

HOUSING AUTHORITY OF THE CITY OF OMAHA

DBE/MBE POLICY

Adopted March 2010-Res.2010-36

ARTICLE I: POLICY AND TERMS

- A. It is the policy of the Omaha Housing Authority (OHA) that Minority, and Women Business Enterprises (MBE/WBE) as defined in regulations developed by the Secretary of the Department of Housing and Urban Development (HUD) and promulgated in 24 CFR Part 85, HUD Handbook 7460.8 and 7485.1 REV-3 Section 6(a) and Notice PIH 88-11 (PHA) shall have the maximum opportunity to participate in the performance of contracts financed in whole or in part with federal funds and that bidders, proposers or contractors and their subcontractors or suppliers shall take all necessary and reasonable steps to ensure that MBE/WBEs shall have the maximum opportunity to compete for and perform contracts financed in whole or in part by federal funds.

It is the policy of OHA to provide and foster economic stimulus, incentives and development to the residents and communities it serves. It is necessary and expedient to require the inclusion of certain provisions in contracts with OHA to promote and encourage the creation of business opportunities for minority and women businesses to compete for OHA contracts; and to promote equality of access to OHA contracts.

This policy shall be implemented through the OHA's MBE/WBE Utilization Plan and called the MBE/WBE Participation Proposal. This Amendment to Special Conditions shall be incorporated by reference in its entirety and made a part of each and every Invitation for Bid (IFB), Request for Proposal (RFP), contract or similar procurement document issued or entered into by the OHA.

- B. Utilization of MBE/WBE Businesses and MBE/WBE Emerging Businesses in OHA Contracts

(1) Commencing April 1, 2010, OHA shall make every good-faith effort feasible to utilize MBE/WBE and MBE/WBE emerging businesses in all OHA contracts.

(2) Commencing April 1, 2010, and then annually thereafter, OHA shall establish an overall goal and sub-goals as necessary for the utilization of MBE/WBE and MBE/WBE emerging business in

all OHA contracts.

(3) Prior to soliciting bids or proposals for supplies, materials, technical, professional or other services, the department soliciting the bid shall work with the Procurement Department to determine if the bid or any portion of the bid may be completed by a certified MBE/WBE or MBE/WBE Emerging business. It may be recommended that MBE/WBE or MBE/WBE Emerging business requirement not be utilized on a bid if it is determined that there are not sufficient MBE/WBE or MBE/WBE Emerging businesses available to respond to the bid or that have the capacity and capability to provide the supplies, materials, technical, professional or other services.

(4) If the Procurement department determines that that the project or portions of the project are appropriate for MBE/WBE or MBE/WBE Emerging businesses either as a prime contractor or a subcontractor, then a recommendation will be made to the procurement committee to make this part of the bid specifications, and bidders not adhering to the requirements set forth in the bid specifications will be deemed non-responsive

C. Pursuant to the MBE/WBE participation requirements as set forth above, the OHA has as its basis for determinations with respect to its MBE/WBE Utilization Plan and its MBE/WBE commitment goals and MBE/WBE Participation Proposal.

Accordingly, a bidder/proposer or contractor agrees to expend not less than the following percentages of the total contract price inclusive of all modifications and amendments, if awarded, for contract participation by MBE/WBEs:

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|-----------------------------|-----|
| 1. Construction & Services: | 10% |
| 2. Materials & Supplies : | 5% |

D. The bidder/proposer's compliance with the OHA's MBE/WBE commitment goals will be evaluated on the basis of a percentage of the total base bid. As indicated in Article 1 Section B, the MBE/WBE participation goal shall apply to the total dollar value of the contract, inclusive of all amendments, modifications and change orders. The bidder/proposer agrees to comply with the MBE/WBE commitment goal in any contract modification work. This commitment may be met through direct and/or indirect participation of MBE/WBEs as private managers, developers, subcontractors, suppliers and/or consultants in the performance of OHA contracts.

