

**AFFIRMATIVE ACTION ORDINANCE**

**REVISED APPENDIX D**

**OF THE**

**METROPOLITAN WATER RECLAMATION DISTRICT**

**OF GREATER CHICAGO**

~~June 2~~ December 31, 2022



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**REVISED APPENDIX D**  
**OF THE**  
**METROPOLITAN WATER RECLAMATION DISTRICT**  
**OF GREATER CHICAGO**

***Section 1. Declaration of Policy***

~~Whereas, it~~ It is the policy of the Metropolitan Water Reclamation District of Greater Chicago ~~(the “(“District”)~~ to ensure competitive business opportunities for ~~small, minority-~~ and women-owned business enterprises in the award of and performance ~~of on~~ District contracts; to prohibit discrimination on the basis of race, sex, ~~gender, color, racial group or perceived racial group,~~ disability, age, religion, national origin ~~or ethnicity,~~ sexual orientation, veteran ~~or military discharge status, association with anyone with these characteristics~~ status, or any other legally protected characteristic in the award of or participation ~~in on~~ District contracts; and to abolish barriers to full participation ~~in on~~ District contracts by all ~~person, regardless of race, ethnicity or sex;~~ and

~~Whereas, the~~ The District, pursuant to its authority under 70 ILCS 2605/11.3, is committed to establishing procedures to implement this policy, as well as state and federal regulations, to assure the utilization of minority ~~owned, and~~ women-owned ~~and small~~ business enterprises in a manner consistent with constitutional requirements; and

~~Whereas, the~~ The District is committed to creating equal ~~opportunity~~ opportunities for minority ~~,~~ and women-owned ~~and small~~ businesses to participate in the award and performance ~~of on~~ District contracts; and

***Section 2. Findings***

Whereas, the Supreme Court of the United States in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), ~~has~~ enunciated certain standards that are necessary to maintain effective contracting affirmative action programs in compliance with constitutional requirements; and

Whereas, the District is committed to implementing its affirmative action program in conformance with the ~~United States Supreme Court’s~~ decision in *Croson* and its progeny; and

Whereas, in furtherance of this commitment, the Board of Commissioners ~~directed of~~ the Metropolitan Water Reclamation District staff of Greater Chicago (“Board of Commissioners”) ~~directed District employees~~ and its outside ~~consultants~~ consultant in ~~1990~~ 1989 to conduct an investigation into the scope of any discrimination in the award of and participation ~~in on~~ District construction contracts, as well as in the construction industry in Metropolitan Chicago, the extent to which such discrimination or the effects thereof has denied and continues to deny minority and women’s business enterprises equal opportunity to participate in on District contracts and to recommend the appropriate affirmative action steps to be taken to eliminate any such discrimination and its continuing effects; and

Whereas, on ~~June 21, 2001~~ March 15, 1990, the District adopted its Revised Appendix D, Notice of Requirements for Affirmative Action Program to Ensure Minority, Small, and Women’s Business Participation (“Appendix D<sup>2</sup>”), which was later amended on June 21, 2001; and

~~Whereas, in 2006 the Board of Commissioners undertook a review of Appendix D, the District's contracting policy and operation under Appendix D and an investigation into the existence of continued discrimination against minority and women-owned businesses in the Metropolitan Chicago construction industry to evaluate the continued need for Appendix D and any necessary revisions thereto;~~

~~Whereas, the Board of Commissioners undertaken a review in 2012 of Appendix D, the District's contracting policy and operation under Appendix D and an investigation into the existence of continued discrimination against minority and women-owned businesses in the Metropolitan Chicago construction industry to evaluate the continued need for Appendix D and any necessary revisions thereto.;~~

~~Whereas, the Board of Commissioners undertook a new review in 2014 of Appendix D, the District's contracting policy and operation under Appendix D and an investigation into the existence of continued discrimination against minority and women-owned businesses in the District's geographic and procurement market areas to evaluate the continued need for Appendix D and any necessary revisions thereto.~~

## ~~Section 2. Findings~~

~~The Board of Commissioners, having reviewed the 2015 report of its outside consultant finds:~~

~~1. In 2003, the U.S. District Court in *Builders Association of Greater Chicago v. City of Chicago*, 298 F. Supp.2d 725 (N.D. Ill. 2003) held that the evidence introduced at trial demonstrated that past and current discriminatory practices continue to place MBE and WBE firms at a competitive disadvantage in the award of governmental contracts and such practices have and continue to impede the growth and success of MBEs and WBEs; and~~

~~2. In 2004, a study of the Metropolitan Chicago Construction Industry by Timothy Bates, Distinguished Professor, at Wayne State University, concluded that the evidence that African-American, Hispanic, and women-owned businesses have been, and continue to be disadvantaged in the construction industry and small businesses is strong, has remained consistent, and that compelling evidence indicates that African-American, Hispanic, and women-owned businesses face barriers in the Metropolitan Chicago construction industry greater than those faced by white males; and~~

~~3. A November 2005 study of the Metropolitan Chicago construction industry by David Blanchflower, Professor of Economics at Dartmouth College, has determined that discrimination against Asian-owned businesses existed in the business community in areas of business financing and construction wages and that this, together with evidence of individual discrimination against Asian-owned construction companies, leads to the conclusion that discrimination against Asian-owned businesses continues to exist in the Metropolitan Chicago construction industry; and~~

~~4. In 2005, the U.S. District Court held in *Northern Contracting, Inc. v. Illinois Department of Transportation*, 2005 U.S. Dist. LEXIS 19868 (N.D. Ill. Sept. 8, 2005) that there is strong evidence of the effects of past and current discrimination against MBEs and WBEs in the construction industry in the Chicago area.~~

5. — The trial court’s decision was affirmed in *Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715 (7<sup>th</sup> Cir. 2007); and

6. — ~~In~~ Whereas, a 2006, Cook County, Illinois ~~accepted a report it had commissioned titled, ”entitled, “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” ~~(Cook County 2006 Report), which~~, concluded that there is extensive evidence of discrimination against MBEs and WBEs in the Chicago area construction marketplace, and the participation of MBEs and WBEs in the County’s construction ~~prime contracts~~ Prime Contracts and ~~subcontracts~~ Subcontracts is below the availability of such ~~firms~~ businesses; and~~

7. — ~~In 2006, the Illinois State Toll Highway Authority commissioned a study for the availability of Disadvantaged Business Enterprises (“DBEs”) in its geographic and procurement markets, to ensure that its DBE program was narrowly tailored as required by constitutional standard, which found 19.56% DBE availability in construction, 19.36% DBE availability in construction-related professional services, and that DBE utilization had steadily increased from 2.40% in 2004 to 24.72% in 2010.~~

8. — Whereas, in 2006, the District commissioned a report on discrimination of and barriers to construction opportunities in the Chicago area market for minority and women-owned businesses and recommendations for District actions to reduce such issues, which found continuing disparities in the Chicago area construction market; and

Whereas, in 2010, Cook County commissioned a new report, entitled “The Status of Minority and Women-Owned Business Enterprises Relevant to Construction Activity In and Around Cook County, Illinois” (Cook County 2010 Study),, which found that MBEs and WBEs were not utilized in all ~~aspects~~ industries in proportion to their availability; and

9. — ~~In~~ Whereas, in 2010, the ~~U.S.~~ United States Department of Justice produced a report to Congress, entitled “Compelling Interest for Race- and Gender-Conscious Federal Contracting Programs: An Update to the May 23, 1996 Review of Barriers to Minority- and Women-Owned Businesses,” that updated the original basis for the ~~U.S.~~ United States Department of Transportation’s DBE program and concluded that discriminatory barriers continue to impede the ability of MBEs and WBEs to compete with other ~~firms~~ businesses on a fair and equal footing in government contracting markets, including in the construction industry; and

10. — ~~In~~ Whereas, in 2012, the District commissioned a report on barriers to construction opportunities in the Chicago area market and recommendations for District efforts to reduce such barriers, which found continuing disparities in the Chicago area construction market; and

11. — ~~In~~ Whereas, in 2014, ~~The~~ the District commissioned a ~~report~~ Disparity Study, conducted by Colette Holt & Associates, on barriers to equal opportunities in the construction industry in the District’s geographic and industry market areas and recommendations for District efforts to reduce such barriers, which found continuing disparities in the District’s market ~~areas~~ area; and

12. — ~~In~~ Whereas, in 2015, the trial court in *Midwest Fence, Corp. v. U.S. Department of Transportation et al*, 2015 WL 139676 (N.D. Ill. March 24, 2015), ~~held~~ held that discrimination continues to impede full and fair opportunities for disadvantaged business ~~enterprise~~ enterprises in

the Illinois construction industry; and this judgment was affirmed in 2016 by the Seventh Circuit Court of Appeals at 840 F.3d. 932; and

13.—~~The~~Whereas, in 2021, the District again commissioned a Disparity Study, conducted by Colette Holt & Associates, which likewise found that there continues to be barriers to equal opportunities for construction firms owned by minorities and women to compete for District contracts, both as Prime Contractors and Subcontractors; and

Whereas, based upon the 2021 Disparity Study, the District has determined that it has a ~~continuing~~ compelling interest in ~~preventing public funds in contracts from perpetuating the effects of past discrimination and current~~continuing to implement narrowly tailored remedies to redress discrimination against minority- and women-owned ~~firms~~businesses in its market; ~~such that it will not function as a passive participant in the market failure of discrimination; and~~

14.—~~The~~Whereas, the Affirmative Action Program, adopted by the District on July 20, 1978 and amended ~~April 2, 2009~~from time to time, is hereby modified to further continue to ameliorate the effects of racial and gender discrimination in the marketplace; and

15.—~~The~~Whereas, the remedies adopted herein by the District will not overly burden non-MBE and non-WBE ~~firms~~businesses in the award of District ~~Contracts~~contracts; and

16.—~~The~~Whereas, the Board of Commissioners ~~shall~~will periodically review minority-~~owned~~ and women-owned participation in contracts awarded by the District to ensure that the District continues to have a compelling interest in remedying discrimination ~~against minority and women-owned firms in the award of District contracts~~ and that the measures adopted herein remain narrowly tailored to accomplish that objective; and

Now, therefore, the ~~District~~District's Board of Commissioners hereby adopts this ~~revised~~Revised Appendix D:

### Section 3. -Purpose and Intent

The purpose and intent of this Affirmative Action Ordinance Revised Appendix D ("Revised Appendix D") is to mitigate the present effects of discrimination on the basis of race, ethnicity, or sex in opportunities to participate on the District's ~~prime~~contracts ~~and associated subcontracts~~as either a Prime Contractor or a Subcontractor and to achieve equitable utilization of minority-~~owned, and~~ women-owned ~~and small~~business enterprises ~~in~~on District contracts.

### Section 4. -Coverage

The following provisions, ~~to be known as "Appendix D"~~ together with relevant forms, ~~shall~~will apply and be appended to every ~~construction contract~~Construction Contract awarded by the District where the ~~estimated~~total approved expenditure is in excess of \$one hundred thousand dollars (\$100,000.00), except contracts ~~let~~inapproved by the ~~event~~Board of ~~an~~emergencyCommissioners pursuant to Sections 11.4 and 11.5 of the District's Purchasing Act (70 ILCS 2605/11.5).

### Section 5. -Definitions

The meaning of these terms in this ~~Ordinance~~Revised Appendix D are as follows:

(a) "Administrator" means the District's Affirmative Action Program Administrator.

