

**AFFIRMATIVE ACTION ORDINANCE**

**REVISED APPENDIX D**

**OF THE**

**METROPOLITAN WATER RECLAMATION DISTRICT**

**OF GREATER CHICAGO**

December 31, 2022

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

*Section 1. Declaration of Policy*

It is the policy of the Metropolitan Water Reclamation District of Greater Chicago (“District”) to ensure competitive business opportunities for minority and women-owned business enterprises in the award of and performance on District contracts; to prohibit discrimination on the basis of race, sex, color, disability, age, religion, national origin, sexual orientation, veteran status, or any other legally protected characteristic in the award of or participation on District contracts; and to abolish barriers to full participation on District contracts by all; and

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 and women-owned business enterprises in a manner consistent with constitutional requirements; and

The District is committed to creating equal opportunities for minority and women-owned businesses to participate in the award and performance on District contracts.

*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), 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 decision in *Croson* and its progeny; and

Whereas, in furtherance of this commitment, the Board of Commissioners of the Metropolitan Water Reclamation District of Greater Chicago (“Board of Commissioners”) directed District employees and its outside consultant in 1989 to conduct an investigation into the scope of any discrimination in the award of and participation 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 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 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”), which was later amended on June 21, 2001; and

Whereas, in 2003, the United States 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 businesses 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

Whereas, a 2004 study of the Metropolitan Chicago Construction Industry by Timothy Bates, 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 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

Whereas, a 2005 study of the Metropolitan Chicago construction industry by David Blanchflower, Professor of Economics at Dartmouth College, 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

Whereas, in 2005, the United States 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. 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

Whereas, a 2006 Cook County, Illinois report 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", 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 and Subcontracts is below the availability of such businesses; and

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", which found that MBEs and WBEs were not utilized in all industries in proportion to their availability; and

Whereas, in 2010, the 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 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 businesses on a fair and equal footing in government contracting markets, including in the construction industry; and

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

Whereas, in 2014, the District commissioned a 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 area; and

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 that discrimination continues to impede full and fair opportunities for disadvantaged business 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

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 compelling interest in continuing to implement narrowly tailored remedies to redress discrimination against minority and women-owned businesses in its market such that it will not function as a passive participant in the market failure of discrimination; and

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

Whereas, the remedies adopted herein by the District will not overly burden non-MBE and non-WBE businesses in the award of District contracts; and

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

Now, therefore, the District's Board of Commissioners hereby adopts this 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 contracts as either a Prime Contractor or a Subcontractor and to achieve equitable utilization of minority and women-owned business enterprises on District contracts.

### ***Section 4. Coverage***

The following provisions, together with relevant forms, will apply and be appended to every Construction Contract awarded by the District where the total approved expenditure is in

excess of one hundred thousand dollars (\$100,000.00), except contracts approved by the Board of Commissioners pursuant to Sections 11.4 and 11.5 of the District's Purchasing Act (70 ILCS 2605).

### **Section 5. Definitions**

The meaning of these terms in this 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, the District will consider all appropriate factors, including common ownership, common management, and contractual relationships.
- (c) "Annual Aspirational Goals" means the targeted levels established by the District for the annual aggregate participation of MBEs and WBEs on District 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) "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" means any District contract, agreement, or amendment thereto, providing for a total expenditure in excess of 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.
- (h) "Commercially Useful Function" means responsibility for the execution of a distinct element of the work of the contract, which is carried out by performing, managing, and supervising the work involved, or fulfilling responsibilities.
- (i) "Contract Goals" means the numerical percentage goals for MBE or WBE participation to be applied to an eligible District Construction Contract subject to this Revised Appendix D for the participation of MBEs and WBEs based upon the scope of work of the contract, the availability of MBEs and WBEs to meet the goals, and the District's progress towards meeting its annual MBE and WBE 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.

(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 United States Department of Labor, Bureau of Labor Standards, beginning January 2008.

