

**PROPOSED SUBSTITUTE ORDINANCE AMENDMENT to
COMMUNICATION NO. 318664**

Sponsored by

**THE HONORABLE TONI PRECKWINKLE, PRESIDENT AND JOHN P. DALEY,
COOK COUNTY BOARD OF COMMISSIONERS**

NOW, THEREFORE, BE IT ORDAINED that Chapter 34, Article IV, Division 1, Sec. 34-121 of the Cook County Code, is hereby amended to include the following definition:

Professional Services means services rendered by members of a recognized profession or possessing a special skill. Such services are generally acquired to obtain information, advice, training or direct assistance.

BE IT FURTHER ORDAINED by the Cook County Board of Commissioners, that Chapter 34, Article IV, Division 1, Sec. 34-125 of the Cook County Code, is hereby amended as follows:

Sec. 34-125. - Powers and duties of the Chief Procurement Officer.

The Chief Procurement Officer shall:

- (a) Make all Procurements and conduct all activities related to the Procurement Process in accordance with the Procurement Code and any procedures promulgated pursuant hereto;
- (b) Establish and maintain procurement policies and procedures, and standardized documents and forms to implement the Procurement Code;
- (c) Cooperate with the Contracts Compliance Director to coordinate the procurement process with the Minority- and Women-Owned Business Program established pursuant to Division 8 of this Procurement Code;
- (d) Develop and maintain procedures for disseminating information and notice of procurement opportunities;
- (e) Have authority to implement innovative procurement methods and processes pursuant to this Procurement Code;
- (f) Have authority to approve and execute an assignment of or an amendment to a Contract; provided that any such amendment does not extend the Contract by more than one year, and further provided that the total cost of all such amendments does not increase the amount of the Contract beyond the authority of the CPO granted in Section 34-123, ~~or in the case of Contracts approved by the Board, provided that the total cost of all such amendments does not increase the Contract by more than 10%;~~
- (g) Have authority to establish the commencement and expiration dates of any Contract as necessary to permit the Contract period to commence upon the date of Execution of the Contract by the County, unless another commencement date is specified in the Contract;

- (h) Within the CPO's authority, approve and execute Contracts;
- (i) Ensure that all certifications, statements and affidavits required by this Procurement Code are submitted;
- (j) Determine when supplies, materials and equipment are obsolete or unusable, and trade in, sell or dispose of such property, except for such property which is the responsibility of the Cook County Health and Hospitals System;
- (k) Compile and maintain information for all Procurements, including those Procurements and Contract amendments which do not require Board approval. The CPO shall submit a report to the Board on a monthly basis listing the Procurements and Procurement amendments executed by the CPO that do not require Board approval, including a list of each Person from whom the County makes such a Procurement and the method of Procurement applied, as well as Procurements that authorize the advance payment for services. Such reports shall include:

(1) The name of the Vendor;

(2) A brief description of the product or service provided;

(3) The name of the Using Department and budgetary account from which the funds are being drawn; and

(4) The amount and term of the Procurement; and

(5) The amount and/or extension period of the amendment, if applicable.

Such report shall be provided to the Board of Commissioners in an electronic format.

~~The CPO shall work with the Comptroller to also provide a monthly report of the individual and total aggregate amount disbursements made for Procurements that do not require Board approval. The Comptroller shall provide to the Board of Commissioners a report of all payments made pursuant to contracts for supplies, materials and equipment and for professional and managerial services for Cook County, including the separately elected Officials, which involve an expenditure of \$150,000.00 or more, within two weeks of being made. Such reports shall include:~~

~~(1) The name of the Vendor;~~

~~(2) A brief description of the product or service provided;~~

~~(3) The name of the Using Department and budgetary account from which the funds are being drawn; and~~

(1) The CPO shall work with the Comptroller to provide a monthly report of the individual and total aggregate amount disbursements made for Procurements that do not require Board approval. The Comptroller shall provide to the Board of Commissioners a report of all payments made pursuant to contracts for supplies, materials and equipment and for professional and managerial services for Cook County, including the separately elected Officials, which involve an expenditure of \$150,000.00 or more, within two weeks of being made. Such reports shall include:

(1) The name of the Vendor;

(2) A brief description of the product or service provided;

(3) The name of the Using Department and budgetary account from which the funds are being drawn; and

(4) The contract number under which the payment is being made.

Such report shall be provided to the Board of Commissioners in an electronic format.

~~(m)~~ Make available on the County's website information related to all Procurements, including, but not limited to, a list of Contracts and a list of Contractors and subcontractors;

~~(n)~~ Keep a record of any Person who has been disqualified under Division 4, Disqualification; Penalties, and shall provide such record to the Cook County Health and Hospitals System;

~~(o)~~ Have authority to terminate a Contract in accordance with its terms;

~~(p)~~ Issue notices of violation to enforce the provisions of this Code, as applicable, and institute enforcement proceedings under Chapter 2, Article IX, as appropriate;

~~(q)~~ Work with the Comptroller to assure that Contractors are not paid in advance of performance, unless such advance payment is provided for and properly justified in the Contract; and

~~(r)~~ Have charge of such other Procurement activities as may be assigned by the President or the Board.

