

RESOURCE GUIDE

MBE | WBE COMPLIANCE



Department of
Procurement
Services

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RESOURCE GUIDE – MBE/WBE COMPLIANCE

CONTENTS

1. THE MBE/WBE PROGRAMS	1
a. Veteran-Owned Business Participation Goal Pilot Program	
2. DEFINITIONS	2
3. BEFORE BIDDING: WHAT TO DO WHEN PREPARING A BID/PROPOSAL FOR A CITY CONTRACT	6
a. Compliance Plan Submittal	6
b. MBE/WBE Compliance Documents to be submitted with a Bid to a Contract Solicitation.....	7
1. Schedule B: MBE/WBE Affidavit of Joint Venture and Joint Venture Agreement	
2. Schedule C: MBE/WBE Letter of Intent to Perform as a Subcontractor or Supplier	
3. Schedule D: Compliance Plan Regarding MBE and WBE Participation	
4. Letters of Certification	
5. Schedule F (Construction Contracts only): Report of Subcontractor Solicitations	
6. Schedule H (Construction Contracts only): Documentation of Good Faith Efforts (GFE)	
7. Waiver Request For Non-Construction Contracts	
c. Impact of Bid Incentives and Programs on MBE/WBE Compliance.....	16
d. Additional Requirements.....	16
4. POST-AWARD COMPLIANCE WITH MBE/WBE REQUIREMENTS	18
a. Execution of Subcontractor Agreements	18
b. How MBE/WBE Participation is Counted Towards the Contract Specific Goals and Compliance Plan	18
c. Commercially Useful Function and Area of Specialty Requirements	21
d. Effect of Modifications/Change Orders on the Compliance Plan	23
e. Changes to a Compliance Plan after Contract Award.....	24
f. Reporting and Record Keeping.....	26
g. Executive Order 2021-02: Procurement Equity and Transparency	27
h. Construction Contracts Additional Lien Waiver Requirements.....	28
i. Site Visits	28
j. Contract Close-out.....	28
k. Non-Compliance.....	28
l. MBE/WBE’s Right to Arbitrate.....	29

1 THE MBE/WBE PROGRAMS

The purpose of this document is to provide helpful information to Bidders and other interested parties regarding compliance with MBE/WBE requirements, but it cannot be relied upon as an authoritative interpretation of the Municipal Code of Chicago (MCC), the Rules promulgated by the CPO, the policies of the Department of Procurement Services (DPS) or the provisions contained in City Contracts. Please refer to the Municipal Code of Chicago and DPS's website for the most up to date ordinances and Rules, which take precedence over this document. This document is subject to change or revision without notice.

The City of Chicago (City) has established MBE/WBE programs for Construction and Non-Construction Contracts. Section 2-92-420 of the MCC articulates the City's affirmative action policy and goal setting for MBE and WBE participation with respect to contracting for goods and services other than construction. Article VI of Chapter 2-92 of the MCC sets forth the City's affirmative action policy and goal setting for MBE and WBE participation with respect to contracts for construction.

Non-Construction Contracts MBE/WBE Participation Goals

The City's overall goals are to award not less than 25 percent of the annual dollar value of all contracts for goods and services other than construction to qualified MBEs and 5 percent of the annual dollar value of such Contracts to qualified WBEs.

Construction Contracts MBE/WBE Participation Goals

The City's current aspirational goals are to award 26 percent of the annual dollar value of all construction contracts to qualified MBEs and 6 percent of the annual dollar value of all construction contracts to qualified WBEs.

In order to achieve the City's overall construction and non-construction goals, each solicitation will identify contract specific MBE and WBE goals.

Veteran-Owned Businesses Participation Goal Pilot Program

The Chief Procurement Officer is authorized to establish a contract-specific participation goal to veteran-owned small local businesses if all of the following conditions are met:

1. the contract has an estimated value in excess of \$10,000; and

2. there are at least three veteran-owned small local businesses certified by the City in each of one or more areas of specialty (as defined by the North American Industry Classification System); and
3. the contract-specific participation goal is not more than one percent of the contract's value.

2 DEFINITIONS

Area of Specialty - the description of an MBE's or WBE's activity that has been determined by the Chief Procurement Officer to be most reflective of the firm's claimed specialty or expertise. Each MBE and WBE letter of certification contains a description of the firm's Area of Specialty. Credit toward the Contract Specific Goals is limited to the participation of MBE/WBE firms performing within their Area of Specialty. The City does not make any representation concerning the ability of any MBE or WBE to perform work within its Area of Specialty. It is the responsibility of the Bidder or Contractor to determine the capability and capacity of MBEs and WBEs to perform the work proposed.

Bid - a bid or proposal submitted in response to a bid solicitation, request for proposal, or request for qualification.

Bidder - any person or business entity that submits a bid, proposal, qualification or submittal that seeks to enter into a Contract with the City, and includes all partners, affiliates and joint ventures of such person or entity.

Broker - a person or entity that fills orders by purchasing or receiving supplies from a third party supplier rather than out of its own existing inventory and provides no commercially useful function other than acting as a conduit between his or her supplier and his or her customer.

Chief Procurement Officer or CPO - the chief procurement officer of the City or his or her designee.

City - the City of Chicago.

Commercially Useful Function - responsibility for the execution of a distinct element of the work of the Contract, which is carried out by actually performing, managing, and supervising the work involved, evidencing the responsibilities and risks of a business owner such as negotiating the terms of (sub)contracts, taking on a financial risk commensurate with the Contract or its subcontract, responsibility for acquiring the appropriate lines of credit and/or loans, or fulfilling responsibilities as a joint venture partner as described in the joint venture agreement.

Construction Contract - a Contract for the construction, repair, or improvement of any building, bridge, roadway, sidewalk, alley, railroad or other structure or infrastructure.

Contract - a contract, purchase order or agreement (other than lease of real property), awarded by any officer or agency of the City, other than the City Council, and whose cost is

to be paid from City funds and includes Construction and Non-Construction Contracts. When the term Contract is used, it is not intended to include a Target Market Contract except for purposes of defining Target Market Contract.

Contract-Specific Goals - the goals for MBE and WBE participation established for a particular Contract whether Construction or Non-Construction as the context may require.

Contractor - any person or business entity that has entered into a Contract with the City, and includes all partners, affiliates and joint ventures of such person or entity.

Good Faith Efforts - actions undertaken by a Bidder or Contractor to achieve a Contract Specific Goal that, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program's requirements.

