retirement Accounts, 401(k) accounts, or other retirement savings or investment programs. An individual's Personal Net Worth also includes the present value of the individual's interest in 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.~~

Program means the Minority- and Women-Owned Businesses Enterprise Program established in this division, and shall include the Public Works Participation Program.

Program Goals means the aspirational contract-specific goals set forth in Section 34-267(a).

Protected Class Enterprise or *PCE* means a business meeting the definition of Minority Business Enterprise, Women's Business Enterprise, or Established Business as set forth in this section.

Public Works Participation Program means the program established pursuant to Subdivision II.

Regular Dealer means a Person that owns, operates, or maintains a store, warehouse, or other establishment in which the supplies, equipment, or goods (excluding software licenses) of the general character required for the Procurement are bought, kept in stock, and regularly sold or leased in the usual course of business. To be a Regular Dealer, the Person must be an established business that engages, as its principal business and under its own name, in the Procurement 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 distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis. Packagers, manufacturer representatives, or other Persons who arrange or expedite transactions are not Regular Dealers.

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, as related to the nature of the work the Person seeks to perform on 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~~ seven fiscal years, exceed 150 percent of the applicable size standards of 13 CFR Part 121.

Socially Disadvantaged means having been subjected to racial, ethnic or gender prejudice or cultural bias within American society because of identity as a member of a group, and without regard to individual qualities, stemming from circumstances beyond the relevant person's control.

Using Agency or *User Agency* means the departments or agencies within Cook County government, including Elected Officials.

Utilization Plan means the document, submitted to the County as part of a bid or proposal, in which one or more bidders or proposers commit to a level of PCE participation in the subject contract, identify the associated responsibilities and scope of work, and dollar value or the percentages of the work to be performed.

Woman means a person of the female gender.

Woman-owned Business Enterprise or *WBE* means a Local Small Business, including a sole proprietorship, partnership, corporation, limited liability company, Joint Venture or any other business or professional entity:

- (1) Which is at least 51 percent ~~O~~wned by one or more economically disadvantaged Women, or in the case of a publicly owned business, at least 51 percent of all classes of the stock of which is ~~O~~wned by one or more such Women;

- (2) Whose management, policies, major decisions and daily business operations are independently ~~managed~~ owned and controlled by one or more such Women; and
- (3) Which has its principal place of business ~~and a majority of its regular, full-time work force~~ located within the County's Marketplace.

Sec. 34-264. Race- and gender-neutral measures to implement the program.

The County shall use measures such as the following in implementing the Program.

- (a) Establishing schedules for submitting Bids and Quotations with adequate time frames for identifying and contacting PCEs qualified to participate in the Procurement;
- (b) Segmenting Procurements to facilitate the participation of MBEs, WBEs and other Small Businesses.
- (c) Providing timely information on contracting procedures, Bid preparation and specific contracting opportunities;
- (d) Holding pre-Bid conferences, where appropriate, to explain the projects and to encourage Contractors to use available qualified PCEs;
- (e) Reviewing retainage, bonding and insurance requirements to eliminate unnecessary barriers to contracting with the County;
- (f) Collecting information from all Contractors detailing the Bids or proposals received from all subcontractors for Procurements and the expenditures to PCEs;
- (g) At the discretion of the CCD, in cooperation with the CPO, periodically entering into a procurement process without Program goals or project specific goals in order to determine MBE and WBE utilization in the absence of such goals;
- (h) Referring complaints of discrimination to Cook County's Commission on Human Rights, or other appropriate authority, for investigation.

Sec. 34-265. Program administration.

- (a) The Office of Contract Compliance, under the direction of the CCD, who shall report to the President, shall administer the Program. The duties of the CCD shall include:
 - (1) Formulating, proposing and implementing rules and regulations for the development, implementation and monitoring of the Program, certification process, ~~recertification process~~ and no-change affidavits, including time limitations for the submission of documents and information regarding certification applications and contract participation. The CCD is authorized to collect certification ~~and recertification~~ processing fees in the amount of \$250.00 per Application; the collection of said processing fees shall be transacted by the CCD through the Bureau of Finance.
 - (2) Providing information and assistance to PCEs, and Small Businesses relating to the Program, and serve as a liaison to community, contractor, professional and supplier groups, and associations and organizations.
 - (3) Establishing uniform procedures and criteria for certifying, ~~recertifying~~ and decertifying Persons as PCEs, accepting certifications by other agencies, and maintaining a directory of Certified PCEs. Such procedures and criteria shall include non-certification or decertification for the willful submission of false or inaccurate material information, the failure to submit complete and accurate material information to the CCD regarding certification, or a Procurement on a timely basis, and shall relate individually and jointly to both PCEs and PCE owners.
 - (4) Establishing contract-specific goals, in collaboration with the User Agency, based upon the availability of PCEs to provide the supplies, materials and equipment or services required by the Contract.
 - (5) Monitoring contracts to evaluate compliance with contract-specific goals and commitments.

- (6) Cooperating with and providing assistance to Using Agencies to facilitate participation by PCEs in Procurements.
 - (7) Reviewing, approving or rejecting Utilization Plans and Good Faith Efforts ~~Transparency Reports~~ for achievement of contract-specific goals, and evaluating the extent to which goals were achieved.
 - (8) Monitoring contracts to ensure compliance with Section 34-388, Prompt Payment of PCEs.
 - (9) Receiving, reviewing, and acting upon complaints and suggestions concerning the Program.
 - (10) Evaluating the effectiveness and utility of the Program.
 - (11) Monitoring the Program and the County's progress towards the Program Goals. The CCD shall report on a quarterly and annual basis to the President on the Program.
 - (12) Reporting to the CCC, at its request, information regarding the administration of the Program and its progress toward achieving the Program Goals.
- (b) Using Agencies shall cooperate with the CCD in the administration of the Program, specifically including assisting the CCD with setting contract-specific goals and assisting in the identification of available PCEs.

Sec. 34-266. Contract Compliance Committee.

The Contract Compliance Committee ("CCC") shall be a Standing Committee of the Board, consisting of seven members of the Board selected as set forth in Chapter 2, Article III, Section 2-105 of the Code. The CCC shall review procedures, proposed modifications to the Program or this Division 8, and complaints as referred by the CCD or the CPO.

Sec. 34-267. Program goals.

- (a) The County aspires to the following annual Program Goals: A program goal of 25 percent of the annual total dollar amount of Contracts other than Public Works Contracts to MBEs, and ten percent of the total dollar amount of such Contracts to WBEs. In addition, the County aspires to annual "best efforts" goal of 35 percent PCE participation for the total professional services and consulting services utilized by the County.
- (b) The CCD, following the compilation of the Main Final Contract Data File ("MFCDF") and the Hospital Final Contract Data File ("HFCDF") stringent review the most current data that is feasibly and practicably available relative to the availability of MBEs and WBEs who have the capacity to successfully supply the relevant goods and services, and in consultation with the CPO and the Using Agency, shall establish contract-specific goals for each Contract, which shall be incorporated into each bid and request for proposal. Using the stringent review of the Program to set legally defensible Program Goals will provide transparency and defensibility, as well as reduce requests for Program Goal reductions or full waivers. Program Goal setting involves four steps:
 1. Weight the estimated dollar value of the scopes of the contract by six-digit NAICS codes, as determined during the process of creating the solicitation.
 2. Determine the unweighted availability of MBEs and WBEs in those scopes, as estimated in the most recent Disparity Study.
 3. Calculate a weighted goal based upon the scopes and the availability of at least three available firms in each scope.
 4. Adjust the resulting percentage based on current market conditions and progress towards the annual Program Goals.
- (c) 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.

- (d) Notwithstanding the above, Established Businesses may participate in the Program as authorized under Section 34-279.

Sec. 34-268. Certification criteria and process.

- (a) Only Persons that meet the criteria for certification as a PCE may participate in the Program. The applicant has the burden of proof by a preponderance of the evidence.
- (b) The Person must be either an individual who is Socially and Economically Disadvantaged or 51 percent owned by one or more individuals who are Socially and Economically Disadvantaged.
- (1) The Ownership by a Socially and Economically Disadvantaged Person must be real, substantial, and continuing, going beyond pro forma ownership of the Person as reflected in Ownership documents. The owner(s) must enjoy the customary incidents of ownership and share in the risks and profits commensurate with that ownership interest.
 - (2) The contributions to acquire the Ownership interest must be real and substantial, direct, and in accord with generally accepted industry standards. If expertise is part of the contribution, the ~~E~~expertise must be of the requisite quality generally recognized in a specialized field, necessary to the Person's potential success, specific to the type of work the Person performs and documented in the Person's records.
- (c) The Person must be ~~managed~~ owned and controlled by one or more Socially and Economically Disadvantaged individual.
- (1) There must not be any formal or informal restrictions that limit the customary discretion of the Socially and Economically Disadvantaged individual(s). There can be no restrictions through corporate charter provisions, by-law provisions, contracts or any other formal or informal devices that prevent the Socially and Economically Disadvantaged individual(s), without the cooperation or vote of any non-Socially and Economically Disadvantaged individuals, from making any business decision of the Person, including the making of obligations or the dispersing of funds.
 - (2) The Socially and Economically Disadvantaged individual(s) must possess the power to direct or cause the direction of the management and policies of the Person and to make day-to-day as well as long-term decisions on management, policy, operations and work.
 - (3) The Socially and Economically Disadvantaged individual(s) may delegate various areas of the management or daily operations of the Person to individuals who are not Socially and Economically Disadvantaged. Such delegations of authority must be revocable, and the Socially and Economically Disadvantaged individual(s) must retain the power to hire and fire any such Person. The Socially and Economically Disadvantaged individual(s) must actually exercise control over the Person's operations, work, management and policy.
 - (4) The Socially and Economically Disadvantaged individual(s) must have an overall understanding of, and managerial and technical competence, experience and expertise, directly related to the Person's s operations and work. The Socially and Economically Disadvantaged individual(s) must have the ability to intelligently and critically evaluate information presented by other participants in the Person's activities and to make independent decisions concerning the Person's daily operations, work, management, and policymaking.
 - (5) If federal, state or local laws, regulations or statutes require a particular license or other credential to own or control a certain type of Person, then the Socially and Economically Disadvantaged owner(s) must possess the license or credential. If state law, county ordinance or other law regulations or statute does not require that the owner possess the license or credential, then the fact that the owner(s) lacks such license or credential is a factor, but is not dispositive, in determining whether the Socially and Economically Disadvantaged owner(s) actually controls the firm.
 - (6) A Socially and Economically Disadvantaged owner cannot engage in outside employment or other business interests that conflict with the management of the Person or prevent the owner from devoting sufficient time and attention to manage and control the Person's Day to day activities.