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

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

(o) "Good Faith Efforts" means honest, fair, and commercially reasonable actions undertaken by a Prime Contractor to meet the MBE or WBE Contract Goal, which by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the Contract Goals.

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

(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 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 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, their relationship, and detailing their respective responsibilities on the contract.

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

(s) “Local 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 maintains a factory or establishment that produces on the premises the materials or supplies obtained by the Bidder. Brokers and packagers do not meet the definition of Manufacturer.

(u) "Minority-owned Business Enterprise" or "MBE" means a 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 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 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.

(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) 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 of which the person claims to be a part.

(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) 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) 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 of the United States of America.

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

(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.

(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 does not include the individual's ownership interest in a business entity seeking to do business with the District or other certified MBE or WBE, provided that the other 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 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.

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

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

(z) "Small Business Enterprise" means a small business as defined by the United States Small Business Administration (SBA), pursuant to the business size standard found in 13 CFR Part 121, that is relevant to the scope of work the business seeks to perform on District contracts. A business is not an eligible SBE in any calendar fiscal year in which its gross receipts, averaged over the business' previous five (5) fiscal years, exceed the size standards of 13 CFR Part 121.

(aa) “Socially Disadvantaged” means a Minority Individual or 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 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.

(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.

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

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

(ee) “Vendor List” means the District’s list of 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 United States Small Business Administration.

(ff) “Women-owned Business Enterprise” or “WBE” means a local small business entity which is at least fifty-one (51) percent 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 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 owned by a woman or women will be made without regard to community property laws.

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

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

- (a) It will not discriminate on the basis of race, sex, color, disability, age, religion, national origin, sexual orientation, veteran status, or any other legally protected characteristic in the bid solicitation for or purchase of goods in the performance of its contract.
- (b) It will actively solicit bids for the purchase or subcontracting of goods or services from qualified MBEs and WBEs.
- (c) It will undertake Good Faith Efforts in accordance with the criteria established in this Revised Appendix D to ensure that qualified MBEs and WBEs are utilized in the performance of the Construction Contract and share in the total dollar value of the contract in accordance with each of the applicable Contract Goals established by the District for the participation of qualified MBEs and WBEs.
- (d) It will require its Subcontractors at all Tiers to make similar Good Faith Efforts to utilize qualified MBEs and WBEs.
- (e) It will maintain records and furnish to the District all requisite information and reports for monitoring of compliance with this Revised Appendix D.
- (f) It will designate a person to act as an affirmative action coordinator on its behalf to facilitate the review of all concerns related to the participation of MBEs and WBEs.

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

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

- (a) Dividing large dollar value contracts into smaller dollar value contracts to facilitate the participation of MBEs and WBEs as Prime Contractors.
- (b) Arranging solicitation times for the presentations of bids, specifications, and delivery schedules to facilitate the participation of interested Prime Contractors and 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 and WBEs with training seminars on the technical aspects of preparing a bid for a District contract or otherwise participating on District Contracts.

- (e) Assisting businesses in overcoming barriers such as difficulty in obtaining financing and support for business development such as accounting, bid estimation, safety requirements, and quality control.
- (f) Prohibiting Prime Contractors from denying a subcontract to an MBE or WBE solely on the basis of that businesses inability to obtain the required performance bond.
- (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 to explain the Contract and to encourage Bidders to contact all available businesses about opportunities to perform as Subcontractors. The pre-bid conferences will be a mandatory requirement on all District contracts where this Revised Appendix D is applicable.
- (i) Adopting prompt payment procedures, including but not limited to, requiring that Prime Contractors promptly pay 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.
- (j) Reviewing retainage, bonding, and insurance requirements to eliminate unnecessary barriers to contracting with the District.
- (k) Collecting information from Prime Contractors on District Construction Contracts which details the bids received from all Subcontractors and the expenditures to Subcontractors on District Construction Contracts.
- (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) Maintaining information on all businesses bidding on District Contracts as both Prime Contractors and Subcontractors.
- (n) At the discretion of the Board of Commissioners, awarding a representative sample of District contracts without Contract Goals to determine MBE and WBE utilization in the absence of Contract Goals.
- (o) Referring complaints of discrimination against MBEs and WBEs 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 assist 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 aides 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. While the District takes into consideration certifications that a business may have received from another agency, the District may request additional documentation or actions to approve District certification.

