

June 28, 2023

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

THE CHIEF EXECUTIVE OFFICER RECOMMENDS:

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

HISTORY:

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

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

December 31, ~~2024~~2028.

_____ 23 and ending

DESCRIPTION:

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

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

The Board of Education of the City of Chicago

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

Effective

[July 1, 2023]

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**REMEDIAL PROGRAM FOR
MINORITY AND WOMEN OWNED BUSINESS ENTERPRISE**

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

- 1.5** In the BAGC case, Judge James B. Moran held that the City has a compelling interest in implementing a remedial race- and gender-conscious affirmative action program in the Chicago construction market, but that its 1990 ordinance was not sufficiently narrowly tailored as applied to construction in 2003.
- 1.6** There is ample availability of ready, willing and able minority- and women-owned firms to participate in Board and private-sector construction contracting and subcontracting opportunities.
- 1.7** Minority and women

- " ~~8660L0RGR0~~ sizing contracts, to facilitate participation by smaller businesses
- " ~~3B1GL00R0HBLGOHDGWLPHV~~

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

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- " ~~'LILF0WREWDL00ERGL0DGL00GH~~
- " ~~'LILF0WVHF00VFR0DFWL0RSSR00WHLV00KSKOLFVHFWRU~~
- " ~~'LILF0WREWDL00FR0DFWV00KSL00WHVHFWR00~~
- " ~~'LILF0WRN00ZWMGR00XHO:%(L00BDWL00R00SRVHV0RIVHF00DELGRU~~
 putting together a proposal submission and who do not ultimately utilize the services of the M/WBEs

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

- " ~~PSB00W0WLP0H0L0VVRISDP00V~~
- " ~~80DWL00VDP00ODG0R0FDOE0XL00VVD00HWP0DNHWS0BJDP~~
- " ~~PSOHP00L0FR0DFWVSHFLILFV0FR0DFWL0JRDOV~~
- " ~~8660L0RGR0JL0FR0DFWVWRIDFL0LWDWHSD0WLF0LSDWLR00VDP00O0H00XL00VHV00V~~
 M/WBEs
- " ~~3B1GL00R0HBLGOHDGWLPHV~~

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

1.158 Based upon a thorough review of the results of the Board’s 1991 Remedial Plan; the evidence presented and findings made at the BAGC trial; the information presented to the City Council and its consequent decision to revise the City of Chicago’s ordinance; other recent judicial decisions regarding the constitutional standards for affirmative action programs; information presented during the April 2006 CPS focus groups and compiled in a report by Collette Holt; and a report ~~H0LW0HG \$0LODEL0LW0DG 80L00J~~ Minority- and Women-Owned Businesses in the Procurement Activities of the Chicago Public Schools,” prepared by Dr. David G. Blanchflower, Professor of Economics Dartmouth College, the Board adopted in July 2006 under Board Report 06-0726-PO9 a Business Diversity Program for Construction Projects (the "Program") which was later amended by the Board in May 2007 under Board Report 07-0523-PO1.

¹ See 86(T00(PSORPH02SSRW00R0PPLVLR000DWLR001607.4(D) (“A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.”).

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

1.169 Based upon a thorough review of the foregoing information (supra, at sections 1.1 – 1.15); other recent

1. The bidder must make GFE the same as one that met the goal, even if the proposed participation is zero. Vendors must report in writing the request for waivers and provide evidence for reasons they believed waivers or reductions of the contract goal(s) will not be approved and therefore they do not bid on contracts where they might fall short of the goal(s).
2. The board is following the judicially approved, and industry accepted, best practices for defining and reviewing GFE submissions. 7/18/27% (SBJDP) is an excellent model. This program does not operate as a quota system or quota limits. The policy revisions reflect that prime vendors, suppliers, distributors is not a quota program and does not operate as such.
3. OBD will develop and disseminate written procedures to appeal program decisions, such as the failure to make GFE to meet a contract goal. This will comport with basic procedural GMSBFHVVVWDQDGV7KGLVSDLWHSRW/HHHHHVW/86'27SBJDPSEMLRQ can provide a starting point for drafting these additions, and edits for GFE.
4. The Board will provide a short period after bid or proposal submission to submit GRFRHQVVSRLQW/8WLOLJDWLRGODS000%(DG:%(SDW/LFLSDWLRQXWOLVW participation on the Plan with the bid or proposal, but the Letter(s) of Intent ("LOIs"), certification letters, requests for reduction of the goal(s) and accompanying GFE, etc., must be submitted up to 48 hours after bid or proposal submission.
5. The Board will continue to follow the best practices on substitution of certified firms during FRQDFW SHURDGH MQRISHURDGH D&LW DV GHVFLFHG LQW/86'27' %(