- (d) Only an independent Person may be certified as a MBE or WBE. An independent Person is one whose viability does not depend on its relationship with another Person, and who has the capacity or ability to successfully undertake and complete the relevant work. Recognition of an applicant as a separate entity for tax or corporate purposes is not necessarily sufficient to demonstrate that a Person is independent. In determining whether an applicant is an independent business, the CCD will:
- (1) Scrutinize relationships with non-Certified Person in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.
 - (2) Consider whether present or recent employer/employee relationships between the Socially and Economically Disadvantaged owner(s) of the applicant and non-Certified Persons associated with non-Certified Firms compromise the applicant's independence.
 - (3) Examine the applicant's relationships with non-Certified Persons to determine whether a pattern of exclusive or primary dealings with non-Certified Persons compromises the applicant's independence.
 - (4) Consider the consistency of relationships between the applicant and non-Certified Persons with normal industry practice.
- (e) The CCD shall certify only Persons that meet all the above criteria. An applicant shall be certified only for specific supplies, equipment, goods or services, or for types of work in which the Socially and Economically Disadvantaged owner(s) has the ability and expertise to manage and control the Person's operations and work.
- (f) The County shall certify the eligibility of Joint Ventures involving PCE and non-Certified Firms, provided that the Joint Venture meets the criteria for certification as a PCE. To be considered an eligible Joint Venture, at least one partner of the Joint Venture must be a Certified Firm, with a share in the capital contribution, control, management, risks, and profits of the Joint Venture which is equal to its ownership interest. Each Certified Firm partner must contribute property, capital, efforts, skill and knowledge and be responsible for a distinct, clearly defined portion of the work of the contract. 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.
- (g) In lieu of conducting its own certifications, the CCD by rule may accept formal certifications by other entities, provided that Cook County's requirements are met.
- (h) The certification status of all PCE shall be reviewed periodically by the Office of Contract Compliance. Failure of the Person to seek ~~recertification~~ continued certification by filing the necessary documentation with the CCD as provided by rule may result in decertification.
- (i) It is the responsibility of the Certified PCE to notify the CCD of any change in its circumstances affecting its continued eligibility for the Program. Failure to do so may result in the PCEs decertification.
- (j) The CCD shall decertify a PCE that does not continuously meet the eligibility criteria.
- (k) Disqualification pursuant to Division 4 of the Procurement Code shall create a prima facie case for decertification by the County. The challenged PCE shall have the burden of proving that its County certification should be maintained.
- (l) Decertification by another agency shall create a prima facie case for decertification by the County. The challenged PCE shall have the burden of proving that its County certification should be maintained.
- (m) PCEs shall submit to the CCD complete and accurate material information, and shall not submit to the CCD false, deceptive, fraudulent, or inaccurate material information, relative to:
- (1) Its status as a PCE;
 - (2) Certification or continued certification ~~or recertification~~;
 - (3) Proposed or actual contract participation; and
 - (4) Any other matter that arises during an investigation by the CCD or another County official, and shall be subject to the penalties set forth in Section 34-175 and 34-275 for a violation of this subsection.

- (n) A Person that has been denied certification ~~or recertification~~ or has been decertified may protest the denial or decertification by submitting a petition for review in a proceeding made pursuant to Part I, Chapter 2, Article IX, Administrative Hearings, and the Administrative Rules promulgated thereunder.
- (o) A Person found to be ineligible for certification or continuing certification for reasons other than those referenced in Section 34-275 may not apply for certification for one year after the effective date of the final decision.
- (p) A third party may challenge the eligibility of an applicant for Certification or a Certified PCE pursuant to procedures established by the CCD. Such challenges shall be signed and sworn by the individual challenging the eligibility of an applicant for Certification or a Certified PCE. The burden of proof shall rest with the complainant. Such challenges to eligibility shall be subject to an appeal. The CCD shall be the final arbiter of all challenges. The presumption that the challenged PCE is eligible shall remain in effect until the CCD renders a final decision.

Sec. 34-269. Utilization plan; commercially useful function.

- (a) *Utilization Plan.* The CPO shall include in Contract Documents for Contracts covered by this Division a requirement that a Utilization Plan be submitted which either: (i) commits to PCE participation equal to or greater than the applicable contract-specific goal or goals, or (ii) requests a waiver of all or a portion of a contract-specific goal by submitting a Good Faith Effort Transparency Report pursuant to Section 34-281.
 - (1) The Utilization Plan shall be in such form and contain such information as is required by the CCD, and may include such components as direct PCE participation, indirect PCE participation, and a mentoring relationship with one or more PCEs.
 - (2) The Utilization Plan shall be due at the time the bid or proposal is due. In the event a bid or proposal leads to a Contract with the County, the Utilization Plan as approved by the CCD shall be incorporated as a material commitment on the part of the Contractor to each relevant PCE and the contractor and the County. Failure to include a Utilization Plan shall render the bid or proposal not Responsive.
 - (3) The CCD shall review and either approve or reject the Utilization Plan. For purposes of evaluating a Utilization Plan, only PCEs which perform a Commercially Useful Function relative to the supplies, equipment, goods, services, or types of work for which the PCE has been certified shall be considered.
 - (4) Once a Utilization Plan has been approved, the Contractor may not change the Utilization Plan, including substituting PCEs named in the Utilization Plan, without the prior written approval of the CCD, in consultation with the CPO and the Using Agency. Upon such written approval by the CCD, the revised Utilization Plan shall be incorporated into the Contract as an amendment by the CPO. The CCD shall promulgate policies and procedures with respect to change to a Utilization Plan.
- (b) *Commercially Useful Function.* To be considered in meeting Goals, a PCE must perform a Commercially Useful Function.
 - (1) In the case of a Procurement of supplies, equipment, or goods, placing an order for delivery directly to the Using Agency is not a Commercially Useful Function; provided, however, that to the extent such practice is consistent with normal industry practices, a PCE subcontractor may enter into second tier subcontracts. However, if a PCE Contractor or subcontractor subcontracts a significantly greater portion of the work of the Contract than would be expected on the basis of normal industry practices, the PCE shall be presumed not to be performing a Commercially Useful Function.
 - (2) In the case of a 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. In the case of a Joint Venture partner, each Joint Venture partner must perform a Commercially Useful Function.
 - (3) A PCE 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 PCE participation.

- (4) When a PCE is presumed not to be performing a Commercially Useful Function, the Certified PCE and the Person seeking to include that PCE in its Utilization Plan, may present evidence to rebut this presumption.

Sec. 34-270. Methods to achieve goals and compliance.

A Person may achieve the applicable Contract Specific Goals in any one or more of the methods set forth below. The same PCE, whether as a contractor, subcontractor or supplier, may not be utilized duplicatively as an MBE and a WBE on the same Contract.

- (1) *PCE as prime Contractor.* An MBE or WBE may count its own participation toward the achievement of the applicable MBE or WBE goal. Such PCE will be required to meet the other goals by another method described herein. If a PCE is certified as a WBE and a MBE, such PCE's participation may count toward the MBE or WBE Goal.
- (2) *Joint Venture with one or more PCE.* Where a Person engages in a Joint Venture with one or more PCEs, the Utilization Plan shall include a written agreement containing at least the information set forth in this Subsection. The CCD 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 each PCE's proposed participation in the performance of the Contract constitutes a Commercially Useful Function;
 - c. Whether the relevant PCE shares in the risks and profits of the Joint Venture is proportional to their ownership interest;
 - d. Whether the relevant PCE will have duties, responsibilities, management 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 or more PCEs.

Sec. 34-271. Request for a full or partial waiver; good faith efforts.