Joint venture - an association of an MBE or WBE firm and one or more other firms to carry out a single, for-profit business enterprise, for which each joint venture partner contributes property, capital, efforts, skills and knowledge, and in which the MBE or WBE is responsible for a distinct, clearly defined portion of the work of the Contract and whose share in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.

Minority-owned Business Enterprise or MBE - a firm awarded certification as a minority owned and controlled business in accordance with City Ordinances and Regulations as well as a firm awarded certification as a minority owned and controlled business by Cook County, Illinois.

MCC - the Municipal Code of Chicago.

Non-Construction Contract - a Contract that is not a Construction Contract.

Participating Established Business - an MBE or WBE that has become an Established Business under the City MBE/WBE program but that remains eligible to participate in the City's MBE/WBE program for a period of three years starting on the date that the MBE or WBE became an established business at reduced levels as provided by regulations adopted by the CPO.

Supplier or Distributor refers to a company that owns, operates, or maintains a store, warehouse or other establishment in which materials, supplies, articles or equipment are bought, kept in stock and regularly sold or leased to the public in the usual course of business. A regular distributor or supplier is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials or supplies required for performance of the Contract are bought, kept in stock, and regularly sold to the public in the usual course of business. To be a regular distributor the firm must engage in, as its principal business and in its own name, the purchase and sale of the products in question. A regular

distributor in such bulk items as steel, cement, gravel, stone, and petroleum products need not keep such products in stock if it owns or operates distribution equipment.

Target Market Contract - a Non-Construction Contract designated by the CPO for award limited to MBEs or WBEs on either a negotiated or competitive bid process.

Women-Owned Business Enterprise or WBE - a firm awarded certification as a woman owned and controlled business in accordance with City Ordinances and Regulations as well as a firm awarded certification as a women owned business by Cook County, Illinois.

3. BEFORE BIDDING

WHAT TO DO WHEN PREPARING A BID OR PROPOSAL FOR A CITY CONTRACT

Compliance Plan Submittal

A Bid for a Contract may be rejected as non-responsive if the Bidder fails to submit one or more of the following with its bid or proposal demonstrating its good faith efforts to meet the Contract Specific Goals set for the contract:

- A. An MBE/WBE Compliance Plan demonstrating how the Bidder plans to meet the Contract Specific Goals (Schedule D); and/or
- B. Documentation of Good Faith Efforts to meet the Contract-Specific Goals; and/or
- C. A request for reduction or waiver of the Contract Specific Goals.

NOTE – The MBE/WBE Special Conditions incorporated into a specification document will clearly outline the type of documentation required when submitting a proper MBE/WBE Compliance Plan.

MBE and WBE contract commitment can be met any one or more of the following:

- the Contractor's status as an MBE or WBE
- joint venturing with one or more certified MBEs or WBEs that will perform work on the project
- subcontracting a portion of the work to one or more MBEs or WBEs
- and by the purchase of materials used in the performance of the Contract from one or more MBEs or WBEs

Firms that are certified as both MBE and WBE may only be listed on a Bidder's Compliance Plan as either an MBE or a WBE to demonstrate compliance with the Contract Specific Goals. For example, a firm certified as both an MBE and a WBE may only be listed on the Bidder's Compliance Plan as an MBE or a WBE, but not both. Additionally, a Bidder that is certified as both an MBE and a WBE could not count its performance towards both the MBE and WBE goals even if it self-performs 100% of a Contract.

MBE/WBE Compliance Documents to be submitted with a Bid to a Contract Solicitation

When submitting a Bid to the City for a Contract, the following documents must be submitted, to the extent applicable:

Schedule B: MBE/WBE Affidavit of Joint Venture and Joint Venture Agreement

Where the Bidder's Compliance Plan includes the participation of any MBE or WBE as a joint venture partner, the Bidder must submit with its Bid a Schedule B and the proposed joint venture agreement.

A joint venture may consist of any combination of MBEs, WBEs, and non-certified firms as long as one member is an MBE or WBE firm. The formation of joint ventures to provide MBEs and WBEs with capacity and experience at the prime contracting level, and thereby meet Contract Specific Goals (in whole or in part) is encouraged.

The joint venture Compliance Plan may be eligible for credit towards the Contract Specific Goals only if:

1. The MBE or WBE joint venture partner's share in the capital contribution, control, management, risks and profits of the joint venture is equal to its ownership interest;
2. The MBE or WBE joint venture partner is responsible for a distinct, clearly defined portion of the requirements of the Contract for which it is at risk;
3. Each joint venture partner executes the Bid to the City; and
4. The joint venture partners have entered into a written agreement specifying the terms and conditions of the relationship between the partners and their relationship and responsibilities to the Contract, and all such terms and conditions are in accordance with the conditions set forth in Items 1, 2, and 3 above.

These documents must both clearly evidence that the MBE or WBE joint venture partner(s) will be responsible for a clearly defined portion of the work to be performed, and that the MBE's or WBE's responsibilities and risks are proportionate to its ownership percentage. The proposed joint venture agreement must include specific details related to:



The Department of Procurement Services maintains a Directory of MBEs and WBEs certified by the City and Cook County.

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Bidders and Contractors are responsible for verifying the current certification status of all proposed MBEs and WBEs.



1. The parties' contributions of capital, personnel, and equipment and share of the costs of insurance and bonding;
2. Work items to be performed by the MBE's or WBE's own forces and/or work to be performed by employees of the newly formed joint venture entity;
3. Work items to be performed under the supervision of the MBE or WBE joint venture partner; and
4. The MBE's or WBE's commitment of management, supervisory, and operative personnel to the performance of the Contract.

NOTE: Vague, general descriptions of the responsibilities of the MBE or WBE joint venture partner do not provide any basis for awarding credit. For example, descriptions such as "participate in the budgeting process," "assist with hiring," or "work with managers to improve customer service" do not identify distinct, clearly defined portions of the work. Roles assigned should require activities that are performed on a regular, recurring basis rather than as needed. Roles must also be pertinent to the nature of the business for which credit is being sought. For instance, if the scope of work required by the City entails delivery of goods to sites in the City, stating that the MBE or WBE joint venture partner will be responsible for performance of routine maintenance and repairs required to the vehicles used to deliver such goods or services is pertinent to the nature of the business for which credit is being sought.