- (a) Only businesses that meet the criteria for certification as a MBE or WBE may be eligible for credit towards meeting Contract Goals. The 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 business owned by a Socially and Economically Disadvantaged person is eligible to participate in the Program.
  - (i) The business' ownership by a Socially and Economically Disadvantaged person must be real, substantial, and continuing, going beyond *pro forma* ownership of the business as reflected in ownership documents. The owner 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 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 business' operations, indispensable to the business' potential success, specific to the type of work the business performs, and documented in the business' records. The individual whose Expertise is relied upon must have a commensurate financial investment in the business.

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

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

(ii) The Socially and Economically Disadvantaged owner must possess the power to direct or cause the direction of the management and policies of the business 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 may delegate various areas of the management or daily operations of the business to persons who are not Socially and Economically Disadvantaged. Such delegations of authority must be revocable, and the Socially and Economically Disadvantaged owner must retain the power to hire and fire any such person. The Socially and Economically Disadvantaged owner must exercise control over the business' operations, work, management, and policy.

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

(v) If federal, state, or local laws, regulations, statutes, or District ordinance, or other legal regulations require the owner to have a particular license or other credential to own or control the business, then the Socially and Economically Disadvantaged owner must possess the required license or credential. If federal, state, or local laws, regulations, statutes, or District ordinance, or other legal

regulations does not require that the Socially and Economically Disadvantaged owner possess the license or credential, and the Socially and Economically Disadvantaged owner lacks such license or credential, this information will be a factor, but is not dispositive, in determining whether the Socially and Economically Disadvantaged owner actually controls the business.

(vi) A Socially and Economically Disadvantaged owner cannot engage in outside employment or other business interests that conflict with the management of the business or prevents them from devoting sufficient time and attention to the affairs of the business, including the management and control of the business' day-to-day operations.

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

(i) Evaluate relationships with non-certified 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 of the applicant for MBE or WBE certification and non-certified businesses or persons thereby associated compromise the applicant's independence.

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

(iv) Consider the consistency of relationships between the applicant and non-certified 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 will be certified only for the specific types of work in which the Socially and Economically Disadvantaged owner for the MBEs and/or WBEs has the ability and Expertise to manage and control the business' operations and work.

(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 will certify the eligibility of Joint Ventures involving MBEs and WBEs and non-certified businesses for credit towards a Contract Goal.

(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 will be reviewed periodically by the Administrator. Failure of the business to seek recertification by filing the necessary documentation with the Administrator as required will result in decertification.

(k) It is the responsibility of the certified 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 will result in the business' decertification.

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

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

### **Section 11. Appeals**

A 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 the date of the letter denying certification, recertification, 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 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 documents including the written request for appeal and will render a decision within thirty (30) calendar days of receipt of a timely appeal. The Executive Director's decision will be the final decision on the matter and is not subject to appeal.

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

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

In fulfillment of this policy to provide MBEs and WBEs full and equitable opportunities to participate on District contracts as both Prime Contractors and Subcontractors, the District will establish Annual Aspirational Goals for MBE and WBE 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 13. Contract Goals**

(a) The Administrator, based upon the information provided by the User Department, will establish Contract Goals for Construction Contracts based upon the availability of at least three (3) MBEs and three (3) WBEs registered on the District's Vendor List to perform the anticipated 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 cost is for the purchase of equipment, the Administrator may designate goals for only that portion of the contract relating to construction work and related supplies or modify the limitations on the credit for MBE and WBE suppliers.