- (a) Parties submitting bids or proposals for Procurements may in all instances request a partial or full waiver of one or more established contract-specific goal for PCE participation. A Contractor, Person, or Business requesting a partial or full waiver shall submit, in writing, a report detailing its efforts to comply with County's "good faith efforts" as defined in Section 34-281, hereinafter referred to as the "Good Faith Effort Transparency Report". In reviewing a Contractor, Person, or Business' written request for a partial or full waiver of a contract-specific goal, the CCD shall determine whether a Contractor, Person, or Business has made good faith efforts to meet the applicable Goals and to what extent the waiver request should be granted. In determining whether a Contractor, Person, or Business has made Good faith efforts, the CCD will consider the Good Faith Effort Transparency Report, pursuant to Section 34-281 and additional factors, pursuant to Section 34-282. Upon evaluation of the Contractor, Person, or Business' Good Faith Effort Transparency Report and additional factors, the CCD will draft and submit a report, pursuant to Section 34-283.
- (b) In determining whether a Bidder or Respondent has made Good Faith Efforts, the levels of participation by PCEs set forth in Utilization Plans submitted by other Persons for the same 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 PCE participation obtained by other Bidders or Respondents, this may be evidence that the apparent successful Bidder or Respondent made Good Faith Efforts.
- (c) Where the County requires professional services, the County must be able to call upon those professionals whose particular training and experience are most beneficial to the County.
 - (1) 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 Section 34-271; provided, however, that such Persons shall not be

- required to attempt to subcontract with PCEs if subcontractors would not typically be utilized for the type of Procurement. In such cases, the Person shall document the reasons for not subcontracting in a waiver request.
- (2) The Contractor will endeavor to maximize use of PCEs for supplies, equipment, goods or services for such Contractor's business operations not specifically for the Procurement.
 - (3) 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 CCD shall compare such plan and goals with the Person's actual affirmative action achievements and such achievements may be considered by the County in future Procurements.
- (d) Mentor/protégé agreements. Where a Contractor enters into or maintains a mentor/protege agreement with a PCE to improve or develop certain aspects of the business of the PCE, the CCD 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 PCE in such areas as technical aspects of the PCE'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.
- (1) The PCE performs a Commercially Useful Function;
 - (2) The agreement shall be included in the Utilization Plan; and
 - (3) The agreement clearly defines the respective responsibilities of the Contractor and the PCE 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.
- (e) The CCD may grant a total or partial waiver based upon the following criteria:
- (1) There are not sufficient PCEs capable of providing the supplies, equipment, goods or services required for the Procurement;
 - (2) The Procurement cannot reasonably be divided;
 - (3) The price required by potential PCEs is more than ten percent above competitive levels; and
 - (4) Any other factor relating to good faith efforts as set forth in the Person's Utilization Plan.

Sec. 34-272. Calculating PCE participation.

In calculating a PCE's participation, only dollar amounts commensurate with a PCE's performance of a Commercially Useful Function may be counted.

- (a) The dollar value of that portion of a Procurement that is performed by the PCEs' own forces shall be counted, including the cost of supplies, materials and equipment furnished by the PCE for the Procurement, whether purchased or leased (except to the extent purchased or leased from the Contractor or the Contractor's Affiliate).
- (b) The dollar amount of fees or commissions charged by a PCE 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.
- (c) When a PCE is a Joint Venture partner, only the dollar value of the distinct, clearly defined work performed by the PCE with its own forces, shall be counted.
- (d) Only the dollar value must be commensurate with the work the PCE actually performs.
- (e) One hundred percent of the cost of the supplies, equipment or goods obtained from a PCE Manufacturer, or Distributor, or Regular Dealer shall be counted, unless otherwise provided pursuant to Section 34-279.

- (f) One hundred 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, unless otherwise provided pursuant to Section 34-279.
- (g) If a PCE ceases to be a certified for any other reason than graduation from the M/WBE Program 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 for the remaining term of the Contract.
- (h) Only the dollar amount actually paid to the PCE shall be counted toward the participation of a PCE.

Sec. 34-273. Review of contract performance.

- (a) *Compliance with Utilization Plan.* The CCD shall review the Contractor and PCE's compliance with its Utilization Plan as necessary during the performance of the Contract. The CCD may establish such requirements for periodic Contractor and PCE reporting on compliance with its Utilization Plan as the CCD determines appropriate and necessary. A Contractor and PCE shall be required to provide any additional requested compliance documentation within 14 days of request by the CCD.
 - (1) If the CCD determines that the Contractor has failed in good faith to comply with a Utilization Plan and has failed to provide a cure accepted by the CCD in his or her discretion, the CCD shall notify the CPO of such failure. The CPO shall then send notice of default to the Contractor, and the Contractor shall have such time to cure the default as is provided in the Contract. If no such period is provided, the Contractor shall have ten days to cure such default. For purposes of this section, providing a plan for bringing the 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.
 - (2) If a Contractor fails to provide any documentation required by the CCD, the CCD shall notify the CPO of such failure. The CPO shall then send notice of default to the Contractor, and the Contractor shall have such time to cure the default as is provided in the Contract. If no such period is provided, the Contractor shall have ten days to cure such default.
- (b) *Bid and target market programs.* To address more specifically the barriers to PCE participation as prime Contractors in County work, the CCD may recommend to the CPO to institute the following special PCE bidding provisions, following determination of the appropriateness of such provisions.
 - (1) In connection with the award of a Contract subject to competitive bidding on which a PCE has bid and where the PCE is bidding on the item in question for the first time; and has never successfully bid on a Cook County purchasing contract, the Contract Compliance Director may, at the opening of the bids on the item, compare the PCE Bid with the lowest Bid, and, if the PCE's Bid is closely competitive as defined by guidelines to be established by the Contract Compliance Director with that of lowest actual Bids, direct the CPO to declare the PCE the successful Bidder. A PCE may use this procedure only once to become the successful Bidder on any particular item. Thereafter, the PCE must be totally competitive in terms of price to be the successful Bidder.
 - (2) The Contract Compliance Director shall develop and coordinate a target market program as follows:
 - a. To ensure that the County receives a competitive price, the Contract Compliance Director shall review the availability of PCEs providing various supplies, equipment, goods and services, and shall identify areas with sufficient PCE availability for inclusion in a potential program for bidding, Requests for Qualifications, and Requests for Proposals among PCE Persons. The Contract Compliance Director shall report his/her findings and recommendations to the Contract Compliance Committee;
 - b. Upon a determination by the CCD that such a program is advisable for any particular supplies, equipment, goods or services procurement, the Contract Compliance Director will institute the following procedures:

1. The Contract Compliance Director will notify the CPO of identification of those supplies, equipment, goods, services, or North American Industry Classification Standard (NAICS) codes appropriate for a target market program;
 2. To the extent practicable, the CPO, with the aid of the Contract Compliance Director, shall divide procurement in the designated supplies, equipment, goods or services areas into economically feasible sizes to facilitate Bids, Requests for Qualifications, or Requests for Proposals from PCEs and shall designate contracts to be offered under the target market program;
 3. The CPO shall offer PCEs the opportunity to bid on such contracts, or submit responses or proposals, in a limited competition;
 4. All standard County procurement rules for bidding, Requests for Qualifications, or Requests for Proposals, will then become effective and, provided that at least three PCEs Bid or submit responses or proposals, the lowest Responsive and Responsible Bidder, Proposer, or Respondent among the PCEs will receive the contract;
 5. In the event less than three PCEs Bid or submit responses or proposals pursuant to a Request for Qualifications or Request for Proposals, or in the event that there is no Responsive Bid or best and final Response or Proposal received from a Responsible PCE, the CPO shall rebid the Contract or reissue the Request for Qualifications or Request for Proposals not subject to the target market program.
- c. 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 or Women's Business Enterprises or both. The PCE Contractor on a target market Contract may subcontract up to 49 percent of the dollar value of the target market Contract to subcontractors who are not Minority Business Enterprises or Women's Business Enterprises.

Sec. 34-274. Prompt payment of PCEs.

If an invoice from a Contractor includes payment for supplies, equipment, goods or services furnished by a PCE, Contractor shall pay such PCE for such supplies, equipment, goods or services within 15 days after receipt of payment from the County. The CCD 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 County Comptroller. Failure of Contractor to comply with this Section 34-388 shall constitute a material breach of the Contract.

Sec. 34-275. Sanctions and penalties.

- (a) In addition to such penalties as are provided in Section 34-175 and Section 34-176, the following violations of this Section may result in an imposition of penalties as provided herein:
- (1) A PCE who violates Section 34-268(m) shall not be eligible for certification for a period of up to five years and shall be liable for a fine of \$2,500.00, and such sanctions shall apply jointly and individually to the PCE and the relevant PCE owner or owners.
 - (2) The CCD may recommend to the County's Chief Procurement Officer that a Contractor, subcontractor, or PCE be disqualified from participation in a County contract for period of up to five years and contractually penalized in the manner and degree identified by the CCD, pursuant to the Procurement Code, for a violation of this Section.
- (b) In the event a party wishes to pursue administrative review, under Section 34-178, of the CCD's decision or determination relative to the denial or revocation of certification, or the CCD's imposition of a penalty under Section 34-175, Section 34-176 or this Section, said party shall, within 60 days of the Final Notice issued by the CCD, seek administrative review by submitting a written petition to both the Department of Administrative Hearings and the CCD, which petition may be supported by information, documents, and arguments, provided that the information and documents so submitted were available to and in the possession of the CCD at the time of the Final Notice, and the administrative hearing process shall be limited to such

documents and information as were available to and in possession of the CCD at the time of such Final Notice, In such administrative review, the petitioning party shall have the burden of proving, by a preponderance of evidence, that CCD's decision or determination, as set forth in the Final Notice, is clearly erroneous.

Sec. 34-276. Reporting and review.

The CCD shall report to the Board on an annual basis with respect to the following:

- (1) The percentage of the total dollar amount of Procurements for such year actually received by PCEs;
- (2) The number of MBEs and WBEs available for participation in Procurements, by category;
- (3) An evaluation of the effectiveness of this division in ensuring equitable participation by PCEs in Procurements;
- (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 Procurements.

(Ord. No. 14-1232, 3-12-2014; Ord. No. 16-3598, 6-29-2016.)

Sec. 34-277. Prohibited provisions.

Any agreement between a Contractor and a PCE in which the Contractor requires that the PCE not provide subcontracting quotations to other Contractors is prohibited.

Sec. 34-278. Outreach and training.

The CCD shall from time to time, by way of seminars, workshops, and internet-based communications, make available to the business community such information, documents, and personnel as well as:

- (a) Assist otherwise eligible businesses in applying for, gaining, and maintaining certification.
- (b) Assist the business community in understanding the manner in which to properly complete a Utilization Plan including how a full or partial waiver may be requested, and the manner in which such a request may be supported.
- (c) Identify best practices by other governmental entities and private sector firms that may improve the Program.
- (d) Identify systemic or organizational problems and related solutions associated with certification and contract participation.

