

DUPAGE COUNTY DISADVANTAGED, MINORITY AND WOMAN-OWNED BUSINESS ENTERPRISE PROGRAM FOR CONSTRUCTION AND CONSTRUCTION-RELATED CONTRACTS

SECTION 1. Establishment of the Disadvantaged, Minority and Woman-owned Business Enterprise Program for Construction and Construction-related Contracts.

A Disadvantaged, Minority and Woman-owned Business Enterprise Program is established by adoption of this Policy.

SECTION 2. Definitions.

When used in this Policy, the following terms shall have the following meanings:

Administrator means the manager of the Division of Contracting Equity.

Bid means a Bidder's response to a construction or construction-related solicitation for bid, proposal, or statement of qualifications for a project that is at least partially funded by the County but does not include federally funded projects which have requirements that preempt the Program.

Bidder means an individual, a business enterprise, including a sole proprietorship, a partnership, a corporation, a limited liability company or any other entity which has submitted a Bid on a County construction or construction-related contract ("Contract"), regardless of the procurement method employed by the County.

Business, Business Concern or Business Enterprise means an entity organized for-profit with a place of business located in the United States.

Certified means a Disadvantaged Business Enterprise ("DBE"), Minority-Owned Business Enterprise ("MBE") or Woman-Owned Business Enterprise ("WBE") found to meet the requirements of this Policy and that is certified under the Uniform Certification Program of the United States Department of Transportation by the Chicago Transit Authority, the Illinois Department of Transportation, METRA, Pace Suburban Bus, or the City of Chicago, or that is certified as an MBE or as a WBE by the City of Chicago or Cook County.

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.

Compliance means that County departments, agents of the County, County Prime Contractors and Subcontractors have correctly implemented the requirements of this Policy.

Construction-related means projects that primarily serve to develop or support construction activities, including preliminary engineering, design engineering, construction engineering, earthwork, maintenance, and other projects performed by architects, engineers, and/or land surveyors.

Contract means a mutually binding, legal relationship, or any modification thereof for construction or construction-related services or work performed.

Contract Goal means the goal for the participation of DBEs, MBEs and/or WBEs on a specific solicitation, which shall be based on the percentage availability of DBEs, MBEs and/or WBEs to perform the specific weighted scopes of work of the entire Contract and other relevant factors.

Contractor means any person or business entity that shall enter into a Contract with the County and includes all partners and all joint venturers of such person for construction or construction-related contracts.

County means the County of DuPage, a body politic and corporate, in DuPage County, Illinois.

Days means calendar days.

Disadvantaged, Minority and Woman-owned Business Enterprise (“DBE,” “MBE” and “WBE”) Program or “Program” means the program that seeks to prohibit discrimination, abolish barriers, and provide equal opportunity for certified DBEs, MBEs and WBEs for the County’s construction and construction-related Contracts as defined by this Policy.

Disparity Study means the report procured by the County and adopted by the DuPage County Board, titled “DuPage County Disparity Study 2023.”

Division means the Division of Contracting Equity created pursuant to this Policy that is responsible for the County’s Program and related operational needs as defined by the County Board Chair of the DuPage County Board.

Good Faith Efforts means efforts to achieve the DBE, MBE or WBE goal which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the Program’s requirements.

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

Minority means Black Americans, Hispanic Americans, Native Americans or Asian Americans.

Minority Business Enterprise or MBE means a for-profit business that is at least 51 percent owned by one or more individuals whose management and daily business operations are controlled by one or more of the Minority individuals; which has a place of business located within the County's Marketplace; and which is Certified.

Prime Contractor means a Contractor or a Consultant that was awarded a County Contract and has been selected for the completion of an entire County project, including purchasing all materials, hiring, and paying Subcontractors, and coordinating all the work.

Reconsideration Official means a County representative that has not participated in the original determination that the Bidder did not make sufficient Good Faith Efforts to meet a Contract Goal.

Site of Work means the physical place or places where the building or work called for in the Contract will remain once the Contract work has been completed and any other site where a significant portion of the building or work is constructed, provided that such site is established specifically for the performance of the Contract or project.

