

AGENDA

ANNUAL MEETING OF THE BOARD OF COMMISSIONERS OF THE PUBLIC BUILDING COMMISSION OF CHICAGO TO BE HELD OCTOBER 1, 2004 AT 8:30 A.M. IN THE SECOND FLOOR BOARD ROOM, RICHARD J. DALEY CENTER

A. GENERAL

- A1. Roll Call.
- A2. Consideration of approval of minutes of the Regular Meeting held September 14, 2004.
- A3. Nomination and election of Chairman and Officers for terms ending September 30, 2005.
- A4. Consideration of approval of Proposed Change Orders to various contracts.
- A5. Report on Notice of Awards for various contracts \$25,000 and under.
- A6. Report by Executive Director concerning the publication of the Public Building Commission's 2003 Annual Report.
- A7. Appointment by the Chairman of members of the Audit Committee of the Public Building Commission of Chicago.
- A8. Consideration of approval to amend Section 4.08 of the By-Laws of the Public Building Commission relative to the establishment of an Administrative Operations Committee and the duties of such Committee.
- A9. Appointment by the Chairman of members of the Administrative Operations Committee of the Public Building Commission of Chicago.
- A10. Consideration of approval of the proposed amendment of Special Conditions regarding Remedial Program for Utilization of Minority Business Enterprise (MBE) and Women Business Enterprise (WBE) and Economically Disadvantaged Firms (Previously approved February 1992).
- A11. Consideration of approval of policy for the Public Building Commission to appoint the Architect of Record with responsibility for all phases of design and administration on projects undertaken on behalf of User Agencies.
- A12. Consideration of approval of proposed resolution requiring approval by the Board of Commissioners of additional fees to be paid on account of Additional Services performed on professional service agreements and review as to form and legality of contracts awarded by the Public Building Commission.

- A13. Report by the Severance Committee concerning proposed amendment to the Public Building Commission of Chicago Severance Policy (Previously approved January 13, 1998). **No back-up, oral report.**
- A14. Report by the Executive Director concerning criteria and standards of review for pre-qualification of contractors to perform work on contracts awarded by the Public Building Commission.
- A15. Report and recommendation by the Executive Director concerning the Public Building Commission's 2005 Administrative Expense Budget.
- A16. Consideration of approval of proposed Richard J. Daley Center Operating and Capital Budget for 2005.
- A17. Report by Executive Director regarding the Public Building Commission's coordination of Mayor Daley's Skill Builders Program.

B. CITY OF CHICAGO

- B1. Consideration of approval of a request from the Office of Emergency Management and Communications to accept the city's Public Camera Network Project, as an expansion to the current Operations Center Project within the OEMC 911 facility located at 1411 West Madison Street.

Consideration of approval to convene an Executive Session under the Open Meetings Act to discuss the 2003-2004 Legal Services Annual Report summarizing the status of land acquisition and litigation under Section 2(c)5 and Section 2(c)11 of the Open Meetings Act.

C. EXECUTIVE SESSION

- C1. Report by Legal Counsel regarding the 2003-2004 Legal Services Annual Report summarizing the status of land acquisition and litigation.

Special Conditions Regarding Remedial Program for
Utilization of Minority Business Enterprise ("MBE"),
Women Business Enterprise ("WBE") and
Economically Disadvantaged Firms

SECTION 1

INTRODUCTION

SECTION 1.1 In February 1992 the Board of Commissioners (the "Board") of the Public Building Commission of Chicago (the "Commission") adopted a Remedial Program for Utilization of MBE and WBE firms (the "Program") as a means of providing open access to the award of Commission Contracts and to remedy the effects of racial and sexual discrimination which have placed such firms at a competitive disadvantage in the award of Commission Contracts.

SECTION 1.2 In 2003, District Judge James B. Moran in the case *Builders Association of Greater Chicago v. City of Chicago*, No. 96 C 1122 (N.D. Ill.) 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 MBE and WBE firms.

SECTION 1.3 The Commission has a compelling interest in preventing public funds from perpetuating the past and current discrimination against MBE and WBE firms which currently exist in the market.

SECTION 1.4 The February 1992 Program adopted by the Commission has not been sufficient to ameliorate the effects of racial and gender discrimination in the marketplace.

SECTION 1.5 The remedies adopted herein by the Commission will not overly burden non-MBE and non-WBE firms in the award of Commission Contracts.