The City will evaluate the proposed joint venture agreement, the Schedule B submitted on behalf of the proposed joint venture, and all related documents to determine whether these requirements have been satisfied. The City will also consider the record of the joint venture partners on other City contracts. The decision of the Chief Procurement Officer regarding the eligibility of the joint venture for credit towards meeting the Contract Specific Goals, and the portion of those goals met by the joint venture, is final.

Schedule C: MBE/WBE Letter of Intent to Perform as a Subcontractor or Supplier

Where the Bidder's Compliance Plan includes the participation of any MBE or WBE as a subcontractor, the Bidder must submit an appropriate Schedule C provided by MBE and WBE Contract participants for each MBE and WBE included on the Schedule D. The Bidder must include a separate Schedule C for each supplier and/or distributor and every first and second or lower tier subcontractor that the Bidder intends to utilize for MBE and WBE credit.

Each Schedule C must accurately detail the work to be performed by the MBE or WBE and the agreed upon rates/prices. Each Schedule C must also include a separate sheet as an attachment on which the MBE or WBE fully describes its proposed scope of work, including a description of the Commercially Useful Function being performed by the MBE or WBE in its Area of Specialty. The Schedules C's must be completed and signed by each subcontractor MBE or WBE firm and NOT the Bidder. All terms and conditions for MBE and WBE participation on the Contract must be negotiated and agreed to between the Bidder or Contractor and the MBE or WBE before submitting the Compliance Plan. An MBE or WBE firm should never sign and submit to the Bidder a blank Schedule C.

Schedule D: Compliance Plan Regarding MBE and WBE Participation

The Bidder must submit a Schedule D showing its Compliance Plan regarding MBE and WBE participation with the Bid. An approved Compliance Plan is required before performance of a Contract may commence. The Compliance Plan must commit to the utilization of each Schedule D-listed MBE and WBE firm(s) for the percentage of participation specified in the plan. The Bidder is responsible for calculating the dollar equivalent of the MBE and WBE Contract Specific Goals as percentages of the total base bid. All Compliance Plan commitments must conform also to MBE and WBE participation shown by the Schedule Cs.

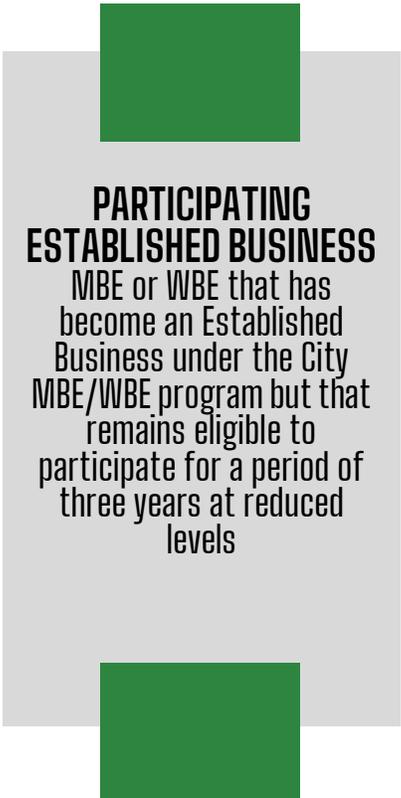
A Bidder or Contractor may not modify its Compliance Plan after bid opening except as directed by the Department of Procurement Services to correct minor errors or omissions. Bidders are not permitted to add MBEs or WBEs after bid opening to meet the Contract Specific Goals; however, Contractors are encouraged to add additional MBE/WBEs to their approved compliance plan during the performance of the Contract when additional opportunities for participation are identified. Except in cases where substantial, documented justification is provided, the Bidder or Contractor shall not reduce the dollar commitment made to any MBE or WBE in order to achieve conformity between the Schedule Cs and Schedule D.

Letters of Certification

A copy of each proposed MBE's and WBE's Letter of Certification from the City or Cook County, Illinois, must be submitted with the Bid. The MBE's or WBE's scope of work as detailed in the Schedule C must conform to the Area(s) of Specialty listed in the Letter of Certification.

Participating Established Businesses

MBEs or WBEs that are in the phased graduation program at the time of the bid may continue to be included in a Bidder's Compliance Plan and be counted toward meeting the Contract Specific Goals as a *Participating Established Business* in the same manner as an MBE or WBE but at reduced levels. During a firm's first year as a *Participating Established Business* in the phased graduation program, the firm will receive 75% credit for participation, i.e., for each dollar (\$1.00) paid to or performed by the firm, the Contractor will be credited for seventy-five cents (\$0.75) of participation. For Bids submitted in the second year the credit is 50% and for the third year the credit is 25%.



**PARTICIPATING
ESTABLISHED BUSINESS**
MBE or WBE that has
become an Established
Business under the City
MBE/WBE program but that
remains eligible to
participate for a period of
three years at reduced
levels

Where a Contractor submits a Compliance Plan for a City project utilizing a *Participating Established Business*, the percentage of compliance will be counted at the same level throughout the life of that Contract. For example, if a firm is entitled to have its participation counted at the 75% level at the start of a Contract, then, for the duration of that particular Contract, that vendor's participation would be counted at 75% for purposes of applying MBW/WBE credit for that Contract. Accordingly, for each new or subsequent Contract awarded during the three-year period, the percentage applied throughout the life of the Contract would be that applicable as of the date the Contract is awarded.

Bidders are required to accurately indicate the correct percentage reduction per dollar committed to *Participating Established Businesses* as part of the compliance plan on the Schedule D forms submitted with any bid or proposal. *Participating Established Businesses* are required to accurately indicate the correct percentage reduction per dollar committed to on any Schedule C submitted to a prime Contractor for submittal with a bid or proposal.

Schedule F (Construction Contracts only): Report of Subcontractor Solicitations

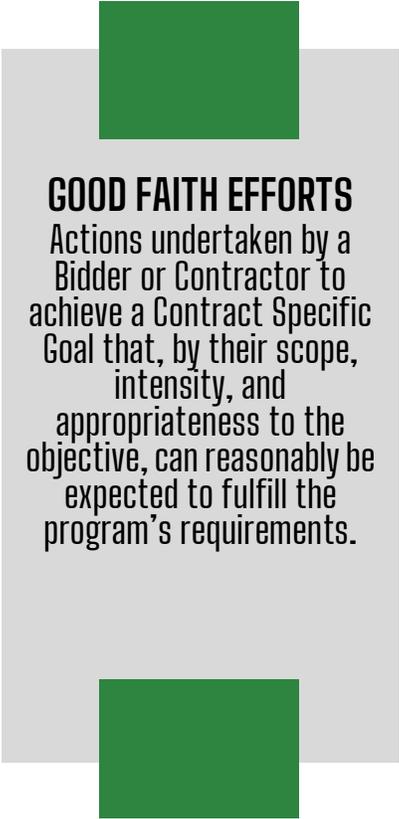
A Schedule F must be submitted with the bid, documenting all subcontractors and suppliers solicited for participation on the Construction Contract by the Bidder. Failure to submit the Schedule F may render the bid non-responsive.