- E. Direct participation refers to the utilization of MBE/WBEs in the performance of this contract as follows:
- (1) The bidder/proposer's status as an MBE/WBE; or
 - (2) A joint venture with one or more MBE/WBEs on the contract(s); or
 - (3) Subcontracting a portion of the work performed on the contract(s) to one or more MBE/WBEs; or
 - (4) The purchase of supplies or materials used in the performance of the contract(s) from one or more MBE/WBEs; or
 - (5) Any combination of the above.
- F. Indirect participation refers to the utilization of MBE/WBEs as subcontractors, suppliers or consultants in the normal course of the bidder/proposer's business. This includes public and/or private sector contracts, purchase orders, invoices, etc.
- G. The bidder/proposer shall, in determining the manner of MBE/WBE participation, first consider the utilization of MBE/WBEs as joint venture partners, private managers, developers, prime contractors, subcontractors and/or suppliers of goods and services directly related to the performance of this contract. In all cases, the OHA requires that the bidder/proposer demonstrate the specific efforts undertaken to utilize MBE/WBEs directly in the performance of this contract.
- H. After exhausting reasonable good faith efforts and with prior OHA approval, the bidder/proposer may also meet all or part of the OHA's MBE/WBE commitment goals by contracting with MBE/WBEs for the provision of goods and services not directly related to the performance of the contract, with notarized documents demonstrating indirect utilization.
- I. Counting MBE/WBE Participation: Guidelines: Proposed MBE/WBEs must perform a commercially useful function in order to be considered eligible for participation in the OHA's MBE/WBE program. A company is considered to perform a commercially useful function responsible for actually performing, managing, and supervising the work involved. To determine whether an MBE/WBE is performing a commercially useful function, the OHA will review and evaluate the specific.

(1) Duties that will be performed by the MBE/WBE. Each MBE/WBE will be expected to perform all of the work contemplated for it by any subcontract or agreement through the use of its own employees and equipment.

(2) The OHA reserves the right to deny or limit MBE/WBE credit to the bidder/proposer where any MBE/WBE is found to be engaged in substantial subcontracting or pass-through activities with others, that is inconsistent with the general industry practice.

(3) Credit for the participation of MBE/WBEs as joint ventures shall be based upon a detailed analysis of the duties, responsibilities and risks undertaken by the MBE/WBE specified by the joint venture's executed agreement. The OHA reserves the right to deny or limit MBE/WBE credit to the bidder/proposer where any MBE/WBE joint venture partner is found to have duties, responsibilities, risks of loss and management control over the joint venture that is not commensurate with or in proportion to its joint venture ownership.

(4) MBE/WBE participation shall be counted toward the MBE/WBE goal set in the contract as follows:

(a) Once an MBE/WBE is determined to be eligible in accordance with these rules, the total dollar value of the contract awarded to the MBE/WBE may be counted toward the MBE/WBE goal, except as indicated below.

(b) A bidder/proposer may count toward its MBE/WBE goal a portion of the total dollar value of a contract with a joint venture eligible under the standards of the Amendment to Special Conditions equal to the percentage of the ownership and control of the MBE/WBE venture.

(c) Bidder/proposer may count toward its MBE/WBE goal only expenditures to the MBE/WBEs that perform a commercially useful function in the performance of a contract. An MBE/WBE is considered to perform a commercially useful function when it is responsible for the execution of a distinct element of the contract work and actually performing, managing, and supervising the work involved.

(d) Consistent with normal industry practices, an MBE/WBE may enter into subcontracts. If an MBE/WBE bidder/proposer subcontracts a significantly greater portion of the work of the contract than would be expected on the basis of normal industry practices, the MBE/WBE shall be presumed not to be performing a

commercially useful function. Evidence may be presented by the contractors involved to rebut this presumption.

(e) A bidder/proposer may count toward its MBE/WBE goal, one hundred percent of its expenditures for products, materials and supplies required under the contract and obtained from an MBE/WBE regular dealer and one hundred percent of such expenditures to an MBE/WBE manufacturer.

(f) A bidder/proposer may count toward its MBE/WBE goal the following expenditures to MBE/WBEs that are not manufacturers or regular dealers:

(i) The fees or commissions charged for providing bona fide services; such as, professional, technical, bidder/proposer or managerial, and assistance in the procurement of essential personnel, facilities, equipment, materials or supplies required for performance of the contract, provided that the fees or commissions are determined by the OHA to be reasonable and not excessive as compared with fees or commissions customarily allowed for similar services and assistance.

(ii) The fees or commissions charged for delivery of materials and supplies required on a job site (but not the cost of materials and supplies themselves) when the hauler, trucker, or delivery service is not also the manufacturer of or a regular dealer in the materials and supplies, provided that such fees are determined by the OHA to be reasonable and not excessive as compared with fees or commissions customarily allowed for similar services.

J. Bidder/Proposers may also achieve compliance by petition for grant of relief or waiver from the OHA's MBE/WBE commitment goals on the bidder/proposer's letterhead, accompanied by documentation demonstrating that all reasonable "good faith" efforts were made toward fulfilling the goal (see Article IV).