Sec. 34-279. Established business participation in the Program.

- (a) An Established Business may participate in the Program, as follows:
 - (1) For a one-year period after the business has become an established business, only 75 percent of such business's participation in a County contract shall account for the MBE or WBE, as applicable, program goals;
 - (2) For a one-year period starting on the one-year anniversary of the date the business became an established business, only 50 percent of such business's participation in a County contract shall account for the MBE or WBE, as applicable, program goals; and

- (3) For a one-year period starting on the two-year anniversary of the date the business became an established business, only 25 percent of such business's participation in a County contract shall account for the MBE or WBE, as applicable, program goals.
- (b) An Established Business shall not be eligible to participate in the Program starting on the three-year anniversary of the date the business became an established business.
- (c) The CCD shall provide notice to participating Established Businesses of the allowed level of participation by such businesses in the Program.

Sec. 34-280. Program review and sunset.

- (a) The President and the Board of Commissioners shall receive an annual report from the CCD detailing the County's performance under the Program.
- (b) The President and the Board of Commissioners will review these reports, including the Annual Participation Goals and the County's progress towards meeting those Goals and eliminating discrimination in its contracting activities and marketplace.
- (c) Within five years after the effective date of this ordinance, the County will review the operation of the Program and the evidentiary basis for the Program in order to determine whether the County has a continuing compelling interest in remedying discrimination against MBEs and WBEs in its marketplace, and the permissible scope of any narrowly tailored remedies to redress discrimination against MBEs or WBEs so that the County will not function as a passive participant in a discriminatory marketplace.
- (d) This subdivision shall sunset on or before ~~March 31, 2023~~ March 31, 2028.

Sec. 34-281. The good faith effort transparency report.

Any Person who seeks a partial or full waiver request shall submit a Good Faith Effort Transparency Report upon its partial or full waiver request. The Good Faith Effort Transparency Report shall include:

- (1) A detailed list of any and all PCEs whom the Contractor, Person, or Business engaged, contacted, and/or reviewed, in the County's Marketplace, from the County's list of PCEs and/or other State and local government agencies, whom Cook County recognizes and/or has a reciprocity agreement with, which identify qualified PCEs for solicitation of bids, for the purposes of securing a bid with the County;
- (2) A detailed explanation of the Contractor, Person, or Business' proposed divided procurement requirements. This explanation will include, but not limited to:
 - a. How the Contractor, Person, or Business proposed to divide the procurement requirements into small tasks and/or quantities into economically feasible units to promote PCE participation; and
 - b. Whether the proposed procurement requirement divisions are consistent with availability of PCEs;
- (3) A detailed explanation of the Contractor, Person, or Business' negotiations in good faith with PCEs. If the Contractor, Person, or Business fails to contact a PCE, this explanation will include, but is not limited to:
 - a. The timeliness when the Contractor, Person, or Business knew of the bid, when the Contractor, Person, or Party formulated its bid and utilization plan, and the bid request due date;
 - b. A detailed explanation of timely attempts to contact PCEs providing the type of supplies, equipment, goods, and/or services required for the Procurement. This explanation will include, but is not limited to:
 - i. Dates of contact attempts;
 - ii. With whom, if anyone, the Contractor, Person, or Business communicated and/or corresponded (including written, virtual, digital, electronic, and other feasible methods of communication); and
 - iii. The number of unsuccessful attempts to communicate or correspond with PCEs.

- (4) A detailed explanation of the Contractor, Person, or Business' negotiations in good faith with PCEs. If the Contractor, Person, or Business successfully contacts a PCE, this explanation will include, but is not limited to:
 - a. A detailed explanation regarding why the PCE was incapable of inclusion for the Contractor, Person, or Business' bid;
 - b. A description of the information provided regarding the plans and specifications for the work selected for subcontracting and why agreements were unreachable;
 - i. The Contractor, Person, or Business shall not determine and reject PCEs as unqualified without sound reasons. The Contractor, Person, or Business shall not consider some additional costs involved in finding and using PCEs as the sole reason for the Contractor, Person, or Business' failure to meet the Goals, as long as such costs are reasonable, as determined by the CCD and Board.
 - c. A detailed explanation regarding a Contractor, Person, or Business' efforts to assist interested PCEs in obtaining necessary equipment, supplies, materials, or related assistance or services, where appropriate; and
 - d. A detailed explanation of any and all adjusted insurance requirements imposed by the Contractor, Person, or Business seeking PCEs, including, but not limited to:
 - i. Whether the Contractor, Person, or Business assisted PCEs in obtaining any required insurance, where economically feasible, to encourage participation by PCEs.
- (5) The Contractor, Person, or Business applying for a waiver shall sign the Good Faith Effort Transparency Report. If the Contractor, Person, or Business is a domestic business organization or authorized to conduct business in Illinois, the signee shall be any, employee, agent, and/or officer authorized to sign on behalf of the Contractor, Person, or Business. The Contractor, Person, or Business' attestation/signature will serve as confirmation the Contractor, Person, or Business provided accurate, complete, and truthful information. Any finding of false, omitted, fraudulent, and/or otherwise misleading information will lead to automatic rejection of the waiver request. The Cook County Office of Contract Compliance reserves the right to pursue additional actions and/or remedies against the requesting Contractor, Person, or Business.
- (6) The Good Faith Effort Transparency Report shall be due at the time the bid or proposal is due. In the event a bid or proposal leads to a Contract with the County, the Good Faith Effort Transparency Report, as approved by the CCD, shall be incorporated into the Contract. Failure to include a Good Faith Effort Transparency Report upon submission of a request for a partial or full waiver shall result in no consideration for waiver and render the bid or proposal not Responsive.
- (7) Once the CCD approves a Good Faith Effort Transparency Report, the Contractor, Person, or Business may not change the Good Faith Effort Transparency Report without the prior written approval of the CCD, in consultation with the CPO and the Using Agency. Upon such written approval by the CCD, the revised Good Faith Effort Transparency Report shall be incorporated into the Contract as an amendment by the CPO and made available to the Board for review no later than one week prior to the Bid appearing on the Board agenda for approval. The CCD shall promulgate policies and procedures with respect to changes to a Good Faith Effort Transparency Report.

Sec. 34-282. Additional good faith effort factors for consideration.

- (a) The Contract Compliance Director may also consider additional factors, if known, including, but not limited to:
 - (1) Whether the Contractor, Person, or Business followed up with PCEs who it originally identified but were unable to include in the bid, based upon prior communication, but prior to submitting its bid;
 - (2) Whether the Contractor, Person, or Business established delivery schedules which will encourage participation by PCEs, where the requirements of the Procurement permit;

- (3) Whether the Contractor, Person, or Business used the services and assistance of the CCD's staff, the Small Business Administration, and/or the Office of Minority Business Enterprises of the U.S. Department of Commerce;
 - (4) Whether the Contractor, Person, or Business timely notified appropriate community, minority, and/or women business organizations, identified as assist agencies, of the opportunity for participation in the Procurement;
 - (5) Whether the Contractor, Person, or Business maintains or commits to establish and maintain a mentor-protégé agreement with one or more PCEs that is enforceable and that, in the judgment of the CCD, has performance standards and outcomes that are clearly established and effective in terms of assisting the PCE in acquiring additional skills, experience, and relationships helpful to the long-term success of the PCE, consistent with the provisions of Subsection 34-271(d).
- (b) In determining whether a Contractor, Person, or Business made Good Faith Efforts, the levels of participation by PCEs set forth in Utilization Plans submitted by other Contractors, Persons, or Businesses for the same Procurement may be considered. For example, if the apparent successful Contractor, Person, or Business fails to meet the Contract Specific Goals, but meets or exceeds the average PCE participation obtained by other Contractors, Persons, or Businesses, this may be evidence that the apparent successful Contractors, Persons, or Businesses made Good Faith Efforts.
- (c) Where the County requires professional services, the County must be able to call upon those professionals whose particular training and experience are most beneficial to the County.
- (1) A Utilization Plan shall be required, and if a waiver or partial waiver is requested, "good faith" efforts shall be demonstrated by the submission of the Good Faith Effort Transparency Report, by the Contractor, Person, or Business, and CCD's consideration of additional factors pursuant to Sections 34-271, 34-281, and 34-282; provided, however, such Contractors, Persons, or Businesses shall not be required to attempt to subcontract with PCEs if subcontractors would not typically be utilized for the type of Procurement. In such cases, the Contractor, Person, or Business shall also complete a Good Faith Effort Transparency Report detailing the reasons for not subcontracting the professional services for the specific bid.
 - (2) The Contractor, Person, or Business will endeavor to maximize use of PCEs for supplies, equipment, goods, or services for such Contractor, Person, or Business' business operations not specifically for the Procurement.
 - (3) If such Contractor, Person, or Business is required to have or has an affirmative action plan and goals, such plan and goals shall be submitted with their Utilization Plan. The CCD shall compare such plan and goals with the Contractor, Person, or Business' actual affirmative action achievements and such achievements may be considered by the County in future Procurements.
- (d) Mentor/protégé agreements. Where a Contractor, Person, or Business enters into or maintains a mentor/protégé agreement with a PCE to improve or develop certain aspects of the business of the PCE, the CCD shall evaluate the effect of such agreement as a factor in determining good faith efforts. The mentor/protégé agreement may provide for the Contractor, Person, or Business to assist the PCE in such areas as technical aspects of the PCE'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.
- (1) The PCE performs a Commercially Useful Function;
 - (2) The agreement shall be included in the Utilization Plan; and
 - (3) The agreement clearly defines the respective responsibilities of the Contractor, Person, or Business and the PCE 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.
- (e) The CCD may grant a total or partial waiver based upon the following criteria:
- (1) There are not sufficient PCEs capable of providing the supplies, equipment, goods, or services required for the Procurement;

- (2) The Procurement cannot reasonably be divided;
 - (3) The price required by potential PCEs is more than ten percent above competitive levels; and
 - (4) Any other factor relating to good faith efforts as set forth in the Contractor, Person, or Business' Utilization Plan and Good Faith Effort Transparency Report.
- (f) Should the CCD grant any partial or full waiver, the CCD shall report, in writing, its justification for granting the waiver, pursuant to Section 34-283.