—(b) “Affiliate” of a person or entity means a person or entity that directly or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person or entity. In determining ~~Affiliation~~affiliation, the District ~~shall~~will consider all appropriate factors, including common ownership, common management, and contractual relationships.

—(c) “Annual ~~Participation~~Aspirational Goals” ~~mean~~means the targeted levels established by the District for the annual aggregate participation of MBEs and WBEs ~~in~~on District ~~construction contracts~~Construction Contracts.

—(d) “Bidder” means an individual, a business enterprise, including a sole proprietorship, a partnership, a corporation, a not-for-profit corporation, a limited liability company, or any other entity which has submitted a bid on a District contract.

—(e) “Books and Records” include, but are not limited to, payroll records, bank statements, bank reconciliations, accounts payable documents, account receivable documents, ledgers, all financial software, and all employer business tax returns.

~~—(f) “Contract Specific Goals” means the Goals established for a particular project or contract based upon the availability of MBEs or WBEs in the scope(s) of work of the Project.~~

~~—(g) “(f) “Calendar Days” in computing any period of time described herein, the day from which the period begins to run will not be counted (e.g., if a notice is issued on a Monday, the countdown of days starts on Tuesday). When the last day of the period is a Saturday or Sunday, the period does not extend to the next day. Only in instances where District offices are closed in observance of a federal holiday, will the period extend to the next day.~~

(g) “Construction ~~contract~~Contract” means any District contract, agreement, or amendment thereto, providing for a total expenditure in excess of ~~One Hundred Thousand Dollars~~one hundred thousand dollars (\$100,000.00) for the construction, demolition, replacement, major repair or renovation, and maintenance of real property and improvement thereon or sludge hauling, and any other construction related contract which the District deems appropriate to be subject to this Revised Appendix D ~~consistent with the Ordinance~~.

—(h) “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 responsibilities.

—(i) ~~“Contract Goals”~~ means the numerical percentage goals for MBE, ~~WBE~~ or ~~SBE~~WBE participation to be applied to an eligible District ~~construction contract~~Construction Contract subject to this Revised Appendix D for the participation of MBEs, and WBEs ~~and SBEs~~, based upon the ~~scope~~scope of work of the contract, the availability of MBEs, ~~WBEs~~ and ~~SBEs~~WBEs to meet the goals, and the District’s progress towards meeting its Annual MBE, and WBE ~~and SBE~~ goals.

~~—(j) “Dealer” means a business 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 dealer, the business must engage in, as its principal~~

business, and under its own name, the purchase and sale of the products in question. A business that operates as a dealer in bulk items such as steel, cement, gravel, stone, and petroleum products need not keep such products in stock, if it owns or operates distribution equipment. Brokers and packagers do not meet the definition of dealers.

(k) “Director” means the District’s Director of Procurement and Materials Management, formerly known as the Purchasing Agent.

~~—(k)(l)~~ “Economically Disadvantaged” means an individual with a Personal Net Worth of less than \$2,000,000.00, indexed annually for the Chicago Metro Area Consumer Price Index, published by the U.S. United States Department of Labor, Bureau of Labor Standards, beginning January 2008.

~~—(l)(m)~~ “Executive Director” means the chief administrative officer of the District, formerly known as the General Superintendent.

~~—(m)(n)~~ “Expertise” means demonstrated ~~skills,~~ knowledge, skills, or ability to perform in the field of endeavor in which certification is sought by the ~~firm~~business as defined by normal industry practices, including licensure, where required.

~~—(n)(o)~~ “Good Faith Efforts” means ~~those~~ honest, fair, and commercially reasonable actions undertaken by a ~~contractor~~Prime Contractor to meet the MBE or WBE ~~goal~~Contract Goal, which by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the ~~Program’s goals~~Contract Goals.

~~—(o)(p)~~ “Hearing Officer” is an attorney licensed to practice in the State of Illinois; and appointed by the Board of Commissioners; to conduct hearings ~~as provided in this Ordinance~~ regarding a ~~contractor’s~~Prime Contractor’s or Subcontractor’s compliance or non-compliance with this ~~Ordinance~~Revised Appendix D.

~~—(p)(q)~~ “Joint Venture” means an association of two or more persons, or any combination of types of business enterprises and persons numbering two or more, proposing to ~~perform~~function as a single for profit business enterprise, in which each Joint Venture partner contributes property, capital, efforts, skill, and knowledge, and in which the certified ~~firm~~business 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 equal to its ownership interest. 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,~~ and detailing their respective responsibilities on the contract.

~~—(q)(r)~~ “Job Order Contract” or “JOC” means a ~~firm~~business, fixed price, indefinite quantity contract designed to complete a large number of construction projects quickly.

~~—(r)~~ ~~“(s)~~ “Local ~~business~~Business” means a business located within the District’s geographic market area as established by the 2021 Disparity Study, namely the counties of Cook, DuPage, Kane Lake, McHenry, or Will, in the State of Illinois

(t) “Manufacturer” means a business that operates or Lake County in the State of Indiana which has the majority of its regular full-time work force located in this region maintains a factory or a business which has been placed establishment that produces on the District’s vendor list premises the materials or has bid on or sought District construction

~~work~~ supplies obtained by the Bidder. Brokers and packagers do not meet the definition of Manufacturer.

~~(s)~~(u) "Minority-owned ~~business enterprise~~Business Enterprise" or "MBE" means a ~~Local Small~~Local small business entity, including a sole proprietorship, partnership, corporation, limited liability company, Joint Venture, or any other business or professional entity, which is at least fifty-one (51) percent ~~(51%)~~ owned by one or more Socially and Economically Disadvantaged individuals who are members of one or more minority groups, or, in the case of a publicly held corporation, at least fifty-one (51) percent ~~(51%)~~ of the stock of which is owned by one or more members of one or more minority groups, and whose management, policies, major decisions, and daily business operations are controlled by one or more Minority Individuals.

~~(t)~~(v) "Minority Individual" means a natural person who is a citizen of the United States or lawful permanent resident of the United States and one of the following:

~~(i)~~(i) African-American - A person having origins in any of the Black racial groups of Africa and is regarded as such by the African American ~~Community~~community of which the person claims to be a part.

~~(ii)~~(ii) Hispanic-American - A person having origins from Mexico, Puerto Rico, Cuba, and South or Central America and is regarded as such by the Hispanic community of which the person claims to be a part, regardless of race.

~~(iii)~~(iii) Asian-American - A person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands or the Northern Marianas, and is regarded as such by the Asian American community of which the person claims to be a part.

~~(iv)~~(iv) Native-American - A person having origins in any of the original peoples of North America and who is recognized through tribal certification as a Native American by either a tribe or a tribal organization recognized by the ~~Government~~government of the United States of America.

~~(v)~~(v) Individual members of other groups whose participation is required under state or federal regulations or by court order.

~~(vi)~~(vi) Individual members of other groups found by the District 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 District's marketplace or to do business with the District.

~~(u)~~(w) "Personal Net Worth" means the net value of the assets of an individual after total liabilities are deducted. An individual's ~~personal net worth~~Personal Net Worth does not include the individual's ownership interest in ~~an applicant~~a business entity seeking to do business with the District or other certified MBE or WBE, provided that the other ~~firm~~business is certified by a governmental agency that meets the District's eligibility criteria or the individual's equity in his or her primary place or residence. As to assets held

jointly with his or her spouse or recognized civil partner, an individual's ~~personal net worth~~Personal Net Worth includes only that individual's share of such assets. An individual's net worth also includes the present value of the individual's interest in any vested pension plans, individual retirement accounts, 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.

—~~(v)(x)~~ “Prime Contractor” means a ~~Contractor~~contractor that is awarded a District contract and is ~~at risk~~responsible for the completion of ~~an~~the entire District ~~project~~contract, including purchasing all materials, hiring and paying ~~subcontractors~~Subcontractors, and coordinating all the work.

—~~(w)(y)~~ “Program” means the program provisions established by this Revised Appendix D.

~~(z)~~ “Small Business Enterprise” ~~or “SBE”~~ means a small business as defined by the ~~U.S.~~United States Small Business Administration (SBA), pursuant to the business size ~~standards~~standard found in 13 CFR Part 121, that is relevant to the scope~~(s)~~ of work the ~~firm~~business seeks to perform on District contracts, ~~except that the size standard for specialty trade construction firms shall be 150 percent of the SBA size standard.~~ A ~~firm~~business is not an eligible SBE in any calendar fiscal year in which its gross receipts, averaged over the ~~firm's~~business' previous five ~~(5)~~ fiscal years, exceed the size standards of 13 CFR Part 121.

—~~(x)(aa)~~ “Socially Disadvantaged” means a Minority Individual or ~~Woman~~woman who has 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~~Disadvantage must stem from circumstances beyond the individual's control. A Socially Disadvantaged individual must be a citizen or lawfully admitted permanent resident of the United States.

—~~(y)(bb)~~ “Subcontractor” means a party that enters into a subcontract agreement with a District Prime Contractor to perform work or provide materials on a District project.

—~~(z)(cc)~~ “Tier” refers to the relationship of a ~~subcontractor~~Subcontractor to the ~~prime contractor~~Prime Contractor. A ~~subcontractor~~Subcontractor having a contract with the ~~prime contractor~~Prime Contractor, including a material supplier to the ~~prime contractor~~Prime Contractor, is considered a “first-tier ~~subcontractor~~Subcontractor,” while a ~~subcontractor's~~Subcontractor's ~~Subcontractor~~ is a “second-tier ~~subcontractor~~Subcontractor,” and ~~the subcontractor's material supplier is a “third tier subcontractor.”~~so forth. The ~~subcontractor~~Subcontractor is subject to the same duties, obligations, and sanctions as the ~~contractor~~Prime Contractor under this ~~Ordinance~~Revised Appendix D.

—~~(aa)~~ ~~“(dd)”~~ “Utilization Plan” means the plan, in the form specified by the District, which must be submitted by a Bidder listing the MBEs, ~~WBEs~~ and ~~SBE~~WBEs that the Bidder intends to use in the performance of a contract, the ~~scopes~~scope of ~~the~~ work, and the dollar values or the percentages of the work to be performed.

~~(bb)(ee)~~ “Vendor ~~list~~” means the District’s list of ~~firms~~businesses that are certified as minority-owned or women-owned by the City of Chicago, the County of Cook, the State of Illinois, the Women’s Business Development Center, or the Chicago Minority Business Development Council, or as a Disadvantaged Business Enterprise by the Illinois Unified Certification Program, or as a Small Disadvantaged Business by the U.S. United States Small Business Administration.

~~(ee)~~ ~~(ff)~~ “Women-owned ~~business enterprise~~”Business Enterprise” or ““WBE”” means a ~~Local and Small business~~local small business entity which is at least fifty-one (51) percent ~~(51%)~~ owned by one or more Socially and Economically Disadvantaged individuals who are women, or, in the case of a publicly held corporation, fifty-one (51) percent ~~(51%)~~ of the stock of which is owned by one or more women, and whose management and daily business operations are controlled by one or more women. Determination of whether a business is at least fifty-one (51) percent ~~(51%)~~ owned by a woman or women shall will be made without regard to community property laws.

### Section 6. -Non-Discrimination and Affirmative Action Clause

As a ~~precondition~~prerequisite to selection, a Prime Contractor must ~~include~~agree in its bid proposal for a ~~covered~~ contract subject to this Revised Appendix D to the following commitments:

~~During the performance of this contract, the Contractor agrees:~~

(a) It shall will not discriminate on the basis of race, sex, ~~gender~~, color, ~~racial group or perceived racial group~~, disability, age, religion, national origin ~~or ethnicity~~, sexual orientation, veteran ~~or military discharge~~ status, ~~association with anyone with these characteristics~~, or any other legally protected characteristic in the bid solicitation for or purchase of goods in the performance of ~~this~~its contract.