K. Failure of a bidder/proposer to carry out the commitments and policies with respect to MBE/WBEs shall constitute a material breach of contract and may result in the suspension or termination of a contract, the disqualification of the bidder/proposer for a future award of OHA contracts, the assessment of liquidated damages or such remedy as OHA deems appropriate (see Article IX).

- L. Compliance with the OHA's MBE/WBE participation commitment goals will not diminish or supplant Equal Employment Opportunity and Civil Rights provisions as specified elsewhere in this contract and as they relate to prime contractor and subcontractor obligations.

ARTICLE II: DEFINITIONS

- A. Area of Specialization – description of the MBE/WBEs business which has been determined to be most reflective of the MBE/WBEs claimed specialty or expertise. Each Letter of Certification contains a description of the MBE/WBEs area of specialty. The OHA reserves the right to investigate and determine active MBE/WBE participation specifically identified for this contract prior to award.
- B. Contractor – the individual or business entity selected by the OHA to (1) enter into contract negotiations with the OHA or (2) to receive an award of contract pursuant to an Invitation for Bid or Request for Proposal. Wherever the term Contractor appears, it shall also be construed to pertain to Architects, Engineers, Consultants or other professional service providers as applicable.
- C. Joint Venture – (1) an association of two or more businesses acting as a contractor or as a subcontractor in carrying out all or a definite portion of a contract in which each combine its property, capital efforts, skills, and knowledge, or (2) an enterprise formed after the date of first publication of the OHA's Invitations for Bids or Requests for Proposals to perform work on a contract, which, if the enterprise were continuing, would qualify as an MBE/WBE.
- D. Joint Venture Agreement – a fully executed and notarized copy of the joint venture agreement submitted with the bid by a joint venture. In order to demonstrate the MBE/WBE partner's share in the ownership, control, management responsibilities, risks in the profits of the joint venture, the proposed Joint Venture Agreement must contain specific details related to:
- Contributions of capital and equipment;
 - Work responsibilities or other performance to be undertaken by the MBE/WBE company;
 - Commitment of management, supervisory and operative personnel employed by the MBE/WBE to be dedicated to the performance of the contract. The Joint Venture

Agreement must also clearly define each partner's authority to contractually obligate the joint venture and each partner's authority to expend joint venture funds (e.g., check signing authority).

E. Manufacturer – a company that operates or maintains a factory or establishment that produces, on premises, the materials or supplies obtained by a contractor.

F. Minority or Minority Group – may include, but is not limited to, the following racial or ethnic groups:

- Black; or
- Hispanic; or
- Asian Pacific (persons with origins from Japan, China, Philippines, Vietnam, Korea, Samoa, Guam, U.S. Trust Territory of the Pacific Islands, Northern Mariana Islands, Laos, Cambodia, Taiwan); or
- Native American (American Indian, Eskimos, Aleut or Native Hawaiians); or
- Subcontinent Asian Americans; or
- Hasidic Jewish.

G. Minority Business Enterprise (MBE) – an independent business which performs a commercially useful function and which is 51% or more owned, controlled and operated on a day-to-day basis by one or more minority persons.

H. Emerging MBE/WBE Business is defined as a business that has invested in a primary headquarters office or has a physical working office location within a census tract or contiguous area within Douglas County, Nebraska, in which the most recent U.S. decennial census shows that 30% or more of the persons in that census tract are below the poverty level.

I. Participation Proposal means an affidavit attesting to the MBE/WBE subcontractors that will be utilized on a given contract, stating the name, address, telephone number of MBE/WBE subcontractor/supplier, dollar amount and percentage of participation and the scope of work to be performed.

- J. Regular Dealer – a company that owns or maintains an office, store, warehouse or other establishment in which products, materials or supplies required under a contract, agreement or purchase order are bought, kept in stock, and regularly sold to the public in the usual course of business. To be considered a regular dealer, the company must engage in, as its principal business and in its own name, the purchase and sale of the products, materials or supplies in question.
- K. Women Business Enterprise (WBE) – an independent business which performs a commercially useful function and which is 51% or more owned, controlled and operated on a day-to-day basis by one or more women.
- L. Utilization Plan – an affidavit attesting to the MBE/ WBE and emerging MBE/WBE prime contractor or subcontractors that will be utilized on a given contract, stating the names, addresses and telephone numbers of the MBE/WBE prime contractor and subcontractors/suppliers, dollar amount, percentage of participation and the scope of work to be performed.