Subcontractor means a Contractor or a Consultant that enters into a subcontract agreement with a Prime Contractor to perform work or provide materials on a County project.

User Department means the department that develops the requisitions.

Utilization Plan means the plan, in the form specified by the County, which must be submitted by a Bidder listing the DBEs, MBEs and/or WBEs that the Bidder intends to use in the performance of a Contract, the scopes of the work, and the dollar values or the percentages of the work to be performed.

Woman-Owned Business Enterprise or WBE means a for-profit small business concern that is at least 51 percent owned by one or more individuals who are women; whose management and daily business operations are controlled by one or more of the women; which has a place of business located within the County's Marketplace; and which is Certified as a WBE.

SECTION 3. Disadvantaged, Minority and Woman-owned Business Enterprise Program Administration

A. Division of Contracting Equity

The Division shall have primary responsibility for the implementation and administration of the Program. The Division and Contracting Equity Administrator of the Division shall report to the Deputy Chief Financial Officer or their designee.

The Division shall administer the Program ensuring that DBEs, MBEs and WBEs are able to compete on all County contracts without artificial barriers to participation. The County shall develop and use race- and gender-neutral measures to the maximum feasible extent in implementing the Program. The Division's duties shall include, but not be limited to:

1. Creating the Program in consultation with the Procurement Services Division, the DuPage County State's Attorney's Office ("SAO"), the County's executive staff, and County User Departments which includes:
 - a. Developing Program rules, regulations, policies, and procedures
 - b. Developing Contract language
 - c. Developing boilerplate Bid, Proposal, and other solicitation language
 - d. Developing monthly and annual reports
 - e. Developing workflows and internal controls
2. Administering the Program
 - a. Setting DBE, MBE or WBE Contract Goals in consultation with User Departments, using a narrowly tailored contract goal setting methodology.
 - b. Monitoring D/M/WBE Compliance (e.g., vendor reporting, contracting goals, certification status, determining Utilization Plan compliance, site inspections, closeouts, etc.)
 - c. Evaluating Prime Contractor's achievement of a Contract Goal or Good Faith Efforts to meet a Contract Goal.
 - d. Reporting regularly on D/M/WBE participation.
 - e. Reviewing individual Contract scope(s) of work, bonding requirements, insurance requirements, retainage conditions and other Contract elements to encourage D/M/WBE participation.

- f. Providing information and technical assistance on the Program (e.g., attending pre-Bid and pre-construction/design conferences to explain the Program and its requirements).
 - g. Promoting and conducting outreach functions to the D/M/WBE and minority and woman business community and other stakeholders, including training seminars on the technical aspects of preparing a Bid for a County Contract.
 - h. Receiving, reviewing, and acting upon feedback and suggestions concerning the Program.
- B. User Department Roles and Responsibilities
- Each User Department that shares responsibility for the awarding or monitoring of County Contracts is responsible for promoting, supporting, and assisting in carrying out the Program. User Departments are to be held accountable for the overall objectives of the Program and exercising specific functions in support of the Program, as well as any other function(s) deemed necessary by the Division to implement the goals and objectives of the Program.
- C. Construction and Construction-related Projects
- The Program applies to construction and construction related Contracts. They are characterized as follows:
- 1. Mirror contracts analyzed in the Disparity Study;
 - 2. Limited to the County's major construction departments (*i.e.*, Public Works, Stormwater Management, Facilities Management, and Transportation);
 - 3. Equal to or greater than \$75,000;
 - 4. Professional services that fall under the Local Government Professional Services Selection Act, 50 ILCS 510/0.01 *et seq.* and Architects, Engineering and Land Surveying Qualification Based Selection Act, 30 ILCS 535/1 *et seq.*, both requiring Qualifications Based Selection ("QBS"); and
 - 5. Public sector, nonprofit, and utilities contracts are not included in the Program. Contracts with requirements not set by the County can be excluded from this Program at the discretion of the Deputy Chief Financial Officer or their designee.