(b) It shall will actively solicit bids for the purchase or subcontracting of goods or services from qualified MBEs, ~~WBEs~~ and ~~SBEs~~WBEs.

(c) It shall will undertake Good Faith Efforts in accordance with the criteria established in this ~~Ordinance~~,Revised Appendix D to ensure that qualified MBEs, ~~WBEs~~, and ~~SBEs~~WBEs are utilized in the performance of ~~this contract~~the Construction Contract and share in the total dollar value of the contract in accordance with each of the applicable ~~utilization goals~~Contract Goals established by the District for the participation of qualified MBEs, ~~WBEs~~ and ~~SBEs~~WBEs.

(d) It shall will require its ~~subcontractors~~Subcontractors at all Tiers to make similar ~~good faith efforts~~Good Faith Efforts to utilize qualified MBEs, ~~WBEs~~ and ~~SBEs~~WBEs.

(e) It shall will maintain records and furnish to the District all requisite information and reports ~~required by the District~~ for monitoring ~~its~~of compliance with this ~~Ordinance~~Revised Appendix D.

(f) It shall will designate a person to act as an ~~Affirmative Action Coordinator~~affirmative action coordinator on its behalf to facilitate the review of all concerns related to the participation of MBEs, ~~WBEs~~ and ~~SBEs~~WBEs.

**Section 7. -Race- and Gender--Neutral Measures to Ensure Equal Opportunities for All Prime Contractors and Subcontractors**

The District ~~shall~~will develop and ~~use~~utilize measures to encourage and facilitate the participation of all ~~firms~~businesses in District construction contracting activities. These measures ~~shall~~will include, but are not limited to:

——(a) ~~Unbundling~~Dividing large dollar value contracts into smaller dollar value contracts to facilitate the participation of MBEs, and WBEs ~~and SBEs~~ as Prime Contractors.

——(b) Arranging solicitation times for the presentations of bids, specifications, and delivery schedules to facilitate the participation of interested ~~contractors~~Prime Contractors and ~~subcontractors~~Subcontractors.

——(c) Providing timely information on contracting procedures, bid preparation, and specific contracting opportunities, including through an electronic system and social media.

——(d) Assisting MBEs, ~~WBEs~~ and ~~SBEs~~WBEs with training seminars on the technical aspects of preparing a bid for a District contract or otherwise participating on District Contracts.

——(e) ~~Providing assistance to~~Assisting businesses in overcoming barriers such as difficulty in obtaining ~~bonding and~~ financing, and support for business development such as accounting, bid estimation, safety requirements, and quality control.

——(f) Prohibiting Prime Contractors from ~~requiring bonding for subcontractors, where appropriate, denying a subcontract to an MBE or WBE solely on the basis of that businesses inability to obtain the required performance bond.~~

——(g) (g) Limiting the amount of insurance coverage required by a Prime Contractor for a subcontract to only that which is required for the portion of work to be performed by the Subcontractor.

(h) Holding pre-bid conferences, where appropriate, to explain the ~~contract~~Contract and to encourage Bidders to ~~use~~contact all available ~~firms~~businesses about opportunities to perform as ~~subcontractors~~Subcontractors. The pre-bid conferences will be a mandatory requirement on all District contracts where this Revised Appendix D is applicable.

——(h)(i) Adopting prompt payment procedures, including but not limited to, requiring by ~~contract~~ that Prime Contractors promptly pay ~~subcontractors~~Subcontractors in compliance with Section 9 of the Local Government Prompt Payment Act, 50 ILCS 505/9, and investigating complaints or charges of excessive delay in payments.

——(i) ~~Developing Linked Deposit and other financing and bonding assistance programs to assist small firms.~~

~~\_\_\_\_\_~~(j) Reviewing retainage, bonding, and insurance requirements ~~and their application to bid calculations~~ to eliminate unnecessary barriers to contracting with the District.

~~\_\_\_\_\_~~(k) Collecting information from Prime Contractors on District ~~construction contracts detailing~~ Construction Contracts which details the bids received from all ~~subcontractors for District contracts~~ Subcontractors and the expenditures to ~~subcontractors utilized by Prime Contractors~~ Subcontractors on District ~~construction contracts~~ Construction Contracts.

~~(l) Limiting the self-performance of prime contractors, where appropriate.~~

~~\_\_\_\_\_~~(l) Developing a separate SBE program that is race and gender neutral which designates specific small dollar value contracts for bid only by certified SBE businesses.

(m) ~~To the extent practicable, developing future policies to award contracts to SBEs.~~

~~\_\_\_\_\_~~(n) Maintaining information on all ~~firms~~ businesses bidding on District ~~prime contracts and subcontracts~~ Contracts as both Prime Contractors and Subcontractors.

~~\_\_\_\_\_~~(~~o~~n) At the discretion of the Board of Commissioners, awarding a representative sample of District contracts without ~~goals~~ Contract Goals to determine MBE, and WBE ~~and SBE~~ utilization in the absence of ~~goals~~ Contract Goals.

~~\_\_\_\_\_~~(~~p~~o) Referring complaints of discrimination against MBEs, and WBEs ~~or SBEs~~ to the appropriate authority for investigation and resolution.

## Section 8. Support and Outreach

To provide optimal support to MBEs and WBEs desiring to participate on District contracts, the Administrator will facilitate support and outreach, which may be in-person and/or virtual as conditions permit, and may include the following:

(a) Meetings with business organizations to engage in discussions regarding difficulties experienced by their members on District contracts and effective steps to minimize those difficulties.

(b) Meetings with assistance agencies and member businesses interested in working on District contracts to discuss upcoming opportunities.

(c) Meetings with new vendors to provide information regarding completion of the District's vendor application and bid documents.

(d) Meetings with Prime Contractors to collect feedback regarding their experiences under this Revised Appendix D.

(e) Participation in mandatory pre-bid conferences, as applicable.

(f) Hosting various seminars and support endeavors as the Administrator deems necessary for MBEs and WBEs to provide information on topics of interest, including financing, bonding, insurance, certification, bid estimation, safety requirements, and quality control.

## Section 9. District Roles and Responsibilities

The District is responsible for promoting, supporting, and assisting in creating awareness of the Program such that it aids the Administrator in the implementation of the Annual Aspirational Goals, Contract Goals, and objectives of the Program. To reduce barriers to MBEs and WBEs participation on District contracts, all departments requesting bids, proposals, or any other solicitation governed by this Revised Appendix D will:

- (a) Provide notification of anticipated solicitations including the following information: the scope of work, experience required, insurance requirements, budget, schedule, bid specifications, and any other relevant information no later than fourteen (14) calendar days prior to the procurement announcement.
- (b) Evaluate anticipated solicitations to unbundle items or services to permit offers on quantities or scope of work less than the total requirement or the performance of discreet portions of the project, where feasible.
- (c) At least fourteen (14) calendar days before a solicitation will be advertised, forward a copy of the advertisement to the Administrator to ensure appropriate Program language has been included.
- (d) Ensure that all applicable provisions of the Program are included in bid specifications/proposals and contracts.
- (e) Monitor contracts to ensure compliance with the Program and provide notification to the Administrator in instances where problems with compliance arise.
- (f) Assist in the compilation of contract data for MBE and WBE availability and utilization.
- (g) Provide the Administrator with a copy of, or independent electronic access to the necessary information for each contract including, but not limited to, the contract value, pre-bid/pre-proposal sign in sheets, the bid or proposal results, any contract modifications, and an executed copy of the agreement.
- (h) Notify the Administrator no later than ten (10) calendar days prior to any key post-award contract meetings or issues that could affect the Prime Contractor's ability to achieve the MBE or WBE commitment, such as contract kickoff meetings, monthly meetings, or meetings to address contract performance issues affecting MBE and WBE commitments.
- (i) Require that each Prime Contractor submit to the Administrator, as part of its pay request process, the required Program information in the format required to ensure an accurate accounting of MBE and WBE participation.

(j) Support the Administrator by ensuring that Prime Contractors provide all necessary documents and information to close out the contract that provide a final accounting for MBE and WBE participation on the contract.

(k) Advertise the contract opportunities via the District's website, and other avenues in consultation with the Administrator, where appropriate, to maximize MBE and WBE participation.

(l) Develop and advertise forecasts of upcoming procurement opportunities, including on an annual basis.

### Section 10. Certification Eligibility

\_\_\_\_\_ The District is a self-certifying agency. Thus, while the District takes into consideration certifications that a business may have received from another agency, this does not mean that the District will automatically accept that certification and allow participation of the business on District contracts. Instead, each business, whether previously certified or not, must submit to the District's certification process.

(a) Only businesses that meet the criteria for certification as a MBE, ~~WBE~~ or ~~SBEWBE~~ may be eligible for credit towards meeting ~~Utilization~~—Contract Goals. The applicant business applying for District certification has the burden of production and persuasion by a preponderance of the evidence at all stages of the certification process.

\_\_\_\_\_(b) Only a firm business owned by a Socially and Economically Disadvantaged person ~~(s) may be certified as a MBE or WBE.~~ is eligible to participate in the Program.

\_\_\_\_\_(i) The firm's business' ownership by a Socially and Economically Disadvantaged person ~~(s)~~ must be real, substantial, and continuing, going beyond *pro forma* ownership of the firm business 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.

\_\_\_\_\_(ii) The contributions of capital or Expertise by the Socially and Economically Disadvantaged owner ~~(s)~~ to acquire the ownership interest must be real and substantial. 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 business' operations, indispensable to the firm's business' potential success, specific to the type of work the firm business performs, and documented in the firm's business' records. The individual whose Expertise is relied upon must have a commensurate financial investment in the firm business.

\_\_\_\_\_(c) Only a firm business that is managed and controlled by a Socially and Economically Disadvantaged person ~~(s)~~ may be certified as a MBE or WBE.

\_\_\_\_\_ (i) A firmbusiness must not be subject to any formal or informal restrictions that limit the customary discretion of the Socially and Economically Disadvantaged owner(s). There can be no restrictions through corporate charter provisions, by ~~law provisions~~ laws, contracts, or any other formal or informal devices that prevent the Socially and Economically Disadvantaged owner(s), without the cooperation or vote of any non-Socially and Economically Disadvantaged person, from making any business decision ~~of the firm~~, including ~~the making of~~ obligations or ~~the~~ dispersing of funds.

\_\_\_\_\_ (ii) The Socially and Economically Disadvantaged owner(s) must possess the power to direct or cause the direction of the management and policies of the firmbusiness and to make day-to-day as well as long term decisions on management, policy, operations, and work.

\_\_\_\_\_ (iii) The Socially and Economically Disadvantaged owner(s) may delegate various areas of the management or daily operations of the firmbusiness to persons who are not Socially and Economically Disadvantaged. Such delegations of authority must be revocable, and the Socially and Economically Disadvantaged owner(s) must retain the power to hire and fire any such person. The Socially and Economically Disadvantaged owner(s) must ~~actually~~ exercise control over the firm'sbusiness' operations, work, management, and policy.

\_\_\_\_\_ (iv) The Socially and Economically Disadvantaged owner(s) must have an overall understanding of, ~~and~~ managerial and technical competence, experience, and Expertise, directly related to the firm'sbusiness' operations and work. The Socially and Economically Disadvantaged owner(s) must have the ability to intelligently and critically evaluate information presented by other participants in the firm'sbusiness' activities and to make independent decisions concerning the firm'sbusiness' daily operations, work, management, and policymaking.