Schedule H (Construction Contracts only): Documentation of Good Faith Efforts (GFE)

If a Bidder in a solicitation for a Construction Contract determines that it is unable to meet the Contract Specific Goals, it must document its Good Faith Efforts to do so, including the submission of Attachment C, Log of Contacts. If the City determines that the Bidder's Compliance Plan does not meet the Contract Specific Goals in full or in part, the Bidder must submit its Schedule H no later than three business days after notification by the Chief Procurement Officer of its status as the apparent lowest bidder. Failure to submit a complete Schedule H will cause the bid to be rejected as non-responsive.

The GFE documentation must include but is not necessarily limited to:

1. A detailed statement of efforts to identify and select portions of work identified in the bid solicitation for subcontracting to MBEs and WBEs;



GOOD FAITH EFFORTS
Actions undertaken by a Bidder or Contractor to achieve a Contract Specific Goal that, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program's requirements.

2. A listing of all MBEs and WBEs contacted for the bid solicitation that includes:
 - i. Names, addresses, emails and telephone numbers of firms solicited;
 - ii. Date and time of contact;
 - iii. Person contacted;
 - iv. Method of contact (letter, telephone call, facsimile, electronic mail, etc.).
3. Evidence of contact, including:
 - i. Project identification and location;
 - ii. Classification/commodity of work items for which quotations were sought;
 - iii. Date, item, and location for acceptance of subcontractor bids;
 - iv. Detailed statements summarizing direct negotiations with appropriate MBEs and WBEs for specific portions of the work and indicating why agreements were not reached.
 - v. Bids received from all subcontractors.
4. Documentation of Bidder or Contractor contacts with at least one of the MBE and WBE Assist Agencies.

In evaluating the Schedule H to determine whether the Bidder or Contractor has made Good Faith Efforts to achieve the Contract Specific Goals, the performance of other bidders or contractors in meeting the goals may be considered. The CPO will consider, at a minimum, the Bidder's efforts to:

1. Solicit through reasonable and available means at least 50% (or at least five when there are more than eleven certified firms in the commodity area) of MBEs and WBEs certified in the anticipated scopes of subcontracting of the contract, as documented by the Schedule H. The Bidder or Contractor must solicit MBEs and WBEs within seven (7) days prior to the date bids are due. The Bidder or Contractor must take appropriate steps to follow up initial solicitations with interested MBEs or WBEs.
2. Advertise the Contract opportunities in media and other venues oriented toward MBEs and WBEs.
3. Provide interested MBEs or WBEs with 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.



DPS will evaluate Good Faith Effort documentation submitted by the Bidder and make a determination as to whether the Bidder has been unable to meet the Contract-Specific Goals.

If DPS determines that the Bidder did not undertake sufficient Good Faith Efforts, the Bid will be deemed non-responsive.



4. Negotiate in good faith with interested MBEs or WBEs that have submitted bids. That there may be some additional costs involved in soliciting and using MBEs and WBEs is not a sufficient reason for a Bidder's failure to meet the Contract Specific Goals, as long as such costs are reasonable.
5. Not reject MBEs or WBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The MBE's or WBE's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations are not legitimate causes for rejecting or not soliciting bids to meet the Contract Specific Goals.
6. Make a portion of the work available to MBE or WBE subcontractors and suppliers and selecting those portions of the work or material consistent with the available MBE or WBE subcontractors and suppliers, so as to facilitate meeting the Contract Specific Goals.
7. Make Good Faith Efforts, despite the ability or desire of a bidder or contractor Contractor to perform the work of a Contract with its own organization. A Bidder or Contractor who desires to self-perform the work of a Contract must demonstrate Good Faith Efforts unless the Contract Specific Goals have been met.
8. Select portions of the work to be performed by MBEs or WBEs in order to increase the likelihood that the goals will be met. This includes, where appropriate, breaking out Contract work items into economically feasible units to facilitate MBE or WBE participation, even when the Bidder or Contractor might otherwise prefer to perform these work items with its own forces.
9. Make efforts to assist interested MBEs or WBEs in obtaining bonding, lines of credit, or insurance as required by the City or Bidder or Contractor.
10. Make efforts to assist interested MBEs or WBEs in obtaining necessary equipment, supplies, materials, or related assistance or services; and
11. Effectively use the services of the City; minority or women community organizations; minority or women assistance groups; local, state, and federal minority or women business assistance offices; and other organizations to provide assistance in the recruitment and placement of MBEs or WBEs.

DPS will evaluate the Good Faith Effort documentation submitted by the Bidder and make a determination as to whether, notwithstanding the Bidder's Good Faith Efforts, the Bidder has been unable to meet the Contract-Specific Goals. If DPS determines that the Bidder has made Good faith Efforts the proposed Compliance Plan will be accepted. If DPS determines

that the Bidder did not undertake sufficient Good Faith Efforts the Bid will be deemed non-responsive.

If the Bidder disagrees with the City's determination that it did not make Good Faith Efforts, the Bidder may file a protest pursuant to the Department of Procurement Services Solicitation and Contracting Process Protest Procedures within 10 business days of the City's decision. See DPS's website for more information regarding the City's protest procedures.

Waiver Request For Non-Construction Contracts

If a Bidder determines that it is unable to meet the MBE and/or WBE Contract-Specific Goal on a Non-Construction Contract, a written request for the reduction or waiver of the commitment must be included in the Bid. The written request for reduction or waiver from the commitment must be in the form of a signed petition for grant of relief from the MBE/WBE Contract Specific Goal percentages submitted on the Bidder's letterhead, and must demonstrate that all required efforts were taken to secure eligible MBEs and WBEs to meet the Contract Specific Goals. The CPO or designee will determine whether the request for the reduction or waiver will be granted.

