

**PROPOSED SUBSTITUTE TO FILE ID 16-3598**  
**Contract Compliance Committee 6/29/2016**

**Sponsored by:** TONI PRECKWINKLE, President, and ROBERT STEELE, County Commissioner  
**BE IT ORDAINED**, by the Cook County Board of Commissioners, that Chapter 34, FINANCE, Article IV, PROCUREMENT CODE, Division 8, MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISES, various sections within Subdivisions I and II of the Cook County Code are 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's businesses~~ 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 ~~is~~ committed to implementing an ~~its~~ 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, ~~and at the direction of~~ 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 ~~into the scope of any~~ discrimination in County Procurements, ~~and in the award of and participation in contracts in the metropolitan~~ County Chicago economy; ~~the extent to which~~ (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 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 its their continuing effects.

(e) Minority and women 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~~minority, and women small businesses on contracts and subcontracts~~Contracts~~.

(g) Minority and women's small businesses continue to be disadvantaged by discriminatory practices in the local construction industry and economy when competing for contracts ~~Contracts~~ and in seeking subcontracting opportunities on such contracts~~Contracts~~.

(h) The County was a passive participant in the discriminatory practices of businesses which discriminate against minority, women businesses by entering into contracts with such discriminating businesses.

(i) Despite the County's ~~its~~ good faith efforts and implementation of previous affirmative action programs, minority and women 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 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'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.

### **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 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, continued certification, or re-certification as an MBE or WBE 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.

*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 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 ~~in~~ the scopes of work of the Project.

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

*Economically Disadvantaged*, with respect to an individual, means having an individual with 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.

*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 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 disadvantaged by having suffered racial or ethnic prejudice or cultural bias within American society, without regard to individual qualities, resulting in decreased opportunities to compete in the 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 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 Personal Net Worth also includes the present value of the individual's interest in ~~any vested pension plans~~, individual retirement accounts, or other retirement savings or investment programs less the tax and interest penalties that would be imposed if the asset were distributed at the present time, and shall not include future payments receivable from a pension or Social Security.

*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 goals set forth in Section 34-267(a).

*Protected Class Enterprise* or *PCE* shall mean a business meeting those Persons qualifying under the definitions of Minority Business Enterprise and Women's Business Enterprise as set forth ~~contained~~ 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.

*Socially Disadvantaged* means ~~an individual who has been~~ having been subjected to racial, ethnic or gender prejudice or cultural bias within American society because of ~~his or her~~ identity as a member of a group, and without regard to individual qualities, ~~Social disadvantage must~~ stemming from circumstances beyond the relevant person's ~~individual's~~ control. A Socially Disadvantaged natural person ~~individual~~ must be a citizen or lawfully admitted permanent resident of the United States.

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 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. 34-265. - 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 Department Agency, based upon the availability of PCEs to provide the supplies, materials and equipment or services required by the Contract.

\*\*\*

#### **Sec. 34-267. - Program goals.**

(a) The County aspires to the following annual Program Goals: A 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 ~~sets an~~ 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 and stringent review of the most current data that is feasibly and practicably available relative to the availability of MBEs and WBEs who have the capacity to successfully supply the relevant goods and services, and in consultation with the CPO and the Using Agency, shall establish Contract Specific Goals for each Contract, which shall be incorporated into each bid and request for proposal. ~~In establishing a Contract Specific Goal, the CCD shall consider the availability of sufficient Certified MBEs and WBEs for the supplies, equipment, goods, or services and the CCD shall consider the availability of sufficient Certified PCEs for the services required as part of the Procurement.~~ (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.

#### **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 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.

\*\*\*

(f) The County shall certify the eligibility of Joint Ventures involving ~~MBEs or WBEs~~ PCEs and non-Certified Firms, provided that the Joint Venture meets the criteria for certification as an ~~MBE or WBE~~ 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 ~~MBEs and WBEs~~ PCEs shall be reviewed periodically by the Office of Contract Compliance. Failure of the Person to seek recertification 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 PCE's 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 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.

~~(nn)~~ 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.



(~~h~~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.

(~~e~~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 ~~Program Goals or Contract Specific Goal or Goals~~, or (ii) requests a waiver of all or a portion of a ~~Program Goal or Contract Specific Goal~~.

(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 ~~will~~ render the bid or proposal submission ~~not Responsive~~.

(3) The CCD shall review and either approve or reject the Utilization Plan. For purposes of ~~evaluation~~ 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 ~~cannot make~~ changes to 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 ~~for~~ changes to a ~~the~~ 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 ~~cannot~~ be utilized duplicatively as ~~both 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 is also a MBE, such PCE's ~~WBE's~~ participation may count toward ~~either~~ the MBE or WBE Goal ~~but not both~~.

