Northeast Ohio Regional Sewer District

Minority- and Women-Owned

Business Enterprise (MBE/WBE) Program

Policies and Procedures Manual

May 8, 2013

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INTRODUCTION

The NEORSD engaged a consultant to perform an intensive disparity study (Disparity Study) to examine evidence regarding the experiences of minority-and women-owned firms in NEORSD's geographic and procurement marketplaces. The Disparity Study found both statistical and anecdotal evidence of business discrimination against MBEs and WBEs in the NEORSD's relevant market area.

Based upon the results of the Disparity Study, NEORSD has developed this MBE/WBE Policy in order to implement narrowly tailored race-and gender-based remedies for the existence of discrimination within the NEORSD's Marketplace.

ARTICLE 1.
DEFINITIONS

For the purpose of this MBE/WBE Program, the following words, terms, phrases and abbreviations 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, or an identity of interest between or among parties exists such that affiliation may be found. In determining Affiliation, the NEORSD shall consider all appropriate factors, including common ownership, common management, and contractual relationships. Affiliates must be considered together in determining whether an applicant meets small business size criteria of this Policy. The NEORSD will follow the requirements of 13 C.F.R. Part 121, as amended, in applying this definition.

"Annual Aspirational Goals" shall mean the targeted levels established by the NEORSD for the annual aggregate participation of MBEs and WBEs in NEORSD Contracts.

"Bidder" or "Contractor" shall mean any person or entity that submits a bid or proposal to NEORSD, or has expressed interest in submitting a bid or proposal in response to a solicitation issued by NEORSD, or who has been awarded a Contract by NEORSD.

"Broker" shall mean a person or entity that fills orders by purchasing or receiving supplies from a third party rather than out of its own existing inventory, and provides no Commercially Useful Function other than acting as a conduit between his or her supplier and his or her customer.

"Commercially Useful Function" shall mean 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, as determined by NEORSD in its sole discretion. To determine whether a firm is performing a Commercially Useful Function, the NEORSD will evaluate the amount of work subcontracted, normal industry practices and other relevant factors.

A MBE/WBE performs a Commercially Useful Function when it is responsible for the work of the Contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a Commercially Useful Function, the MBE/WBE must also be responsible, with respect to materials and supplies used on the Contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. The determination that a MBE/WBE is performing a Commercially Useful Function will be determined by the amount of work subcontracted, normal industry practices, whether the amount the firm is to be paid under the Contract is commensurate with the work it is actually performing, and other relevant factors.

A MBE/WBE does not perform a Commercially Useful Function if its role is limited to that of an extra participant in a transaction, Contract, or project through which funds are passed in order to obtain the appearance of MBE/WBE participation.

Generally, if a MBE/WBE does not perform or exercise responsibility for at least 30 percent of the total cost of its Contract with its own work force, or the MBE/WBE subcontracts a greater portion of the work of a Contract than would be expected on the basis of normal industry practice for the type of work involved, it is not performing a Commercially Useful Function.

"Compliance" shall mean the condition existing when NEORSD has determined that a participant has met the requirements of this Program.

"Contract" shall mean any mutually binding legal obligation of NEORSD created to acquire some good and/or service from one or more firms, which is paid or which is to be paid for, in whole or in part, with monetary appropriations of NEORSD. In this context, the terms "contracting," "purchasing," and "procurement" are synonymous and refer to the process or processes under which NEORSD undertakes such acquisitions. Contract does not include sole source procurements, which by their very nature limit the source of supply to one vendor; State of Ohio contract purchases that do not require competitive bidding; the acquisition of any interest in real property, including lease holdings; direct and indirect employee payments including payroll expenditures, pensions and unemployment compensation and other employee-related expenditures; agreements with non-profit or governmental entities; agreements with utility

providers; and any other categories and subcategories of goods and services that NEORSD may from time to time establish as excluded.

"Contract Goal" shall mean the goal or goals for MBE and WBE participation on particular project or Contract based upon the availability of MBEs or WBEs in the scopes of work of the project or Contract.

"Economically Disadvantaged" shall mean a firm whose gross receipts do not exceed the business size standards established by the NEORSD and posted on NEORSD's internet site at www.neorsd.org, relevant to the scope(s) of work the firm seeks to perform on NEORSD Contracts.

"Expertise" means demonstrated skills, knowledge or ability to perform in the field of endeavor in which certification is sought by the firm as defined by normal industry practices, including licensure where required. A firm shall be entitled to a rebuttable presumption that it has the Expertise to perform in the categories for which it is applying for certification under the MBE/WBE Program if the firm has been in continuous operation in those categories for at least one (1) year prior to its application for certification.

"Joint Venture" shall mean an association of two or more independent Bidders or Contractors formed to carry out a for-profit business enterprise in a single transaction or a series of transactions, for which, pursuant to a written agreement (i) the parties combine, pool, or integrate some of their assets with a view to mutual gain, but otherwise remain independent operations and (ii) the MBE or WBE has a legal and actual right or obligation, consistent with its equity share of the Joint Venture (A) to contribute to the operating capital of the Joint Venture; (B) share in the operating profits or losses of the Contract and the Joint Venture; and (C) to perform clearly defined services under the Contract in the name of the Joint Venture.