SECTION 4. Race- and Gender-Conscious Measures to Implement the Program

- A. Program Eligibility
- To be eligible to be counted as a DBE, MBE or WBE towards a Contract Goal, the firm must be certified at the time of Bid submission by a government agency recognized by the County as meeting the requirements of strict constitutional scrutiny. Certifying agencies are the Members of the Unified Certification Program for U.S. Department of Transportation contract, *i.e.*, the Chicago Transit Authority, the Illinois Department of Transportation, METRA, Pace Suburban

Bus, or the City of Chicago, or that is certified as an MBE or as a WBE by the City of Chicago or Cook County.

B. Counting D/M/WBE Participation Towards a Contract Goal

A Bidder may achieve the Contract Goals by its status as a DBE, MBE, or WBE; by entering into a Joint Venture with one or more DBEs, MBEs, or WBEs; by subcontracting at any tier a portion of the work to one or more DBEs, MBEs, or WBEs; or by any combination of the above. When a DBE, MBE, or WBE participates in a Contract, the County will count only the value of the work actually performed by the DBE, MBE, or WBE towards the Contract Goal. The participation of DBEs, MBEs, or WBEs will be counted as follows towards the Contract Goal:

1. The Bidder may count the entire amount of that portion of the Contract that is performed by the DBE's, MBE's, or WBE's own forces.
2. The Bidder that is a DBE, MBE, or WBE may count the entire amount of the Prime Contractor's self-performance that the DBE, MBE, or WBE is performing with its own forces.
3. The Bidder may count the entire amount of fees or commissions charged by an DBE, 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, provided the County determines the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.
4. When a DBE, MBE, or WBE subcontracts part of the work of its Contract to another firm, the value of the subcontracted work may be counted only if the DBE's, MBE's, or WBE's Subcontractor is itself a DBE, MBE, or WBE. Work that a DBE, MBE, or WBE subcontracts to a non-certified firm does not count towards the Contract Goal.
5. When a DBE, MBE, or WBE performs as a participant in a Joint Venture, the Joint Venture Bidder may count only the portion of the total dollar value of the Contract equal to the distinct, clearly defined portion of the work of the Contract that the DBE, MBE, or WBE performs with its own forces. The DBE, MBE, or WBE participant in the Joint Venture must be responsible for a clearly defined portion of the work to be performed equal to its share in the ownership, control, management responsibility, risks and profits of the Joint Venture. The Administrator shall review the profits and losses, initial capital investment, actual participation of the DBE, MBE, or WBE Joint Venture partner in the performance of the Contract with its own forces and for which it is separately at risk, and other pertinent factors of the Joint Venture. The Joint Venture agreement must be approved by the Administrator, and it is required to operate in accordance with the approved Joint Venture agreement.
6. The dollar value of work performed under a Contract with a certified firm after it has ceased to be certified can count toward the Contract Goal if the

Bidder's Contract with the County was executed prior to removal of the firm's certification.

7. DBE, MBE, or WBE Subcontractor participation only counts toward a Prime Contractor's Compliance with its Utilization Plan when the amount being counted has actually been paid to the DBE, MBE, or WBE.

SECTION 5. Utilization Plan Submissions

Each Bidder shall submit a Utilization Plan and associated Certification Letter with the completed Bid. DBE, MBE, or WBE certifying agencies are the Chicago Transit Authority, the Illinois Department of Transportation, METRA, Pace Suburban Bus, the City of Chicago, and Cook County. Failure to submit the Utilization Plan and Certification Letters shall render the Bid non-responsive.

Each Bidder's Utilization Plan shall include either (i) a commitment to meeting or exceeding the Contract Goal set forth in the solicitation; or (ii) a demonstration of its Good Faith Efforts to meet the Contract Goal set forth in the solicitation.

Based on Good Faith Effort documentation, a Bidder may request a partial or total reduction of the Contract Goal.