ARTICLE III: MBE/WBE UTILIZATION PLAN: GUIDELINES GOVERNING SUBMISSION,
EVALUATION AND APPROVAL

A. Submission of the MBE/WBE and emerging MBE/WBE Participation Proposal

The following schedules and described documents constitute the bidder/proposer's MBE/WBE and emerging MBE/WBE Utilization Plan and must be submitted as part of the overall proposal/bid on or before the time set for that proposal or bid opening. The MBE/WBE Participation Proposal will be reviewed for completeness; all spaces on the schedules must be filled out or indicated as not applicable. Failure to submit the following described documents in accordance with the guidelines stated may be cause for the rejection of the overall proposal/bid in its entirety.

(1) MBE/WBE PROPOSERS – MBE/WBE REQUIREMENTS

- (a) Letter(s) of Certification – A copy of the MBE/WBE's current Letter(s) of Certification from the City of Omaha, the Minority Supplier Development Council, the Small Business Administration (SBA) or any other governmentally recognized certification of a minority business.

NOTICE: The Omaha Housing Authority does not make any representations concerning the ability of any MBE/WBEs to perform work within their area of specialty. It is the responsibility of all bidder/proposers to determine the capability and capacity of the MBE/WBEs to satisfactorily perform the work proposed.

If the required documents are not provided, the MBE/WBE may be considered a NON-MBE/WBE and may be required to comply with the OHA's MBE/WBE and emerging MBE/WBE Utilization Plan requirements for NON-MBE/WBEs.

All Letters of Certification must include a statement of the MBE/WBE's area of specialization. The MBE/WBE's scope of work must conform to the area of specialization stated in the proposal/bid.

Any MBE/WBE with a principal place of business located outside of the Omaha Standard Metropolitan Statistical Area (SMSA) and/or the State of Nebraska may participate in contracts let by the OHA. For an out of state MBE/WBE to be considered as a bidder/proposer, a copy of a current Letter of Certification from a recognized local and/or out of state certifying agency must be submitted with the proposal. Evaluation of request for proposal (RFP), request for qualification (RFQ) and invitation for bid (IFB) that included objective and subjective evaluation factor weighting as to cost, capability and technical and other such factors as part of the scoring process for an award should be initially reviewed by the procurement committee and any modification to the initially review thereafter.

Additional consideration in the form of evaluation factor weighing will be given to Emerging MBE/WBE businesses which are businesses that has invested in a primary headquarters office or has a physical working office location within a census tract or contiguous area within Douglas County, Nebraska, in which the most recent U.S. decennial census shows that 30% or more of the persons in that census tract are below the poverty level.

Additional consideration in the form of evaluation factor weighing will be give in the DBE goal requirement is met through direct participation versus indirect participation.

For a non-certified MBE/WBE to be considered as a bidder/proposer, a time stamped receipt or a letter advising that the certification application is under review from at least one of the recognized certifying agencies must be submitted with the proposal.

(b) Statement of Bidders' Qualifications – See Appendix General Conditions Section

(c) Equal Employment Opportunity Certification – See General Conditions – Section.

(2) NON-MBE/WBE BIDDERS/PROPOSERS: MBE/WBE PROPOSAL REQUIREMENTS

(a) Schedule A: Affidavit of MBE/WBE utilization – NON- MBE/WBE bidders/proposers must submit, as part of the overall MBE/WBE Participation Proposal on or before the time set for that proposal, a Schedule A which commits them to the utilization of each listed MBE/WBE in the direct or indirect performance of contract work. Through Schedule B, the bidder/proposer shall also commit to the expenditure of a specific dollar amount of participation by each listed MBE/WBE. The total dollar commitment to proposed MBE/WBEs must at least equal the required contract participation goal.

(b) Schedule B: Letter of Intent from the MBE/WBE Subcontractors and Suppliers – Schedule B, executed by each MBE/WBE (or MBE/WBE joint venture), included on Schedule A shall be attached and submitted as part of the overall proposal on or before the time set for that proposal. Each Schedule B must accurately detail the work to be performed by the MBE/WBE and the agreed upon prices to be paid.

(c) Letter(s) of Certification: A copy of each proposed MBE/WBE's current Letter(s) of Certification from the City of Omaha, Douglas County, the State of Nebraska, the Minority Business Development Council, the Small Business Administration (SBA) or other governmentally recognized certification must be attached to the Schedule B Letter of Intent.

All letters of certification must include a statement of the MBE/WBE's area of

specialization. The MBE/WBE's scope of work, as detailed in Schedule A, must conform to their stated area of specialization. Where an MBE/WBE is proposed to perform work not covered by their area of specialization, they must request in writing an expansion of the area of specialization prior to their being proposed to perform such work. The MBE/WBE's request to expand the scope of the area of specialization, together with all documentation required by recognized certifying agencies, must be received at the time set for that proposal.