SECTION 1.6 The Commission will periodically review MBE and WBE participation on contracts awarded by the Commission to insure that the Commission continues to have a compelling interest in remedying discrimination against MBE and WBE firms in the award of Commission Contracts and that the measures adopted herein remain narrowly tailored to accomplish that objective.

SECTION 2

POLICY STATEMENT

SECTION 2.1 It is the policy of the Commission to ensure competitive business opportunities for MBE and WBE firms in the performance of Contracts, to prohibit discrimination in the award of or participation in Contracts, and to abolish arbitrary barriers to full participation in Contracts by all persons, regardless of race, sex or ethnicity. Therefore, during the performance of this Contract, the Contractor must agree that it shall not discriminate against any person or business on the basis of race, color, religion, ancestry, age, marital status, physical or mental handicap, unfavorable discharge from military service, parental status, sexual orientation, national origin or sex, in the solicitation or the purchase of goods and services or the subcontracting of work in the performance in this Contract.

SECTION 2.2 The Commission shall require the Contractor also agrees to take affirmative action to ensure that MBE and WBE firms shall have the maximum opportunity to compete for and perform subcontracts with respect to this Contract.

SECTION 3

SECTION 3.1 For purposes of this Special Condition, the following definitions shall apply:

- (a) "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 whether persons or entities are affiliates, the Commission shall consider all appropriate factors including common ownership, common management and contractual relationships. Affiliates shall be considered together in determining whether a firm is a Small Business Enterprise.
- (b) "Broker" means a person or entity that fills orders by purchasing or receiving supplies from a third party supplier rather than out of existing inventory and provides no commercially useful function other than acting as a conduit between a supplier and a customer.
- (c) "Certification" or "Certified" shall mean a person or entity qualified or granted certification as a Minority Business Enterprise (MBE) or Woman Business Entity (WBE) by the City of Chicago.

(d) "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 as a joint venture.

(e) "Construction Contract" means a contract for the construction, repair, alteration, renovation or improvement of any building, facility or other structure.

(f) "Contract" means any contract awarded by the Commission which is to be paid from funds belonging to or administered by the Commission regardless of source.

(g) "Contract Specific Goals" means the subcontracting goals for MBE and WBE participation established for a particular contract based upon the availability of MBEs and WBEs to perform and anticipated scope of work of the contract and the Commission's progress towards meeting the aspirational goals.

(h) "Contractor" means any person or business entity that seeks to enter into a Construction Contract with the Commission and includes all partners, affiliates and joint ventures of such person or entity.

(i) "Economically disadvantaged" means an individual whose personal net worth is less than \$750,000, indexed annually for the Chicago Metro Area Consumer Price Index published by the U.S. Department of Labor, Bureau of Labor Standards, beginning January, 1999.

(j) "Executive Director" means the Executive Director of the Commission or his duly designated representative as appointed in writing.

(k) "Good faith efforts" means actions undertaken by a Contractor to achieve a Contract Specific Goal that by their scope, intensity and appropriations to the objective can reasonably be expected to fulfill the Program's requirements.

(l) "Joint venture" means an association of two or more persons or entities or any combination of two or more business enterprises and persons numbering two or more, proposing to perform a single for-profit business enterprise, in which each joint venture partner contributes property, capital, efforts, skill and knowledge, and in which the MBE or WBE is responsible for a distinct, clearly-defined portion of the work of the contract and whose share in the capital contribution, control, management, risks and profits of the joint venture is equal to its ownership interest. Joint ventures must have an agreement in writing specifying the terms and conditions of the relationships between the parties and their relationship and responsibilities to the contract.

(m) "Local business enterprise" means, for purposes of Certification, a business entity located within the counties of Cook, DuPage, Kane, Lake, McHenry or Will in the State of Illinois (the "Six County Region"), which has the majority of its regular, full time work force located within the Six County Region.

(n) "Minority" means:

(i) Any individual in the following racial or ethnic groups, members of which are rebuttably presumed to be socially disadvantaged:

(A) African-Americans or Blacks, which includes persons having origins in any of the Black racial groups of Africa;

(B) Hispanics, which includes persons of Spanish culture with origins in Mexico, South or Central America or the Caribbean Islands, regardless of race; and

(ii) Individual members of other groups, including but not limited to Asian-Americans, Arab-Americans and Native-Americans, found by the Commission 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 Chicago area markets or to do business with the Commission.