BE IT FURTHER ORDAINED by the Cook County Board of Commissioners, that Chapter 34, Article IV, Division 2, Sec. 34-144(a) of the Cook County Code, is hereby amended as follows:

Sec. 34-144. Innovative procurement.

(a) The CPO may make a Procurement using innovative methods of procurement, including but not limited to electronic procurement, reverse auctions, electronic bidding, electronic auctions, prequalification, and pilot procurement programs that have no cost to the County. In order to implement innovative methods of procurement, either directly or through a service provider, the CPO must make a determination that such process is competitive and in the best interest of the County.

BE IT FURTHER ORDAINED THAT Chapter 34, Article IV, Division 8, Subdivision 1, Sec. 34-260 of the Cook County Code, is hereby amended as follows:

Sec. 34-260. Short title.

This subdivision shall be known and may be cited as the Cook County Minority- and Women-Owned Business Enterprise General Ordinance. This subdivision is applicable to all

Contracts, ~~including except~~ Public Works Contracts ~~other than as modified pursuant to~~ which are governed by sSubdivision 2 of this Division 8.

BE IT FURTHER ORDAINED THAT Chapter 34, Article IV, Division 8, Subdivision 1, Sec. 34-263 of the Cook County Code, is hereby amended as follows:

Sec. 34-263. Definitions.

The following words, terms and phrases, when used in this Subdivision I, ~~including both subdivision I and subdivision II~~, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning. Capitalized terms not defined in this section are defined in Division 1 of this Procurement Code, or in Sec. 1-3 of the County Code. Additional terms applicable to subdivision II are set forth in such subdivision.

County Marketplace means the ~~Metropolitan Statistical Area for Chicago, as established by the Bureau of the Census~~ six-county region, currently the counties of Cook, DuPage, Kane, Lake, ~~Kendall~~McHenry and Will.

BE IT FURTHER ORDAINED THAT Chapter 34, Article IV, Division 8, Subdivision II, Sections 34-285 to 289 of the Cook County Code, are hereby amended as follows:

Sec. 34-285. Short title; incorporation of provisions.

This subdivision may be known and cited as the Cook County Public Works Minority- and Women-Owned Business Enterprise Ordinance and may be cited as such. ~~The provisions of the Cook County Minority and Women Owned business Enterprise General Ordinance are applicable to Public Works Contracts, except to the extent modified hereby.~~

Sec. 34-286. Findings.

(a) The findings set forth in subdivision I Sec. 34-261 of this division 8 are incorporated herein by this reference.

(b) After ~~the~~ requirement in subdivision I that minority- and women-owned businesses (M/WBEs) be allotted certain percentages of County construction contracts was ruled unconstitutional, the County witnessed a drastic reduction in M/WBE construction prime contract and subcontract participation. ~~as applied to construction contracts in Builders Association of Greater Chicago v. County of Cook, 256 F.3d 642 (7th Cir. 2001). See also Builders Association of Greater Chicago v. City of Chicago, 2003 WL 1786489, 2003 U.S. Dist. Lexis 23287 (N.D. Ill. 2003).~~

(c) The President and the Board of Commissioners of the County of Cook, after considering (i) evidence presented at trial in *Builders Association of Greater Chicago v. City of Chicago*, 298 F.Supp.2d 725 (N.D. Ill. 2003) and *Northern Contracting, Inc. v. Illinois*

Department of Transportation, 2005 U.S. Dist. LEXIS 19868 (N.D. Ill. Sept. 8, 2005); (ii) County statistical evidence of continuing discrimination against Blacks, Hispanics, Asians and women in the County's Procurements; (iii) the Report title, "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;" as well as (iv) anecdotal evidence of discrimination against minorities and women in the County's Public Works Contracts; and (v) receiving and considering written reports, adopts the following findings as a strong basis in evidence supporting a narrowly tailored, remedial affirmative action program in Public Works Contracts.

(d) The County seeks to provide a level playing field and equal access for all prime contractors and subcontractors to participate in Public Works Contracts;

(e) The County has engaged in committee hearings in which the County has heard anecdotal evidence of discrimination in the construction industry, has commissioned and reviewed the a study entitled "The Status of Minority and Women-Owned Business Enterprises Relevant to Construction Activity In and Around Cook County, Illinois"(the "NERA Study") on the levels of PCE participation in Public Works Contracts, ~~has reviewed the report prepared indicating evidence of discrimination in Public Works Contracts~~ and has considered the evidence in relevant case law; and

(f) The NERA Study made recommendations for a revised Minority and Women owned business program for construction contracting, emphasizing the establishment of Project-specific goals, implementation of race and gender neutral measures, and enhancements to data gathering, implementation and performance monitoring of the program;

(g) The County has a compelling interest in preventing discrimination and desires to reaffirm its commitment to full and fair opportunities for all firms to participate in its construction contracts.

Sec. 34-287 Policy.

~~Based on the findings set forth in subdivision I, Sec. 34 261 and the findings set forth in subdivision II, Sec. 34 286, and in addition to the policy set forth at Sec. 34 262, the policy and purpose of this subdivision is to establish and implement goals for participation of PCEs in Public Works Contracts, in accordance with all applicable laws.~~

It is hereby found, determined and declared that the purpose of this Ordinance is to ensure the full and equitable participation of Minority- and Women-Owned Business Enterprises in the County's procurement process as both prime and subcontractors in the County's Public Works contracts. The County is committed to a policy of preventing discrimination in the award of or participation in Public Works contracts and has recommended appropriate narrowly tailored remedies to eliminate any such discrimination.