(c) The Contract 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 14. Counting MBE and WBE Participation Towards Contract Goals**

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

(b) If a business is certified as both a MBE and a WBE, the Bidder may count the business' participation either toward the achievement of its MBE or WBE Contract Goal, but not both. Participation by a business certified as both an MBE 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 Prime Contractor may count the entire amount of that portion of a contract that is performed by MBEs or WBEs own forces, including the cost of supplies and materials obtained and installed by the MBE or WBE for the work on the contract, and supplies

purchased or equipment leased by the MBE or WBE used to directly perform the work on the contract, except supplies and equipment the MBE or WBE purchases or leases from the Prime Contractor or the Prime Contractor's Affiliate.

(e) Where a Bidder or first-tier Subcontractor engages in a Joint Venture to meet the Contract Goal, the Administrator 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, 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 or WBE participation that will be credited towards the Contract Goal. The Joint Venture's Utilization Plan must evidence how it will meet the 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 Revised Appendix D. The MBE or WBE Joint Venture partner must have a history of proven 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 or WBE Joint Venture partner will be responsible and the assigned individuals must be clearly designated in the Joint Venture 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 or WBE Joint Venture partner's participation to be credited towards the Contract Goals.

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

(g) Only expenditures to a MBE or WBE that is performing a Commercially Useful Function will be counted towards the Contract Goals.

(i) A business is considered to perform a 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 business must pay all costs associated with personnel, materials, and equipment. The business 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 business cannot share employees with the Prime Contractor or its Affiliates. No payments for use of equipment or materials by the business 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 business.

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

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

(iv) If a business 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 business is presumed not to be performing a Commercially Useful Function, the business 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 first-tier Subcontractor MBEs or WBEs. No less than eighty-five (85) percent 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 business must furnish supporting documentation to rebut this presumption to the Administrator.

(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 Contract Goal attainment. The Bidder may count payments to MBE or WBE regular dealers or Manufacturers for Contract Goal attainment for no more than fifty (50) percent of each MBE or WBE goal, unless otherwise approved by the Administrator. If the Bidder exceeds the supplier exception amount allowable as stated in the bid documents, the bid will be viewed as non-responsive.

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

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

### ***Section 15. Utilization Plan Submission***

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

(b) A Bidder must either meet the 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 must submit with its bid a completed and signed Utilization Plan that lists for each Subcontractor and supplier proposed to be used to perform the scope of work on the contract: the name; address; telephone number; electronic mail address; six-digit North

American Industry Classification System code; a description of the work with contract item number; the dollar amount to be allocated to the business; the contact person of the business; and any other information required in the solicitation documents. Each Bidder's Utilization Plan must commit to MBE or 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 MBE/WBE Subcontractor's Letter of Intent for each business proposed to meet the Contract Goals in the form specified in the bid solicitation, with a copy of each MBE or WBE current Letter of Certification from a state or local government or agency, or documentation demonstrating that the business is a MBE or 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 MBE/WBE Subcontractor's Letter of Intent, the terms stated on the Utilization Plan will control. An original or scanned copy of the MBE/WBE Subcontractor's Letter of Intent will be acceptable.

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

(i) Good Faith Efforts will include, but are not limited to:

(1) Attending the mandatory pre-bid conference conducted by the District to acquaint Prime Contractors with MBEs and WBEs available to provide relevant goods and services and to inform MBEs and WBEs of subcontracting opportunities on a contract.

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

(3) Soliciting, not less than fifteen (15) calendar days before the bid opening date, through reasonable and available means (*e.g.*, written notices, advertisements on social media) MBEs and WBEs that can provide services in the anticipated scopes of subcontracting on the contract.

(4) Providing MBEs and 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 to prepare an informed response to a Prime Contractor solicitation and following up initial solicitations to answer questions and encourage MBEs and WBEs to submit bids.