\_\_\_\_\_ (v) If federal, state ~~and/~~ or local laws, regulations ~~or~~, statutes, ~~or~~ District ordinance, or other legal regulations require the owner(s) to have a particular license or other credential to own ~~and/~~ or control ~~a certain type of firmthe~~ business, then the Socially and Economically Disadvantaged owner(s) must possess the required license or credential. If federal, state law, District ordinance or other law regulations, or statute ~~local laws, regulations, statutes, or District ordinance, or other legal regulations~~ does not require that the ~~owner~~ Socially and Economically Disadvantaged owner ~~posses~~ possess the license or credential, ~~that~~ and the Socially and Economically Disadvantaged owner(s) lacks such license or credential ~~is, this information will be~~ a factor, but is not dispositive, in determining whether the Socially and Economically Disadvantaged owner(s) actually controls the firmbusiness.

\_\_\_\_\_ (vi) A Socially and Economically Disadvantaged owner cannot engage in outside employment or other business interests that conflict with the management of the firmbusiness or ~~prevent the owner~~ prevents them from devoting

sufficient time and attention to the affairs of the ~~firm to manage business, including the management~~ and control ~~its of the business'~~ day-to-day ~~activities operations~~.

——(d) Only an independent ~~firm business~~ may be certified as a MBE, ~~WBE~~ or ~~SBE WBE~~. An independent ~~firm business~~ is one whose viability does not depend on its relationship with another ~~firm business~~. Recognition of an applicant as a separate entity for tax or corporate purposes is not ~~necessarily~~ sufficient to demonstrate that a ~~firm business~~ is independent ~~and non-Affiliated~~. In determining whether an applicant is an independent business, the ~~Director Administrator~~ will:

——(i) Evaluate relationships with non-certified ~~firms businesses~~ in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.

——(ii) Consider whether present or recent employer/employee relationships between the Socially and Economically Disadvantaged owner(s) of the applicant for MBE or WBE certification ~~or any owners of the applicant for SBE certification~~ and non-certified ~~firms businesses~~ or persons ~~thereby~~ associated ~~with non-certified firms~~ compromise the applicant's independence.

——(iii) Examine the applicant's relationships with non-certified ~~firms businesses~~ to determine whether a pattern of exclusive or primary dealings with non-certified ~~firm businesses~~ compromises the applicant's independence.

——(iv) Consider the consistency of relationships between the applicant and non-certified ~~firms businesses~~ with normal industry practice.

——(e) ~~All documentation submitted by an applicant will remain in the custody of the District pursuant to Local Records Act, 50 ILCS 205, whether or not the certification is approved.~~

(f) An applicant ~~shall will~~ be certified only for ~~the~~ specific types of work in which the Socially and Economically Disadvantaged owner(s) for ~~the~~ MBEs and ~~WBEs or the majority owner for SBEs/or WBEs~~ has the ability and Expertise to manage and control the ~~firm's business'~~ operations and work.

——(f)(g) ~~An applicant will be certified only in the specific category for which they are applying. A business that is both a MBE and WBE will not automatically be certified as both if the application is submitted only in regards to one category.~~

(h) The District ~~shall will~~ certify the eligibility of Joint Ventures involving MBEs, ~~and WBEs or SBEs~~ and non-certified ~~firms businesses for credit towards a Contract Goal~~.

——(g)(i) ~~A business found to be ineligible may not apply for certification for two (2) years after the effective date of the final decision.~~

(j) The certification status of all MBEs, ~~and WBEs and SBEs shall will~~ be reviewed periodically by the Administrator. Failure of the ~~firm business~~ to seek recertification by

filing the necessary documentation with the Administrator as ~~provided by rule may required will~~ result in decertification.

~~(h)(k)~~ It is the responsibility of the certified ~~firm~~business to notify the Administrator of any change in its circumstances affecting its continued eligibility, including change in ownership and licenses held by the business. Failure to do so ~~may~~will result in the ~~firm's~~business' decertification.

~~(i)(l)~~ The Administrator ~~shall~~will decertify a ~~firm~~business that does not continuously meet the eligibility criteria.

~~(j)(m)~~ Decertification by another agency ~~shall~~will create a *prima facie* case for decertification by the District. The challenged ~~firm~~business will have the burden of proving by a preponderance of the evidence that its District certification should be maintained.

### ~~(k)~~ Section 11. Appeals

A ~~firm~~business that has been denied certification or recertification, or that has been decertified by the Administrator may protest the denial or decertification by filing a written appeal with the Executive Director. The appeal must meet the following criteria:

(a) Timeliness of appeals. The appeal must be received by the Executive Director within ten (10) calendar days of receipt of the denial date of District the letter denying certification, recertification or decertification. The appeal should set forth in detail the facts upon, or decertifying. The appeal must be received no later than 4:30 p.m. central time zone on the tenth (10) calendar day. Any appeal received after this time will not be considered timely and will be automatically denied.

(b) Form of appeals. Appeals may be a type-written hardcopy document delivered to the District or may be attached to electronic mail sent directly to the Executive Director no later than 4:30 p.m. If the appeal is a hard-copy document, it must be addressed to the Executive Director and delivered to 100 E. Erie no later than 4:30 p.m.

(c) Content of appeals. The appeal must clearly articulate the basis on which it is based, and attach being made and consist only of a letter clearly explaining why the business believes that the Administrator's decision should not be upheld. No new documents may be submitted for the Executive Director's consideration. Only documents already in the possession of the Administrator will be considered in the appeal to the Executive Director.

(d) Decision on appeals. The Executive Director will carefully review all relevant documentations. ~~The Executive Director shall~~documents including the written request for appeal and will render a decision within ~~45~~thirty (30) calendar days of receipt of a timely appeal. The Executive Director's decision ~~shall~~will be the final decision on the matter and is not subject to appeal.

~~(1)(e)~~ **Denial of appeals.** A ~~firm~~business found to be ineligible for certification may not ~~apply~~reapply for certification for two (2) years after the ~~effective~~-date of the final decision issued by the Executive Director.

### **Section ~~9-12.~~ Schedule of Goals for Minority- and Women-Owned Business Enterprise Utilization**

In fulfillment of ~~its~~this policy to provide MBEs, and WBEs, ~~and SBEs~~ full and equitable opportunities to participate ~~in the District's prime on~~ District contracts as both Prime Contractors and subcontractsSubcontractors, the District ~~shall~~will establish ~~annually goals~~Annual Aspirational Goals for ~~MBE, and~~ WBE ~~and SBE~~ participation, based on the availability of MBEs and WBEs in the District's geographic and procurement market area as established by the 2021 Disparity Study.

### **Section ~~10-13.~~ Contract Goals:**

~~(a)~~ The ~~Director, in consultation with the~~ Administrator ~~and, based upon the information provided by~~ the User Department, ~~shall~~will establish Contract Goals for ~~construction contracts~~Construction Contracts based upon the availability of at least three (3) MBEs and three (3) WBEs registered on the District's ~~vendor list~~Vendor List to perform the anticipated ~~contracting functions~~scope of work on the entire contract and the District's utilization of MBEs and WBEs to date.

~~(b)~~ Where a substantial portion of the total ~~construction contract~~Construction Contract cost is for the purchase of equipment, the ~~Director~~Administrator may designate goals for only that portion of the contract relating to construction work and related supplies ~~and/or~~ modify the limitations on the credit for ~~M/~~MBE and WBE suppliers ~~herein.~~

~~(c)~~ The Contract ~~Goal(s) shall~~Goals will be designated in the contract documents.

(d) All contracts on which goals are placed will have goals that are narrowly tailored to the type of work being performed under the contract.

### **Section ~~11-14.~~ Counting MBE, ~~WBE,~~ and ~~SBE~~WBE Participation ~~towards~~Towards Contract Goals**

(a) A Bidder may achieve the ~~Utilization~~Contract Goals by its status as a MBE, ~~WBE~~ or ~~SBE or~~WBE, by entering into a Joint Venture with one or more MBEs, ~~WBEs~~ and ~~SBEs or~~WBEs, by first-tier subcontracting a portion of the ~~work contract~~ to one or more MBEs, ~~WBEs~~ and ~~SBEs or~~WBEs, by direct purchase of materials or services from one or more MBEs, ~~WBEs~~ and ~~SBEs~~WBEs, or by any combination of the above.

~~(b)~~ If a firmbusiness is certified as both a MBE and a WBE, the Bidder may count the ~~firm's~~business' participation either toward the achievement of its MBE or WBE ~~goal~~Contract Goal, but not both.

~~—(c) A Bidder may count toward the achievement of its SBE goal the utilization of any Participation by a business certified as both an MBE or WBE that also satisfies the definition of a SBE and a WBE cannot be split between the MBE and the WBE Contract Goal.~~

~~—(c) When a MBE or WBE participates on a contract, the District will count only the value of the work actually performed by the MBE or WBE towards the Contract Goal.~~

(d) A ~~Bidder~~Prime Contractor may count the entire amount of that portion of a contract that is performed by MBEs, or WBEs ~~or SBEs~~ own forces, including the cost of supplies and materials obtained and installed by the MBE, or WBE ~~or SBE~~ for the work ~~of~~on the contract, and supplies purchased or equipment leased by the MBE, ~~WBE~~ or SBEWBE used to directly perform the work ~~of~~on the contract ~~(, except supplies and equipment the MBE, WBE or SBE~~WBE purchases or leases from the Prime Contractor or the Prime Contractor's Affiliate).

~~—(e) Where a Bidder or first-tier subcontractor~~Subcontractor engages in a Joint Venture to meet the Contract Goal, the Administrator ~~shall~~will review the profits and losses, initial capital investment, actual participation of the Joint Venture in the performance of the contract with its own forces and for which it is separately at risk, and other pertinent factors of the ~~joint venture~~Joint Venture, which must be fully disclosed and documented in the Utilization Plan in the same manner as for other types of participation, to determine the degree of MBE, ~~WBE~~ or SBEWBE participation that will be credited towards the Contract Goal. The Joint Venture's Utilization Plan must evidence how it will meet the ~~goal~~Contract Goal or document the Bidder's Good Faith Efforts to do so. The Administrator has the authority to review all records pertaining to Joint Venture agreements before and after the award of a contract in order to assess compliance with this ~~Ordinance~~Revised Appendix D. The MBE, ~~WBE~~ or SBEWBE Joint Venture partner must have a history of proven ~~expertise~~Expertise in performance of a specific area of work and will not be approved for performing only general management of the Joint Venture. The specific work activities for which the MBE, ~~WBE~~ or SBEWBE Joint Venture partner will be responsible and the assigned individuals must be clearly designated in the Joint Venture ~~Agreement~~agreement. The Joint Venture must submit to the Administrator quarterly work plans, including scheduling dates of the tasks. The Administrator must approve the quarterly plans for the MBE, ~~WBE~~ or SBEWBE Joint Venture partner's participation to be credited towards the Contract Goals.

~~—(f) Only the participation of MBEs, or WBEs or SBEs that will perform as first-tier subcontractors~~Subcontractors will be counted towards meeting the ~~Utilization~~Contract Goals.

~~—(g) Only expenditures to a MBE, WBE or SBE~~WBE that is performing a Commercially Useful Function ~~shall~~will be counted towards the ~~Utilization~~Contract ~~Goal~~Goals.