Sec. 34-283. Contract compliance director waiver transparency reporting.

The CCD shall report to the Board, in writing, on a monthly basis, ~~and at least three days prior to the Board meeting~~ where such Contracts seek Board approval with a waiver request, a report which shall include:

- (1) The percentage of the total dollar amount of Procurements for such Contracts seeking approval by the Board, whereby the Person or Party, seeking Contract approval requested a partial or full waiver and submitted a Good Faith Effort Transparency Report.
- (2) The number of PCEs available for participation in Procurements, based on Contracts seeking approval by the Board and requesting a waiver, including:
 - a. PCE designation, and
 - b. Industry type and/or NAICS codes of the PCEs, where appropriate.
- (3) A summary regarding whether the CCD approved or rejected the Good Faith Effort Transparency Report and why.
- (4) The CCD report shall include Good Faith Transparency Reports for such Contracts seeking approval, attached to the CCD report as an exhibit.

Sec. 34-284. Reserved.

Subdivision II. Participation in Cook County Public Works Contracts

Sec. 34-285. Short title; incorporation of provisions.

This Subdivision may be known and cited as the "Cook County Public Works Minority- and Women-Owned Business Enterprise Ordinance" and may be cited as such.

Sec. 34-286. Preface and findings.

- (a) The findings set forth in Subdivision I, Section 34-261 of this Division 8 are incorporated herein by this reference;
- (b) After the requirement in Subdivision I that Minority- and Women-Owned Businesses (M/WBEs) be allotted certain percentages of County construction contracts was ruled unconstitutional, the County witnessed a drastic reduction in M/WBE construction prime contract and subcontract participation;
- (c) The President and the Board of Commissioners of the County of Cook, after considering:
 - (1) 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);
 - (2) County statistical evidence of continuing discrimination against Blacks, Hispanics, Asians and women in the County's Procurements;

- (3) The Report title, "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;" as well as;
- (4) Anecdotal evidence of discrimination against minorities and women in the County's Public Works Contracts; and
- (5) Receiving and considering written reports, adopts the following findings as a strong basis in evidence supporting a narrowly tailored, remedial affirmative action program in Public Works Contracts;
- (d) The County seeks to provide a level playing field and equal access for all prime contractors and subcontractors to participate in Public Works Contracts;
- (e) The County continues to be committed to implementing an affirmative action program associated with local small businesses owned by economically disadvantaged minorities and women in conformance with the United States Supreme Court's decision in *City of Richmond v. Croson* and other relevant law;
- (f) In furtherance of this commitment, the Board and the President of the Board, supported by County staff, professionals, and consultants, conducted an investigation to determine whether and to what degree:
 - (1) There continues to be discrimination in County Procurements, and in the award of and participation in contracts in the metropolitan County economy;
 - (2) Such discrimination or the effects thereof has denied and continues to deny small and economically disadvantaged minority and women's business enterprises equal opportunity to participate in such Procurements and contracts;
 - (3) Small businesses owned and ~~managed~~ controlled by economically disadvantaged minorities and women in the County Marketplace experience disparate negative impacts in terms of participating in public and private transactions, including, but not limited to, transactions with the County, those private enterprises with whom it does business, and other private enterprises;
 - (4) Small, economically disadvantaged businesses owned and ~~managed~~ controlled by minorities and women in the County Marketplace experience reduced earnings;
 - (5) The formation of businesses owned and managed by minorities and women in the County Marketplace is disproportionately low;
 - (6) There continues to be a chronic lack of wealth, business loans, and financial liquidity among the County's minority communities and among minorities who own and operate their own small businesses;
 - (7) The disproportionate levels of poverty among minorities in the County and any of the foregoing elements detrimentally affect the County's efforts to protect and promote public safety, health and welfare, and to identify the appropriate affirmative action steps to be taken to eliminate any such discrimination, obstacles, and poverty and their continuing effects;
- (g) The County has collected and analyzed data, conducted interviews with stakeholders, and otherwise conducted a study of its Program to determine whether and to what degree disparities exist relative to the participation of minority and woman-owned businesses in County and non-County contracts "Cook County, Illinois Disparity Study ~~2015~~" (the "Disparity Study"); and
- (h) The Disparity Study entails recommendations for an improved Minority- and Women-owned business program, emphasizing the ~~establishment~~ utilization of contract-specific goals, implementation of race- and gender-neutral measures, and enhancements to data gathering, implementation and performance monitoring of the program;
- (i) The County has a compelling interest in preventing discrimination and desires to reaffirm its commitment to full and fair opportunities for all firms to participate in its construction contracts.

Sec. 34-287. Policy and purpose.

It is hereby found, determined and declared that the purpose of this Ordinance is to ensure the full and equitable participation of local small businesses owned by economically disadvantaged minorities and women in the

County's procurement process as both prime and subcontractors in the County's Public Works contracts. The County is committed to a policy of preventing discrimination in the award of or participation in Public Works contracts and has recommended appropriate narrowly tailored remedies to eliminate any such discrimination.

Sec. 34-288. Applicability.

This subdivision shall apply to all Public Works contracts, regardless of the sources of other funds; provided that any Public Works contract with respect to which a goal for Minority-Owned Business Enterprise or Women-Owned Business Enterprise participation is inconsistent with or prohibited by State or Federal law shall be exempt from the goals included in this subdivision.

Sec. 34-289. Severability.

If any section, subsection, clause or provision of this subdivision is held to be invalid by a court of competent jurisdiction, the remainder of the subdivision shall not be affected by such invalidity.

Sec. 34-290. Definitions.

The following terms shall have the following meanings:

Affiliate. An "Affiliate" of or a Person "Affiliated" with, a specified Person shall mean any Person that directly or indirectly through one or more intermediaries, Controls, is Controlled by, or is under common Control with, the Person Specified. Affiliates shall be considered together in determining whether a firm is a small business.

Annual Participation Goals means the targeted levels established by the County for the annual aggregate participation of MBEs and WBEs in County construction contracts.

Applicant means a person who submits documents and information seeking certification, or continued certification, ~~or re-certification~~ as a PCE to the Office of Contract Compliance.

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 required for performance of the 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.

Business means a sole proprietorship, partnership, corporation, limited liability company, Joint Venture or any other business or professional entity.

Certified firm means a firm that has been accepted by the County as a certified MBE or WBE or Established Business.

Contract means any Procurement or Contract (as defined in Section 34-121) in an amount exceeding \$25,000.00.

Contractor means any Business that seeks to enter into a construction contract with the County, other than for professional services, and includes all partners and Affiliates Business.

Commercially Useful Function means responsibility for the execution of a distinct element of the work of the contract, which is carried out by actually performing, managing, and supervising the work involved, or fulfilling such responsibilities as a Joint Venture partner.

Compliance Contract Director or "*CCD*" means the Contract Compliance Director.

County means the County of Cook and its participating User Agencies.

Contract Specific Goals means the aspirational goals established under Section 34-267(b) that are based upon relevant factors, including, but not limited to, the availability of MBEs or WBEs relative to the scope of work of the Project.

County's Marketplace means the six-county region, currently the counties of Cook, DuPage, Kane, Lake, McHenry and Will.

Disparity Study means the stringent review examining Cook County's M/WBE Program for contracts issues by Cook County Government and Cook County Health and Hospital System.

Economically Disadvantaged means, with respect to an individual, having a Personal Net Worth less than \$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 2008.

Established Business means a Local Business that is not a Small Business and was certificated as an MBE or WBE within the past 12 months:

- (1) Which is at least 51 percent owned by one or more Minority Individuals or Women, or in the case of a publicly owned business, at least 51 percent of all classes of the stock of which is owned by one or more such Minority Individuals or Women;
- (2) Whose management, policies, major decisions and daily business operations are independently ~~managed~~ owned and controlled by one or more such Minority Individuals or Women; and
- (3) Which has its principal place of business ~~and a majority of its regular, full-time workforce~~ located within the County's Marketplace.

Expertise means demonstrated skills, knowledge or ability to perform in the field of endeavor in which certification is sought by the Business, as defined by normal industry practices, including licensure where required.

Good Faith Efforts means actions undertaken by a Contractor pursuant to Section 34-271.

Joint Venture means an association of two or more Businesses proposing to perform a for-profit business enterprise. Joint Ventures must have an agreement in writing specifying the terms and conditions of the relationships between the partners and their relationship and responsibility to the contract.

Local Business means a Business located within the County's Marketplace which has the majority of its regular, full-time work force located within the County's Marketplace.

Local Small Business means a Local Business which is also a Small Business.

Manufacturer means a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.

Minority Business Enterprise or *MBE* means a Local Small Business, including a sole proprietorship, partnership, corporation, limited liability company, Joint Venture or any other business or professional entity:

- (1) Which is at least 51 percent owned by one or more Minority Individuals who are economically disadvantaged, or in the case of a publicly owned business, at least 51 percent of all classes of the stock of which is owned by one or more such Minority Individuals;
- (2) Whose management, policies, major decisions and daily business operations are independently managed and Controlled by one or more such Minority Individuals; and
- (3) Which has its principal place of business ~~and a majority of its regular, full-time workforce located~~ within the County's Marketplace.