A Bidder's Compliance Plan will be considered responsive if, at the time of bid, the Bidder submits a waiver request and all supporting documentation that adequately addresses the conditions for the requested waiver of MBE/WBE Contract Specific goals, including proof of notification to assist agencies except, with respect to Bidders responding to Request for Proposals (RFPs) and Bidders responding to Request for Information and or Qualifications (RFI/RFQs) the timing for the submittals of waiver requests will be as follows:

1. Bidders responding to RFPs who have been identified as a short listed candidate and/or a prospective awardee will be given a designated time allowance, but no more than fourteen (14) calendar days to submit to the Department of Procurement Services complete documentation that adequately addresses the conditions for waiver; and
2. Bidders responding to RFI/RFQs deemed by the Chief Procurement Officer or authorized designee to be the most responsive and responsible must submit documentation that adequately addresses the conditions for waiver described herein during Contract negotiations.

Failure to submit documentation sufficient to support the waiver request will cause the Bid to be found non-responsive by the CPO and be rejected. In such cases the remedies to be taken by the CPO, in his or her discretion, may include, but are not limited to, forfeiture of bid deposit; negotiating with the next lowest bidder; or re-advertising the solicitation. Except as described above, all Bidders must submit all required documents at the time of bid opening to expedite the Contract award.

Each of the following elements must be present in order to determine whether or not such a reduction or waiver is appropriate.

1. Unsuccessful Solicitation. The Bidder has documented the unsuccessful solicitation for either subcontractors or joint venture partners of at least 50% (or at least five when there are more than eleven certified firms in the commodity area) of the appropriate certified MBE/WBE firms to perform any direct or indirect work identified or related to the advertised bid/proposal. Documentation must include but is not necessarily limited to:
 - a. A detailed statement of efforts to identify and select portions of work identified in the bid solicitation for subcontracting to MBEs and WBEs;
 - b. A listing of all MBEs and WBEs contacted for the bid solicitation that includes:
 - i. Name, address, email and telephone number of MBE/WBE firms solicited;
 - ii. Date and time of contact;
 - iii. Person contacted;
 - iv. Method of contact (letter, telephone call, facsimile, email, etc.).
 - c. Copies of letters or any other evidence of mailing that substantiates outreach to MBE/WBE vendors that includes:
 - i. Project identification and location;
 - ii. Classification/commodity of work items for which quotations were sought;
 - iii. Date, item, and location for acceptance of subcontractor bids;
 - iv. Detailed statements summarizing direct negotiations with appropriate MBEs and WBEs for specific portions of the work and indicating why negotiations were not successful;
 - v. Affirmation that Good Faith Efforts have been demonstrated by: choosing subcontracting opportunities likely to achieve MBE/WBE goals; not imposing any limiting conditions which were not mandatory for all subcontractors; providing notice of subcontracting opportunities to M/WBE firms and assist agencies at least five (5) business days in advance of the initial bid due date.
2. Excessive Cost. Subcontractor participation will be deemed excessively costly when the MBE/WBE subcontractor proposal exceeds the average price quoted by more than twenty percent (20%). In order to establish that a subcontractor's quote is excessively costly, the Bidder must provide the following information:
 - a. Detailed statement of the work identified for participation for which the Bidder asserts the MBE/WBE quote(s) were excessively costly (in excess of 20% higher).
 - b. A listing of all potential subcontractors contacted for a quotation on that work item;
 - c. Prices quoted for the subcontract in question by all such potential subcontractors for that work item.

3. Other documentation that demonstrates to the satisfaction of the Chief Procurement Officer that the MBE/WBE proposals are excessively costly, even though not in excess of 20% higher than the average price quoted. This determination will be based on factors that include, but are not limited to the following:
 - a. The City's estimate for the work under a specific subcontract;
 - b. The Bidder's own estimate for the work under the subcontract;
 - c. An average of the bona fide prices quoted for the subcontract;
 - d. Demonstrated increase in other Contract costs as a result of subcontracting to the M/WBE or other firm.

4. Assist Agency Notification by Bidder. Every waiver and/or reduction request must include evidence that the Bidder has provided timely notice of the need for subcontractors to an appropriate association/assist agency representative of the MBE/WBE business community shown in the solicitation. This notice must be given at least five (5) business days in advance of the initial bid due date.

The notice requirement of this Section will be satisfied if a Bidder contacts at least one of the Assist Agencies listed in the solicitation MBE/WBE Special Conditions, when the Bidder seeks a waiver or reduction in the utilization goals. The solicitation MBE/WBE Special Conditions provides a letter format that a Bidder may use. Proof of notification prior to bid submittal (e.g. certified mail receipt or facsimile transmittal receipt) will be required for any Bid submitted to be deemed responsive on the date of bid opening. If deemed appropriate, the DPS Contract Compliance Officer may contact the assist agency for verification of notification.

ASSIST AGENCY

DPS maintains a list of registered assist agencies as a resource to help identify MBE and WBE firms.

The most recent Assist Agency List is available on the DPS website:
www.chicago.gov/DPS

Impracticability

The requirements set forth in the this Guide and the MBE/WBE Special Conditions shall not apply where the CPO determines that MBE/WBE subcontractor participation is impracticable. If the CPO has determined that it is impracticable to set Contract Specific Goals, Bidders may be eligible to earn a bid incentive for committing to the utilization of MBEs and WBEs on the contract despite the lack of Contract Specific Goals. Information about the Bid Incentive to Encourage MBE/WBE participation is on DPS's website.

If the CPO determines that a lesser MBE and/or WBE Contract Specific Goal is appropriate with respect to a particular contract prior to the bid opening for such solicitations, an addenda shall be issued with a statement of such revised standard.

Impact of Bid Incentives and Programs on MBE/WBE Compliance

Mentor/Protégé Program

As part of a proposed Compliance Plan, a Bidder may also apply to earn additional MBE or WBE credit towards the Contract Specific Goals through its participation in the City's Mentor/Protégé Program. In order to receive credit, the Bidder and a MBE or WBE protégé must submit a mentor/protégé agreement to the City for approval and must indicate on the Schedule C and D that the Bidder and the protégé MBE or WBE are participating in the Mentor/Protégé program. If participation in the program is approved, then the parties must comply with all requirements of the program throughout the term of the Contract. The maximum additional credit that can be earned is 5%. See DPS's website for additional information regarding the Mentor/Protégé Program.

Diversity Credit Program

As part of its proposed Compliance Plan, a Bidder may also apply to the Contract Specific Goals credits that it may have been awarded to it by the City's Affirmative Action Advisory Board (the "Board") under the City's Diversity Credit Program.