Sec. 34-288. Program goals. Applicability.

~~———— The Program Goal applicable to Public Works Contracts shall be a goal of twenty four percent (24%) of the annual total dollar amount of Public Works Contracts to MBEs and a goal of not less than ten percent (10%) of the annual total dollar amount of Public Works Contracts to WBEs. In establishing a Contract Specific Goal for Public Works Contracts, the CCD shall consider the availability of sufficient Certified MBEs and WBEs for each trade required as part of the project.~~

This subdivision shall apply to all Public Works contracts, regardless of the sources of other funds; provided that any Public Works contract with respect to which a goal for Minority-Owned Business Enterprise or Women-Owned Business Enterprise participation is inconsistent with or prohibited by State or Federal law shall be exempt from the goals included in this subdivision.

Sec. 34-289. Commercially Useful Function. Severability.

~~———— To determine whether a PCE is performing a Commercially Useful Function, the County will evaluate whether the portion of the work subcontracted to or by a PCE is in accordance with industry standards. For example, if a PCE 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. In addition, to perform a Commercially Useful Function, the PCE must be responsible, with respect to materials, equipment and supplies used in performing its portion of the Contract, for negotiating price, determining whether quality meets specifications, ordering the material, installing (where applicable) and paying for the material itself.~~

If any section, subsection, clause or provision of this subdivision is held to be invalid by a court of competent jurisdiction, the remainder of the subdivision shall not be affected by such invalidity.

Sec. 34-290. Definitions.

The following terms shall have the following meanings:

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 County shall consider all appropriate factors, including common ownership, common management, and contractual relationships.

Annual Participation Goals mean the targeted levels established by the County for the annual aggregate participation of MBEs and WBEs in County construction contracts.

Business means a sole proprietorship, partnership, corporation, limited liability company, Joint Venture or any other business or professional entity.

Certified Firm means a firm that has been accepted by the County as a certified MBE or WBE.

Contractor means any Business that seeks to enter into a construction contract with the County, other than for professional services, and includes all partners and Affiliates Business.

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 partner.

Compliance Contract Director or "CC Director" means the Contract Compliance Director.

County means the County of Cook and its participating User Departments.

County's Marketplace means the Metropolitan Statistical Area for Chicago, as established by the Bureau of the Census six-county region, currently the counties of Cook, DuPage, Kane, Lake, Kendall, McHenry and Will.

Doing Business means having a physical location from which to engage in for profit activities in the scope(s) of expertise of the Business.

Economically Disadvantaged means an individual with a Personal Net Worth less than \$2,000,000.00 indexed annually for the Chicago Metro Area Consumer Price Index, published by the U.S. Department of Labor, Bureau of Labor Standards, beginning January 2007.

Expertise means demonstrated skills, knowledge 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.

Good Faith Efforts means actions undertaken by a Contractor to achieve an MBE or WBE goal, which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the Program's goals.

Joint Venture means an association of two or more Businesses proposing to perform a for profit business enterprise. Joint Ventures must have an agreement in writing specifying the terms and conditions of the relationships between the partners and their relationship and responsibility to the contract.

Local Business means a Business located within the County's Marketplace which has the majority of its regular, full time work force located within the County's Marketplace.

Local Small Business means a Local Business which is also a Small Business.

Manufacturer means a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.

Minority Business Enterprise (MBE) means a Business:

- (1) Which is at least 51 percent owned by one or more Minority Individuals, 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 Minority Individuals;
- (2) Whose management, policies, major decisions and daily business operations are independently managed and controlled by one or more Minority Individuals;

(3) Which performs a Commercially Useful Function;

(4) Which is a Certified Firm; and

(5) Which is a Local Small Business.

Minority Individual means:

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

(2) Hispanic-Americans, which includes persons of Mexican, Puerto Rican, Cuban, Caribbean, Dominican, Central or South American;

(3) Native-Americans, which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians; or

(4) Asian-Americans, which includes persons whose origins are in any of the original peoples of the Far East, Southeast Asia, the islands of the Pacific or the Northern Marianas, or the Indian Subcontinent; or

(5) Individual members of other groups, including but not limited to Arab-Americans, found by the County 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 County's marketplace or to do business with the County.

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.

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 County certified MBE or WBE, provided that the other firm is certified by a governmental agency that meets the County'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, 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.

Program means the Program established by the Minority- and Women- Owned Business Enterprise Interim Ordinance.

Project Specific Goals means the Goals established for a particular project or contract based upon the availability of MBEs or WBEs in the scopes of work of the Project.

Public Works means all fixed works constructed or demolished by the County, or paid for wholly or in part out of public funds administered by the County. "Public Works" as defined herein includes all projects financed in whole or in part with bonds, grants, loans, or other funds made available by or through federal or State government, or the County. "Public Works" does

not include projects undertaken by the owner at an owner-occupied single-family residence or at an owner-occupied unit of a multi-family residence. "Public Works" includes any maintenance, repair, assembly, or disassembly work performed on equipment whether owned, leased, or rented.