To determine whether a Bidder has made Good Faith Efforts, the Division will consider whether the Bidder:

- A. Provided complete and accurate documentation for the request, including copies of each DBE, MBE, or WBE and non-Certified Subcontractor quote submitted to the Bidder when a non-Certified Subcontractor is selected over a DBE, MBE, or WBE for work on the Contract.
- B. Attended any pre-Bid conference conducted by the County to acquaint Prime Contractors with DBEs, MBEs, or WBEs available to provide relevant services and to inform DBEs, MBEs, or WBEs of subcontract opportunities on the Contract.
- C. Solicited through reasonable and available means (e.g., written notices, advertisements) DBEs, MBEs, or WBEs certified in the anticipated scopes of subcontracting of the Contract, not less than ten (10) days before the Bid is due.
- D. Provided timely and adequate information about the plans, specifications and requirements of the Contract. Followed up initial solicitations to answer questions and encouraged DBEs, MBEs, or WBEs to submit Bids.
- E. Negotiated in good faith with interested DBEs, MBEs, or WBEs that have submitted Bids and thoroughly investigated their capabilities. Evidence of such negotiations includes the names, email addresses and telephone numbers of DBEs, MBEs, or WBEs with whom the Bidder negotiated; a description of the information provided to MBEs and WBEs regarding the work selected for subcontracting; and explanations as to why agreements could not be reached with DBEs, MBEs, or WBEs to perform the work. The Bidder may not reject DBEs,

MBEs, or WBEs as being unqualified without sound reasons. The fact that there may be some additional costs involved in finding and using DBEs, MBEs, or WBEs is not in itself a sufficient reason for a Bidder's failure to meet the Contract Goal, as long as such costs are reasonable.

In determining whether a Bidder has made Good Faith Efforts, the levels of participation by DBEs, MBEs, or WBEs set forth in the Utilization Plans submitted by other Bidders for the same procurement may be considered. For example, if the apparent successful Bidder fails to meet the Contract Goal(s) but meets or exceeds the average DBE, MBE or WBE participation obtained by other Bidders, then this evidence may indicate that the apparent successful Bidder made Good Faith Efforts.

If the County determines that the apparent successful Bidder has failed to meet the Good Faith Efforts requirements of the Program, the County must provide the Bidder an opportunity for administrative reconsideration. A Bidder's request for reconsideration must be to the County within ten (10) days of the Bidder's receipt of the County's determination that it did not make adequate Good Faith Efforts to meet the Contract Goal. As part of this reconsideration, the Bidder must have the opportunity to provide written documentation of its argument concerning the issue of whether it met the Contract Goal or made adequate Good Faith Efforts to do so. The County's decision on reconsideration must be made by an official who did not take part in the original determination that the Bidder failed to meet the Contract Goal or make adequate Good Faith Efforts to do so. The Bidder must have the opportunity to meet in person with the County's Reconsideration Official to discuss the issue of whether it met the Contract Goal or made adequate Good Faith Efforts to do so. The County must send the Bidder a written decision on reconsideration within ten (10) days, explaining the basis for finding that the Bidder did or did not meet the Contract Goal or make adequate Good Faith Efforts to do so. The result of the reconsideration process is final.

The Prime Contractor shall make available to the Division upon request a copy of all subcontract agreements. All Subcontractors, regardless of their subcontracting tier, shall adhere to the provisions of the Program.

SECTION 6. Contract Performance Compliance

The Prime Contractor shall be required to submit a status report of its progress towards meeting the Contract Goal, or other Program requirements, in the form and at the time specified in the solicitation or as otherwise directed by the County. The Prime Contractor's failure to do so may result in a delay of the progress payment. Evidence of DBE, MBE, or WBE Subcontractor participation and payments must be submitted as required by the County to confirm Subcontractors' participation and payment.

County Contract Compliance officers and auditors, or their designees, shall have access to the Contractor's and Subcontractor's books and records, including certified payroll records, bank statements, employer business tax returns and all records including all computer records and books of account to determine the Prime Contractor's and DBE, MBE, or WBE Subcontractor's Compliance with the Contract Goal commitment. A Prime Contractor must provide the Administrator any additional Compliance documentation within ten (10) days of such request. Audits may be conducted without notice at any time at the discretion of the County.