Minority Individual means an individual in one of the following groups:

- (1) African-Americans or Blacks, which includes persons having origins in any of the Black racial groups of Africa;
- (2) Hispanic-Americans, which includes persons who are Mexican, Puerto Rican, Cuban, Caribbean, Dominican, Central or South American, regardless of race;

- (3) Native-Americans, which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;
- (4) Asian-Americans (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
- (5) Other groups, including, but not limited to, Arab-Americans, found by the County to be socially and economically disadvantaged and to have suffered actual racial or ethnic discrimination and decreased opportunities to compete in the County's Marketplace or to do business with the County. ~~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 County's Marketplace.~~

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

Personal Net Worth means 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 business that is not publicly held, or the individual's equity in any real estate and any related fixtures or furnishings. ~~In addition, the classes of assets not subject to the calculation would also include the market value of goods such as art, furnishings, jewelry, vehicles and other non-monetary assets. Certified MBE or WBE, provided that the other Person is certified by a governmental agency that meets the County'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 net worth also does not include the value of the individual's interest in any pension plans, Individual Retirement Accounts, 401(k) accounts, or other retirement savings or investment programs. ~~An individual's Personal Net Worth also includes the present value of the individual's interest in 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.~~

Program means the means the Minority- and Women-Owned Businesses Enterprise Program established in subdivision I.

Project Specific Goals means the aspirational contract-specific Goals (as set forth in Section 34-295) established for a particular project or contract based upon the availability of MBEs or WBEs in the scopes of work of the Project.

Protected Class Enterprise or *PCE* means an business meeting the definition of Minority Business Enterprise, Women's Business Enterprise, or Established Business as set forth in this section.

Public Works means all fixed works constructed or demolished by the County, or paid for wholly or in part out of public funds administered by the County, or funds or financing derived from assets owned or controlled by the County. "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. "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.

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

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, as related to the nature of the work the Person seeks to perform on 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~~ seven fiscal years, exceed 150 percent of the applicable size standards of 13 CFR Part 121.

Socially Disadvantaged means 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, stemming from circumstances beyond the relevant person's control.

Using Agency or *User Agency* means the departments or agencies within Cook County government, including Elected Officials.

Utilization Plan means the document, submitted to the County as part of a bid or proposal, in which one or more bidders or proposers commit to a level of PCE participation in the subject contract, identify the associated responsibilities and scope of the work, and dollar value or the percentages of the work to be performed.

Woman means a person of the female gender.

Woman-owned Business Enterprise or *WBE* means a Local Small Business, including a sole proprietorship, partnership, corporation, limited liability company, Joint Venture or any other business or professional entity:

- (1) Which is at least 51 percent Owned by one or more economically disadvantaged Women, or in the case of a publicly owned business, at least 51 percent of all classes of the stock of which is Owned by one or more such Women;
- (2) Whose management, policies, major decisions and daily business operations are independently managed and Controlled by one or more such Women; and
- (3) Which has its principal place of business and a majority of its regular, full-time work force located within the County's Marketplace.

Sec. 34-291. Program administration.

- (a) The CCD, who shall report to the President of the Board of Commissioners of Cook County, shall administer the Program, and whose duties shall include:
 - (1) Formulating, proposing and implementing rules and regulations for the development, implementation and monitoring of the Program, certification process, ~~recertification process~~, and no-change affidavits, including time limitations for the submission of documents and information regarding certification applications and contract participation. The CCD is authorized to collect certification ~~and recertification processing fees~~ in the amount of \$250.00 per Application; the collection of said processing fees shall be transacted by the CCD through the Bureau of Finance.
 - (2) Providing information and assistance to PCEs relating to County procurement practices and procedures, and bid specifications, requirements, goals and prerequisites.
 - (3) Establishing uniform procedures and criteria for certifying, ~~recertifying~~ and decertifying Businesses as PCEs, accepting certifications by other agencies, and maintaining a directory of Certified Firms. Such procedures and criteria shall include non-certification or decertification the willful submission of false or inaccurate material information, the failure to submit complete and accurate material information to the CCD regarding certification, or a Procurement on a timely basis, and shall relate individually and jointly to both PCEs and PCE owners.
 - (4) Establishing Project Specific Goals, in collaboration with the User Agency, based upon the availability of PCEs to provide the supplies, materials and equipment or services required by the Contract.
 - (5) Evaluating Contractors' achievement of Project Specific Goals and/or Good Faith Efforts to meet Project Specific Goals.
 - (6) Working with User Agencies to monitor contracts to ensure prompt payments to PCEs and compliance with Project Specific Goals and commitments, including gathering data to facilitate such monitoring.
 - (7) Receiving, reviewing, and acting upon complaints and suggestions concerning the Program.

- (8) Collecting data to evaluate the Program and other County contracting initiatives.
 - (9) Monitoring the Program and the County's progress towards the Annual Participation Goals. The CCD shall report on a quarterly and annual basis to the President on the administration and operations of the Program.
- (b) The User Agencies that receive appropriate delegation for project management, contract management, and/or construction and/or design contract responsibility shall have the following duties and responsibilities with regard to the Program:
- (1) Assisting the CCD with setting Project Specific Goals.
 - (2) Assisting in the identification of available PCEs, and providing other assistance in meeting the Project Specific Goals.
 - (3) Performing other activities to support the Program.
 - (4) Gathering and maintaining prime contracting and subcontracting data for those contracts which they manage.
 - (5) Submitting subcontracting data as required to the CCD.

Sec. 34-292. Race- and gender-neutral measures to ensure equal opportunities for all contractors and subcontractors.

The County shall develop and use measures to facilitate the participation of all firms in County construction contracting activities. These measures shall include, but are not limited to:

- (a) Arranging solicitation times for the presentations of bids, quantities, specifications, and delivery schedules to facilitate the participation of interested firms;
- (b) Segmenting, structuring or issuing contracts to facilitate the participation of PCEs and other Small Businesses;
- (c) Providing timely information on contracting procedures, bid preparation and specific contracting opportunities;
- (d) Providing assistance to Business in overcoming barriers such as difficulty in obtaining bonding and financing;
- (e) Holding pre-bid conferences, where appropriate, to explain the projects and to encourage Contractors to use all available qualified firms as subcontractors;
- (f) Adopting prompt payment procedures, including, requiring by contract that prime Contractors promptly pay subcontractors within 15 days in accordance with Section 34-165;
- (g) Reviewing retainage, bonding and insurance requirements to eliminate unnecessary barriers to contracting with the County;
- (h) Collecting information from all prime Contractors on County construction contracts detailing the bids received from all subcontractors for County construction contracts and the expenditures to subcontractors utilized by prime Contractors on County construction contracts.
- (i) At the discretion of the CCD, letting a representative sample of County construction contracts without goals, to determine MBE and WBE utilization in the absence of goals;
- (j) Maintaining information on all firms bidding on County prime contracts and subcontracts; and
- (k) Referring complaints of discrimination to Cook County's Commission on Human Relations, or other appropriate authority, for investigation.

Sec. 34-293. Certification criteria and process.

- (a) Only Businesses that meet the criteria for certification as a PCE may participate in the Program. The applicant has the burden of proof by a preponderance of the evidence.
- (b) Only a firm owned by a Socially and Economically Disadvantaged person(s) may be certified as an MBE or WBE.
 - (1) The firm's ownership by a Socially and Economically Disadvantaged person must be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. The owner(s) must enjoy the customary incidents of ownership and share in the risks and profits commensurate with that ownership interest.
 - (2) The contributions of capital or Expertise by the Socially and Economically Disadvantaged owner(s) to acquire the ownership interest must be real and substantial, direct and in accord with generally accepted industry standards. If Expertise is relied upon as part of a Socially and Economically Disadvantaged owner's contribution to acquire ownership, the Expertise must be of the requisite quality generally recognized in a specialized field, in areas critical to the firm's operations, indispensable to the firm's potential success, specific to the type of work the firm performs and documented in the firm's records. The individual whose Expertise is relied upon must have a commensurate financial investment in the firm.
- (c) Only a firm that is managed and controlled by a Socially and Economically Disadvantaged person(s) may be certified as an MBE or WBE.
 - (1) A firm must not be subject to any formal or informal restrictions that limit the customary discretion of the Socially and Economically Disadvantaged owner(s). There can be no restrictions through corporate charter provisions, by-law provisions, contracts or any other formal or informal devices that prevent the Socially and Economically Disadvantaged owner(s), without the cooperation or vote of any non-Socially and Economically Disadvantaged person, from making any business decision of the firm, including the making of obligations or the disbursing of funds.
 - (2) The Socially and Economically Disadvantaged owner(s) must possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long-term decisions on management, policy, operations and work.
 - (3) The Socially and Economically Disadvantaged owner(s) may delegate various areas of the management or daily operations of the firm to persons who are not Socially and Economically Disadvantaged. Such delegations of authority must be revocable, and the Socially and Economically Disadvantaged owner(s) must retain the power to hire and fire any such person. The Socially and Economically Disadvantaged owner(s) must actually exercise control over the firm's operations, work, management and policy.
 - (4) The Socially and Economically Disadvantaged owner(s) must have an overall understanding of, and managerial and technical competence, experience and Expertise directly related to, the firm's operations and work. The Socially and Economically Disadvantaged owner(s) must have the ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to make independent decisions concerning the firm's daily operations, work, management, and policymaking.
 - (5) If federal, state and/or local laws, regulations or statutes require the owner(s) to have a particular license or other credential to own and/or control a certain type of firm, then the Socially and Economically Disadvantaged owner(s) must possess the required license or credential. If state law, County ordinance or other law regulations or statute does not require that the owner possess the license or credential, that the owner(s) lacks such license or credential is a factor, but is not dispositive, in determining whether the Socially and Economically Disadvantaged owner(s) actually controls the firm.
 - (6) A Socially and Economically Disadvantaged owner cannot engage in outside employment or other business interests that conflict with the management of the firm or prevent the owner from devoting sufficient time and attention to the affairs of the firm to manage and control its day-to-day activities.