A Bidder that has been awarded credits must indicate with its Bid that it intends to use those credits toward MBE/WBE participation goals on the Contract, subject to the following:

- The MBEs or WBEs on which the credit is based must still be certified as such at the time of the bid opening for the Contract.
- The maximum amount of credit available on any given City Contract is five percent (5%) of the dollar value of that City Contract.
- Credits may only be used once.

See DPS's website for additional information regarding the Diversity Credit Program.

Additional Requirements

Agreements between a Bidder or Contractor and an MBE or WBE in which the MBE or WBE promises not to provide subcontracting quotations to other Bidders or Contractors are prohibited.

Prior to award, the Bidder agrees to promptly cooperate with DPS in submitting to interviews, allowing entry to places of business, providing further documentation, or soliciting the cooperation of a proposed MBE or WBE. Failure to cooperate may render the bid non-responsive.

If the City determines that the Compliance Plan contains minor errors or omissions, the Bidder or Contractor must submit a revised Compliance Plan within five (5) business days after notification by the City that remedies the minor errors or omissions. Failure to correct all minor errors or omissions may result in the determination that a bid is non-responsive.

For all notifications required to be made by Bidders in situations where the CPO has determined that time is of the essence, documented telephone contact may be substituted for letter contact.

4. POST AWARD

COMPLIANCE WITH MBE/WBE REQUIREMENTS

Execution of Subcontractor Agreements

After receipt of the executed Contract, the successful Bidder must execute a complete subcontract agreement or purchase order with each MBE and WBE listed on the Contractor's Schedule D, and provide a copy of such subcontract agreement or purchase order to the City upon request. Upon request, the Contractor must provide copies of each signed subcontract, purchase order, or other agreement to DPS, Contract Compliance Division.

How MBE/WBE Participation is Counted Towards the Contract Specific Goals And the Compliance Plan

If the MBE or WBE performs the work itself:

- 100% of the value of work actually performed by the MBE's or WBE's own forces is counted toward the Contract Specific Goals, including:
 - the cost of supplies purchased or equipment leased by the MBE or WBE from third parties or
 - second tier subcontractors in order to perform its (sub) contract with its own forces; however supplies and equipment the MBE or WBE subcontractor purchases or leases from the prime Contractor or its affiliate(s) will not be counted.
- Zero percent (0%) of the value of work at the project site that an MBE or WBE subcontracts to a non-certified firm counts toward the Contract Specific Goals.

If the MBE or WBE is a manufacturer:

- 100% of expenditures to an MBE or WBE manufacturer for items needed for the Contract are counted toward the Contract Specific Goals.
 - A manufacturer is a firm that operates or maintains a factory or establishment that produces on the premises the materials or supplies obtained by the Bidder or Contractor.

If the MBE or WBE is a distributor or supplier:

- 60% of expenditures for materials and supplies purchased from an MBE or WBE that is certified as a regular dealer or supplier are counted toward the Contract -Specific Goals.

If the MBE or WBE is a Broker:

- No expenditures paid to Brokers are counted toward the Contract Specific Goals; as Brokers provide no commercially useful function.

If the MBE or WBE is a member of the Joint Venture Contractor/Bidder:

- A joint venture may count the portion of the total dollar value of the Contract equal to the distinct, clearly defined portion of the work of the Contract that the MBE or WBE joint venturer performs with its own forces toward the Contract Specific Goals; OR
- If employees of the distinct joint venture entity perform the work then the value of the work may be counted toward the Contract Specific Goals at a rate equal to the MBE or WBE firm's percentage of participation in the joint venture as in Schedule B.
- Note: a joint venture may also count the dollar value of work subcontracted to other MBEs and WBEs, however, work subcontracted out to non-certified firms may not be counted.

If the MBE or WBE subcontracts out any of its work:

- 100% of the value of the work subcontracted by an MBE or WBE to other MBEs or WBEs performing work in its Area of Specialty may be counted toward the MBE or WBE Contract Specific Goals, as applicable, subject to the following special rules:
 - None of the work that an MBE or WBE subcontracts to a non-certified firm counts toward the Contract Specific Goals (except for the cost of supplies purchased/equipment leased by the MBE or WBE from third parties or second tier subcontractors in order to perform its (sub)contract with its own forces.)

If the MBE or WBE provides a bona fide service:

- The fees or commissions charged by an MBE or WBE for providing a bona fide service, such as professional, technical, consulting or managerial services or for providing bonds or insurance or the procurement of essential personnel, facilities, equipment, materials or supplies required for performance of the Contract, may be counted toward the Contract Specific Goals, provided that the fee or commission is

determined by the CPO to be reasonable and not excessive as compared with fees customarily allowed for similar services.

- The entire amount paid to the MBE or WBE for providing such service to the Contractor will not be counted.

If the MBE or WBE delivers materials and supplies to a job site:

- The fees charged by an MBE or WBE for delivery of materials and supplies required on a job site when the hauler, trucker, or delivery service is not also the manufacturer of or a regular dealer in the materials and supplies, may be counted toward the Contract Specific Goal, provided the fee is determined by the CPO to be reasonable and not excessive as compared with fees customarily allowed for similar services.
- The cost of the materials and supplies themselves will not be counted.

If the MBE or WBE provides bonds or insurance:

- The fees or commissions charged by an MBE or WBE for providing any bonds or insurance specifically required for the performance of the Contract, will be counted towards the Contract Specific Goals, provided that the fee or commission is determined by the CPO to be reasonable and not excessive as compared with fees customarily allowed for similar services.
- The cost of the premium itself will not be counted

Commercially Useful Function and Area of Specialty Requirements

Only expenditures to firms that perform a Commercially Useful Function may count toward the Contract Specific Goals.

The CPO will determine whether a firm is performing a commercially useful function by evaluating the amount of work subcontracted, whether the amount the firm is to be paid under the Contract is commensurate with the work it is actually performing and the credit claimed for its performance of the work, industry practices, and other relevant factors.

An MBE or WBE does not perform a commercially useful function if its participation is only required to receive payments in order to obtain the appearance of MBE or WBE participation. The CPO may examine similar commercial transactions, particularly those in which MBEs or WBEs do not participate, to determine whether non-MBE and non WBE firms perform the same function in the marketplace to make a determination.

Indications that a subcontractor is not performing a commercially useful function include, but are not limited to, labor shifting and equipment sharing or leasing arrangements with the prime Contractor or a first-tier subcontractor.