If County personnel observe that any purported DBE, MBE, or WBE Subcontractor other than those listed on the Utilization Plan are performing work or providing materials and/or equipment for those DBE, MBE, or WBE Subcontractors listed on the Utilization Plan, the Prime Contractor will be notified in writing that an apparent violation is taking place and progress payments may be withheld. The Prime Contractor will be given an opportunity to meet with the Administrator prior to a finding of non-Compliance. Individual User Departments may require additional procedures.

The Contract Goal obligation extends to all Contract work covered by change orders, irrespective of the Contracting tier. The obligation to make Good Faith Efforts to meet the Contract Goal extends to the entire performance of the Contract. When Contract work is added to the original scope of work corresponding to tasks designated to the DBE, MBE, or WBE Subcontractors, the Prime Contractor must award that work to the MBE or WBE listed in its Utilization Plan. If the original listed DBE, MBE, or WBE cannot perform the additional work, the Prime Contractor must make Good Faith Efforts to secure DBE, MBE, or WBE Subcontractors to perform the additional Contract work to ensure that the goal percentage committed to in the Contract is maintained or the Contract Goal is achieved.

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

The Prime Contractor is required to fill out the Supplemental Change Order Form or such other documents as the County may require which details the names of the Subcontractors impacted and provides a description of the work and dollar amount of the change and the amended Contract value. The Prime Contractor will submit the Supplemental Change Order Form along with any additional documents as required to the Division of Contracting Equity and the Procurement Services Division for approval.

After Contract award, a Prime Contractor cannot make any changes to the approved Utilization Plan or substitute or terminate a DBE, MBE, or WBE Subcontractor listed in its approved Utilization Plan without prior written consent of the Division of

Contracting Equity and the Procurement Services Division (“Divisions”). This includes, but is not limited to, instances in which a Prime Contractor seeks to perform work originally designated for a DBE, MBE, or WBE Subcontractor with its own forces or those of an affiliate, a non-DBE, MBE, or WBE or another DBE, MBE, or WBE. The County will include in each Contract a provision stating that the Prime Contractor shall utilize the specific DBE, MBE and WBE listed in the approved Utilization Plan to perform the work and supply the materials for which each is listed unless the Prime Contractor obtains the Divisions’ written consent. The Prime Contractor shall not be entitled to any payment for work unless it is performed or supplied by the approved DBE, MBE, or WBE.

The County may provide such written consent for the above-referenced substitution, replacement or termination only if the County agrees that the Prime Contractor has good cause to terminate the DBE, MBE, or WBE. Good cause includes the following circumstances:

- A. The listed DBE, MBE, or WBE Subcontractor fails or refuses to execute a written subcontract agreement.
- B. The listed DBE, MBE, or WBE Subcontractor fails or refuses to perform the work of its subcontract agreement in a way consistent with normal industry standards. Good cause does not exist, however, if the failure or refusal of the DBE, MBE, or WBE Subcontractor to perform its work on the subcontract agreement results from the bad faith or discriminatory action of the Prime Contractor.
- C. The listed DBE, MBE, or WBE Subcontractor fails or refuses to meet the Prime Contractor’s reasonable, nondiscriminatory bond requirements.
- D. The listed DBE, MBE, or WBE Subcontractor becomes bankrupt, insolvent, or exhibits credit unworthiness.
- E. The listed DBE, MBE, or WBE Subcontractor is ineligible to work on Contracts because of suspension and/or debarment or is ineligible due to compliance with applicable federal or state law.
- F. The County has determined that the listed DBE, MBE, or WBE Subcontractor is not a responsible Subcontractor.
- G. The listed DBE, MBE, or WBE Subcontractor voluntarily withdraws from the project and provides written notice to the Divisions of its withdrawal.
- H. The listed DBE, MBE, or WBE Subcontractor is ineligible to receive DBE, MBE, or WBE credit for the type of work required.
- I. The DBE, MBE, or WBE owner dies or becomes disabled with the result that the listed DBE, MBE, or WBE Subcontractor is unable to complete its work on the Contract.
- J. Other documented good cause that the Divisions determine compels the termination of the DBE, MBE, or WBE Subcontractor.