(n) "Minority-owned business enterprise" or "MBE" means a small local business enterprise which is at least 51 percent owned by one or more economically disadvantaged minority persons, or in the case of a publicly held corporation at least 51 percent of all classes of the stock of which is owned by one or more economically disadvantaged minority persons whose management, policies, major decisions and daily business operations are independently managed and controlled by one or more economically disadvantaged minority persons.

(o) "Owned" means having all of the customary incidents of ownership, including the right of disposition and sharing in all of the risks, responsibilities and profits commensurate with the degree of ownership.

(p) "Personal net worth" means the net value of the assets of an individual after total liabilities are deducted. An individual's personal net worth does not include the individual's ownership interest in an applicant or other certified MBE or WBE or the individual's equity in his or her primary place of residence. As to

assets held jointly with his or her spouse, 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, 401(K) 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.

(q) "Program" means the minority- and women-owned business enterprise construction procurement program established in this special condition.

(r) "Small business enterprise" means a small business as defined by the U.S. Small Business Administration pursuant to the business size standards found in 13 C.F.R Part 121 relevant to the scope(s) of work the firm seeks to perform on Commission contracts. A firm is not an eligible small business enterprise in any fiscal year in which its gross receipts, averaged over the firm's previous five fiscal years, exceed the size standards of 13 C.F.R Part 121.

(s) "Small local business enterprise" means a business that is a small business enterprise and a local business enterprise.

(t) "Woman" means a person of the female gender, who is presumed to be socially disadvantaged.

(u) "Women-owned business enterprise" or "WBE" means a small local business enterprise which is at least 51 percent owned by one or more economically disadvantaged women or in the case of a publicly owned business, at least 51 percent of all classes of the stock of which is owned by one or more economically disadvantaged women, whose management, policies, major decisions and daily business operations are independently managed and controlled by one or more economically disadvantaged women.

SECTION 4

ASPIRATIONAL AND CONTRACT SPECIFIC GOALS

SECTION 4.1 Upon the effective date of these Special Conditions, the bi-annual aspirational goals shall be to award 24 percent of the annual dollar value of all Commission Construction Contracts to certified MBEs and 4 percent of the annual dollar value of all Commission Contracts to qualified WBEs and 25 percent of the annual dollar value of all other Commission Contracts to certified MBEs and 5 percent of the annual dollar value of the all other Commission Contracts to certified WBEs.

The Commission shall establish subsequent bi-annual aspirational goals for the award of Commission Contracts based on the best available evidence. Quotas are hereby prohibited.

SECTION 4.2 As one method to achieve the aspirational goals, the Executive Director is authorized to establish contract specific goals for MBE and WBE participation for each contract let through competitive bidding. Contract specific goals shall be based on normal industry practice, as determined in consultation with other governmental agencies, the scope of work of the contract, the availability of at least three MBEs and three WBEs to perform the functions of those individual contracts, and the Commission's progress to date towards meeting the bi-annual, aspirational goals of Section 4.1. The Executive Director shall implement administrative procedures to establish contract-specific goals.

SECTION 4.3 Each Bidder's commitment to utilization of certified MBE and WBE firms shall be considered as further evidence of the responsibility of the Bidder. Further, the Bidder must agree to use its best efforts to include MBE and WBE firms in any Contract modification work that increases the Contract value of ten (10%) percent of the initial Contract value or fifty thousand (\$50,000) dollars, whichever is less.

SECTION 4.4 Failure to carry out the commitments and policies set forth in this Program shall constitute a material breach of contract and may result in termination of the Contractor or such other remedy as the Commission deems appropriate.

SECTION 5

RACE AND GENDER-NEUTRAL MEASURES

SECTION 5.1 The Commission shall develop and use race and gender-neutral measures to facilitate the participation of small business enterprises in Commission Contracts. Race and gender-neutral measures shall be used to the maximum feasible extent to meet the bi-annual aspirational goals established in Section 4.1. These measures may include, but are not limited to:

- (a) Arranging solicitation times for the presentations of bids, specifications, and delivery schedules so as to facilitate the participation of interested contractors and subcontractors;
- (b) Segmenting contracts so as to facilitate the participation of small business enterprises;
- (c) Providing assistance to businesses in overcoming barriers such as difficulty in obtaining bonding and financing;