Any MBE/WBE with a principal place of business located outside of Omaha SMSA and/or the State of Nebraska may participate in contracts let by the OHA. For an out of state MBE/WBE to be considered as a bidder/proposer, a copy of a current Letter of Certification from a recognized local and/or out of state certifying agency must be submitted with the proposal.

Any non-certified MBE/WBE proposed by the NON- MBE/WBE on Schedule A must have a time stamped receipt or a letter advising that the certification application is under review from at least one of the recognized certifying agencies.

(d) Statement of Bidder's Qualifications: See General Conditions – Section

(e) Equal Employment Opportunity Compliance Certification: See General Conditions – Section

(f) Waiver Requests – In cases where the bidder/proposer is requesting a waiver or variance of the MBE/WBE participation goals, the request must be submitted at the time of submission of the overall proposal. The waiver request must be completed in accordance with Section IV: Waiver of MBE/WBE Participation Goals.

B. EVALUATION OF MBE/WBE UTILIZATION PLAN: GUIDELINES

Within 4 hours after the determination of the proposed awardee(s) or highest ranking proposer, the Procurement Department will submit the proposed awardee's MBE/WBE and emerging MBE/WBE Utilization Plan to the Procurement Director for evaluation. The MBE/WBE Participation Proposal shall include a copy of the Specifications, the Bid

Tabulation Summary, the RFP Recommendation Memorandum, the Statement of Bidder's Qualifications, the Equal Employment Opportunity Compliance Certificate, the MBE/WBE Schedules, the Letter(s) of certification, Waiver Requests and related documents. During the evaluation period, the bidder/proposer agrees to give upon request, earnest and prompt cooperation to the OHA in submitting to interviews that may be necessary allowing entry to places of business, providing additional documentation, or soliciting the cooperation of proposed MBE/WBEs in providing such assistance.

- (1) The OHA may deem the bid as non-responsive in its entirety by reason of the determination that:
 - (a) A bidder/proposer's MBE/WBE Participation Proposal contains an insufficient level of MBE/WBE participation;
 - (b) A bidder/proposer is non-responsive or uncooperative to requests for further information relative to the MBE/WBE Participation Proposal; or
 - (c) The MBE/WBE Participation Proposal contains false statements.

C. APPROVAL OF MBE/WBE PARTICIPATION PROPOSAL – GUIDELINES

- (1) The Procurement Department will review and evaluate the MBE/WBE Participation Proposal as follows:
 - (a) Verify the certification of MBE/WBEs identified on Schedules A, B, and the Letter of Certification.
 - (b) Verify that the scope of work proposed by each MBE/WBE is within the area of specialization of such business.
 - (c) Evaluate Schedules A and B for the proposed awardee(s) in accordance with the MBE/WBE goal established for the contract.
 - (d) Calculate the total MBE/WBE dollar participation for the proposed contract.
 - (e) Review the waiver request, if included, and determine if the bidder/proposer is in compliance with the OHA's waiver requirements. This includes preparation of the recommendation memo for the Executive Director's approval.

(f) Submit MBE/WBE Participation Compliance Determination for proposed awardee to the Procurement Department at the earliest practicable time.

(2) The OHA, at its sole discretion, may modify the MBE/WBE Participation Proposal approval time frames on a contract specific basis in order to have sufficient time to obtain, evaluate and make a determination on the best information available from the proposed awardee(s), while giving due consideration to having the award completed to meet the OHA's needs on a timely basis.

(3) Upon receipt of the MBE/WBE Participation Proposal Compliance Determination, the contract shall be routed for award and execution in accordance with the OHA's Purchasing and Contracts Policies and Procedures.

(4) **The Procurement department** shall report quarterly to the procurement committee the results of the efforts made to implement the MBE/WBE goals. The reports shall include a listing of all OHA contracts and the utilization MBE/WBE business and MBE/WBE emerging business in each project or contract. If any exceptions were utilized, then the Procurement department shall specifically comment on why no such firm was utilized.

ARTICLE IV: WAIVER OF MBE/WBE PARTICIPATION GOALS

A. If a bidder/proposer is unable to meet the MBE/WBE participation commitment goals in its proposal for an OHA contract, a written request for waiver of MBE/WBE participation commitment goals must be submitted as part of its submissions in response to an IFB or RFP.

B. The OHA's Executive Director has the authority to waive MBE/WBE participation goals on contracts with a recommendation from the Procurement Department. This may occur whenever the Director of Procurement determines that for the reasons of time, need, or standards not previously known, that such a waiver would be in the OHA's best interest.