(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; MBE and WBE assistance groups; local, state, and federal minority 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 investigation may be grounds for the rejection of a bid submission or a Waiver Request.

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

(iv) Thereafter, the Administrator will determine whether to grant the Waiver Request based on the Bidder's Good Faith Efforts at the time of the bid submission.

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

(f) A Prime Contractor's submission of a Utilization Plan that commits to MBE or WBE participation equal to or greater than the Contract Goals does not provide a basis for a higher bid, an increase in contract price, or a later change order.

(g) The requirement to submit a Utilization Plan and MBE/WBE Subcontractor's Letter of Intent applies when the individual project is awarded under a Job Order Contract.

(i) A Prime Contractor awarded a Job Order Contract must submit with each work order issued under such a contract its Utilization Plan that lists the name, address, telephone number, electronic mail address, and contact person for each MBE and WBE to be used on the work order, as well as a description of work to be performed

and the dollar amount to be allocated to the MBE or WBE. The Prime Contractor must submit with each work order a MBE/WBE Subcontractor's Letter of Intent from each certified business.

(ii) A Prime Contractor awarded a Job Order Contract will be subject to the compliance monitoring provisions 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 must be documented as provided in this Revised Appendix D.

#### **Section 16. Bid Submission Compliance Review**

(a) The Director, in coordination with the Administrator, will declare 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 participation equal to or greater than the Contract Goals unless the Bidder submitted with its bid a request a total or partial waiver of the Contract Goals.

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

(c) Prior to the award of any contract, the Administrator will review the Utilization Plan, MBE/WBE Subcontractor's Letter of Intent, Letter of Certification, Contractor Information, and Waiver Request Form submitted by the apparent low Bidder and conduct any other investigation the Administrator deems appropriate to determine compliance.

(d) Within thirty (30) calendar days after request, the Prime Contractor must furnish executed copies of all MBE and WBE subcontracts to the Administrator. Subsequently, the Prime Contractor will obtain and submit a copy of all MBE and WBE contracts at all Tiers within five (5) calendar days of a written request.

(e) The Prime Contractor will set timetables for the use of its Subcontractors before ten (10) percent of the work is completed. Timetables may be modified during contract performance with the prior written approval of the Administrator.

(f) If requested by the Administrator, the Prime Contractor must submit a MBE and WBE work plan projecting the work tasks associated with a certified business' commitments prior to the award of the contract. The work plan must provide a description of the work to be subcontracted to MBEs and WBEs and non-certified businesses and the dollar amount, as well as the name of all Tiers of Subcontractors. The work plan will become a part of the Prime Contractor's commitment and the contract record and may not be changed without prior written approval of the Administrator.

## **Section 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) Following the award of a contract, the Administrator will review the Prime Contractor's compliance with its MBE and WBE commitments during the performance of the contract.

(b) The Prime Contractor will be required to submit the Affirmative Action Monthly MBE/WBE Status Report providing the information in the written format specified by the Administrator. Evidence of MBE and WBE Subcontractor participation and payments must be submitted as required 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.

(c) District contract compliance officers and auditors, or their designees, must have access to the Prime Contractor's and Subcontractor's Books and Records, including certified payroll records, bank statements, employer business tax returns, and all records including all computer records and books of account to determine Prime Contractor and Subcontractor compliance with Program requirements. The District has the sole discretion to perform audits at any time and without notice to the Prime Contractor or Subcontractor. A Prime Contractor must provide the Administrator with any additional compliance documentation within ten (10) calendar days of receipt of a written request.

(d) If District personnel observe that any Subcontractor other than those listed on the Utilization Plan is performing work or providing materials or equipment for those MBE and WBE Subcontractors listed on the Utilization Plan, the Prime Contractor will be notified in writing of an apparent violation and progress payments may be withheld. The Prime Contractor will have the opportunity to meet with the Administrator prior to a finding of 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 of the Contract Goals has been granted, the Prime Contractor must continue to make Good Faith Efforts during the performance of the contract to meet the Contract Goals, and the Administrator will provide technical assistance with respect to such efforts. The Administrator will require the Prime Contractor to provide documentation of its continuing Good Faith Efforts in attempting to fulfill the Contract Goals.