~~—(i) A firm~~business is considered to perform a ~~commercially useful function~~Commercially Useful Function when it is responsible for execution of a distinct element of the work of a contract and carries out its responsibilities by actually performing, managing, and supervising the work involved. The

firmbusiness must pay all costs associated with personnel, materials, and equipment. The firmbusiness must be formally and directly responsible for the employment, supervision and payment of its workforce, must own and /or lease equipment, and must be responsible for negotiating price, determining quality and quantity and paying for and ordering materials used. The firmbusiness cannot share employees with the Prime Contractor or its Affiliates. No payments for use of equipment or materials by the firmbusiness can be made through deductions by the Prime Contractor. No family members who own related businesses are allowed to lease, loan, or provide equipment, employees, or materials to the firmbusiness.

—————(ii) A firmbusiness does not perform a ~~commercially useful function~~Commercially Useful Function if its role is limited to that of an extra participant in a transaction through which funds are passed ~~in order~~ to obtain the appearance of MBE, ~~or~~ WBE ~~or~~ SBE participation. The Prime Contractor is responsible for ensuring that the firmbusiness is performing a ~~commercially useful function~~Commercially Useful Function.

—————(iii) The District will evaluate the amount of work subcontracted, industry practices, and whether the amount the MBE, ~~WBE~~ or ~~SBE~~WBE is to be paid under the contract is commensurate with the work it is actually performing ~~and~~, along with other relevant factors.

—————(iv) If a firmbusiness subcontracts a greater portion of the work of a contract than would be expected based on normal industry practice, it is presumed not to perform a Commercially Useful Function. When a firmbusiness is presumed not to be performing a Commercially Useful Function, the firmbusiness may present evidence to the Administrator to rebut this presumption. If no rebuttal is presented, then the presumption will stand.

—————(h) Credit towards the Contract Goals will be allowed only for those direct services performed or materials supplied by MBEs, ~~or~~ WBEs or ~~SBEs~~ ~~or~~ first-tier ~~subcontractor~~Subcontractor MBEs, ~~or~~ WBEs ~~or~~ SBEs ~~must perform no. No~~ less than eighty-five (85) percent (~~85%~~) of their work must be performed with their own forces, through the use of its own management and supervision, employees, and equipment. If industry standards and practices differ, the firmbusiness must furnish supporting documentation ~~for consideration by~~to rebut this presumption to the ~~District~~Administrator.

—————~~(i)~~(i) Prime Contractors are prohibited from allocating MBE and WBE Subcontract work to items identified in a contract as allowances, contingencies, and unit price. Allocation by a Prime Contractor to these categories under the scope of work of a contract will result in the rejection of the Utilization Plan by the Administrator.

(j) Purchase of materials and supplies must be pre-approved if their purchase is related to ~~goal~~Contract Goal attainment. The Bidder may count payments to MBE, ~~WBE~~ or ~~SBE~~WBE regular dealers or ~~manufacturers who offer only furnish and deliver contracts~~Manufacturers for Contract Goal attainment for no more than ~~twenty five~~50 percent (~~25%~~) of each MBE, ~~WBE~~ or ~~SBE~~WBE goal, unless otherwise approved by the Administrator. If the ~~bidder~~Bidder exceeds the supplier

exception amount allowable as stated in the bid documents, the bid will be viewed as non-responsive.

~~(j) A dealer 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 dealer, 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 dealer 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. Brokers and packagers shall not be regarded as manufacturers or regular dealers within the meaning of this section. 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.~~

~~(k) If a firm/business ceases to be a-certified during its performance on a contract, the dollar value of work performed under the contract with that firm/particular business after it has ceased to be certified shall/will not be counted.~~

~~(l) In determining achievement of Utilization-Contract Goals, the participation of a MBE, or WBE or SBE shall/will not be counted until that amount, including retention, has been paid to the MBE, or WBE or SBE.~~

#### Section ~~12.15~~. Utilization Plan Submission

~~(a) Compliance documents must be submitted as provided/detailed in the bid solicitation. Failure to do so will render the bid non-responsive. The Director shall/Administrator will review compliance documents for each bid submission to determine if/whether it meets the requirements herein.~~

~~(b) A Bidder must either meet the Utilization-Contract Goals or establish its Good Faith Efforts to do so as described in this Revised Appendix D and the bid solicitation.~~

~~(c) Each Bidder shall/must submit with its bid a completed and signed Utilization Plan that lists the names, addresses, for each Subcontractor and supplier proposed to be used to perform the scope of work on the contract: the name; address; telephone numbers, email addresses and number; electronic mail address; six-digit North American Industry Classification System code; a description of the work with contract item number and contact person of the businesses intended to be used as subcontractors, subconsultants and suppliers, including those firms proposed to meet the Contract Goal(s); the type of work or service each business will perform; and; the dollar amount to be allocated to the certified firm(s)-business; the contact person of the business; and any other information required in the solicitation documents. Each Bidder's Utilization Plan shall/must commit to MBE, WBE or SBE/WBE participation equal to or greater than each of the Contract Goals set forth in the bid solicitation, unless the Bidder requests a partial or total waiver of the requirement that it file a Utilization Plan or achieve a particular goal by submitting with the bid a signed Waiver Request in the form specified in the bid solicitation.~~

~~(d) Each Bidder must submit with its bid a signed M/W/SBEMBE/WBE Subcontractor's Letter of Intent for each firm/business proposed to meet the Contract Goals~~

in the form specified in the bid solicitation, with ~~either~~ a copy of each MBE, ~~WBE~~ or ~~SBEs~~ WBE current Letter of Certification from a state or local government or agency, or documentation demonstrating that the firm/business is a MBE, ~~WBE~~ or ~~SBE~~ WBE within the meaning of this Revised Appendix D. In the event of a conflict between the amounts stated on the Utilization Plan and the M/W/SBEMBE/WBE Subcontractor's Letter of Intent, the terms stated on the Utilization Plan shall will control. An original or facsimile scanned copy of the M/W/SBEMBE/WBE Subcontractor's Letter of Intent will be acceptable.

———(e) Where a Bidder ~~had has~~ failed to meet the Contract ~~Goal(s), Goals,~~ it must file a Waiver ~~request~~ Request documenting its Good Faith Efforts to meet the ~~Goal(s) Contract Goals~~ as provided in the format described in the bid solicitation. Following submittal of a Waiver Request, the Administrator shall will require the ~~contractor~~ Prime Contractor to file a Contractor Information Form and provide additional documentation of its ~~good faith efforts~~ Good Faith Efforts in attempting to fulfill such goals.

—————(i) ~~Such~~ Good Faith Efforts, ~~as defined herein, shall will~~ include, but are not limited to, ~~the following:~~

—————(i) ~~Attend any~~ (1) Attending the mandatory pre-bid conference conducted by the District to acquaint ~~contractors~~ Prime Contractors with MBEs, ~~WBEs~~ and ~~SBEs~~ WBEs available to provide relevant goods and services and to inform MBEs, and WBEs and ~~SBEs~~ of ~~subcontracts~~ subcontracting opportunities on ~~the~~ a contract;

—————(ii) ~~Review~~ (2) Reviewing lists of available MBEs, and WBEs and ~~SBEs~~ maintained by the District and, as well as other state and local governments and agencies, prior to the bid opening to identify qualified MBEs, and WBEs and ~~SBEs~~ for solicitation for bids;

—————(iii) ~~Advertise~~ (3) Soliciting, not less than fifteen (15) calendar days before the bid opening date, ~~in one or more daily newspapers and/or trade publications, for proposals or bids by MBEs, WBEs and SBEs for subcontracts or the supply of goods and services on the contract;~~

—————(iv) ~~Make timely written solicitations of through~~ reasonable and available means (e.g., written notices, advertisements on social media) MBEs, and WBEs and ~~SBEs~~ identified on the District's vendor list that can provide relevant services for subcontracts or in the supply/anticipated scopes of goods and services; subcontracting on the contract.

—————(v) ~~Provide~~ (4) Providing MBEs, ~~WBES~~ and ~~SBEs~~ WBEs with convenient and timely opportunities to review and obtain relevant plans, specifications, or terms and conditions of the contract to enable such MBEs, and WBEs and ~~SBEs~~ to prepare an informed response to a ~~contractor~~ Prime Contractor solicitation;

—————(vi) ~~Divide total contract requirements into small tasks or quantities and adjust performance bond and insurance requirements or otherwise assist MBEs, WBEs and SBEs~~

~~in obtaining the required bonding, insurance or financing, where economically feasible, to encourage participation of MBEs, WBEs and SBEs;~~

~~\_\_\_\_\_ (vii) Follow and following up initial solicitation of MBEs, WBEs and SBEs by contacting them solicitations to determine if the enterprises are interested in making bids or proposals; answer questions and encourage MBEs and WBEs to submit bids.~~

~~\_\_\_\_\_ (viii) Negotiate in good faith with MBEs, WBEs and SBEs prior to the bid opening and do not reject as unsatisfactory any bids or proposals submitted by M/WBEs without justifiable reason, including the lack of bonding capacity or the ability to obtain insurance requirements such as Completed Builders Risk (All Risk) Insurance, Comprehensive General Liability Insurance, Contractor Contractual Liability Insurance and Public Liability Insurance;~~

~~\_\_\_\_\_ (ix) Establish delivery schedules, where the requirements of the work permit, which will encourage participation by MBEs, WBEs and SBEs;~~

~~\_\_\_\_\_ (x) Establish joint ventures with MBEs, WBEs and SBEs;~~

~~\_\_\_\_\_ (xi) Use(5) Negotiating in good faith with interested MBEs and WBEs that have submitted bids and thoroughly investigated their capabilities. Evidence of such negotiations includes: the names, electronic mail addresses, and telephone numbers of MBEs and WBEs with whom the Bidder negotiated; a description of the information provided to MBEs and WBEs regarding the work selected for subcontracting; and explanations as to why agreements could not be reached with MBEs and/or WBEs to perform the work. The Bidder may not reject MBEs and WBEs as being unqualified without sound reasons. That there may be some additional costs involved in finding and using MBEs and WBEs is not in itself a sufficient reason for a Bidder's failure to meet the Contract Goals, as long as such costs are reasonable.~~

~~(6) Selecting those portions of the contract consistent with the available MBEs and WBEs, including where appropriate, breaking out contract work items into economically feasible units to facilitate MBE and WBE participation.~~

~~(7) Making efforts to assist interested MBEs and WBEs in obtaining financing or insurance as required by the District for performance on the contract, when applicable.~~

~~(8) Using the services and assistance of the District, the Small Business Administration, the Office of Minority Business Enterprises of the U.S. Department of Commerce and appropriate community and; MBE and WBE assistance groups; local, state, and federal minority and women's or woman business assistance offices; and other organizations; to provide assistance in the recruitment and placement of MBEs and WBEs.~~

~~\_\_\_\_\_ (ii) Failure of a Bidder to provide requested information to the Administrator or to cooperate with the ~~Administrator's~~ Administrator's~~

investigation; may be grounds for the rejection of a bid ~~and~~submission or a Waiver ~~request~~Request.

\_\_\_\_\_ (iii) Upon completion of the investigation, the Administrator ~~shall~~will inform the Director of his or her findings.

\_\_\_\_\_ (iv) ~~The Director, after consultation with~~Thereafter, the Administrator, ~~shall~~ will determine whether to grant the Waiver ~~request~~Request based on the Bidder's Good Faith Efforts at the time of the bid submission.