- A. When determining whether and MBE or WBE is performing a Commercially Useful Function, DPS considers, among other things, the following questions:
- Who supervises and carries out the work?
 - Who pays the MBE/WBE/DBE's employees?
 - Who owns the equipment used by the MBE/WBE/DBE?
- B. DPS also considers the responsibilities of the MBE or WBE firm when determining whether the MBE or WBE is performing a commercially useful function:
1. Management
Does the MBE or WBE:
 - Schedule the work operations;
 - Receive quotes and order equipment and materials;
 - Prepare and submit certified payrolls;
 - Hire and fire employees;
 - Make all operational and managerial decisions; and
 - Supervise daily operations, either personally or with a full time, skilled, and knowledgeable superintendent who is under the MBE/WBE/DBE owner's direct supervision.
 2. Equipment
Does the MBE or WBE:
 - Have a valid lease for equipment consistent with industry practices and at competitive rates;

- Have a lease agreement that is on a long-term basis;
- Lease equipment on an *ad hoc* basis from another contractor, excluding the prime Contractor or subsidiary or affiliate of the prime;
- Fully control the operation of the equipment;
- Provide the operator for the equipment; and
- Have responsibility for all payroll and labor compliance requirements.

3. Workforce

Does the MBE or WBE:

- Keep a regular workforce;
- Not “share” employees with non-MBE/WBE contractors, particularly the prime Contractor or a subsidiary or affiliate; and
- Have responsibility for all payroll and labor compliance requirements for all employees within the control of the company.

4. Materials

Does the MBE or WBE:

- Negotiate the cost, arrange delivery, take ownership and pay for the materials and supplies for the project, and
- Prepare the estimate, determine the quantity of material, and have responsibility for the quality of the materials.

5. Performance

Does the MBE or WBE:

- Have responsibility for the performance, management, and supervision of a distinct element of the work, in accordance with normal business practice, and
- Assume financial risk appropriate for the amount of work to be performed.

C. Only the value of the dollars paid to the MBE or WBE firm for work that it performs in its Area of Specialty in which it is certified counts toward meeting the Contract Specific Goals.

D. Only payments made to MBE and WBE firms that meet BOTH the Commercially Useful Function and Area of Specialty requirements *above* will be counted toward the Contract Specific Goals.

Effect of Modifications/Change Orders on The Compliance Plan

The MBE and WBE Contract Specific Goals established at the time of Contract bid also apply to any modifications to the Contract after award. That is, any additional work and/or money added to the Contract must also adhere to the MBE/WBE Special Conditions requiring the Contractor to (sub) contract with MBEs and WBEs to meet the Contract Specific Goals.

For Construction Contracts, the Contractor must assist the Construction Manager or user Department in preparing its “proposed contract modification” by evaluating the subject matter of the modification and determining whether there are opportunities available for MBEs or WBEs to participation in, and at what rates.

The Contractor must also produce a statement listing the MBEs/WBEs that will be utilized on any contract modification. The statement must include the dollar value of commitment for each firm that will be utilized. If no MBE/WBE participation is available in a Construction Contract, an explanation of Good Faith Efforts to obtain participation must be included and approved by the CPO.

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

Changes to a Compliance Plan after Contract Award

No changes to the Compliance Plan, contractual MBE and WBE commitments, substitution of MBE or WBE subcontractors may be made without the prior written approval of the CPO.

Unauthorized changes or substitutions, including performing the work designated for a subcontractor with the Contractor's own forces are a breach of the Contract with the City, and may cause termination of the executed Contract for breach, and/or subject the Bidder or Contractor to Contract remedies or other sanctions.

The facts supporting the request for changes must not have been known nor reasonably could have been known by the parties prior to entering into the subcontract. Bid shopping is prohibited.

The Bidder or Contractor must negotiate with the subcontractor to resolve any problems. If requested by either party, DPS will facilitate such process.

Where there has been a mistake or disagreement about the scope of work, the MBE or WBE can be substituted only where an agreement cannot be reached for a reasonable price for the correct scope of work.

Substitutions of an MBE or WBE subcontractor are permitted only on the following bases:

1. Unavailability after receipt of reasonable notice to proceed;
2. Failure of performance;
3. Financial incapacity;
4. Refusal by the subcontractor to honor the bid or proposal price or scope;
5. Mistake of fact or law about the elements of the scope of work of a solicitation where a reasonable price cannot be agreed;
6. Failure of the subcontractor to meet insurance, licensing or bonding requirements;
7. The subcontractor's withdrawal of its bid or proposal;
8. De-certification of the subcontractor as an MBE or WBE. (Graduation from the MBE/WBE program does not constitute de-certification; or
9. Termination of a Mentor Protégé Agreement.

If it becomes necessary to substitute an MBE or WBE or otherwise change the Compliance Plan, the procedure will be as follows:

1. The Bidder or Contractor must notify the Chief Procurement Officer in writing of the request to substitute an MBE or WBE or otherwise change the Compliance Plan. The request must state specific reasons for the substitution or change. A letter from the MBE or WBE to be substituted or affected by the change stating that it cannot perform on the Contract or that it agrees with the change in its scope of work must be submitted with the request.

2. The City will not review a request for substitution or other change until it has determined that all required documentation has been submitted and respond accordingly.
3. Where the Bidder or Contractor has established the basis for the substitution to the satisfaction of the Chief Procurement Officer, it must make good faith efforts to meet the Contract Specific Goal by substituting an MBE or WBE subcontractor. Documentation of a replacement MBE or WBE, or of good faith efforts, must meet the requirements set forth above and in the MBE/WBE Special Conditions. If the MBE or WBE Contract Specific Goal cannot be reached and good faith efforts have been made, as determined by the CPO, the Bidder or Contractor may substitute with a non-MBE or non-WBE.
4. If a Bidder or Contractor plans to hire a subcontractor for any scope of work that was not previously disclosed in the Compliance Plan, the Bidder or Contractor must obtain the approval of the CPO to modify the Compliance Plan and must make good faith efforts to ensure that MBEs or WBEs have a fair opportunity to bid on the new scope of work.
5. A new subcontract must be executed and submitted to the Chief Procurement Officer within five business days of the Bidder's or Contractor's receipt of City approval for the substitution or other change.
6. The City is not required to approve extra payment for escalated costs incurred by the Contractor when a substitution of subcontractors becomes necessary to comply with MBE/WBE Contract requirements.