WAIVER OF MBE/WBE PARTICIPATION GOALS; PREAWARD

A. Bidder/Proposers requesting a waiver of the OHA's MBE/WBE participation commitment goals must submit a request for waiver on the bidder/proposer's letterhead. The bidder/proposer must demonstrate that all required good faith efforts were taken to secure eligible MBE/WBEs for the performance of contract work. The following are examples of good faith efforts:

- (1) Attendance at a pre-bid meeting, if any, scheduled by the OHA to inform MBE/WBEs of subcontracting opportunities under a given solicitation or;
- (2) Advertisements in general circulation media, trade association publications, and minority-focused media for at least 20 days before bids or proposals are due. If 20 days are not available, publication for a shorter reasonable time is acceptable or;
- (3) Written notification to MBE/WBEs that their interest in the contract is solicited or;
- (4) Efforts made to select portions of the work proposed to be performed by MBE/WBEs in order to increase the likelihood of achieving the stated goal or;
- (5) Efforts to negotiate with MBE/WBEs for specific sub-bids including at a minimum:
 - The names, addresses, and telephone numbers of MBE/WBEs that were solicited or;
 - A description of the information provided to MBE/WBEs regarding the plans and specifications for portions of the work to be performed or;
 - A statement of why additional agreements with MBE/WBEs were not reached or;
 - Listing of at least three assist agencies (including the OHA) contacted to identify qualified MBE/WBEs or;
 - Explanation of unsuccessful solicitation attempts.
- (6) Failure to submit documentation sufficient to support the waiver request will cause the proposal to be found non-responsive by the OHA and the proposal will be rejected. In such cases, the OHA's remedies may include but not limited to, negotiating with another bidder/proposer or re-advertising the IFB/RFP proposal.
- (7) To expedite the contract, bidder/proposer must submit all necessary documents as part of its overall proposal on or before the time set for that proposal.
- (8) The OHA's Procurement Department will review all waiver requests to determine whether there is sufficient evidence that the bidder/proposer has exercised good faith efforts but was, despite such efforts, unable to meet the applicable goals. The designee, upon the

Executive Director's review and compliance determination, will notify the bidder/proposer of the OHA's decision.

WAIVER OF MBE/WBE PARTICIPATION GOALS: POST AWARD

- A. After award of the contract, no relief of the MBE/WBE requirements will be granted by the OHA except in exceptional circumstances. Requests for complete or partial waiver of the contract's MBE/WBE participation goals must be made in writing, stating all details of the request, the circumstances, and all relevant information. The request must be accompanied by a record of all efforts taken by the bidder/proposer to locate MBE/WBEs, solicit MBE/WBEs, and to seek assistance from technical assistance agencies.
- B. In a case where a business under contract was previously considered to be an MBE/WBE but is later found to be, or whose work is found not to be creditable toward the MBE/WBE goal fully as planned, the OHA will consider the following special criteria in evaluating a waiver request:
- (1) Whether the bidder/proposer was reasonable in believing the business was an MBE/WBE or those certification standards were not being violated;
 - (2) The adequacy of unsuccessful efforts taken to obtain a substitute MBE/WBE as outlined in Article V, MBE/WBE Substitutions.

WAIVER OF MBE/WBE PARTICIPATION GOALS: APPEALS

- A. The bidder/proposer shall have the right to appeal a denial of a waiver request. A notice to appeal a waiver request must be received by the Procurement Department within five days of the bidder/proposer's receipt of the waiver denial. The letter of appeal must be accompanied by supporting documents evidencing the grounds for its request.
- B. A decision on an appeal by the OHA will be forwarded to the bidder/proposer within 10 days of receipt of the appeal.
- C. The final determination by the OHA may be appealed to the Procurement Committee of the Board of Commissioners of the Omaha Housing Authority (OHA). Any party which believes that it has been wrongly denied a waiver may file an appeal in writing, signed and dated with the Secretary, United States Department of Housing and Urban Development, no

later than two days after the date of the OHA's final determination.