Good cause does not include where the Prime Contractor seeks to terminate a listed DBE, MBE, or WBE Subcontractor so that the Prime Contractor can self-perform the

work for which the DBE, MBE, or WBE Subcontractor was engaged or so that the Prime Contractor can substitute another DBE, MBE, or WBE or non-certified Subcontractor after Bid submission.

Before requesting to terminate and/or substitute a DBE, MBE, or WBE Subcontractor, the Prime Contractor must give notice in writing to the DBE, MBE, or WBE Subcontractor, with a copy to the Divisions, of its intent to request to terminate, replace and/or substitute, and the reason for the request. The Prime Contractor must give the DBE, MBE, or WBE ten (10) days to respond to the notice. The DBE, MBE, or WBE shall then advise the County and the Prime Contractor of the reasons, if any, why they object to the proposed termination and why the Divisions should not approve the request. If required in a particular case as a matter of public necessity (e.g., safety), the Divisions may require a response period shorter than ten (10) days. The User Department or the Division reserves the right to make emergency repairs through any practical means as necessary to maintain public safety.

When an DBE, MBE, or WBE Subcontractor is terminated or fails to complete its work on the Contract for any reason, the Prime Contractor must make Good Faith Efforts to substitute another DBE, MBE, or WBE for the original DBE, MBE, or WBE. These Good Faith Efforts shall be directed at substituting another DBE, MBE, or WBE to perform at least the same amount of work under the Contract as the DBE, MBE, or WBE that was terminated, to the extent needed to meet the Contract Goal. The Prime Contractor must submit a DBE, MBE, or WBE Subcontractor's Letter of Intent for each proposed new DBE, MBE, or WBE Subcontractor. If the Prime Contractor is not successful in substituting another DBE, MBE, or WBE, then its documented Good Faith Efforts to do so must be submitted within ten (10) days of the approved substitution. The Division shall provide a written determination to the Prime Contractor stating whether Good Faith Efforts have been demonstrated.

In the event a Prime Contractor, in the performance of its Contract, determines that the conditions of the work warrant a reduction in the scope of work to be performed by an DBE, MBE, or WBE, the Prime Contractor must utilize Good Faith Efforts to fulfill its Contractual Goal commitment. The Prime Contractor must notify the Administrator in writing within ten (10) days of the determination to request an amendment of its Utilization Plan. The Prime Contractor must give the DBE, MBE, or WBE Subcontractor notice in writing, with a copy to the Administrator, of its intent to request to reduce the scope of work and the detailed reasons for the request. The Administrator will approve or disapprove the reduction in conjunction with the User Department based on the Prime Contractor's documented compliance with these provisions.

SECTION 7: Enforcement and Sanctions for Non-Compliance

The County shall insert a clause into each Contract stating that the failure by the Prime Contractor to carry out the requirements of the Program is a material breach of the Contract and may result in the termination of the Contract or such other remedies as the County deems appropriate, including but not limited to denying or limiting credit towards the Contract Goal, withholding progress payments, termination of the Contract, liquidated damages, debarment from future County Contract opportunities or other appropriate remedies.

Any DBE, MBE, or WBE that has misrepresented its DBE, MBE, or WBE status and/or failed to operate as an independent business concern performing a Commercially Useful Function, shall be declared by the Administrator to be ineligible to participate as a DBE, MBE, or WBE for future County Contracts for a period of two years.

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

The County may refer any matters to the appropriate law enforcement agencies for follow-up action.

SECTION 8: Other

Notwithstanding any other provisions of this Policy, the County shall at all times comply with all laws and regulations of the state and federal government or any administrative agencies thereof.

The provisions of this Policy shall not apply to any contract to the extent that different procedures or standards are required by any law or regulation of the United States.

This Policy shall be effective and apply to all Bids for construction or construction-related Contracts advertised beginning one-year after the formal adoption of this Policy by the DuPage County Board.

The Program shall sunset six years from adoption of this Policy, unless otherwise reenacted. The County shall regularly review the operations and achievements of the Program. The County shall perform a disparity study prior to the sunset date.