\_\_\_\_\_ (v) Where the ~~Director~~Administrator determines that a Bidder has not made Good Faith Efforts, the Director ~~shall~~will declare the bid submission non-responsive and ~~will~~ reject the bid.

\_\_\_\_\_ (d(f)) A ~~contractor's~~Prime Contractor's submission of a Utilization Plan that commits to ~~a M/MBE or~~ WBE participation equal to or greater than the ~~applicable utilization goals shall~~Contract Goals does not provide a basis for a higher bid, an increase in contract price, or a later change order.

\_\_\_\_\_ (e(g)) The requirement to submit a Utilization Plan and ~~M/MBE~~WBE Subcontractor's ~~Letters~~Letter of Intent applies when the individual project is awarded under a Job Order ~~Contracts awarded by the District~~Contract.

\_\_\_\_\_ (i) A Prime Contractor ~~issued~~awarded a Job Order Contract ~~shall~~must submit with each work order issued under such a ~~Contract~~contract its Utilization Plan that lists the name, address, telephone number, ~~email~~electronic mail address, and contact person for each ~~M/W/SBEMBE and~~ WBE to be used on the work order, as well as a description of work to be performed and ~~at~~the dollar amount to be allocated to ~~such M/W/SBE, the~~ MBE or WBE. The Prime Contractor ~~shall~~must submit with each work order a ~~M/W/SBEMBE/WBE~~ Subcontractor's Letter of Intent from each certified ~~firm~~business.

\_\_\_\_\_ (ii) A Prime Contractor awarded a Job Order Contract ~~shall~~will be subject to the compliance monitoring provisions ~~herein~~contained in this Revised Appendix D. The Prime Contractor must submit to the Administrator monthly documentation, as specified by the Administrator, demonstrating that the Prime Contractor has attained the Contract Goals for the completed portion of the Job Order Contract, or that it has been unable to do so despite its ~~good faith efforts~~. Good Faith ~~efforts~~Efforts. Good Faith Efforts must be documented as provided in this ~~Ordinance~~Revised Appendix D.

### **Section ~~13-~~16. Bid Submission Compliance Review**

\_\_\_\_\_ (a) The Director ~~shall, in coordination with the Administrator, will~~ declare ~~the~~a bid submission non-responsive if a Bidder:

\_\_\_\_\_ (i) Failed to submit with its bid a completed and signed Utilization Plan; and signed MBE/WBE Subcontractor's Letter of Intent from each MBE and WBE listed on its Utilization Plan.

~~\_\_\_\_\_~~(ii) Failed to commit in its Utilization Plan to MBE, and WBE and ~~SBE~~ participation equal to or greater than ~~each of the Utilization~~ Contract Goals unless the Bidder submitted with its bid a request ~~for~~ a total or partial waiver of the ~~Goal(s). Contract Goals.~~

~~\_\_\_\_\_~~(iii) Failed to identify in its Utilization Plan the MBE, WBE or SBE by name, scope of work, contract item number, and dollar value of work or percentage of participation equal to or greater than each of the Contract Goal(s).

~~\_\_\_\_\_~~(iv) Failed to submit with its bid the M/W/SBE Subcontractor's Letter of Intent from each MBE, WBE and SBE listed on its Utilization Plan.

~~\_\_\_\_\_~~(b) Where, after consultation with the Administrator, the Director determines that the Utilization Plan submitted by a Bidder is false or fraudulent, the bid ~~shall~~will be rejected or, if the determination is made after the ~~bid award~~contract is awarded, the contract may be forfeited in accordance with the ~~provision of Article 28 of the General Conditions.~~

~~\_\_\_\_\_~~(c) If a Mentor Protégé relationship is proposed to meet the Contract Goal, the Mentor Protégé Development Plan must be submitted to the Administrator for approval prior to applicable contract award ~~Mentor Protégé relationship~~ describes an association between large business prime contractor firms and socially disadvantaged firms designed to motivate, encourage and to provide mutually beneficial developmental assistance to those socially disadvantaged firms. provision.

~~\_\_\_\_\_~~(~~d~~c) Prior to the award of any contract, the Administrator ~~shall~~will review the Utilization Plan, M/W/SBEMBE/WBE Subcontractor's Letter(s) of Intent ~~and~~, Letter(s) of Certification, ~~and~~ Contractor Information, and Waiver Request ~~Forms as specified in the solicitation.~~Form submitted by the apparent low ~~bidder on a contract~~Bidder and conduct any other investigation the Administrator deems appropriate to determine compliance.

~~\_\_\_\_\_~~(~~e~~d) Within thirty (30) calendar days after ~~demand~~request, the Prime Contractor ~~shall~~must furnish executed copies of all MBE, and WBE ~~and SBE~~ subcontracts to the Administrator. Subsequently, the ~~contractor shall~~Prime Contractor will obtain and submit a copy of all MBE, and WBE ~~and SBE~~ subcontracts ~~on demand~~at all Tiers within five (5) calendar days of a written request.

~~\_\_\_\_\_~~(~~f~~e) The Prime Contractor ~~shall~~will set timetables for the use of its ~~subcontractors~~Subcontractors before ~~fiftyten (10)~~ percent (~~50%~~) of the work is completed. Timetables may be modified during contract performance with the prior written approval of the Administrator.

~~\_\_\_\_\_~~(~~g~~f) If requested by the Administrator, the Prime Contractor must submit a MBE, and WBE ~~and SBE~~ Work Planwork plan projecting the work tasks associated with a certified ~~firms'~~business' commitments prior to the award of the contract. The ~~Work Plan~~work plan must provide a description of the work to be subcontracted to ~~other~~ MBEs, and WBEs and ~~SBEs and~~ non-certified ~~firms~~businesses and the dollar amount ~~and, as well as~~ the name of ~~the~~ all ~~tiers~~Tiers of ~~subcontractors~~Subcontractors. The ~~Work Plan becomes~~work plan will become a part of the Prime Contractor's ~~contractual~~ commitment and the contract record; and may not be changed without prior written approval of the Administrator.

#### Section 14-17. Mentor-Protégé Program

The mentor-protégé program has been designed to encourage Prime Contractors to actively participate in the development and mentoring of MBE and WBE businesses. To motivate Prime Contractors to participate in the mentor-protégé program, the District will include a three (3) percent Contract Goal credit towards the applicable mentee category on all contracts to which this Revised Appendix D is applied. In addition to providing mentoring opportunities, the mentor-protégé program will also provide increased access to resources which will facilitate improved economic growth and greater contracting opportunities for the MBE or WBE protégé. The following guidelines will apply to the mentor-protégé program:

- (a) The mentor/Prime Contractor will indicate that it wishes to participate in the mentor-protégé program in its bid submission for a District contract. This indication will be considered as an application to participate in the mentor-protégé program, and the application will be subject to the review and approval of the Administrator.
- (b) The mentor and protégé must have a relationship independent of the District that pre-exists the mentor/Prime Contractor's bid application. The District will not facilitate a relationship between a mentor and a protégé.
- (c) To qualify as a mentor, the Prime Contractor must present evidence that it has been operating in the market in which the protégé conducts business for at least five (5) years; is in good financial standing as determined by its federal tax returns or audited financial statements; and has not been debarred, suspended, or had its business license revoked.
- (d) To qualify as a protégé, the Subcontractor must be a MBE and WBE as defined in this Revised Appendix D. Additionally, the protégé must have at least one (1) year of work experience in the market in which the mentor conducts business.
- (e) A mentor may only have a total of three (3) protégés at any given time, and no more than one (1) protégé per contract. This information must be provided to the Administrator at the time that the bid application is reviewed.
- (f) A protégé may only have one (1) mentor at any given time. This information must be provided to the Administrator at the time that the bid application is reviewed.
- (g) A business may not serve as a mentor and a protégé at the same time.
- (h) The mentor and protégé must be separate and distinct businesses. The mentor cannot possess an ownership interest in the protégé business, nor can the businesses be otherwise affiliated outside of the mentor-protégé relationship, including any familial relationship. The Administrator will review and assess the nature of the relationship to ensure that this requirement is fulfilled.
- (i) If the mentor-protégé agreement is terminated during the pendency of the District contract on which the mentor-protégé relationship has been approved, it is the obligation of the mentor/Prime Contractor to notify the Administrator within three (3) calendar days of the termination. Failure to notify the Administrator within this required timeframe may result in the mentor/Prime Contractor being prohibited from participating in the mentor-protégé program on future contracts. In the event of termination, the mentor/Prime

Contractor will cease to receive any credit or recognition for work performed by the protégé/Subcontractor from the point the agreement has been terminated, separate from any credit or recognition for which it is otherwise entitled.

(j) In the event of termination of the original mentor-protégé agreement, the mentor will not be permitted to engage with another protégé for the same District contract. Likewise, no substitutions of a protégé will be permitted.

(k) Any application to the mentor-protégé program will be denied if, in the opinion of the Administrator, the mentor-protégé relationship presents no opportunity for professional benefit to the protégé, but instead serves only as vehicle for the mentor to receive Contract Goal credits on a District contract. The Administrator's decision on this matter will be final and is not subject to appeal.

(l) Violation of any of the provisions contained in this section will result in the mentor-protégé application being denied, or in the event that information pertaining to a violation is discovered after the application is approved, permission to participate in the mentor-protégé program will be revoked. The Administrator's decision on this matter will be final and is not subject to appeal.

### **Section 18. Contract Performance Compliance**

~~\_\_\_\_\_~~(a) ~~After~~Following the award of a contract, the Administrator ~~shall~~will review the Prime Contractor's compliance with its ~~M/W/SBEMBE and WBE~~ commitments during the performance of the contract.

~~\_\_\_\_\_~~(b) The Prime Contractor ~~shall~~will be required to submit the Affirmative Action Monthly MBE/WBE/~~SBE~~ Status Report providing the information ~~and~~ in the written format ~~as~~ specified by the ~~District with every payment request. The Contractor's failure to do so may result in a delay of the progress payment.~~

~~\_\_\_\_\_~~(c) ~~Administrator.~~ Evidence of MBE, and WBE ~~and~~ ~~SBE subcontractor~~Subcontractor participation and payments must be submitted as required ~~by the District to confirm subcontractors' participation and payment to confirm Subcontractors' participation and payment. The Prime Contractor's failure to do so may result in a finding of non-compliance by the Administrator pursuant to Section 20 of this Revised Appendix D. The Administrator reserves the right to require that the Affirmative Action Monthly MBE/WBE Status Report be submitted electronically via the compliance system upon notice.~~

~~\_\_\_\_\_~~(d)(c) District contract compliance officers and auditors, or their designees, ~~shall~~must have access to the ~~contractor's~~Prime Contractor's and ~~subcontractor's books~~Subcontractor's Books and ~~records~~Records, including certified payroll records, bank statements, employer business tax returns, and all records including all computer records and books of account to determine ~~the contractor~~Prime Contractor and ~~MBE, WBE and SBE subcontractor~~Subcontractor compliance with ~~the goal commitment. Audits may be conducted~~Program requirements. The District has the sole discretion to perform audits at any time and without notice into the total discretion of the DistrictPrime Contractor or Subcontractor. A Prime Contractor must provide the Administrator with any additional

compliance documentation within ~~14~~ten (10) calendar days of ~~such~~receipt of a written request. ~~-Audits may be conducted without notice at any time at the discretion of the District.~~

~~—(e)(d)~~ If District personnel observe that any ~~purported MBE, WBE and SBE subcontractor~~Subcontractor other than those listed on the Utilization Plan ~~are~~is performing work or providing materials ~~and~~and/or equipment for those ~~M/MBE and WBE subcontractors~~Subcontractors listed on the Utilization Plan, the Prime Contractor will be notified in writing of an apparent violation ~~is taking place~~and progress payments may be withheld. ~~-The contractor~~Prime Contractor will have the opportunity to meet with the ~~Affirmative Action~~Administrator prior to a finding of ~~noncompliance~~non-compliance.