Regular Dealer means a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business. To be a Regular Dealer, the firm must be an established, regular Business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question. A firm may be a Regular Dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business if the firm both owns and operates distribution equipment for the products. Any supplementing of a Regular Dealer's distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis. Packagers, manufacture representatives, or other persons who arrange or expedite transactions are not Regular Dealers.

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

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.

User Department means the department of the County or elected official responsible for initiating the procurement process.

Utilization Plan means the list of MBEs and WBEs that the Bidder/Proposer commits will be utilized, the scopes of the work and the dollar values or the percentages of the work to be performed.

Woman means a person of the female gender.

Woman-Owned Business Enterprise (WBE) means a Business:

- (1) Which is at least 51 percent owned by one or more 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 Women;
- (2) Whose management, policies, major decisions and daily business operations are independently managed and controlled by one or more such Women;
- (3) Which performs a Commercially Useful Function;
- (4) Which is a Certified Firm; and

(5) Which is a Local Small Business.

Sec. 34-291. Program administration.

(a) The CC Director who shall report to the President of the Board of Commissioners of Cook County, shall administer the Program, and whose duties shall include:

- (1) Formulating, proposing and implementing rules and regulations for the development, implementation and monitoring of the Program.
- (2) Providing information and assistance to MBEs and WBEs relating to County procurement practices and procedures, and bid specifications, requirements, goals and prerequisites.
- (3) Establishing uniform procedures and criteria for certifying, recertifying and decertifying Businesses as MBEs and WBEs, accepting certifications by other agencies, and maintaining a directory of Certified Firms.
- (4) Establishing Project Specific Goals, in collaboration with the User Department.
- (5) Evaluating Contractors' achievement of Project Specific Goals or and Good Faith Efforts to meet Project Specific Goals.
- (6) Working with User Departments to monitor contracts to ensure prompt payments to MBEs and WBEs and compliance with Project Specific Goals and commitments, including gathering data to facilitate such monitoring.
- (7) Receiving, reviewing, and acting upon complaints and suggestions concerning the Program.
- (8) Collecting data to evaluate the Program and other County contracting initiatives.
- (9) Monitoring the Program and the County's progress towards the Annual Participation Goals. The CC Director shall report on a quarterly and annual basis to the President on the administration and operations of the Program.

(b) The User Departments that receive appropriate delegation for project management, contract management, and/or construction and/or design contract responsibility shall have the following duties and responsibilities with regard to the Program:

- (1) Assisting the CC Director with setting Project Specific Goals.
- (2) Assisting in the identification of available MBEs and WBEs, and providing other assistance in meeting the Project Specific Goals.
- (3) Performing other activities to support the Program.
- (4) Gathering and maintaining prime contracting and subcontracting data for those contracts which they manage.
- (5) Submitting subcontracting data as required to the CC Director.

Sec. 34-292. Race- and gender-neutral measures to ensure equal opportunities for all contractors and subcontractors.

The County shall develop and use measures to facilitate the participation of all firms in County construction contracting activities. These measures shall include, but are not limited to:

(a) Arranging solicitation times for the presentations of bids, quantities, specifications, and delivery schedules to facilitate the participation of interested firms;

(b) Segmenting, structuring or issuing contracts to facilitate the participation of MBEs, WBEs and other Small Businesses;

(c) Providing timely information on contracting procedures, bid preparation and specific contracting opportunities;

(d) Providing assistance to Business in overcoming barriers such as difficulty in obtaining bonding and financing;

(e) Holding pre-bid conferences, where appropriate, to explain the projects and to encourage Contractors to use all available qualified firms as subcontractors;

(f) Adopting prompt payment procedures, including, requiring by contract that prime Contractors promptly pay subcontractors;

(g) Reviewing retainage, bonding and insurance requirements to eliminate unnecessary barriers to contracting with the County;

(h) Collecting information from all prime Contractors on County construction contracts detailing the bids received from all subcontractors for County construction contracts and the expenditures to subcontractors utilized by prime Contractors on County construction contracts;

(i) At the discretion of the CC Director, letting a representative sample of County construction contracts without goals, to determine MBE and WBE utilization in the absence of goals;

(j) Maintaining information on all firms bidding on County prime contracts and subcontracts; and

(k) Referring complaints of discrimination to Cook County's Commission on Human Relations, or other appropriate authority, for investigation.

Sec. 34-293. Program eligibility.

(a) Only Businesses that meet the criteria for certification as a an MBE or WBE may participate in the Program. The applicant has the burden of persuasion by a preponderance of the evidence.

(b) Only a firm owned by a Socially and Economically Disadvantaged person(s) may be certified as a MBE or WBE.

(1) The firm's ownership by a Socially and Economically Disadvantaged person must be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. The owner(s) must enjoy the customary incidents of ownership and share in the risks and profits commensurate with that ownership interest.

(2) The contributions of capital or Expertise by the Socially and Economically Disadvantaged owner(s) to acquire the ownership interest must be real and substantial. If Expertise is relied upon as part of a Socially and Economically Disadvantaged owner's contribution to acquire ownership, the Expertise must be of the requisite quality generally recognized in a specialized field, in areas critical to the firm's operations, indispensable to the firm's potential success, specific to the type of work the firm performs and documented in the firm's records. The

individual whose Expertise is relied upon must have a commensurate financial investment in the firm.