- (d) Providing timely informational programs on contracting procedures, bid preparation and specific contracting opportunities;
- (e) Holding pre-bid conferences, where appropriate, to explain the projects and to encourage contractors to use small business enterprises as subcontractors;
- (f) Adopting prompt payment procedures, including requiring by contract that prime contractors pay subcontractors within specified days of receipt of payment from the Commission and where necessary, issuing payments directly to subcontractors in lieu of payments to prime contractors;
- (g) Reviewing bonding, insurance and retainage requirements so as to eliminate unnecessary barriers to and reduce the burdens of contracting with the Commission;
- (h) Expediting payments and advancing payments to cover start-up and mobilization costs, where appropriate;
- (i) Providing information concerning small business loan programs and other programs providing access to capital to small business enterprises;
- (j) Collecting information from all prime contractors on Commission construction contracts detailing the bids received from all subcontractors for Commission construction contracts and the expenditures to subcontractors utilized by prime contractors on Commission construction contracts;
- (k) At the discretion of the Executive Director, letting a representative sample of Commission construction contracts without goals to determine MBE and WBE utilization in the absence of goals;
- (l) Providing a bid preference on construction contracts of 2 percent for firms bidding on prime contracts whose principal place of business is located in the City of Chicago;
- (m) Limiting the self-performance of prime contractors, where appropriate;
- (n) Creating a target market program for bidding on Commission prime construction contracts by small local business enterprises;
- (o) To the extent practicable, awarding contracts requiring the expenditure of funds not exceeding \$5,000 to small local business enterprises; and
- (p) Referring complaints of discrimination against MBEs or WBEs to appropriate authorities, for investigation and resolution.

SECTION 6

CONTRACT PROVISION

SECTION 6.1 Each Commission Contract let through competitive bidding with an estimated value in excess of \$5,000 for which contract specific goals have been established shall contain the following requirements:

(a) Include with the bid specifications for each competitively bid contract a list of certified MBEs and WBEs that are available to perform the work required by the specifications or otherwise make such a list available to potential contractors.

(b) A description of this Special Condition and the program including the requirement of an approved compliance plan; the requirements related to achieving the goals and counting MBE or WBE participation towards meeting the goals; if goals are not met, the requirement of documentation of the Contractor's good faith efforts to achieve the goals including the good faith efforts of MBEs and WBEs to achieve the goal for which they do not qualify; and a requirement that the Contractor commit to the expenditure of at least the dollar value of the contract specific goals with one or more MBEs and one or more WBEs or make good faith efforts to do so. This commitment may be met by the contractor's status as a MBE or WBE, a joint venture with one or more MBEs or WBEs as prime contractor (to the extent of the MBE's or WBE's participation in such joint venture), subcontracting a portion of the work to one or more MBEs or WBEs, purchasing materials or services for the work from one or more MBEs or WBEs or by any combination of the foregoing;

(c) A requirement that prime contractors on Commission construction contracts notify MBEs and WBEs utilized on those contracts about opportunities on contracts without affirmative action contracting goals;

(d) A requirement that where the Contractor cannot achieve the contract specific goals it must document its good faith efforts to do so. In determining whether the contractor has made such good faith efforts, the performance of other contractors in meeting the goals may be considered. The Executive Director or his designee shall consider, at a minimum, the Contractor's efforts to do the following:

(i) Soliciting through reasonable and available means the interest of MBEs or WBEs that have the capability to perform the work of the contract. The contractor must solicit this interest within sufficient time to allow the MBEs or WBEs to respond. The contractor must take appropriate steps to follow up initial solicitations with interested MBEs or WBEs.

- (ii) Provide interested MBEs or WBEs with adequate information about the plans, specifications and requirements of the contract, including addenda, in a timely manner to assist them in responding to the solicitation.
- (iii) Negotiating in good faith with interested MBEs or WBEs that have submitted bids. Documentation of negotiation must include the names, addresses and telephone numbers of MBEs or WBEs that were solicited; the date of each such solicitation; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why agreements could not be reached with MBEs or WBEs to perform the work. That there may be some additional costs involved in solicitation and using MBEs and WBEs is not a sufficient reason for a contractor's failure to meet the goals, as long as such costs are reasonable.
- (iv) Not rejecting MBEs or WBEs as being unqualified without sound reasons based on the thorough investigation of their capabilities. The MBEs' or WBEs' standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations are not legitimate causes for rejecting or not soliciting bids to meet the goals.
- (v) Making a portion of the work available to MBE or WBE subcontractors and suppliers and to select those portions of the work or material consistent with the available MBE or WBE subcontractors and suppliers, so as to facilitate meeting the goals.
- (vi) Making good faith efforts despite the ability or desire of a Contractor to perform the work of a contract with its own organization. A Contractor that desires to self-perform the work of a contract must demonstrate good faith efforts unless the goals have been met.
- (vii) Selecting portions of the work to be performed by MBEs or WBEs in order to increase the likelihood that the goals will be met. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate MBE or WBE participation even when the Contractor might otherwise prefer to perform these work items with its own forces.
- (viii) Making efforts to assist interested MBEs or WBEs in obtaining bonding lines of credit or insurance as required by the Commission or Contractor.
- (ix) Making efforts to assist interested MBEs or WBEs in obtaining necessary equipment, supplies, materials or related assistance or services, including participation in a mentor-protégée program; and