- (d) Only an independent firm may be certified as an MBE or WBE. An independent Person is one whose viability does not depend on its relationship with another Person, and who has the capacity or ability to successfully undertake and complete the relevant work. Recognition of an applicant as a separate entity for tax or corporate purposes is not necessarily sufficient to demonstrate that a firm is independent and non-Affiliated. In determining whether an applicant is an independent Business, the CCD will:
- (1) Scrutinize relationships with non-Certified Firms in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.
 - (2) Consider whether present or recent employer/employee relationships between the Socially and Economically Disadvantaged owner(s) of the applicant and non-Certified Firms or persons associated with non-Certified Firms compromise the applicant's independence.
 - (3) Examine the applicant's relationships with non-Certified Firms to determine whether a pattern of exclusive or primary dealings with non-Certified Firm compromises the applicant's independence.
 - (4) Consider the consistency of relationships between the applicant and non-Certified Firms with normal industry practice.
- (e) The CCD shall certify only Persons that meet all the above criteria. An applicant shall be certified only for specific types of work in which the Socially and Economically Disadvantaged owner(s) has the ability and Expertise to manage and control the person's operations and work.
- (f) The County shall certify the eligibility of Joint Ventures involving PCEs and non-Certified Firms, provided that the Joint Venture meets the criteria for certification as an PCEs. To be considered an eligible Joint Venture, at least one partner of the Joint Venture must be a Certified Firm, with a share in the capital contribution, control, management, risks, and profits of the Joint Venture which is equal to its ownership interest. Each Certified Firm partner must contribute property, capital, efforts, skill and knowledge and be responsible for a distinct, clearly defined portion of the work of the contract. 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.
- (g) In lieu of conducting its own certifications, the CCD by rule may accept formal certifications by other entities as meeting the requirements of the Program, if the CCD determines that the certification standards of such entities are comparable to those of the County.
- (h) The certification status of all PCEs shall be reviewed periodically by the Office of Contract Compliance. Failure of the firm to ~~seek recertification by filing~~ file the necessary documentation with the CCD as provided by rule may result in decertification.
- (i) It is the responsibility of the Certified Firm to notify the CCD of any change in its circumstances affecting its continued eligibility for the Program, including decertification by another agency. Failure to do so may result in the firm's decertification.
- (j) The CCD shall decertify a firm that does not continuously meet the eligibility criteria.
- (k) Disqualification pursuant to Division 4 of the Procurement Code shall create a prima facie case for decertification by the County. The challenged PCE shall have the burden of proving that its County certification should be maintained.
- (l) Decertification by another agency shall create a prima facie case for decertification by the County. The challenged firm shall have the burden of proving that its County certification should be maintained.
- (m) PCEs shall submit to the CCD complete and accurate material information, and shall not submit to the CCD false, deceptive, fraudulent, or inaccurate material information, relative to:
- (1) Its status as a PCE;
 - (2) Certification or continued certification ~~recertification~~;
 - (3) Proposed or actual contract participation; and
 - (4) Any other matter that arises during an investigation by the CCD or another County official,

and shall be subject to the penalties set forth in Section 34-175 and 34-299 for a violation of this subsection.

- (n) A firm that has been denied certification ~~or recertification~~ or has been decertified may protest the denial or decertification by submitting a petition for review in a proceeding made pursuant to Part I, Chapter 2, Article IX, Administrative Hearings, and the Administrative Rules promulgated thereunder.
- (o) A firm found to be ineligible for certification or continuing certification for reasons other than those referenced in Section 34-299 may not apply for certification for one year after the effective date of the final decision.
- (p) A third party may challenge the eligibility of an applicant for certification, or a Certified Firm as provided by rule. Such challenges shall be signed and sworn by the individual challenging the eligibility of an applicant for certification or a certified firm. The burden of proof shall rest with the complainant. Such challenges to eligibility shall be subject to an appeal. The CC Director shall be the final arbiter of all challenges. The presumption that the challenged firm is eligible shall remain in effect until the CCD renders a final decision.

Sec. 34-294. Annual aspirational goals.

The annual aspirational goals for the utilization of MBEs and WBEs on County Public Works contracts and subcontracts shall be 24 percent for MBEs and ten percent for WBEs. Notwithstanding the above, Established Businesses may participate in the Program as authorized under Section 34-300.1.

Sec. 34-295. Project specific goals.

The CCD, following the compilation ~~and stringent~~ of the Main Final Contract Data File (“MFCDF”) and the Hospital Final Contract Data File (“HDCDF”) review of the most current data that is feasibly and practicably available relative to the availability of MBEs and WBEs who have the capacity to successfully supply the relevant goods and services, and in consultation with the User Agency, shall establish Project Specific Goals for construction, which shall be incorporated into each bid and RFP. Using study data to set legally defensible contract goals will provide transparency and defensibility, as well as reduce requests for goal reductions or full waivers. Goal setting involves four steps:

1. Weight the estimated dollar value of the scopes of the contract by six-digit NAICS codes, as determined during the process of creating the solicitation.
2. Determine the unweighted availability of MBEs and WBEs in those scopes, as estimated in the Disparity Study.
3. Calculate a weighted goal based upon the scopes and the availability of at least three available firms in each scope.
4. Adjust the resulting percentage based on current market conditions and progress towards the annual goals.

Notwithstanding the above, Established Businesses may participate in the Program as authorized under Section 34-300.1.

Sec. 34-296. Counting MBE and WBE participation.

- (a) The entire amount of that portion of a contract that is performed by the PCE's own forces shall be counted, including the cost of supplies and materials obtained by the PCE for the work on the contract, and supplies purchased or equipment leased by the PCE (except supplies and equipment the PCEs purchases or leases from the prime Contractor or the prime Contractor's Affiliate), unless otherwise provided pursuant to Section 34-300.1.
- (b) The entire amount of fees or commissions charged by a PCE for providing a bona fide service, such as professional, technical, consultant or managerial services, or for providing bonds or insurance specifically

required for the performance of a contract, shall be counted, provided the fee is reasonable and not excessive as compared with fees customarily charged for similar services, unless otherwise provided pursuant to Section 34-300.1.

- (c) When a PCE performs as a participant in a Joint Venture, only the portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the Joint Venture's contract that is performed by the PCE with its own forces and for which it is separately at risk, shall be counted, unless otherwise provided pursuant to Section 34-300.1.
- (d) Only expenditures to a PCE that is performing a Commercially Useful Function shall be counted. To determine whether a PCE is performing a Commercially Useful Function, the County will evaluate the amount of work subcontracted, industry practices, whether the amount the PCE 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 PCE 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 PCE 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 PCE participation. If a PCE 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 PCE is presumed not to be performing a Commercially Useful Function, the Certified Firm may present evidence to rebut this presumption.
- (e) One hundred percent of the fees or transportation charges for the delivery of materials or supplies required on a job site shall be counted only if the payment of such fees is a customary industry practice and are commensurate with fees customarily charged for similar services, unless otherwise provided pursuant to Section 34-300.1.
- (f) One hundred percent of the cost of the supplies, equipment or goods obtained from a PCE Manufacturer shall be counted, unless otherwise provided pursuant to Section 34-300.1.
- (g) Sixty percent of the cost of the supplies, equipment or goods obtained from a PCE Distributor or Regular Dealer shall be counted, unless otherwise provided pursuant to Section 34-300.1.
- (h) If a PCE ceases to be certified for any other reason than graduation from the Program 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 for the remaining term of the Contract.
- (i) In determining achievement of Project Specific Goals, the participation of a PCE shall not be counted until that amount has been paid to the PCE.

Sec. 34-297. Contract pre-award compliance procedures.

- (a) For all solicitations, the Contractor, Person, or Business shall submit a Utilization Plan detailing all subcontractors from which the Contractor, Person, or Business solicited bids or quotations, and if Project Specific Goals have been established, its achievement of the Goals or its Good Faith Efforts to do so. The Utilization Plan shall be due at the time the bid/proposal is due. Any Contractor, Person, or Business requesting a partial or full waiver shall submit a Good Faith Effort Transparency Report with its Utilization Plan when the Utilization Plan is due. In the event a bid or proposal leads to a Contract with the County, the Utilization Plan as approved, and any Good Faith Effort Transparency Report as approved and applicable, by the CCD shall be incorporated as a material commitment on the part of the Contractor, Person, or Business to each relevant PCE, and the Contractor, Person, or Business, and the County. Failure to include a Utilization Plan, and Good Faith Effort Transparency Report, where applicable, shall render the bid or proposal not Responsive.
- (b) Any agreement between a Contractor, Person, or Business and a PCE in which the Contractor requires that the PCE not provide subcontracting quotations to other Contractors is prohibited.
- (c) Where the Contractor, Person, or Business cannot achieve the Project Specific Goal(s), the CCD will determine whether the Contractor, Person, or Business has made Good Faith Efforts to meet the Goal(s), based upon the submission of a Good Faith Effort Transparency Report by the bidding Contractor, Person, or

Business and consideration of additional factors by the CCD, pursuant to Sections 34-281 and 34-282. A Contractor, Person, or Business submitting bids or proposals for Procurements may in all instances request a partial or full waiver of one or more established Project Specific Goal for PCE participation. In making this determination, the Contract Compliance Director will consider, at a minimum, the Good Faith Effort Transparency Report, pursuant to Section 34-281 and additional factors, pursuant to Section 34-282.