(g) The Prime Contractor cannot make any changes to the approved Utilization Plan 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 Subcontractor with its own forces or those of an Affiliate, a non-certified business, or another MBE or WBE. Failure to obtain the prior written approval of the Administrator will constitute a breach of the contract and subject the Prime Contractor to any and all available sanctions. Additionally, the participation of certified businesses that did not receive prior written approval by the Administrator will not be counted towards the Contract Goals.

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

(1) The listed MBE or WBE Subcontractor fails or refuses to execute a written contract.

(2) The listed MBE or WBE Subcontractor becomes bankrupt, insolvent, or exhibits credit unworthiness.

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

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

(5) The listed MBE or WBE 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 Subcontractor is ineligible to receive credit for the type of work required.

(7) The MBE or WBE owner dies or becomes disabled rendering the business unable to complete 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 so that the Prime Contractor can self-perform the work or substitute another MBE or WBE or non-certified Subcontractor to perform the work.

(iii) The Prime Contractor must give the MBE or WBE notice in writing, with a copy to the Administrator, of its intent to request to terminate 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 or WBE Subcontractor for any reason, the Prime Contractor must make Good Faith Efforts as defined herein to find a substitute MBE or WBE Subcontractor to meet its MBE or WBE contractual commitment. Its Good Faith Efforts must be directed at finding another MBE or WBE to perform or provide at least the same amount of work, material, or service under the contract as the original MBE or WBE to the extent necessary to meet the Contract Goals.

(v) The Prime Contractor must submit a MBE/WBE Subcontractor's Letter of Intent for each proposed new MBE or WBE Subcontractor.

(vi) The Administrator will 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 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 elimination of the work to be performed by a MBE or WBE, the Prime Contractor must notify the Administrator in writing and request an amendment of its Utilization Plan. A letter of release signed by the Subcontractor must be included with the request.

(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 the contract. When contract work is added, the Prime Contractor must award that work to the MBE or WBE listed in its Utilization Plan, if the original scope of work is to be performed by a MBE or WBE 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 ten (10) calendar days of its determination to request an amendment of its Utilization Plan. The Prime Contractor must give the MBE or WBE notice in writing, with a copy to the Administrator, of its intent to request a reduction in the scope of work, and the detailed reasons for the request. The Administrator will review the request for the reduction and decide whether to approve the request based on the Prime Contractor's documented compliance with these provisions.

(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 of the original contract value, the Prime Contractor will increase the utilization of all MBEs or WBEs, where feasible, so that the total value of the percentage of work performed by MBEs or 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 utilization committed to in the Prime Contractor's original Utilization Plan.

### ***Section 19. Compliance System***

All contractors are to comply with Diversity'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) Where the Administrator believes that the Prime Contractor or Subcontractor has: committed fraud or made misrepresentations to the District; failed to comply with this Revised Appendix D or its contract; provided false or fraudulent documentation; or failed

to comply with its Utilization Plan, the Administrator will notify the Prime Contractor and/or Subcontractor in writing of such determination of non-compliance and withhold up to one hundred (100) percent of the current progress or final payment due to the Prime Contractor. 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 or WBE contractual commitments and to what extent the Prime Contractor has made Good Faith Efforts to achieve such commitments. The Prime Contractor and/or 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 is complying.