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

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

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

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

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

(5) If federal, state and/or local laws, regulations or statutes require the owner(s) to have a particular license or other credential to own and/or control a certain type of firm, then the Socially and Economically Disadvantaged owner(s) must possess the required license or credential. If state law, County ordinance or other law regulations or statute does not require that the owner possess the license or credential, that the owner(s) lacks such license or credential is a factor, but is not dispositive, in determining whether the Socially and Economically Disadvantaged owner(s) actually controls the firm.

(6) A Socially and Economically Disadvantaged owner cannot engage in outside employment or other business interests that conflict with the management of the firm or prevent the owner from devoting sufficient time and attention to the affairs of the firm to manage and control its day to day activities.

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

(1) Scrutinize relationships with non-Certified Firms in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.

(2) Consider whether present or recent employer/employee relationships between the Socially and Economically Disadvantaged owner(s) of the applicant and non-Certified Firms or persons associated with non-Certified Firms compromise the applicant's independence.

(3) Examine the applicant's relationships with non-Certified Firms to determine whether a pattern of exclusive or primary dealings with non-Certified Firm compromises the applicant's independence.

(4) Consider the consistency of relationships between the applicant and non-Certified Firms with normal industry practice.

(e) An applicant shall be certified only for specific types of work in which the Socially and Economically Disadvantaged owner(s) has the ability and Expertise to manage and control the firm's operations and work.

(f) The County shall certify the eligibility of Joint Ventures involving MBEs or WBEs and non-Certified Firms. To be considered an eligible Joint Venture, at least one partner of the Joint Venture must be a Certified Firm, with a share in the capital contribution, control, management, risks, and profits of the Joint Venture which is equal to its ownership interest. Each Certified Firm partner must contribute property, capital, efforts, skill and knowledge and be responsible for a distinct, clearly defined portion of the work of the contract. Joint Ventures must have an agreement in writing specifying the terms and conditions of the relationships between the partners and their relationship and responsibility to the contract.

(g) In lieu of conducting its own certifications, the CC Director by rule may accept formal certifications by other entities as meeting the requirements of the Program, if the CC Director determines that the certification standards of such entities are comparable to those of the County.

(h) The certification status of all MBEs and WBEs shall be reviewed periodically by the Office of Contract Compliance. Failure of the firm to seek recertification by filing the necessary documentation with the CC Director as provided by rule may result in decertification.

(i) It is the responsibility of the Certified Firm to notify the CC Director of any change in its circumstances affecting its continued eligibility for the Program, including decertification by another agency. Failure to do so may result in the firm's decertification.

(j) The CC Director shall decertify a firm that does not continuously meet the eligibility criteria.

(k) Decertification by another agency shall create a prima facie case for decertification by the County. The challenged firm shall have the burden of proving that its County certification should be maintained.

(l) A firm that has been denied certification or recertification or has been decertified may protest the denial or decertification as provided by rule.

(m) A firm found to be ineligible may not apply for certification for six (6) months after the effective date of the final decision.

(n) A third party may challenge the eligibility of an applicant for certification or a Certified Firm as provided by rule. Such challenges shall be signed and sworn by the individual challenging the eligibility of an applicant for certification or a certified form. The burden of proof shall rest with the complainant. Such challenges to eligibility shall be subject to an appeal. The CC Director shall be the final arbiter of all challenges. The presumption that the challenged firm is eligible shall remain in effect until the CC Director renders a final decision.

Sec. 34-294. Annual aspirational goals.

The Annual Aspirational Goals for the utilization of MBEs and WBEs on County Public Works contracts and subcontracts shall be twenty-four percent for MBEs and ten (10) percent for WBEs.

Sec. 34-295. Project specific goals.

The CC Director, in consultation with the User Department, shall establish Project Specific Goals for construction Contracts based upon the availability of at least three MBEs and three WBEs to perform the anticipated subcontracting functions of the project and the County's utilization of MBEs and WBEs to date.

Sec. 34-296. Counting MBE and WBE participation.

(a) The entire amount of that portion of a contract that is performed by the MBEs or WBEs own forces shall be counted, including the cost of supplies and materials obtained by the MBE or WBE for the work of the contract, and supplies purchased or equipment leased by the MBE or WBE (except supplies and equipment the MBE or WBE purchases or leases from the prime Contractor or the prime Contractor's Affiliate).

(b) The entire amount of fees or commissions charged by a MBE or WBE for providing a bona fide service, such as professional, technical, consultant or managerial services, or for providing bonds or insurance specifically required for the performance of a contract, shall be counted, provided the fee is reasonable and not excessive as compared with fees customarily charged for similar services.

(c) When a MBE or WBE performs as a participant in a Joint Venture, only the portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the Joint Venture's contract that is performed by the MBE or WBE with its own forces and for which it is separately at risk, shall be counted.

(d) Only expenditures to a MBE or WBE that is performing a Commercially Useful Function shall be counted. To determine whether a MBE or WBE is performing a Commercially Useful Function, the County will evaluate the amount of work subcontracted, industry practices, whether the amount the MBE or WBE is to be paid under the contract is commensurate with the work it is actually performing and other relevant factors. To perform a Commercially Useful Function, the MBE or WBE must be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, installing (where applicable) and paying for the material itself. A MBE or WBE does not perform a Commercially Useful Function if its role is limited to that of an extra participant in the contract through which funds are passed in order to obtain the appearance of MBE or WBE participation. If a MBE or WBE 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 MBE or WBE is presumed not to be performing a Commercially Useful Function, the Certified Firm may present evidence to rebut this presumption.