ARTICLE V: CHALLENGES TO MBE/WBE'S ELIGIBILITY

- A. Any third party may challenge the MBE/WBE status of any individual presumed to be an MBE/WBE provided that the challenged party is an owner of an MBE/WBE company seeking recognition of certification from the OHA. An individual who has a current 8(a) Certification from the Small Business Administration (SBA) may not be challenged through this procedure.
- B. The challenge shall be in writing and shall include all information available to the challenging party relevant to the determination of whether the challenged individual is, in fact, an MBE/WBE. The written challenge shall be filed with the OHA's Manager of the Procurement Department and/or the Director of the Procurement.
- C. The OHA shall determine, on the basis of the information provided, whether there is reason to believe that the challenged party is, in fact, not an MBE/WBE. If the OHA determines that there is no reason to believe that the challenged party is not an MBE/WBE, the OHA shall so inform the challenging party in writing.
- D. The decision is final and terminates the proceedings as provided. If the OHA determines that there is reason to believe that the challenged party is not an MBE/WBE, the OHA shall begin a proceeding as follows:
- (1) The OHA shall notify the challenged party that its status as an MBE/WBE company has been challenged. The notice shall identify the challenging party and summarize the grounds for the challenge. The notice shall also require the challenged party to provide the OHA, within 10 business days, information sufficient to evaluate the party's MBE/WBE status. Failure to provide the requested information will result in sanctions up to and including debarment.
 - (2) The OHA shall evaluate the information available to it, conduct such investigation as deemed necessary and make a proposed determination of the MBE/WBE status of the challenged party. The OHA shall also provide an opportunity to the parties for an informal hearing at which time each party shall have the opportunity to respond to this proposed determination in writing and in person. The rules of evidence shall not apply and there shall be no presentation of witnesses or cross-examination.
 - (3) Following the informal hearing, the OHA shall make a final determination as to the

challenged party's MBE/WBE status. The OHA shall inform the party, in writing, of the final determination, setting forth the reasons for its decision. In making its determination, the OHA shall be guided by the federal guidelines governing MBE/WBE status.

- D. During the pendency of the challenge under this Article, the presumption that the challenged party is an MBE/WBE shall remain in effect.
- E. Once the OHA has made a final decision on a challenged matter, that determination goes into effect immediately.
- F. The final determination by the OHA may be appealed by the adversely affected party to the Procurement Committee from the Board of Commissioners of the Omaha Housing Authority. Any party which believes that it has been wrongly denied recognition of certification as an MBE/WBE or joint venture may file an appeal in writing, signed and dated with the Procurement Committee no later than two days after the date of the OHA's final determination. Third parties who have reason to believe that another party has been wrongly denied or granted recognition of certification may advise the Secretary of the United States Department of Housing and Urban Development.

ARTICLE VI: MBE/WBE UTILIZATION PLAN: REPORTING REQUIREMENTS DURING
THE TERM OF THE CONTRACT.

- A. Post-Award monitoring shall be conducted by the Procurement Department and includes the following:
 - (1) Reviewing MBE/WBE participation compliance;
 - (2) Conducting on-site visits to monitor compliance of contractors with Omaha Housing Authority's MBE/WBE Participation Proposal;
 - (3) Tracking and monitoring payments to MBE/WBEs;
 - (4) Conducting MBE/WBE: "Front" investigations; and
 - (5) Reviewing and acting upon waivers, substitutions and modifications proposed by contractors after the contract has been awarded and executed. The bidder/proposer shall, within five business days of receiving the awarded contract or prior to any work being performed, execute formal contracts or purchase orders with the MBE/WBEs included in their various

MBE/WBE related schedules. These written agreements shall be forwarded to the OHA Procurement, 540 S. 27th Street, Omaha, NE 68105.

B. Specialty areas: In cases where the bidder/proposers have not identified their MBE/WBEs prior to award, they will be required to submit the completed affidavit within 30 days and prior to Notice-To-Proceed. Specialty areas are to be determined by the Procurement Department and Executive Director.

C. Schedule R: Status Reports of MBE/WBE Subcontract Payments

(1) During the term of contracts, the bidder/proposer shall submit regular "Status Reports of MBE/WBE Subcontract payments" (see Appendix V, Schedule R). The reports are to be submitted with each request for payment from the OHA during the term of the contract. Failure to submit the Schedule R may result in payment delay and/or denial. The Schedule R must be submitted to the Manager of the OHA Procurement Department, 540 S. 27th Street, Omaha, NE 68105.

(2) In the case of one time procurement with either single or multiple deliveries, a Schedule R, indicating final MBE/WBE payments shall be submitted directly to the Manager of the Procurement Department so as to assure receipt of, either at the same time or before the user department receives the contractor's final invoice.

NOTICE: Do not submit original invoices with the Schedule R.

ARTICLE VII. MBE/WBE SUBSTITUTIONS

A. Arbitrary changes by the bidder/proposer of its commitment goals earlier certified in the Schedule A are prohibited. Further, once entering into each approved MBE/WBE sub-agreement, the bidder/proposer shall, thereafter, neither terminate the sub-agreement, nor reduce the scope of the work to be performed by the MBE/WBE, nor decrease the price to the MBE/WBE without, in each instance, receiving prior written approval of the Omaha Housing Authority.