- (x) Effectively using the services of the Commission; minority or women community organizations; minority or women contractors' groups; local, state and federal minority or women business assistance offices; and other organizations to provide assistance in the recruitment and placement of MBEs or WBEs.
- (e) Provide a procedure whereby the Contractor may protest the determination that it did not make good faith efforts.
- (f) Negotiate with any Contractor whose contract is in excess of \$25,000 in value and is not awarded by competitive bidding a commitment, where practicable, to meet at least the aspirational goals as percentages of the dollar value of the contract.
- (g) Include MBEs and WBEs on solicitation mailing lists and encourage that they be solicited for suitable contracts.
- (h) Publicize the Program through appropriate means, in order to attract qualified MBEs and WBEs.

SECTION 6.2 To achieve the contract specific goals, the Executive Director shall undertake, in addition to the other measures provided herein, the following:

- (a) Include uniform provisions permitting the termination of the contract by the Commission upon the disqualification of the Contractor as a MBE or WBE if the contractor's status as MBE or WBE was a factor in the award of the contract and such status was misrepresented by the Contractor;
- (b) Include uniform provisions permitting termination of the contract by the Commission upon the disqualification of any MBE or WBE if the subcontractor's or supplier's status as a MBE or WBE was a factor in the award of the contract and the status of the subcontractor or supplier was misrepresented by the contractor. In the event that the contractor is determined not to have been involved in any misrepresentation of the status of the disqualified subcontractor or supplier, the contractor shall discharge the disqualified subcontractor or supplier and make good faith efforts to engage a qualified MBE or WBE replacement;
- (c) Include uniform provisions allowing the Executive Director access to the Contractor's books and records, including without limitation payroll records, tax returns and records and books of account, to determine the Contractor's compliance with its commitment to MBE and WBE participation and the status of any MBE or WBE performing any portion of the contract. This provision shall be in addition to, and not a substitute for, any other provision allowing inspection of the Contractor's records by the Commission for any purpose;

(d) Review each proposed contract modification request that, by itself or aggregated with previous modification requests, increases the contract value by ten percent of the initial contract value or \$50,000.00, whichever is less, for opportunities to increase participation of MBEs or WBEs. Where the proposed contract modification involves work which can be performed by MBEs or WBEs already performing work on the contract such MBEs and WBEs shall participate in such work specified in the contract modification;

(e) Insert in each contract containing a commitment to MBE and/or WBE participation:

(i) A requirement of periodic reporting by the Contractor to the Executive Director on all expenditures made to achieve compliance with the foregoing provisions. Such reports shall include the name and business address of each subcontractor and supplier actually involved in the contract, a description of the work performed and/or product or service supplied by each such subcontractor or supplier, the date and amount of each expenditure, and such other information as may assist the Executive Director in determining the Contractor's compliance with the foregoing provisions;

(ii) A requirement that the Contractor cannot make changes to its contractual MBE and WBE commitments or substitute such MBE or WBE subcontractors without the prior written approval of the Executive Director. Unauthorized changes or substitutions, including performing the work designated for a subcontractor with the contractor's own forces, shall be a violation of this section and a breach of the contract with the Commission, and may cause termination of the contract for breach, and/or subject the Contractor to contract remedies or other sanctions. The facts supporting the request must not have been known nor reasonably should have been known by the parties prior to entering into the subcontract.

(f) Substitutions of the subcontractor shall be permitted only on the following bases:

(I) Unavailability after receipt of reasonable notice to proceed;

(ii) Failure of performance;

(iii) Financial incapacity;

(iv) Refusal by the subcontractor to honor the bid or proposal price or scope;

(v) Mistake of fact or law about the elements of the scope of work of a solicitation where a reasonable price cannot be agreed;

- (vi) Failure of the subcontractor to meet insurance, licensing or bonding requirements;
- (vii) The subcontractor's withdrawal of its bid or proposal; or
- (viii) Decertification of the subcontractor as MBE or WBE.