Reporting and Record Keeping

The Contractor is responsible for reporting payments to all subcontractors on a monthly basis electronically. Upon the first payment issued by the City to the Contractor for services performed, on the first day of each month and every month thereafter, email and/or fax audit notifications will be sent out to the Contractor with instructions to report payments that have been made in the prior month to each MBE and WBE. The reporting of payments to all subcontractors must be entered into the Certification and Compliance Monitoring System (C2), or whatever reporting system is currently in place, on or before the fifteenth (15th) day of each month.

Once the prime Contractor has reported payments made to each MBE and WBE, including zero-dollar amount payments, the MBE and WBE will receive an email and/or fax notification requesting them to log into the system and confirm payments received. All monthly confirmations must be reported on or before the 20th day of each month. Contractor and subcontractor reporting to the C2 system must be completed by the 25th of each month or payments may be withheld.

All subcontract agreements between the Contractor and MBE/WBE firms or any first tier non-certified firm and lower tier MBE/WBE firms must contain language requiring the MBE/WBE to respond to notifications from the City requiring them to report payments received for the prime or the non-certified firm.

Access to the Certification and Compliance Monitoring System (C2), which is a web-based reporting system, can be found at: <http://chicago.mwdbe.com>.

The CPO or any party designated by the CPO must have access upon request 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 is 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 City for any purpose.

The Contractor shall maintain records of all relevant data with respect to the utilization of MBEs and WBEs, retaining these records for a period of at least five years after final acceptance of the work. Full access to these records must be granted to City, federal or state authorities or other authorized persons.

Executive Order 2021-02 (EO): Procurement Transparency and Equity

To improve the City's monitoring of the usage of Certified firms on all contracts containing goals, effective March 10, 2021:

- **Proposed Utilization Report** - Contractors are required to submit projections as to when and to what extent in the schedule of performance of the Contract Certified Firms are expected to be used toward the goals. On all applicable Contracts awarded after March 10, 2021, the Contractor shall submit the required report before the Contract award, and every year thereafter.
- **Quarterly Utilization Report** - Contractors will be required to submit quarterly reports on the actual usage of Certified Firms throughout the duration of the Contract, comparing actual usage with projected usage, and including an explanation and recovery plan if participation by Certified Firms is materially below projected usage.
- **Business Diversity Program** - On July 1 of each calendar year, unless otherwise determined by the CPO, Contractors under any Contract(s) that are Redevelopment Agreements or are for the purchase of goods or services with an aggregate award value of at least \$100,000 (or such other amount as determined by the CPO from time to time) must submit annual reports that contain a description of the Contractor's Business Diversity Program, or report the lack thereof, and include information as to its expenditure on goods and services from minority-owned firms and women-owned firms during the prior calendar year, expressed in both dollars and percentages to the extent the Contractor has such information available. Aggregate award value of contracts shall be calculated based on awards within twelve months prior to the report due date, or other date determined by the CPO by rule.

The reporting requirements of this section shall not apply to: (1) contractors that are themselves Certified Firms; or (2) Contractors on Contracts for the professional consulting services of an individual who is also the majority owner of the contractor or is the contracting party; or (3) circumstances where it is contrary to applicable funding requirements; (4) for Redevelopment Agreements, after any City-supported construction or rehabilitation has been completed or (5) circumstances in which the CPO determines that an exception is in the best interest of the City to protect the public health, safety or welfare, or because the City is otherwise unable to acquire the goods or services at comparable price and quality, and in sufficient quantity. Contractors not required to report may report voluntarily. Contractors shall submit their reports to the City office designated by the Mayor from time to time.

Construction Contracts Additional Lien Waiver Requirements

During the term of the Construction Contract, the Contractor and its non-certified subcontractors, must submit partial and final waivers of lien from MBE and WBE subcontractors that show the accurate cumulative dollar amount of subcontractor payments made to date.

Upon acceptance of the Final Quantities from the City, FINAL certified waivers of lien from the MBE and WBE subcontractors must be attached to the Contractor's acceptance letter and forwarded to DPS.

Site Visits

Compliance staff will make frequent announced and unannounced site visits to monitor the Contractor's Compliance Plan. It is expected that both the Contractor's employees and its subcontractors will cooperate fully in this monitoring process.

Contract Close-out

During the contract closeout process, the City will determine whether the Contractor has met its MBE/WBE commitments as provided in the Compliance Plan and will notify the Contractor of its findings. If the City determines that a Contractor has not met its commitments, the Contractor may request a reduction or waiver of its MBE/WBE commitments by submitting documentation demonstrating that it has made good faith efforts to do so. See DPS's website for additional information about the factors the CPO will consider when evaluating whether the Contractor has made Good Faith Efforts.

Non-Compliance

In the event fails to demonstrate good faith efforts to meet its MBE/WBE commitments, remedies or sanctions may include liquidated damages in the amount of the discrepancy between the amount of the commitment in the Compliance Plan, as such amount may be amended through change orders or otherwise over the term of the Contract, and the amount paid to MBEs or WBEs, and disqualification from contracting or subcontracting on additional City contracts for up to three years. The consequences provided herein is in addition to any other criminal or civil liability to which such entities may be subject.

MBE/WBE's Right to Arbitrate

If the City determines that the Contractor has not made Good Faith Efforts to fulfill its Compliance Plan the affected MBE or WBE may recover damages from the Contractor pursuant to arbitration as described below.

Disputes between the Contractor and the MBE or WBE must be resolved by binding arbitration before the American Arbitration Association (AAA), with reasonable expenses, including attorney's fees, being recoverable by a prevailing MBE or WBE. This provision is intended for the benefit of any MBE or WBE affected by the Contractor's failure to fulfill its Compliance Plan and grants such entity specific third-party beneficiary rights. These rights are non-waivable and take precedence over any agreement to the contrary, including but not limited to those contained in a subcontract, suborder, or communicated orally between a Contractor and an MBE or WBE.

An MBE or WBE seeking arbitration will serve written notice to the Contractor and file a demand for arbitration with the AAA in Chicago, IL. The dispute shall be arbitrated in accordance with the Commercial Arbitration Rules of the AAA.

The MBE or WBE must copy the City on the Demand for Arbitration within 10 business days after filing with the AAA. The MBE or WBE must copy the City on the arbitrator's decision within 10 business days of receipt of the decision. Under the Contract, judgment upon the arbitrator's award may be entered in any court of competent jurisdiction.