(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 ~~34-384(ii)1 through 4 [(2)a. through d.]~~ below. 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 ~~the~~ each PCE's' proposed participation in the performance of the Contract constitutes a Commercially Useful Function;
- c. Whether the relevant PCE's ~~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 total 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. In reviewing a request for a partial or total request for waiver of a Contract Specific Goal, the CCD shall determine whether a Person has made good faith efforts to meet the applicable Goals and to what extent the waiver request should be granted. In determining whether a Person has made Good faith efforts, the CCD will consider whether the Person has ~~taken the following actions:~~

(1) Reviewed lists of PCEs maintained by the County and other State and local governments and agencies to identify qualified PCEs for solicitation for Bids;

(2) Divided Procurement requirements into small tasks or quantities. This shall include, where appropriate, breaking out Contract work items into economically feasible units, consistent with the availability of PCEs, to facilitate PCE participation, even when the Contractor would otherwise prefer to perform these work items with its own forces;

(3) Adjusted any insurance requirements imposed by the Person seeking PCEs, or otherwise assist PCEs in obtaining any required insurance, where economically feasible, to encourage participation by PCEs;

(4) ~~Make~~ Made timely attempts to contact PCEs providing the type of supplies, equipment, goods or services required for the Procurement; and provide them with a convenient and timely opportunity to obtain and review all information concerning the Procurement necessary to enable such PCE to respond;

(5) Followed up initial contacts of PCEs to determine if they are interested participating in the Procurement;

(6) Negotiated in good faith and on a timely basis with PCEs to enable them to participate in the Procurement. Evidence of such negotiation includes the names, addresses, and telephone numbers of PCEs that were contacted; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and why agreements could not be reached. The Contractor may not reject PCEs as being unqualified without sound reasons. That there may be some additional costs involved in finding and using PCEs is not in itself sufficient reason for a Contractor's failure to meet the Goals, as long as such costs are reasonable;

(7) ~~Make~~ Made efforts to assist interested PCEs in obtaining necessary equipment, supplies, materials, or related assistance or services, where appropriate; provided, however, that such efforts shall not be inconsistent with the requirement that the PCE be responsible for actually obtaining and paying for such items;

(8) Established delivery schedules which will encourage participation by PCEs, where the requirements of the Procurement permit;

(9) Used the services and assistance of the CCD's staff, the Small Business Administration, the Office of Minority Business Enterprises of the U.S. Department of Commerce;

(10) Timely notify notified appropriate community and minority and women's business organizations identified as assist agencies of the opportunity for participation in the Procurement;

(11) 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 Section 34-271(d). Demonstrate to the CCD that no PCE exists with which a mentor/protege relationship could be established, as described in Section 34-271.

(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.**

\*\*\*

(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 Procurement, the dollar value of work performed under a contract with that firm Person after it has ceased to be cCertified 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 or PCE has failed in good faith to comply with ~~its~~ 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 or PCE, or both, and the Contractor and PCE shall have such time to cure the default as is provided in the Contract. If no such period is provided, the Contractor or PCE, as the case may be, 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 or PCE 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 or PCE, and the Contractor or PCE 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.

\*\*\*

**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. 34-2756. - 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.

**Sec. 34-2767. - Prohibited provisions.**

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

**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.

**Secs. 34-279. - Program review and sunset.**

(a) The President and the Board of Commissioners shall receive quarterly and annual reports 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 June 30, 2021

\*\*\*

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 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.

(eg) The County has ~~engaged in committee hearings~~ 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 "NERA Disparity Study") ~~on the levels of PCE participation in Public Works Contracts, and has considered the evidence in relevant case law;~~ and

(fh) The ~~NERA Disparity Study entails made~~ NERA Disparity Study entails made recommendations for an ~~revised improved~~ revised improved Minority- and Women-owned business program ~~for construction contracting~~, emphasizing the establishment of Project-specific goals, implementation of race- and gender-neutral measures, and enhancements to data gathering, implementation and performance monitoring of the program;

(gi) 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 Mminority-ies and Wwomen-Owned Business Enterprises 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. 34-290. - 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, continued certification, or re-certification as an MBE, or WBE, VBE, or SDVBE 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 or certification* means the granting of Minority Business Enterprise, or Women's Business Enterprise status to an Applicant.~~

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

*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 ~~Departments~~ Agencies.

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

Contract Specific Goals means the 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.