(e) One hundred percent of the cost of the materials or supplies obtained from a MBE or WBE Manufacturer or Regular Dealer shall be counted. One hundred percent of the fees or transportation charges for the delivery of materials or supplies required on a job site shall be counted only if the payment of such fees is a customary industry practice and are commensurate with fees customarily charged for similar services.

(f) If a firm ceases to be a Certified Firm for any other reason than graduation from the M/WBE Construction Program during its performance on a contract, the dollar value of work performed under a contract with that firm after it has ceased to be certified shall not be counted.

(g) In determining achievement of Project Specific Goals, the participation of a MBE or WBE shall not be counted until that amount has been paid to the MBE or WBE.

Sec. 34-297. Contract pre-award compliance procedures.

(a) For all solicitations, the bidder/proposer shall submit a Utilization Plan detailing all subcontractors from which the Contractor solicited bids or quotations, and if Project Specific Goals have been established, its achievement of the Goals or its Good Faith Efforts to do so. The Utilization Plan shall be due at the time the bid / proposal is due.

(b) Any agreement between a Contractor and a MBE or WBE in which the Contractor requires that the MBE or WBE not provide subcontracting quotations to other Contractors is prohibited.

(c) Where the Contractor cannot achieve the Project Specific Goal(s), the CC Director will determine whether the Contractor has made Good Faith Efforts to meet the Goal(s). In making this determination, the Director will consider, at a minimum, the Contractor's efforts to:

- (1) Solicit through all reasonable and available means (e.g., attendance at pre-bid meetings, advertising and written notices) the interest of all MBEs and WBEs certified in the scopes of work of the contract. The Contractor shall provide interested MBEs and WBEs with timely, adequate information about the plans, specifications, and requirements of the contract to allow MBEs and WBEs to respond to the solicitation. The Contractor must follow up initial solicitations with interested MBEs and WBEs.
- (2) Select portions of the work to be performed by MBEs and WBEs in order to increase the likelihood that the Project Specific Goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate MBE and WBE participation, even when the Contractor would otherwise prefer to perform these work items with its own forces. It is the Contractor's responsibility to make a portion of the work available to MBEs and WBEs and to select those portions of the work or material needs consistent with the availability MBEs and WBEs to facilitate their participation.
- (3) Negotiate in good faith with interested MBEs and WBEs. Evidence of such negotiation includes the names, addresses, and telephone numbers of MBEs and WBEs that were contacted; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and why agreements could not be reached with MBEs and WBEs. The Contractor may not reject MBEs and WBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. That there may be some additional costs involved in finding and using MBEs and WBEs is not in itself sufficient reason for a Contractor's failure to meet the Project Specific Goals, as long as such costs are reasonable. The ability or desire of a Contractor to perform the work of a contract with its

own organization does not relieve it of the responsibility to make Good Faith Efforts on all scopes of work that could be subcontracted.

(4) Make efforts to assist interested MBEs and WBEs in obtaining bonding, lines of credit, or insurance as required by the County or the prime Contractor, where appropriate.

(5) Make efforts to assist interested MBEs and WBEs in obtaining necessary equipment, supplies, materials, or related assistance or services, where appropriate.

(6) Use the services of the Office of Contract Compliance, available minority/women community organizations, minority/women contractors' groups, government sponsored minority/women business assistance offices and other appropriate organizations to provide assistance in the recruitment and placement of MBEs and WBEs.

(e) In determining whether a Contractor has made Good Faith Efforts, the performance of other Contractors in meeting the Project Specific Goals may be considered. For example, when the apparent successful Contractor fails to meet the Project Specific Goals but others meet it, it may be reasonably questioned whether, with additional reasonable efforts, the apparent successful Contractor could have met the Project Specific Goals. Similarly, if the apparent successful Contractor fails to meet the Project Specific Goals, but meets or exceeds the average MBE or WBE participation obtained by other Contractors, this may be evidence that the apparent successful Contractor made Good Faith Efforts.

(f) A signed letter of intent from each listed MBE or WBE, describing the work, materials, equipment or services to be performed or provided by the MBE or WBE and the agreed upon dollar value shall be due at the time of bid proposal or within three days after such submission.

(g) The CC Director shall timely review the Utilization Plan before award, including the scope of work and the letters of intent from MBEs and WBEs. The CC Director may request clarification in writing of items listed in the Utilization Plan, provided such clarification shall not include the opportunity to augment listed participation or Good Faith Efforts.

(h) If the CC Director determines that the Utilization Plan demonstrates that the Project Specific Goals have been achieved or Good Faith Efforts made, with the concurrence of the User Department, the CC Director and User Department shall recommend award to Purchasing Agent Department.

(i) If the CC Director finds that a Contractor did not make sufficient Good Faith Efforts, the CC Director shall communicate this finding to the User Purchasing Department and recommend that the bid/proposal be rejected. A Contractor may protest this determination pursuant to the County's bid protest procedures.

Sec. 34-298. Contract administration procedures.

(a) Upon award of a contract by the County that includes Project Specific Goals, the Project Specific Goals become covenants of performance by the Contractors and incorporated in the contract.