- (d) In determining whether a Contractor, Person, or Business has made Good Faith Efforts, the performance of other Contractors, Persons, or Businesses in meeting the Project Specific Goals may be considered. For example, when the apparent successful Contractor, Person, or Business fails to meet the Project Specific Goals but others meet it, it may be reasonably questioned whether, with additional reasonable efforts, the apparent successful Contractor, Person, or Business could have met the Project Specific Goals. Similarly, if the apparent successful Contractor, Person, or Business fails to meet the Project Specific Goals, but meets or exceeds the average PCE participation obtained by other Contractors, Persons, or Businesses, this may be evidence that the apparent successful Contractor, Person, or Business made Good Faith Efforts.
- (e) A signed letter of intent from each listed PCE, describing the work, materials, equipment or services to be performed or provided by the PCE and the agreed upon dollar value shall be due at the time of bid proposal or within three days after such submission.
- (f) The CCD shall timely review the Utilization Plan before award, including the scope of work and the letters of intent from PCEs. The CCD may request clarification in writing of items listed in the Utilization Plan and/or the Good Faith Effort Transparency Report.
- (g) If the CCD determines that the Utilization Plan demonstrates that the Project Specific Goals have been achieved or accepts the Good Faith Effort Transparency Report, ~~submitted, with the concurrence of the User Agency,~~ the CCD and User Agency shall recommend award to ~~Purchasing Agent~~ the Procurement Office. The CCD must issue a report to the Board pursuant to Section 34-283 upon acceptance of the Contractor's Good Faith Effort Transparency Report no later than three days prior to the Board meeting where the Contract seeks approval by the Board.
- (h) If the CCD rejects the Contractor, Person, or Business' Good Faith Effort Transparency Report, the CCD shall communicate this finding to the ~~Purchasing~~ Procurement Department and recommend that the bid/proposal be rejected. A Contractor may protest this determination pursuant to the County's bid protest procedures.

Sec. 34-298. Contract administration procedures.

- (a) Upon award of a contract by the County that includes Project Specific Goals, the Project Specific Goals become covenants of performance by the Contractors and incorporated in the contract.
- (b) The Contractor shall provide a listing of all subcontractors to be used in the performance of the contract, and detailed subcontractor information to the County with each request for payment submitted to the County or as otherwise directed by the County. The CCD and the User Agency shall monitor subcontractor participation during the course of the contract. The County shall have full and timely access to the Contractor's books and records, including, without limitation, payroll records, tax returns and records and books of account, to determine the Contractor's compliance with its commitment to MBE and WBE participation and the status of any PCEs performing any portion of the contract. This provision shall be in addition to, and not a substitute for, any other provision allowing inspection of the Contractor's records by any officer or official of the County for any purpose.
- (c) The Contractor cannot make changes to the Utilization Plan or substitute PCEs named in the Utilization Plan without the prior written approval of the CCD, in consultation with the CPO and the User Agency. 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. Upon such written approval by the CCD, the revised Utilization Plan shall be incorporated into the Contract as an amendment by the CPO. The CCD shall promulgate policies and procedures with respect to changes to a Utilization Plan.

- (1) All requests for changes or substitutions of a PCE Subcontractor(s) named in the Utilization Plan shall be made to the CCD, CPO and the User Agency in writing, and shall clearly and fully set forth the basis for the request. A Contractor shall not substitute a PCE subcontractor or perform the work designated for a PCE subcontractor with its own forces unless and until the CCD, in consultation with the CPO and the User Agency, approves such substitution in writing. A Contractor shall not allow a substituted subcontractor to begin work until the CCD, CPO and the User Agency have approved the substitution.
- (2) The facts supporting the request must not have been known nor reasonably should have been known by either party before the submission of the Utilization Plan. Bid shopping is prohibited. The Contractor must negotiate with the PCE subcontractor to resolve the problem. Where there has been a mistake or disagreement about the scope of work, the PCE can be substituted only where an agreement cannot be reached for a reasonable price for the correct scope of work.
- (3) Substitutions of the subcontractor shall be permitted only on the following bases:
 - (i) Unavailability after receipt of reasonable notice to proceed.
 - (ii) Failure of performance.
 - (iii) Financial incapacity.
 - (iv) Refusal by the subcontractor to honor the bid or proposal price.
 - (v) Mistake of fact or law about the elements of the scope of work of a solicitation where agreement upon a reasonable price cannot be reached.
 - (vi) Failure of the subcontractor to meet insurance, licensing or bonding requirements; or
 - (vii) The subcontractor's withdrawal of its bid or proposal.
- (4) The final decision whether to permit or deny the proposed substitution, and the basis of any denial, shall be communicated to the parties in writing by the CCD.
- (5) Where the Contractor has established the basis for the substitution to the satisfaction of the County, the Contractor shall make Good Faith Efforts to fulfill the Utilization Plan. The Contractor may seek the assistance of the Office of Contract Compliance in obtaining a new PCE. If the Project Specific Goal(s) cannot be reached and Good Faith Efforts have been made, the Contractor may substitute with a non-Certified Firm.
- (6) If the County requires the substitution of a PCE subcontractor listed in the Utilization Plan, the Contractor shall undertake Good Faith Efforts to fulfill the Utilization Plan. The Contractor may seek the assistance of the Office of Contract Compliance in obtaining a new PCE subcontractor. If the Goal(s) cannot be reached and Good Faith Efforts have been made, the Contractor may substitute with a non-Certified Firm.
- (d) If a Contractor plans to hire a subcontractor on any scope of work that was not previously disclosed in the Utilization Plan, the Contractor shall obtain the approval of the CCD to modify the Utilization Plan and must make Good Faith Efforts to ensure that PCEs have a fair opportunity to bid on the new scope of work.
- (e) Changes to the scopes of work shall be documented by the User Agency at the time they arise to establish the reasons for the change and the effect on achievement of the PCE goal.
- (f) Prior to contract closeout, the CCD shall evaluate the Contractor's fulfillment of the contracted goals, taking into account all approved substitutions, terminations and changes to the contract's scope of work. If the County determines that Good Faith Efforts to meet the PCE commitments were not made, or that fraudulent misrepresentations have been made, or any other breach of the contract or violation of this subdivision, a remedy or sanction may be imposed, as provided in the contract.

Sec. 34-299. Sanctions and penalties.

- (a) In addition to such penalties as are provided in Section 34-175 and Section 34-176, the following violations of this Section may result in an imposition of penalties as provided herein:

- (1) A PCE who violates Section 34-293(m) shall not be eligible for certification for a period of up to five years and shall be liable for a fine of \$2,500.00, and such sanctions shall apply jointly and individually to the PCE and the relevant PCE owner or owners.
 - (2) The CCD may recommend to the County's Chief Procurement Officer that a contractor, subcontractor, or PCE be disqualified from participation in a County contract for period of up to five years and contractually penalized in the manner and degree identified by the CCD, pursuant to the Procurement Code, for a violation of this Section.
- (b) In the event a party wishes to pursue administrative review, under Section 34-178, of the CCD's decision or determination relative to the denial or revocation of certification, or the CCD's imposition of a penalty under Section 34-175, Section 34-176 or this Section, said party shall, within 60 days of the Final Notice issued by the CCD, seek administrative review by submitting a written petition to both the Department of Administrative Hearings and the CCD, which petition may be supported by information, documents, and arguments, provided that the information and documents so submitted were available to and in the possession of the CCD at the time of the Final Notice, and the administrative hearing process shall be limited to such documents and information as were available to and in possession of the CCD at the time of such Final Notice. In such administrative review, the petitioning party shall have the burden of proving, by a preponderance of evidence, that CCD's decision or determination, as set forth in the Final Notice, is clearly erroneous.

Sec. 34-300. Outreach and training.

The CCD shall from time to time, by way of seminars, workshops, and internet-based communications, make available to the business community such information, documents, and personnel as well as:

- (a) Assist otherwise eligible businesses in applying for, gaining, and maintaining certification.
- (b) Assist the business community in understanding the manner in which to properly complete a Utilization Plan including how a full or partial waiver may be requested, and the manner in which such a request may be supported.
- (c) Identify best practices by other governmental entities and private sector firms that may improve the Program.
- (d) Identify systemic or organizational problems and related solutions associated with certification and contract participation.

Sec. 34-300.1. Established business participation in the program.

- (a) An Established Business may participate in the Program, as follows:
 - (1) For a one-year period after the business has become an established business, only 75 percent of such business's participation in a County contract shall account for the MBE or WBE, as applicable, program goals;
 - (2) For a one-year period starting on the one-year anniversary of the date the business became an established business, only 50 percent of such business's participation in a County contract shall account for the MBE or WBE, as applicable, program goals; and
 - (3) For a one-year period starting on the two-year anniversary of the date the business became an established business, only 25 percent of such business's participation in a County contract shall account for the MBE or WBE, as applicable, program goals.
- (b) An Established Business shall not be eligible to participate in the Program starting on the three-year anniversary of the date the business became an established business.
- (c) The CCD shall provide notice to participating Established Businesses of the allowed level of participation by such businesses in the Program.

Sec. 34-300.2. Program review and sunset.

- (a) The President and the Board of Commissioners shall receive an annual report from the CCD detailing the County's performance under the Program.
- (b) The President and the Board of Commissioners will review these reports, including the Annual Participation Goals and the County's progress towards meeting those Goals and eliminating discrimination in its contracting activities and marketplace.
- (c) Within five years after the effective date of this ordinance, the County will review the operation of the Program and the evidentiary basis for the Program in order to determine whether the County has a continuing compelling interest in remedying discrimination against MBEs and WBEs in its construction marketplace, and the permissible scope of any narrowly tailored remedies to redress discrimination against MBEs or WBEs so that the County will not function as a passive participant in a discriminatory marketplace.
- (d) This subdivision shall sunset on or before ~~March 31, 2023~~ March 31, 2028. |

Effective date: This ordinance shall be in effect |immediately upon adoption. |