2.6 Chief Procurement Officer or CPO: The Chief Procurement Officer of the Chicago Public

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

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

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

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

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

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

2.21 Non-Construction Contracts: MBE/WBE Participation Goals CPS’ overall goals are to award not less than 30 percent of the annual dollar value of all contracts for goods and services other than construction to qualified MBEs and 7 percent of the annual dollar value of such Contracts to ~~T~~OLILHG :%(V 7K\H JRDOV ~~M~~ H|FO\LRQD 8WLWLHV 6~~S~~SORI (OHFWLFLWDQ DVE Tuition-based programs or tuition payments to other educational institutions (c.) Intergovernmental agreements (d). Information Technology license agreements for hardware and software of a proprietary nature (e). Grant-funded contracts where vendor is named or stipulated in the grant

2.4622 Personal Net Worth: The net value of the assets of an individual after total liabilities are deducted. An individual's personal net worth does not include the individual's ownership interest in an applicant or other MBE or WBE or the individual's equity in ~~his or her~~ their primary place of

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

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

2.1825 Subcontractor, ~~or~~ Supplier or Distributor: A person or entity that enters into a Goods and/or

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

V. RACE AND GENDER-NEUTRAL MEASURES

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

- a. provision of timely information on contracting procedures, bid/proposal preparation, and specific contracting opportunities.
- b. arrangement of solicitation times for the presentation of bids/proposals, quantities, specifications, and delivery schedules to facilitate the participation of interested vendors, suppliers and subcontractors.
- c. simplification of bid/proposal submission requirements and documentation required by the user departments and the Department of Procurement.
- d. unbundling contracts, where appropriate, to facilitate the participation of smaller businesses.
- e. review of bonding and insurance requirements to eliminate unnecessary barriers to contracting with the Board, consistent with the Board's interest in financial security.
- f. reduction in bid deposit requirements or arrangements for a standing bid deposit to cfi

VI. CONTRACT AWARD PROCESS

6.1 Bid/Proposal Specifications

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

- a. A description of the Program, including the requirement of an approved M/WBE Plan; the requirements related to achieving the goals and counting MBE or WBE participation towards meeting the goals; if the goals are not met, the requirement of documentation of the contractor's Good Faith Efforts to achieve the goals, including the Good Faith Efforts of MBEs and WBEs to achieve the goal for which they do not qualify; and a requirement that the contractor commit to the expenditure of at least the dollar value of the Contract Specific Goals with one or more MBEs and one or more WBEs or make to8(s)]TJ0 Tc 052ironortors of0 0[3 (di t)-1.1 (oMB) D20.7 (t)-1d4 (ds)-8 (m di)3.1 (nc8c8c8c

2. provide interested M/WBEs adequate information about the plans, specifications and requirements of the contract, including addenda, in a timely manner to assist them in responding to the solicitation;
3. negotiate in good faith with interested M/WBEs that have submitted bids. Documentation of negotiation must include the names, addresses and telephone numbers of M/WBEs that were solicited; the date of each such solicitation; a description of the information provided about the plans and specifications for the work selected for subcontracting; and evidence as to why agreements could not be reached with M/WBEs to perform the work. A Contractor may not use the fact that additional costs may be involved in soliciting and using M/WBEs as a reason for failing to meet the goals, as long as such additional costs are reasonable;
4. not reject M/WBEs as being unqualified without sound reasons based upon a thorough investigation of their capabilities. The M/WBEs' standing within its industry, membership in specific groups, organizations, or associations, or its political or social affiliations are not legitimate reasons for rejecting or failing to solicit bids to meet the goals;
- 5.

contemplated by the Program.