(b) The Contractor shall provide a listing of all subcontractors to be used in the performance of the contract, and detailed subcontractor information to the County with each request for payment submitted to the County or as otherwise directed by the County. The CC Director and the User Department shall monitor subcontractor participation during the course of the contract. The County shall have full and timely 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 any officer or official of the County for any purpose.

(c) The Contractor cannot make changes to the Utilization Plan or substitute MBEs or WBEs named in the Utilization Plan without the prior written approval of the CC Director, Purchasing Agent and the User Department. Unauthorized changes or substitutions shall be a violation of this subdivision and a breach of contract, and may constitute grounds for rejection of the bid or proposal or cause termination of the executed contract for breach, the withholding of payment and/or subject the Contractor to contract penalties or other sanctions.

(1) All requests for changes or substitutions of a MBE or WBE Subcontractor(s) named in the Utilization Plan shall be made to the CC Director, Purchasing Agent and the User Department in writing, and shall clearly and fully set forth the basis for the request. A Contractor shall not substitute a MBE or WBE subcontractor or perform the work designated for a MBE or WBE subcontractor with its own forces unless and until the CC Director, Purchasing Agent in consultation with the User Department, approves such substitution in writing. A Contractor shall not allow a substituted subcontractor to begin work until both the Director, Purchasing Agent and the User Department have approved the substitution.

(2) The facts supporting the request must not have been known nor reasonably should have been known by either party before the submission of the Utilization Plan. Bid shopping is prohibited. The Contractor must negotiate with the MBE or WBE subcontractor to resolve the problem. Where there has been a mistake or disagreement about the scope of work, the MBE or WBE can be substituted only where an agreement cannot be reached for a reasonable price for the correct scope of work.

(3) 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.

(v) Mistake of fact or law about the elements of the scope of work of a solicitation where agreement upon a reasonable price cannot be reached.

(vi) Failure of the subcontractor to meet insurance, licensing or bonding requirements; or

(vii) The subcontractor's withdrawal of its bid or proposal.

(4) The final decision whether to permit or deny the proposed substitution, and the basis of any denial, shall be communicated to the parties in writing by the CC Director.

(5) Where the Contractor has established the basis for the substitution to the satisfaction of the County, the Contractor shall make Good Faith Efforts to fulfill the Utilization Plan. The Contractor may seek the assistance of the Office of Contract Compliance in obtaining a new

MBE or WBE. If the Project Specific Goal(s) cannot be reached and Good Faith Efforts have been made, the Contractor may substitute with a non-Certified Firm.

(6) If the County requires the substitution of a MBE or WBE subcontractor listed in the Utilization Plan, the Contractor shall undertake Good Faith Efforts to fulfill the Utilization Plan. The Contractor may seek the assistance of the Office of Contract Compliance in obtaining a new MBE or WBE subcontractor. If the Goal(s) cannot be reached and Good Faith Efforts have been made, the Contractor may substitute with a non-Certified Firm.

(d) If a Contractor plans to hire a subcontractor on any scope of work that was not previously disclosed in the Utilization Plan, the Contractor shall obtain the approval of the CC Director to modify the Utilization Plan and must make Good Faith Efforts to ensure that MBES and WBEs have a fair opportunity to bid on the new scope of work.

(e) Changes to the scopes of work shall be documented by the User Department at the time they arise to establish the reasons for the change and the effect on achievement of the MBE or WBE goal.

(f) Prior to contract closeout, the CC Director shall evaluate the Contractor's fulfillment of the contracted goals, taking into account all approved substitutions, terminations and changes to the contract's scope of work. If the County determines that Good Faith Efforts to meet the MBE or WBE commitments were not made, or that fraudulent misrepresentations have been made, or any other breach of the contract or violation of this subdivision, a remedy or sanction may be imposed, as provided in the contract.

Sec. 34-299. Sanctions and penalties.

(a) The following violations of this subdivision may result in a breach of contract:

(1) Providing false or misleading information to the County in connection with submission of a bid, responses to requests for qualifications or proposals, Good Faith Efforts documentation, post award compliance, or other Program operations.

(2) Committing any other violations of this subdivision.

(b) A Contractor or subcontractor is subject to withholding of payments under the contract, termination of the contract for breach, contract penalties, or being barred or deemed non-responsive in future County solicitations and contracts as determined by the County's Purchasing Agent, if it is found to have:

(1) Provided false or misleading information in connection with an application for certification or recertification or colluded with others to do so;

(2) Provided false or misleading information in connection with the submission of a bid or proposal or documentation of Good Faith Efforts, post-award compliance, or other Program operations or colluded with others to do so;

(3) Failed in bad faith to fulfill Project Specific Goals, thereby materially breaching the contract;
or

(4) Failed to comply in good faith with substantive provisions of this subdivision.

Sec. 34-300. Program review and sunset.

(a) The President and the Board of Commissioners shall receive quarterly and annual reports from the CC Director detailing the County's performance under the Program.

(b) The President and the Board of Commissioners will review these reports, including the Annual Participation Goals and the County's progress towards meeting those Goals and eliminating discrimination in its contracting activities and marketplace.