Where the Contractor has established the basis for the substitution to the satisfaction of the Executive Director, it must make good faith efforts to substitute with a MBE or WBE subcontractor. If the MBE or WBE contract specific goal cannot be reached and good faith efforts have been made, the Contractor may substitute with a non-MBE or non-WBE. If a Contractor plans to hire a subcontractor on any scope of work that was not previously disclosed within the compliance plan the Contractor must obtain the approval of the Executive Director to modify the compliance plan and must make good faith efforts to ensure that MBEs or WBEs have a fair opportunity to bid on the new scope of work.

SECTION 7

DETERMINING MBE/WBE UTILIZATION

SECTION 7.1 The methodology for determining MBE and WBE utilization shall be determined for purposes of analysis with respect to this contract as follows:

- (a) The total dollar value of the contract awarded to the certified MBE or WBE firm shall be credited to such participation. Only minority business participation may be counted toward MBE participation and only women business participation may be counted toward WBE participation.
- (b) The total dollar value of a contract with a firm owned and controlled by minority women is counted toward either the MBE or WBE goal, but not both. The Contractor employing the firm may choose the goal to which the contract value is applied. Various work done by one and the same subcontractor shall be considered, for the purpose of this principle, as work effectively done under one subcontract only, which subcontractor may be counted toward only one of the goals, not toward both.
- (c) In a firm owned and controlled by both minority males and minority females, if the minority females own and control 51% or more of the business, then the total dollar value of a contract with such firm may be counted toward either MBE participation or WBE participation, but not both. If the minority females, however, own and control less than 51% of the firm, then the firm's participation may be counted only toward MBE utilization.

(d) A Contractor may count toward its MBE or WBE goal the portion of the total dollar value of a contract with an eligible joint venture equal to the percentage of the ownership and control of the MBE or WBE partner in the joint venture. A joint venture seeking to be credited for MBE participation may be formed among certified MBE and WBE firms, or between certified MBE and WBE firms and a non-MBE/WBE firm. A joint venture satisfies the eligibility standards of this Program if the certified MBE or WBE participant of the joint venture:

(i) Shares in the ownership, control, management responsibilities, risks and profits of the joint venture; and

(ii) Is responsible for a clearly defined portion of work to be performed in proportion to the MBE or WBE ownership percentage.

(e) A Contractor may count toward its MBE and WBE goals only expenditures to firms that perform a commercially-useful function in the work of a contract. A firm 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. To determine whether a firm is performing a commercially-useful function, the Commission shall evaluate the amount of work subcontracted, industry practices and other relevant factors.

(f) Consistent with normal industry practices, a MBE or WBE firm may enter into subcontracts. If a MBE or WBE contractor subcontracts a significantly greater portion of the work of a contract than would be expected on the basis of normal industry practices, the MBE or WBE shall be rebuttably presumed not to be performing a commercially-useful function.

(g) A Contractor may count toward its goals expenditures to MBE or WBE manufacturers (i.e., suppliers that produce goods from raw materials or substantially alters them before resale).

(h) A Contractor may count toward its goals expenditures to MBE or WBE suppliers provided that the supplier performs a commercially-useful function in the supply process.

SECTION 8

SUBMISSION OF BID PROPOSALS

SECTION 8.1 The following schedules and documents constitute the Bidder's MBE/WBE compliance proposal and must be submitted at the time of the bid or proposal or within such extended period as provided in Section VII hereof:

(a) Evidence of Certification/Schedule A: Affidavit of MBE/WBE. A copy of each proposed MBE and WBE firm's Letter of Certification from the certifying agency must be submitted. Where the Bidder's MBE/WBE compliance proposal includes any MBE or WBE firm that is not currently certified (as evidenced by a Letter of Certification), "Schedule A: Affidavit of MBE/WBE" executed by the proposed MBE or WBE must be submitted.

(b) Schedule B: Affidavit of MBE/Non-MBE or WBE/Non-WBE Joint Ventures. Where the Bidder's MBE/WBE compliance proposal includes participation of any MBE or WBE as a joint venture participant on any tier, the Bidder must submit a "Schedule B: Affidavit of MBE/Non-MBE or WBE/Non-WBE Joint Venture" with an attached copy of the joint venture agreement proposed among the parties. The Schedule B and the joint venture agreement must clearly evidence that the MBE or WBE participant will be responsible for a clearly defined portion of the work to be performed and that the MBE or WBE firm's responsibilities are in proportion with its ownership percentage. In order to demonstrate the MBE or WBE participant's share in the ownership, control, management responsibilities, risks and profits of the joint venture, the proposed joint venture agreement should include specific details related to:

- (i) The contributions of capital and equipment;
- (ii) Work items to be performed by the MBE or WBE firm's own forces;
- (iii) Work items to be performed under the supervision of the MBE or WBE participant; and
- (iv) The commitment of management, supervisory and operational personnel employed by the MBE or WBE to be dedicated to the performance of the contract.