6.4.1 Student Initiatives

As appropriate the Board, will require the Prime Construction Contractor or Supplier to participate in various initiatives designed to provide opportunities to current CPS students and CPS graduates. Such initiatives include, but are not limited to, internships and job shadowing for current students and an Apprenticeship Initiative for CPS graduates that would secure employment for

- and the contractor misrepresented that status; and
 - ii. upon the disqualification of any MBE or WBE, if the subcontractor's or supplier's status as an MBE or WBE was a factor in the award of the contract, and the Prime Construction Contractor or Supplier misrepresented the status of the subcontractor or supplier. If Facilities or OBD determines that the contractor was not involved in any such misrepresentation, then that contractor shall discharge the disqualified subcontractor or supplier and make good faith efforts to engage a qualified MBE or WBE replacement.
2. allows OBD and/or Facilities, with or without other District staff and with or without notice,
- i. to conduct on-site inspections of any performance site or place of business of any Prime Construction Contractor or Supplier, to determine whether the contractor has complied with its obligations; and
 - ii. to access any contractor's books and records including, without limitation, payroll records, tax returns and records and books of account, to determine the Prime Construction Contractor or Supplier's compliance with its commitment to M/WBE participation and the status of any MBE or WBE performing any portion of the contract.
- 3.

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released to the Prime Construction Contractor or Supplier when not involved in ongoing

- 8. the subcontractor's withdrawal of its bid or proposal.
- f. The final decision on a substitution request shall be communicated in writing as soon as practicable to the affected parties. OBD may request more information or schedule an interview

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

- c. The facts supporting the request to change a M/WBE subcontractor must not have been known nor reasonably foreseeable by either party prior to the submission of the Program Compliance Proposal. Prior to requesting a change, the Prime Vendor or Supplier must negotiate with the subcontractor to resolve the problem. If requested by either party, CPS shall facilitate such a meeting. Where there has been a mistake or disagreement

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

- a. ~~Sanctions for non-compliance may include, but are not limited to the following:~~
 - i. ~~Withholding of payments under the contract~~
 - ii. ~~Recommendation to not exercise contract renewal option~~
 - iii. ~~Termination of the contract~~
 - iv. ~~Debarment from future business with the Board~~

- b. ~~A Prime Construction Contractor or Supplier may protest OBD's determination of Section 9.2 sanctions by filing a written appeal in accordance with the Appeals Process within fourteen (14) business days of receipt of OBD's determination, stating the grounds for such appeal and including all relevant information and documentation.~~

- e. ~~All debarment recommendations will be processed according to the Board's Debarment Policy.~~

- a. Failure to carry out the commitments and policies set forth herein shall constitute a material breach of the contract and may result in the termination of the contract or such remedy as Chicago Public Schools or Chicago Board of Education deems appropriate.


- b. If the Chief Procurement Officer determines, upon reviewing a particular contract, that the vendor did not meet the aspirational goals set forth in the bid documents, and further finds that the vendor has not made good faith attempts to achieve those goals through the methods described in Section 6.4 herein, the CPO shall notify the vendor that they have committed a material breach of their obligations. The CPO shall concurrently advise the vendor of the CPO's intention to seek remedies for breach, including, but not limited to the following:
 - i. withholding payments from the vendor until such time as corrective action has been taken;
 - ii. voiding the contract, with the contractor being only entitled to compensation for services already rendered prior to imposition of the penalty, and/or
 - iii. imposing a penalty in the amount of the discrepancy between the amount of the commitment, as such amount may be amended through change orders or otherwise over the term of the contract, and the achieved amount may be applied to the contractor.

The consequences provided herein shall be in addition to any other criminal or civil liability to which such entities may be subject.

- c. Prior to imposing the penalty specified by this section, the Chief Procurement Officer shall notify the contractor in writing of the fact and amount of the proposed penalty. Within 30 days of the notification, the contractor may submit a memorandum addressed to the CPO which controverts the basis or amount of the proposed penalty. The contractor may also present a detailed and verifiable plan which demonstrates good faith efforts to come into compliance. The CPO may issue a response to the contractor's memorandum which either renders a final decision or invites further submissions from the contractor.

- d. In addition to the penalty specified by this section, after a contractor's second failure to meet

Approved for Consideration:

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Chief Education Officer

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