(e) The Prime Contractor is required to fill out the Supplemental Change Order Form or such other documents as the Administrator may require which details the names of the Subcontractors impacted and provides a description of the work and dollar amount of the change and the amended contract value. The Prime Contractor will submit the Supplemental Change Order Form along with any additional documents as required to the Administrator for approval.

(f) Where a partial or total ~~Waiver~~waiver of the Contract ~~Goal(s)~~Goals has been granted, the Prime Contractor must continue to make Good Faith Efforts during the performance of the contract to meet the ~~Goal(s)~~Contract Goals, and the Administrator ~~shall~~will provide technical assistance with respect to such efforts. The Administrator ~~shall~~will require the Prime Contractor to provide documentation of its continuing Good Faith Efforts in attempting to fulfill ~~its commitments~~the Contract Goals.

~~—(g)~~ The Prime Contractor cannot make any changes to the approved Utilization Plan ~~or substitutions of the MBE(s), WBE(s) or SBE(s) listed in the Utilization Plan throughout the life of the contract~~ without the prior, written approval of the Administrator. This includes, but is not limited to, instances in which the Prime Contractor seeks to perform work originally designated for a MBE, ~~or~~ WBE ~~or SBE subcontractor~~Subcontractor with its own forces or those of an ~~affiliate~~Affiliate, a non-certified ~~firm~~business, or another MBE, ~~WBE~~ or ~~SBE~~WBE. Failure to obtain the prior, written approval of the Administrator ~~in the format specified by the District shall will~~ constitute a breach of the contract, and subject the Prime Contractor to any and all available sanctions. ~~The~~Additionally, the participation of certified ~~firms~~businesses that did not receive prior, written approval by the Administrator will not be counted towards the Contract ~~Goal(s)~~Goals.

~~—(i)~~ The Prime Contractor must demonstrate good cause to terminate or reduce the scope of work of the MBE, ~~WBE~~ or ~~SBE~~WBE to the satisfaction of the Administrator. Good cause is limited to the following circumstances:

- (1) The listed MBE, ~~WBE~~, or ~~SBE subcontractor~~WBE Subcontractor fails or refuses to execute a written contract.
- (2) The listed MBE, ~~or~~ WBE ~~or SBE subcontractor~~Subcontractor becomes bankrupt, insolvent, or exhibits credit unworthiness.

(3) The listed MBE, ~~WBE~~ or ~~SBE~~ ~~WBE~~ is ineligible to work on public works projects because of suspension ~~and/or~~ debarment proceedings pursuant to federal ~~or~~, state, or local law.

(4) The Administrator has determined that the listed MBE, ~~or~~ WBE ~~or~~ ~~SBE~~ ~~subcontractor~~ Subcontractor is not a responsible contractor.

(5) The listed MBE, ~~or~~ WBE ~~or~~ ~~SBE~~ ~~subcontractor~~ Subcontractor voluntarily withdraws from the project and provides the Administrator with prior written notice of its withdrawal before a decision on certification eligibility by the Administrator is rendered.

(6) The listed MBE, ~~or~~ WBE ~~or~~ ~~SBE~~ ~~subcontractor~~ Subcontractor is ineligible to receive credit for the type of work required.

(7) The MBE, ~~or~~ WBE ~~or~~ ~~SBE~~ owner dies or becomes disabled ~~with the result that rendering~~ the listed MBE, WBE or SBE ~~subcontractor is~~ business unable to complete ~~its~~ the work on the contract.

(8) Other good cause as determined in the Administrator's sole discretion.

—————(ii) Good cause does not include instances where the Prime Contractor seeks to terminate a MBE, ~~or~~ WBE ~~or~~ ~~SBE~~ ~~it relied upon to obtain the contract~~ so that the Prime Contractor can self-perform the work or substitute another MBE, ~~or~~ WBE or ~~SBE~~ ~~or~~ non-certified ~~subcontractor~~ Subcontractor to perform the work ~~for which the MBE, WBE or SBE was engaged or listed on the Utilization Plan~~.

—————(iii) The Prime Contractor must give the MBE, ~~WBE~~ or ~~SBE~~ ~~WBE~~ notice in writing, with a copy to the Administrator, of its intent to request to terminate ~~and/or~~ substitute, and the detailed reasons for the request. The Prime Contractor must give the MBE or WBE five (5) business days to respond to the notice and advise the Administrator of the reasons, if any, why the MBE or WBE objects to the proposed termination and why the Administrator should approve the request to terminate. If required in a particular case as a matter of public necessity (e.g., safety), the Administrator may require a response period shorter than five (5) business days.

—————(iv) If the Prime Contractor proposes to terminate or substitute a MBE, ~~WBE~~ or ~~SBE~~ ~~subcontractor~~ WBE Subcontractor for any reason, the Prime Contractor must make Good Faith Efforts as defined herein to find a substitute MBE, ~~WBE~~ or ~~SBE~~ ~~subcontractor~~ ~~for the original MBE, WBE or SBE~~ Subcontractor to meet its MBE, ~~or~~ WBE ~~or~~ ~~SBE~~ contractual commitment. Its Good Faith Efforts ~~shall~~ must be directed at finding another MBE, ~~WBE~~ or ~~SBE~~ ~~WBE~~ to perform or provide at least the same amount of work, material, or service under the contract as the original MBE, ~~or~~ WBE ~~or~~ ~~SBE~~ to the extent necessary to meet ~~its MBE, WBE or SBE contractual commitment~~ the Contract Goals.

~~\_\_\_\_\_~~(v) The Prime Contractor must submit a MBE, ~~WBE or SBE~~ Subcontractor's Letter of Intent for each proposed new MBE, ~~or~~ WBE ~~or SBE~~ ~~subcontractor~~ Subcontractor.

~~\_\_\_\_\_~~(vi) The Administrator will ~~approve or disapprove~~ review the substitution request and decide whether to grant the request based on the Prime Contractor's documented compliance with these provisions.

~~\_\_\_\_\_~~(h) In the event that a Prime Contractor fails to achieve the level of MBE, ~~WBE or SBE~~ or WBE participation described in its Utilization Plan as demonstrated by its request for a progress payment, the Administrator will provide written notice to the Prime Contractor regarding the deficiency and progress payments may be withheld until compliance is achieved. If additional instances of non-compliance occur, subsequent progress payments may also be withheld pending compliance. Failure to meet the Contract Goals as stated on the Utilization Plan will be a *prime facie* case of non-compliance.

(i) In the event that a Prime Contractor fails to achieve the level of MBE or WBE participation described in its Utilization Plan as the result of the ~~District's deletion~~ District's elimination of the work to be performed by a MBE, ~~or~~ WBE ~~or SBE~~, the Prime Contractor ~~shall~~ must notify the Administrator in writing and ~~may~~ request an amendment of its Utilization Plan. A letter of release signed by the ~~subcontractor~~ Subcontractor must be included with the request.

~~\_\_\_\_\_~~~~(i) In the event a Prime Contractor, in the~~(j) The Contract Goal obligation extends to all contract work covered by change orders. The obligation to make Good Faith Efforts to meet the Contract Goal extends to the entire performance of ~~its~~ the contract, ~~determines~~. When contract work is added, the Prime Contractor must award that the conditions of work to the work warrant a reduction MBE or WBE listed in its Utilization Plan, if the original scope of work is to be performed by a MBE, ~~WBE or SBE~~ the Prime Contractor must utilize Good Faith Efforts to fulfill its MBE, or WBE or SBE contractual commitment listed in the Utilization Plan. If the original listed MBE or WBE cannot perform the additional work, the Prime Contractor must make Good Faith Efforts to secure MBE or WBE Subcontractors to perform the additional contract work so that the goal percentage committed to in the contract is maintained or the Contract Goal is achieved.

(k) When the scope of Contract work is deducted, the Prime Contractor must make Good Faith Efforts to achieve the Contract Goal percentages committed to in the Contract.

(l) The Prime Contractor must notify the Administrator in writing within ~~14~~ ten (10) calendar days of ~~the~~ its determination to request an amendment of its Utilization Plan. The Prime Contractor must give the MBE, ~~WBE~~ or ~~SBE~~ WBE notice in writing, with a copy to the Administrator, of its intent to request ~~to reduce~~ a reduction in the scope of work, and the detailed reasons for the request. The Administrator will ~~approve or disapprove~~ review the request for the reduction and decide whether to approve the request based on the Prime Contractor's documented compliance with these provisions.

~~(j)(m)~~ Where contract change orders are made individually or in the aggregate that increase the total value of the contract by more than ten (10) percent ~~(10%)~~ of the original contract value, the Prime Contractor ~~shall~~will increase the utilization of all MBEs, ~~or~~ WBEs ~~or~~ SBEs, where feasible, so that the total value of the percentage of work performed by MBEs, ~~WBEs~~ or ~~SBEs~~WBEs as to increased contract value bears the same relationship to the total value of the contract ~~(, as modified by change orders),~~ as the percentage of MBEs, ~~or~~ WBEs ~~or~~ SBEs utilization committed to in the ~~contractor's~~Prime Contractor's original Utilization Plan.

### Section 15-19. Compliance System

All contractors are to comply with the Diversity Department's electronic compliance and monitoring system for reporting purposes. Failure to comply with these requirements may result in a finding of non-compliance by the Administrator pursuant to Section 20 of this Revised Appendix D. The reporting requirements include, but are not limited to:

(a) Prime Contractors are required to submit monthly Diversity spend numbers as well as make payments towards invoices submitted by Subcontractors, on a monthly basis.

(b) Subcontractors are required to submit invoices for their work and to acknowledge payment from Prime Contractors when received.

### Section 20. Sanctions for Non-Compliance

~~(a)~~ (a) Where the Administrator believes that the Prime Contractor or ~~subcontractor~~Subcontractor has: committed fraud or ~~misrepresentation against~~made misrepresentations to the District ~~or has;~~ failed to comply with this ~~Ordinance~~Revised Appendix D or its contract, ~~or;~~ provided false or fraudulent documentation; ~~or failed to comply with its Utilization Plan,~~ the Administrator ~~shall~~will notify the Prime Contractor and/or ~~subcontractor~~Subcontractor in writing of such determination of ~~noncompliance~~non-compliance and withhold up to one hundred (100) percent ~~(100%)~~ of the current progress or final payment due to the Prime Contractor ~~for up to 90 days.~~ The amount to be withheld ~~shall~~will be based upon a determination of the degree to which the Prime Contractor has failed to meet its MBE, ~~or~~ WBE ~~or~~ SBE contractual commitments and to what extent the Prime Contractor has made Good Faith Efforts to achieve such commitments. The Prime Contractor and/or ~~subcontractor~~ ~~shall~~Subcontractor will have the right to meet with the Administrator within ten (10) calendar days of receipt of the notice. After conference and conciliation, the Administrator will determine whether the Prime Contractor and/or ~~subcontractor~~Subcontractor is ~~in compliance~~complying.