(b) If the Administrator determines that the Prime Contractor and/or Subcontractor is not in compliance and the violation cannot be resolved by conference and conciliation, the Administrator will refer the matter to the Executive Director. 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 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 will have ten (10) calendar days after receipt of the Show Cause notice within which to file a response in writing with the Administrator. A hearing before a duly appointed Hearing Officer will be convened to provide the Prime Contractor and/or Subcontractor an opportunity to be heard with respect to the non-compliance. Within twenty (20) calendar days after the Executive Director's referral, the Hearing Officer will schedule a hearing to be held within twenty (20) calendar days of receipt of the referral. The District will carry the burden of proof as to non-compliance by a preponderance of the evidence. An official record will be kept with the Clerk of the District. All filings by the District or the 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 will conduct the Show Cause hearing and issue findings of fact, conclusions of law, and recommendations regarding disposition of the hearing. Procedures and rules governing the Show Cause hearings will be followed as adopted by the Board of Commissioners.

(iii) All Show Cause hearings must be conducted on the record and all testimony must be under oath and transcribed verbatim by a court reporter. All parties will be given the opportunity to present and respond to evidence. The Hearing Officer will conduct a fair hearing and maintain order and 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, the Hearing Officer 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 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 non-compliance with this Revised Appendix D including, but not limited to:

(1) Withholding up to fifty (50) percent of the current progress or final payment due the Prime Contractor until the Administrator determines that the Prime Contractor is in compliance. Following the withholding of up to fifty (50) percent of the current progress payment, up to one hundred (100) percent of further progress payments may be withheld until the Prime Contractor is found to be in compliance. 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 or WBE contractual commitments and to what extent the Prime Contractor has made Good Faith Efforts to achieve such commitments.

(2) Declaring the Prime Contractor and/or Subcontractor to be non-responsible and disqualify/debar the Prime Contractor and/or Subcontractor from eligibility to bid on District Construction Contracts for a period of not less than one (1) year and not more than three (3) years. A business that is disqualified pursuant to the provisions of this Revised Appendix D will be precluded from participation on any District contract as a Prime Contractor, Subcontractor, and supplier for the period of disqualification. In cases 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, and not less than two (2) years and not more than three (3) years for the third violation from the date of disqualification established by the Board of Commissioners' Order.

(3) Rejecting bid submissions by the Prime Contractor for other contracts not yet awarded when it is determined that 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 that has misrepresented its MBE or WBE status and failed to operate as an independent business performing a Commercially Useful Function, declaration by the Director that the MBE or WBE is ineligible to participate as a MBE or WBE in District contracts. A business that has been declared ineligible may not participate as a MBE or 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 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 District's attorneys' fees and costs may be assessed against the Prime Contractor and/or Subcontractor where the Hearing Officer makes a finding that the Prime Contractor and/or Subcontractor used false documentation, made false statements, or committed fraud or misrepresentation.

(d) Notice of sanctions imposed by the Board of Commissioners for violations of this Revised Appendix D by the Prime Contractor, 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.

(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 21. Federal Regulations***

The provisions of this Revised Appendix D shall not apply to any contract in which there will be monetary contributions received from a federal agency and the requirements of the 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 Equal Employment Opportunity Commission requirements.

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

The Administrator will provide periodic reports to the Board of Commissioners containing the following information:

- (a) The level of MBE or WBE participation achieved during the prior calendar year or other time period on District Construction Contracts subject to this Revised Appendix D; and
- (b) Identification of any 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 23. Sunset Provision***

This Revised Appendix D will expire on December 31, 2027, 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 District's Chicago construction industry and geographic market area.

**Section 24. Repeal of Prior Inconsistent Provisions**

All enactments and provisions previously adopted by the Board of Commissioners with regard to affirmative action on Construction Contracts subject to this Revised Appendix D that are inconsistent with the provisions contained in this Revised Appendix D are hereby expressly repealed.

**Section 25. Severability**

If any clause, sentence, paragraph, section, or part of this Revised Appendix D is held by a court of competent jurisdiction to be invalid, illegal, or unenforceable, that judgment will not affect, impair, or invalidate the remainder 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 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 26. Effective Dates**

This amendment to Revised Appendix D will be effective and apply to all bids for Construction Contracts advertised after 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