~~*Doing Business* means having a physical location from which to engage in for profit activities in the scope(s) of expertise of the Business.~~

*Economically Disadvantaged* means, with respect to an individual, having an individual with 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.

*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 ~~to achieve an MBE or WBE goal, which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the Program's goals.~~

*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 disadvantaged by having suffered racial or ethnic prejudice or cultural bias within American society, without regard to individual qualities, resulting in decreased opportunities to compete in the 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 and profits 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 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 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. ~~Program established by the Minority and Women-Owned Business Enterprise Interim Ordinance.~~

*Project Specific Goals* means the 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 shall mean an business meeting the definitions of Minority Business Enterprise and Women's Business Enterprise 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 ~~firm~~ Person that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business. To be a Regular Dealer, the ~~firm~~ Person must be an established, regular Business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question. A ~~firm~~ Person may be a Regular Dealer in such bulk items as petroleum

products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business if the firm both owns and operates distribution equipment for the products. Any supplementing of a ~~Regular Dealer's~~ Person's distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis. Packers, manufacture representatives, or other persons who arrange or expedite transactions are not Regular Dealers.

*Socially Disadvantaged* means ~~a Minority Individual or Woman who has been~~ having been subjected to racial, ethnic or gender prejudice or cultural bias within American society because of his or her identity as a member of a group, and without regard to individual qualities, ~~Social disadvantage must stem~~ming from circumstances beyond the relevant person's ~~individual's~~ control. A Socially Disadvantaged natural person ~~individual~~ must be a citizen or lawfully admitted permanent resident of the United States.

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

*User Department* means ~~the department of the County or elected official responsible for initiating the procurement process.~~

*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 list of MBEs and WBEs that the Bidder/Proposer commits will be utilized, ~~the scopes of the work, and the dollar values 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 MBEs and WBEs 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 MBEs and WBEs, 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 ~~Department~~, 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 ~~Departments~~ Agencies to monitor contracts to ensure prompt payments to MBEs and WBEs and compliance with Project Specific Goals and commitments, including gathering data to facilitate such monitoring.

(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 ~~Departments~~ 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:

\*\*\*

**Sec. 34-293. - Certification criteria and process.**

(a) Only Businesses that meet the criteria for certification as an MBE or WBE 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.

\*\*\*

(f) The County shall certify the eligibility of Joint Ventures involving ~~MBEs or WBEs~~ PCEs and non-Certified Firms, provided that the Joint Venture meets the criteria for certification as an ~~MBEs or WBEs~~ 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 ~~MBEs and WBEs~~ PCEs shall be reviewed periodically by the Office of Contract Compliance. Failure of the firm to seek recertification by filing 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 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.

(nn) 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.

(oo) 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.

(pp) 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.

**Sec. 34-295. - Project specific goals.**

The CCD, following the compilation and stringent review of the most current data that is feasibly and practicably available relative to the availability of MBEs and WBEs who have the capacity to successfully supply the relevant goods and services, and in consultation with the User Department Agency, shall establish Project Specific Goals for construction, which shall be incorporated into each bid and RFP. ~~Contracts based upon the availability of at least three MBEs and three WBEs to perform the anticipated subcontracting functions of the project and the County's utilization of MBEs and WBEs to date.~~

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

\*\*\*

(h) If a PCE ceases to be a Certified Firm for any other reason than graduation from the M/WBE Construction 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 an MBE or WBE shall not be counted until that amount has been paid to the MBE or WBE.

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



(a) For all solicitations, the bidder/proposer shall submit a Utilization Plan detailing all subcontractors from which the Contractor solicited bids or quotations, and if Project Specific Goals have been established, its achievement of the Goals or its Good Faith Efforts to do so. The Utilization Plan shall be due at the time the bid/proposal is due. In the event a bid or proposal leads to a Contract with the 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.

(b) Any agreement between a Contractor and an MBE or WBE in which the Contractor requires that the MBE or WBE not provide subcontracting quotations to other Contractors is prohibited.

(c) Where the Contractor cannot achieve the Project Specific Goal(s), the CCD will determine whether the Contractor has made Good Faith Efforts to meet the Goal(s). Parties 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 Director will consider, at a minimum, whether the Contractor's efforts to~~has~~:

(1) Solicited through all reasonable and available means (e.g., attendance at pre-bid meetings, advertising and written notices) the interest of all MBEs and WBEs certified in the scopes of work of the contract. The Contractor shall provide interested MBEs and WBEs with timely, adequate information about the plans, specifications, and requirements of the contract to allow MBEs and WBEs to respond to the solicitation. The Contractor must follow up initial solicitations with interested MBEs and WBEs.