~~(b)~~ If the Administrator determines that the Prime Contractor and/or ~~subcontractor~~Subcontractor is not in compliance and the violation cannot be resolved by conference and conciliation, the Administrator ~~shall~~will refer the matter to the Executive Director ~~and. Upon review of the matter,~~ the Executive Director may return the referral to the Administrator with direction on how to proceed or may direct that the Prime Contractor

and/or ~~subcontractor to show cause~~ Subcontractor participate in a Show Cause hearing on a date certain to explain why further sanctions should not be imposed.

\_\_\_\_\_ (i) The Prime Contractor ~~and/or subcontractor shall~~ Subcontractor will have ~~15~~ ten (10) calendar days after receipt of the ~~show cause~~ Show Cause notice within which to file a response in writing with the Administrator. A hearing before a duly appointed Hearing Officer ~~shall~~ will be convened to provide the ~~contractor~~ Prime Contractor and/or ~~subcontractor~~ Subcontractor an opportunity to be heard with respect to the non-compliance. Within ~~30~~ twenty (20) calendar days after the Executive Director's referral, the Hearing Officer ~~shall~~ will schedule a hearing to be held within ~~30~~ twenty (20) calendar days of receipt of the referral ~~for hearing at which the District, the contractor and/or subcontractor may present evidence of the purported violation and/or the absence thereof.~~ The District will carry the burden of proof as to non-compliance by a preponderance of the evidence. ~~The Prime Contractor and/or subcontractor may present additional evidence and witnesses to show cause why sanctions should not be imposed.~~ An official record will be kept with the Clerk of the District. All filings by the District or the ~~respondents~~ Prime Contractor and/or Subcontractor should be made with the Clerk of the District, with courtesy copies going to the parties and the Hearing Officer.

\_\_\_\_\_ (ii) The Hearing Officer ~~shall~~ will conduct ~~such show cause hearings involving the Ordinance~~ Show Cause hearing and ~~shall render~~ issue findings of fact, conclusions of law, and recommendations regarding disposition of the ~~hearings~~ hearing. Procedures and rules governing the ~~show cause~~ Show Cause hearings will be followed as adopted by the Board of Commissioners. ~~The Hearing Officer will not become co-counsel with any attorneys appearing before him/her at any time during the hearing.~~

\_\_\_\_\_ (iii) All Show Cause ~~Hearings~~ hearings must be conducted on the record and all testimony must be under oath and transcribed verbatim by a court reporter. All parties ~~shall~~ will be given the opportunity to present and respond to evidence. The Hearing Officer ~~shall~~ will conduct a fair hearing and maintain order and ~~shall~~ will abide by the Judicial Canons of Ethics enacted by the Illinois Supreme Court.

\_\_\_\_\_ (iv) Within thirty (30) calendar days after the Show Cause hearing ~~with the Prime Contractor and/or subcontractor~~, the Hearing Officer ~~shall~~ will issue in writing to the Executive Director his/her written findings of fact, conclusions of law as to compliance, and recommendations with respect to any appropriate sanctions. The Executive Director ~~shall~~ will transmit the Hearing Officer's findings, conclusions, and recommendations to the Board of Commissioners which may impose sanctions for a Prime Contractor's and/or ~~subcontractor's~~ noncompliance Subcontractor's non-compliance with this ~~Ordinance~~ Revised Appendix D including, but not limited to:

\_\_\_\_\_ (1) Withholding up to fifty (50) percent ~~(50%)~~ of the current progress or final payment due the ~~contractor~~ Prime Contractor until

the Administrator determines that the ~~contractor~~Prime Contractor is in compliance. Following the withholding of up to fifty ~~(50)~~ percent ~~(50%)~~ of the current progress payment, up to one hundred ~~(100)~~ percent ~~(100%)~~ of further progress payments may be withheld until the ~~contractor~~Prime Contractor is found to be in compliance ~~with the requirements of this Ordinance~~. The amount to be withheld will be based upon a determination of the degree to which the Prime Contractor has failed to meet its MBE, ~~WBE~~ or ~~SBE~~WBE contractual commitments and to what extent the Prime Contractor has made ~~good faith efforts~~Good Faith Efforts to achieve such commitments.

~~\_\_\_\_\_~~(2) Declaring the Prime Contractor and/or ~~subcontractor~~Subcontractor to be non-responsible and disqualify/debar the Prime Contractor and/or ~~subcontractor~~Subcontractor from eligibility to bid on District ~~construction contracts~~Construction Contracts for a period of not less than one (1) year, and not more than three (3) years. ~~An entity~~A business that is disqualified pursuant to the provisions of this ~~Ordinance~~ ~~shall~~Revised Appendix D will be precluded from participation on any District contract as a Prime Contractor, ~~subcontractor~~Subcontractor, and supplier for the period of disqualification. In cases ~~of~~involving the use of false documentation, the making of false statements, fraud or misrepresentation, the disqualification period will be not less than eighteen (18) months, and not more than three (3) years for the second violation ~~of the Ordinance~~, and not less than ~~twenty-four (24) months~~two (2) years and not more than three (3) years for the third violation ~~of the Ordinance~~ from the date of disqualification established ~~in~~by the Board of Commissioners' Order.

~~\_\_\_\_\_~~(3) Rejecting ~~bids~~bid submissions by the Prime Contractor for other ~~contract(s)~~contracts not yet awarded ~~to~~when it is determined that ~~Bidder in instances of the Prime Contractor participated in~~ the use of false documentation, the making of false statements, or fraud or misrepresentation.

~~\_\_\_\_\_~~(4) For any MBE, or WBE ~~or SBE~~ that has misrepresented its MBE, or WBE ~~or SBE~~ status and/or failed to operate as an independent business ~~concern~~ performing a Commercially Useful Function, ~~declaring~~declaration by the Director that the MBE, or WBE ~~or SBE~~ is ineligible to participate as a MBE, or WBE ~~or SBE~~ in District contracts. A ~~firm~~business that has been declared ineligible may not participate as a MBE, ~~WBE~~ or ~~SBE~~WBE for a period of not less than one (1) year and not more than three (3) years.

~~\_\_\_\_\_~~(5) Forfeiting and deducting from the Prime Contractor's progress or final payments under the contract an amount up to the dollar amount of its MBE, or WBE goal commitment that the ~~contractor~~ ~~has~~Prime Contractor failed to meet. The amount to be deducted will be

based upon a determination of the extent to which the Prime Contractor made Good Faith Efforts to achieve such commitments at the sole discretion of the Administrator.

~~\_\_\_\_\_~~(6) Referring the matter to the Office of the Attorney General or Cook County State's Attorney for follow-up action, where applicable.

~~\_\_\_\_\_~~(c) ~~The Administrator and Director will take action to prevent a contract from being awarded to a Prime Contractor or first tier subcontractor disqualified from bidding hereunder for the period of disqualification.~~

~~\_\_\_\_\_~~(d) ~~The~~ District's attorneys' fees and costs will~~may~~ be assessed against the Prime Contractor and/or ~~subcontractor~~Subcontractor where the Hearing Officer makes a finding that the Prime Contractor and/or ~~subcontractor~~Subcontractor used false documentation, made false statements, or committed fraud or misrepresentation.

~~\_\_\_\_\_~~(e) ~~(d)~~ Notice of sanctions imposed by the Board of Commissioners for violations of ~~the Ordinance~~this Revised Appendix D by the Prime Contractor, ~~subcontractor and~~Subcontractor, or supplier will be spread upon the public record by the District, including but not limited to publication in the Record of Proceedings of the Board of Commissioners, posting on the District's web site, publication in any type of media, or newspaper publication, and direct notice by letter to governmental entities.

~~\_\_\_\_\_~~(f) ~~Any sanctions imposed against an entity shall also apply personally to all officers and directors of the entity or partners of the entity, and their successors and assigns with knowledge of the acts and omissions that give rise to the sanctions against the entity.~~

~~\_\_\_\_\_~~(g)(e) The District may take other action, as appropriate, within the discretion of the Administrator, subject to the approval of the Hearing Officer and the Board of Commissioners.

#### ~~Section 16.~~ Other **21. Federal Regulations**

The provisions of this ~~Ordinance~~Revised Appendix D shall not apply to any contract ~~to in~~ which there will be monetary contributions received from a federal agency and the extent that different procedures or standards are required by any law or regulation ~~requirements~~ of the ~~United States and nothing herein~~ federal agency dictate automatic compliance with that agency's affirmative action program. No language contained in this Revised Appendix D shall be interpreted to diminish or supplant the present Equal Employment Opportunity Requirements contained in Appendices B and C of Grant funded contracts or Appendix C non Grant funded contracts Commission requirements.

#### ~~Section 17.~~ 22. **Reporting and Review**

The ~~Administrator will provide periodic reports to the~~ Board of Commissioners ~~directs the~~ District staff to report to the Board of Commissioners on an annual basis with respect to ~~containing~~ the following information:

—(a) The level of MBE, ~~or~~ WBE ~~or SBE~~ participation achieved ~~in each~~ during the prior calendar year in or other time period on District ~~construction contracts~~ Construction Contracts subject to this Revised Appendix D; and

(b) Identification of any ~~problems~~ difficulties with the enforcement of this Revised Appendix D; and

—(c) Any recommendations with respect to improving the implementation of this Revised Appendix D.

### **Section ~~18-23~~. Sunset Provision**

This Revised Appendix D ~~shall~~ will expire on December 31, ~~2022~~ 2029, unless the District finds its remedial purposes have not been fully achieved and that there is a compelling interest in continuing to implement narrowly tailored remedies to redress discrimination against MBEs and WBEs so that the District will not function as a passive participant in a discriminatory marketplace in the ~~Metropolitan District's~~ Chicago construction industry and geographic market area.

### **Section ~~19-24~~. Repeal of Prior Inconsistent Provisions**

All enactments and provisions ~~heretofore~~ previously adopted by ~~this~~ the Board of Commissioners ~~in the area of~~ with regard to affirmative action ~~in connection with construction contractson~~ Construction Contracts subject to this ~~Interim Ordinance~~ Revised Appendix D that are inconsistent with the provisions ~~of~~ contained in this ~~Interim Ordinance~~ Revised Appendix D are hereby expressly repealed.

### **Section ~~20-25~~. Severability**

If any clause, sentence, paragraph, section, or part of this ~~Interim Ordinance~~ shall be adjudged Revised Appendix D is held by ~~any~~ any court of competent jurisdiction to be invalid, ~~the~~ illegal, or unenforceable, that judgment ~~shall~~ will not affect, impair, or invalidate the remainder ~~thereof, but shall be confined in its operation to~~ of this Revised Appendix D and will be construed as if the clause, sentence, paragraph, section, or part had never been contained in this Revised Appendix D. The remaining language contained in this Revised Appendix D will remain in full force and effect. In lieu of such invalid, illegal, or unenforceable clause, sentence, paragraph, section, or part, there will be automatically added as part of this Interim Ordinance directly involved in the controversy in which the judgment shall have been rendered. Revised Appendix D language as similar in its terms to such invalid, illegal, or unenforceable language as may be possible and be valid, legal, and enforceable.

*Section ~~21-26~~. Effective Dates*

This amendment to ~~revised~~Revised Appendix D ~~shall~~will be effective and apply to all bids for ~~contracts~~Construction Contracts advertised after ~~June 2~~December 31, 2022.

ADOPTED:

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Kari K. Steele, President  
Board of Commissioners of the  
Metropolitan Water Reclamation  
District of Greater Chicago

Approved as to form and legality:

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Head Assistant Attorney

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General Counsel

Exhibit A  
Utilization Plan

Exhibit B

MBE/WBE Subcontractor's Letter of Intent

Exhibit C  
Assist Agencies List