B. In some cases however, it may become necessary to substitute a new MBE/WBE in order to actually fulfill the MBE/WBE requirements. In such cases, the Omaha Housing Authority must be given reasons justifying the release by the OHA of prior specific MBE/WBE commitments established in the bidder/proposer's proposal. The substitution procedure will be as follows:

(1) The bidder/proposer must notify the Procurement Department immediately in writing of an apparent necessity to reduce or terminate an MBE/WBE subcontract and to propose a substitute company for some phase of work, in order to sustain the fulfillment of the MBE/WBE participation goals.

(2) The bidder/proposer's notification to the OHA should include the specific reasons for the proposed substitution. Stated reasons that would be acceptable include any of the following examples:

- A previously committed MBE/WBE was found not to be able to perform, or not to be able to perform on time;
- A committed MBE/WBE was found not to be able to produce acceptable work;
- A committed MBE/WBE was later determined not to be bona fide;
- An MBE/WBE previously committed to a given price later demands an unreasonable escalation of price.

(3) The bidder/proposer's position in these cases must be fully explained and supported with adequate documentation. Stated reasons which will not be acceptable include:

- A replacement company has been recruited to perform the same work under terms more advantageous to the bidder/proposer;
- Issues about performance by the committed MBE/WBE are disputed (unless every reasonable effort has already been taken to have the issues resolved or mediated satisfactorily);
- An MBE/WBE has requested reasonable price escalation, which may be justified due to unforeseen circumstances (i.e., a change in scope of MBE/WBE's work).

(4) The bidder/proposer's notification should include the name, address, and principal official of any proposed substitute MBE/WBE, the dollar value and scope of work of the newly proposed subcontract. The same MBE/WBE Schedules, which are required of bidder/proposers, as enumerated above in Article III, Submission, Evaluation and Approval of MBE/WBE Participation Proposal, shall be attached.

(5) The OHA will evaluate the submitted documentation and respond within 15 working days after the request for a compliance determination for the proposed MBE/WBE substitution. The response may be in the form of requesting more information, or requesting an interview to clarify, or to mediate the problem. The response may also be in the form of a rejection of the proposed MBE/WBE substitution with the reasons therefore included in the OHA's response. In the case of an expressed emergency need to receive the necessary decision for the sake of job progress, the OHA will instead respond as soon as practicable.

(6) Actual substitution of an MBE/WBE to fulfill commitment goals should not be made prior to the OHA's approval, in writing. Once notified of the OHA's approval, the substitute MBE/WBE subcontract must be executed within five working days and a copy of the MBE/WBE subcontract with signatures of both parties to the agreement should be submitted to the OHA.

(7) The OHA will not approve extra payment for escalated costs incurred by the bidder/proposer when a substitution of subcontractors become necessary in order to comply with MBE/WBE contract requirements.

(8) Appeals of the OHA's decision to reject a substitution request must be submitted to the Director of Procurement within seven days after the rejection notification is received. Appeals will be conducted before the OHA's Hearing Officer in accordance with the OHA's Procurement Policies and Procedures.

ARTICLE VIII: NON-COMPLIANCE SANCTIONS AND LIQUIDATED DAMAGES

- A. The OHA shall have the discretion to apply suitable sanctions to the bidder/proposer if the bidder/proposer is found to be in non-compliance with the MBE/WBE requirements. Failure to comply with the MBE/WBE terms of commitment goals as applicable to and in the contract or failure to use MBE/WBEs as stated in the bidder/proposer's submitted schedules, constitutes a material breach of the contract and may lead to the suspension and/or termination of this contract in whole or in part; furthermore, continued eligibility to enter into future contracting arrangements with the OHA may be jeopardized as a result of non-compliance. In some cases, payments may be withheld until corrective action is taken.
- B. When work is completed, in the event that the OHA has determined that the bidder/proposer was not compliant in the fulfillment of the required MBE/WBE commitment

goal and a waiver was not obtained, the OHA will thereby be damaged in the failure to provide the benefit of participation to the MBE/WBE to the degree set forth in this MBE/WBE Utilization Plan.

C. Therefore, in the event of such non-compliance, the bidder/proposer and contractor agrees that the OHA will deduct as liquidated damages cumulative amounts computed as follows:

- For each one percent (or fraction thereof) of shortfall toward the MBE/WBE goal, one percent of the base bid for this contract shall be surrendered by the bidder/proposer to the OHA in payment as liquidated damages, if such damages are assessed or may be deducted from pay requests.