(c) Schedule C: Letter of Intent to Perform as a Subcontractor, Subconsultant, or Material Supplier, Schedule C, executed by the MBE/WBE firm (or Joint Venture Subcontractor) must be submitted by the Bidder for each MBE/WBE included on the Schedule D. Schedule C must accurately detail the work to be performed by the MBE or WBE firm and the agreed rates and prices to be paid.

(d) Schedule D: Affidavit of Prime Contractor Regarding MBE or WBE Utilization. A completed Schedule D committing to the utilization of each listed MBE or WBE firm. Unless the Bidder has submitted a completed request for a waiver of participation by MBE/WBE firms (See Request for Waiver procedures in Section VIII hereof), the Bidder must include the specific dollar amount of participation of each MBE/WBE firm listed on its Schedule D. The total dollar commitment to proposed MBE firms must at least equal the MBE goal, and the total dollar commitment to proposed WBE firms must at least

equal the WBE goal. Bidders are responsible for calculating the dollar equivalent of MBE or WBE utilization as percentages of their total base bid.

SECTION 8.2 The submittals must have all blank spaces on the Schedule pages applicable to the contract correctly filled in. Agreements between a Bidder and a MBE/WBE in which the MBE/WBE promises not to provide subcontracting quotations to other Bidders are prohibited.

SECTION 9

EVALUATION OF BID PROPOSALS

SECTION 9.1 During the period between bid opening and contract award, the submitted documentation will be evaluated by the Commission. The Bidder agrees to provide, upon request, earnest and prompt cooperation to the Executive Director or his designee in submitting to interviews that may be necessary, in allowing entry to places of business, in providing further documentation, or in soliciting the cooperation of a proposed MBE or WBE firm in providing such assistance. A bid may be treated as non-responsive by reason of the determination that the Bidder's proposal did not contain a sufficient level of Certified MBE or WBE participation, that the Bidder was unresponsive or uncooperative when asked for further information relative to the proposal, or that false statements were made in the Schedules.

SECTION 9.2 If the Commission's review of a Bidder's proposal concludes that the MBE or WBE proposal was deficient, the Commission shall promptly notify the Bidder of the apparent deficiency and instruct the Bidder to submit (within three (3) business days of such notice given by the Commission) a modification of the MBE or WBE Proposal, in proper format, which remedies the deficiencies cited. Failure to correct all deficiencies cited by the Commission will be cause for rejection of the Bidder's proposal as nonresponsive.

SECTION 9.3 Bidders will not be permitted to modify their MBE/WBE compliance proposal except insofar as directed to do so by the Commission. Therefore, all terms and conditions stipulated for prospective MBE and WBE subcontractors or suppliers should be satisfactorily negotiated prior to the submission to the Commission of the Bidder's MBE/WBE compliance proposal with the bid. If circumstances should arise, however, where a proposed MBE/WBE is no longer available, the process described in Section 6.2(f) should be followed.

SECTION 10

REQUEST FOR WAIVER

SECTION 10.1 If a Bidder is unable to identify qualified MBE and WBE firms to perform sufficient work to fulfill the MBE or WBE percentage goals for this Contract, the bid or proposal must include a written request for waiver. A request for waiver shall set forth the Bidder's

inability to obtain sufficient MBE and WBE firms notwithstanding good faith attempts to achieve such participation.