(c) Within five years after the effective date of this ordinance, the County will review the operation of the Program and the evidentiary basis for the Program in order to determine whether it the County has a continuing compelling interest in remedying discrimination against MBEs and WBEs in its construction marketplace, and the permissible scope of any narrowly tailored remedies to redress discrimination against MBEs or WBEs so that the County will not function as a passive participant in a discriminatory marketplace.

(d) This subdivision shall sunset on or before June 30, 2016.

DIVISION 9. CONTRACT MANAGEMENT

Sec. 34-3001. Contracts

(a) *Purpose.* The purpose of this Division is to ensure that Contracts in an amount of \$1,000,000.00 or more are performed in accordance with the Contract terms.

(b) *Applicability.* This Division shall only apply to Contracts of \$1,000,000.00 or more.

(c) *Funding.* The extent to which this division shall be implemented shall be limited to the availability of funding. The Board encourages the County to seek out any available grant funding for this initiative.

Sec. 34-3012. Information to be contained in Contracts

All Contracts over \$1,000,000.00 should contain, but not be limited to, the following information, as applicable:

(a) Clearly state the specifications, contract period, allowable renewals or extension periods, and procedures for amendments or changes;

(b) Provide for specific measurable deliverables and reporting requirements, including due dates;

(a) Describe any payment schedules and escalation factors;

(d) Contain performance standards;

(e) Tie payments to the acceptance of deliverables or the final product;

(f) Contain all standard or required clauses as published in an RFP. Order of precedence should be addressed in case of a discrepancy between the RFP and the Contract;

(g) Contain appropriate signatures, approvals, acknowledgements, or witnesses; and

(h) Be reviewed and approved as to form by an attorney from the Cook County State's Attorney's Office prior to execution.

Sec. 34-3023. Contract management for Contracts.

(a) Using Agency responsibilities are as follows:

(1) Designate one or more individuals as the "Contract Manager" with the knowledge, skills, ability and time to monitor the Contract;

(2) The CPO may provide staff to assist the Using Agency in complying with this division.

(b) Contract Manager's duties:

(1) Monitor performance of the Contract in accordance with its terms;

(2) Track budgets and compare invoices and charges to contract terms and conditions;

(3) Document the timeliness and acceptance or rejection of deliverables and initiate appropriate action to enforce the Contract terms; and

(4) Evaluate and document compliance with Contract requirements on a periodic basis during the term of the Contract and submit to the CPO.

(c) CPO's duties:

(1) Create uniform evaluation forms for use by Contract Managers, to evaluate the extent to which the Contractor satisfied the Contract terms;

(2) Establish appropriate procedures to ensure that evaluations are utilized in determining whether a Bidder or Proposer is Responsible; provided, however, that evaluations made only within the past three years shall be considered;

(3) Assist Using Agencies in obtaining training through the National Contract Managers Association, Institute of Supply Management or National Institute of Government Purchasing standards, for Contract Managers.

DIVISION 10. INVOICES FOR SERVICES RENDERED

Sec. 34-310. Invoices required for all service Contracts.

(a) *Work Performed.* All Contracts for Professional and Consulting sServices, regardless of compensation structure, shall contain a provision requiring the Contractor to maintain and submit for review upon request by the Using Agency, itemized records indicating the dates that services were provided, a detailed description of the work performed on each such date, and the amount of time spent performing work on each such date.

(b) *Expenses.* Contracts for Professional and Consulting sServices shall also require Contractors to submit documentation of the types and amounts of expenses incurred related to the work performed if the Contractor seeks reimbursement for any such expenses incurred.

(c) *Invoice Documentation.* All Contracts for Professional and Consulting sServices, regardless of compensation structure, shall contain a provision requiring the Contractor to submit itemized records indicating the dates or time period in which the services being invoiced were provided, a detailed description of the work performed for the time period being invoiced and the amount of time spent performing work for the time period in question. In addition, all Contracts for Professional and Consulting sServices that are procured as Sole Source must also contain a provision requiring the Contractor to submit itemized records indicating the dates that services were provided, a detailed description of the work performed on each such date, and the amount of time spent performing work on each such date.

(ed) *Payment.* All Contracts for Professional and Consulting sServices shall further require that the itemized work and expense records required in 34-310 (b) and (c) be submitted to the Using Agency with the Contractor's invoice as a condition of payment for any Professional and Consulting sServices rendered.

Sec. 34-311. No payment prior to submission of invoice.

The Comptroller shall not issue a payment to any Contractor providing Professional and Consulting sServices who has not submitted the requisite invoice with work and expense records unless the Contractor has been approved for advance payment per the Contract. The Comptroller shall not issue an advance payment to any Contractor providing Professional and Consulting sServices unless the invoice includes written authorization from the Using Agency documenting the contractual basis for the advance payment. Contractors approved for advance payment shall be required to submit invoices providing work and expense records as described above in Section 34-310 on at least a monthly basis.

BE IT FURTHER ORDAINED by the Cook County Board of Commissioners, that Chapter 32 Fees, Section 32-1 of the Cook County Code is hereby amended as follows:

	Description	Fees, Rates, Charges (in
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		dollars)
34-283(a)	M/WBE Certification Fee	\$20 <u>5</u> 0.00
34-283(b)	M/WBE Recertification Fee	\$100.00
34-283(c)	"No Change" Affidavit Processing Fee	\$50.00

This amendment shall be effective immediately upon passage.