(2) Selected portions of the work to be performed by MBEs and WBEs in order to increase the likelihood that the Project Specific Goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate MBE and WBE participation, even when the Contractor would otherwise prefer to perform these work items with its own forces. It is the Contractor's responsibility to make a portion of the work available to MBEs and WBEs and to select those portions of the work or material needs consistent with the availability of MBEs and WBEs to facilitate their participation.

(3) Negotiated in good faith with interested MBEs and WBEs. Evidence of such negotiation includes the names, addresses, and telephone numbers of MBEs and WBEs that were contacted; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and why agreements could not be reached with MBEs and WBEs. The Contractor may not reject MBEs and WBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. That there may be some additional costs involved in finding and using MBEs and WBEs is not in itself sufficient reason for a Contractor's failure to meet the Project Specific Goals, as long as such costs are reasonable. The ability or desire of a Contractor to perform the work of a contract with its own organization does not relieve it of the responsibility to make Good Faith Efforts on all scopes of work that could be subcontracted.

(4) Make efforts to assist interested MBEs and WBEs in obtaining bonding, lines of credit, or insurance as required by the County or the prime Contractor, where appropriate.

(5) ~~Make~~ efforts to assist interested MBEs and WBEs in obtaining necessary equipment, supplies, materials, or related assistance or services, where appropriate.

(6) ~~Used~~ the services of the Office of Contract Compliance, available minority/women community organizations, minority/women contractors' groups, government-sponsored minority/women business assistance offices and other appropriate organizations to provide assistance in the recruitment and placement of MBEs and WBEs.

(7) Maintains or commits to establish and maintain a mentor-protégé agreement with one or more PCEs that is enforceable and that, in the judgement 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 Section 34-271(d).

\*\*\*

(g) If the CCD determines that the Utilization Plan demonstrates that the Project Specific Goals have been achieved or Good Faith Efforts made, with the concurrence of the User ~~Department~~ Agency, the CCD and User ~~Department~~ Agency shall recommend award to Purchasing Agent.

**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 ~~Department~~ 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 MBE or WBE performing any portion of the contract. This provision shall be in addition to, and not a substitute for, any other provision allowing inspection of the Contractor's records by any officer or official of the County for any purpose.

(c) The Contractor cannot make changes to the Utilization Plan or substitute MBEs or WBEs named in the Utilization Plan without the prior written approval of the CCD, in consultation with the Purchasing Agent CPO and the User ~~Department~~ 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 an MBE or WBE Subcontractor(s) named in the Utilization Plan shall be made to the CCD, ~~Purchasing Agent CPO~~ and the User ~~Department~~ Agency in writing, and shall clearly and fully set forth the basis for the request. A Contractor shall not substitute an

MBE or WBE subcontractor or perform the work designated for an MBE or WBE subcontractor with its own forces unless and until the CCD, in consultation with the CPO Purchasing Agent in consultation with and the User ~~Department~~ Agency, approves such substitution in writing. A Contractor shall not allow a substituted subcontractor to begin work until the CCD Director, Purchasing Agent CPO and the User ~~Department~~ Agency have approved the substitution.

\*\*\*

(e) Changes to the scopes of work shall be documented by the User Agency ~~Department~~ at the time they arise to establish the reasons for the change and the effect on achievement of the MBE or WBE goal.

### **Sec. 34-299. - Sanctions and penalties.**

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

~~(1) Providing false or misleading information to the County in connection with submission of a bid, responses to requests for qualifications or proposals, Good Faith Efforts documentation, post award compliance, or other Program operations.~~

~~(2) Committing any other violations of this subdivision.~~

~~(b) A Contractor, or subcontractor is subject to withholding of payments under the contract, termination of the contract for breach, contract penalties, or being barred or deemed nonresponsive in future County solicitations and contracts as determined by the County's Purchasing Agent, if it is found to have:~~

~~(1) Provided false or misleading information in connection with an application for certification or recertification or colluded with others to do so;~~

~~(2) Provided false or misleading information in connection with the submission of a bid or proposal or documentation of Good Faith Efforts, post award compliance, or other Program operations or colluded with others to do so;~~

~~(3) Failed in bad faith to fulfill Project Specific Goals, thereby materially breaching the contract;~~

or

~~(4) Failed to comply in good faith with substantive provisions of this subdivision.~~

(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~~. - Program review and sunset.**

(a) The President and the Board of Commissioners shall receive quarterly and annual reports 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 June 30, ~~2021~~2016.

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