SECTION 10.2 Examples of such good faith efforts may include, but are not limited to, the following:

- (a) Attendance at the Pre-bid conference;
- (b) The Bidder's general affirmative action policies regarding the utilization of MBE and WBE firms, plus a description of the methods used to carry out those policies;
- (c) Advertisement in trade association newsletters and minority and women-oriented and general circulation media for specific sub-bids;
- (d) Timely notification of specific sub-bids to minority and women contractor assistance agencies and associations;
- (e) Description of direct negotiations with MBE and WBE firms for specific sub-bids, including:
 - (i) The name, address and telephone number of MBE and WBE firms contacted;
 - (ii) A description of the information provided to MBE and WBE firms regarding the portions of the work to be performed; and
 - (iii) The reasons why additional MBE and WBE firms were not obtained in spite of negotiations.
- (f) A statement of the efforts made to select portions of the work proposed to be performed by MBE and WBE firms (such as sub-supplier, transport, engineering, distribution, or any other roles contributing to production and delivery as specified in the contract) in order to increase the likelihood of achieving such participation.
- (g) As to each MBE and WBE contacted which the Bidder considers to be not qualified, a detailed statement of the reasons for the Bidder's conclusion.
- (h) Efforts made by the Bidder to expand its search for MBE and/or WBE firms beyond usual geographic boundaries.
- (i) General efforts made to assist MBE and WBE firms to overcome participation barriers.

SECTION 10.3 The Executive Director, after review and evaluation of the documents provided by the Bidder, may grant a waiver request upon the determination that:

- (a) Sufficient qualified MBE and/or WBE firms capable of providing the goods or services required by the contract are unavailable despite the good faith efforts of the Bidder;
- (b) The Bidder is the sole source for work to be performed under the contract; or
- (c) The price(s) quoted by potential MBE and/or WBE firms for goods or services is above competitive levels to an extent unwarranted by any increased cost of doing business attributable to the present effects of disadvantage or discrimination.

SECTION 11

REPORTING AND RECORD-KEEPING REQUIREMENTS

SECTION 11.1 The Contractor, within five (5) working days of contract award, shall execute a formal subcontract or purchase order in compliance with the terms of the Contractor's bid proposal and MBE/WBE assurances, and submit to the Commission a copy of the MBE and WBE subcontracts or purchase orders, each showing acceptance of the subcontract or purchase order by the MBE and WBE firms. During the performance of the contract, the Contractor shall submit partial and final waivers of lien from MBE and WBE subcontractors and suppliers indicating the current payment amount and the cumulative dollar amount of payments made to date. The Contractor shall file regular MBE and WBE utilization reports on the form entitled "Status Report of MBE and WBE (Sub) Contract Payments" at the time of submitting each monthly payment voucher ("Summary of Estimate"), which reflects the current status of cumulative and projected payments to MBE and WBE firms.

SECTION 11.2 The Contractor shall maintain records of all relevant data with respect to the utilization of MBE and WBE firms, including without limitation payroll records, tax returns and records, and books of account, and retain such records for a period of at least three (3) years after final acceptance of the work. Full access to such records shall be granted to the Commission and/or its designees, on five (5) business days' notice in order for the Commission to determine the Contractor's compliance with its MBE and WBE commitments and the status of any MBE or WBE firm performing any portion of the contract.

SECTION 12

NON-COMPLIANCE AND LIQUIDATED DAMAGES

SECTION 12.1 The Executive Director has the authority to apply suitable sanctions to the Contractor if the Contractor is found to be in non-compliance with the MBE and WBE requirements. Failure to comply with the MBE or WBE terms of this contract or failure to use MBE and WBE firms as stated in the Contractor's assurances constitutes a material breach of the contract, and may lead to the suspension or termination of the contract in part or in whole, disqualification from entering into future contracting arrangements with the Commission, and criminal liability. In some cases, monthly progress payments may be withheld until corrective action is taken.

SECTION 12.2 When the contract is completed, in the event that the Executive Direct has determined that the Contractor did not comply in the fulfillment of the required MBE and/or WBE goals, and a grant of relief of the requirements was not obtained, the Commission will thereby be damaged in the failure to provide the benefit of participation to minority or women business to the degree set forth in this Special Condition. Therefore, in case of such non-compliance, the Commission will deduct as liquidated damages one (1%) percent (or fraction thereof) deficiency toward the MBE goal or WBE goal.

SECTION 13

REVIEW AND SUNSET

SECTION 13.1 These Special Conditions shall be reviewed no later than 5 years from their adoption and shall expire on October 31, 2009 unless the Commission find that its remedial purposes have not been fully achieved and there is a compelling interest in continuing narrowly tailored remedies to redress discrimination against MBEs or WBEs so that the Commission will not function as a passive participant in a discriminatory marketplace.

SECTION 14

SEVERABILITY

SECTION 14.1 In the event that any section, subsection, paragraph, clause, provision or application of these Special Conditions shall be held invalid by any court, the invalidity of such section, paragraph, clause or provision shall not affect any of the remaining provisions hereof.