"Local Small Business" shall mean a business entity with a functioning office located within the Marketplace of the NEORSD. Mailbox facilities or other similar arrangements are not sufficient to establish office location. Additionally, the firm must be registered to conduct business within the State of Ohio, as demonstrated through official documents filed with the Secretary of State of Ohio. Additionally, the firm's gross receipts must not exceed the business size standards established by the NEORSD and posted on NEORSD's internet site at www.neorsd.org, relevant to the scope(s) of work the firm seeks to perform on NEORSD Contracts. A firm does not qualify as a Local Small Business for any calendar fiscal year in which its gross receipts, averaged over the firm's previous five (5) fiscal years, exceed the size standards established by the NEORSD.

"**Manufacturer**" shall mean an individual (or individuals) who owns, operates, or maintains a factory or establishment that produces on the premises the

components, Materials and/or Equipment, or supplies equipment required under the Contract and of the general character described by the specifications.

"Marketplace" shall mean the NEORSD's geographic and procurement markets as established by the Disparity Study: the Metropolitan Statistical Areas of Cleveland-Elyria-Mentor, Ohio; Akron, Ohio; Canton-Massilon, Ohio; Youngstown-Warren, Ohio; and Ashtabula, Ohio. Such Metropolitan Statistical Areas include the counties of Cuyahoga, Lorain, Medina, Summit, Portage, Geauga, Lake, Ashtabula, Trumbull, Stark, Mahoning, and Carroll.

"Material" shall mean supplies that may be incorporated into, or attached to, an end product, or that may be consumed or expended in the manufacturing process.

"Minority-Owned Business Enterprise (MBE)" shall mean any sole proprietorship, partnership, corporation, limited liability company, or Joint Venture that is certified by NEORSD as meeting each of the following requirements:

1. **Ownership.** At least 51% of the equity of the enterprise is owned by one or more Minority Individuals.

2. **Operational Control.** Minority Individuals are in actual control of the management, major business decisions, and the conduct of the business and operations of the enterprise.

3. **Local Small Business.** The enterprise is qualified as a Local Small Business.

4. **Expertise.** The enterprise meets the NEORSD standards as to Expertise and Commercially Useful Function applicable to the certification being sought by the enterprise.

"Minority Individual" shall mean a natural person who is a citizen or permanent resident of the United States and is a member of one of the following groups:

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, or other Spanish or Portuguese culture or origin, regardless of race.

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

4. Asian-Americans (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).

5. Natural Persons who are not neither women nor members of other groups that are not described in subparagraphs 1-4 above and that are found by the NEORSD 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 NEORSD's Marketplace or to do business with the NEORSD.

"Non-Compliance" shall mean the condition that exists when a Bidder or Contractor has failed to meet the requirements of this MBE/WBE Policy.

"Prime Contractor" shall mean the Contractor who enters into Contract with NEORSD and who is primarily responsible for performance under such Contract.

"Regular Dealer" shall mean 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.

"Socially Disadvantaged" shall mean 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" shall mean the specific NEORSD department for which the Contract is entered into.

"Utilization Plan" shall mean the document(s) provided by the Contractor and approved by the NEORSD identifying the MBEs and WBEs that the Contractor

intends to utilize on a Project, including the corresponding scopes of work and dollar amounts.

"Woman" shall mean a natural person of the female gender, as defined under Ohio law.

"Woman-Owned Business Enterprise (WBE)" shall mean any sole proprietorship, partnership, corporation, limited liability company, or Joint Venture that is certified by NEORSD as meeting each of the following requirements:

1. **Ownership.** At least 51% of the equity of the enterprise is owned by one or more Women.

2. **Operational Control.** A Woman or Women are in actual control of the management, major business decisions, and the conduct of the business and operations of the enterprise.

3. **Local Small Business.** The enterprise is qualified as a Local Small Business.

4. **Expertise.** The enterprise meets the NEORSD standards as to Expertise and Commercially Useful Function applicable to the certification being sought by the enterprise.

ARTICLE 2.
MBE/WBE PROGRAM ADMINISTRATION

Definition and Purpose: The Office of Contract Compliance (OCC) is responsible for administering and enforcing the Minority- and Women-Owned Business Enterprise Program (MBE/WBE Program) as established by this MBE/WBE Policy. The OCC shall periodically report to the Board of Trustees, the Executive Director and the Director of the Department of Finance of NEORSD on all matters concerning the MBE/WBE Program.

Functions of the OCC: The OCC shall encourage contracting opportunities for MBEs and WBEs, and strive to achieve the objectives of this MBE/WBE Policy and the MBE/WBE Program by, among other things:

1. Recommending written rules, regulations and procedures for adoption by NEORSD with respect to the administration of the MBE/WBE Program consistent with this MBE/WBE Policy.

2. Maintaining outreach assistance programs and Contractor advisory council(s) to promote contracting opportunities for MBEs/WBEs, the efficacy of the MBE/WBE Policy, and the fair and equitable administration of the MBE/WBE Program.

3. Establishing, enhancing and maintaining relationships with agencies and stakeholders that share the goals of the MBE/WBE Program and, whenever possible, coordinating the operation of the MBE/WBE Program with the programs of such agencies and stakeholders.

4. Establishing uniform procedures and criteria for certifying, recertifying and decertifying businesses as MBEs/WBEs, accepting certifications by other agencies, maintaining a directory of certified firms, and making the directory available to all interested persons.

5. Monitoring and tracking data related to utilization of MBEs/WBEs and non-MBEs/WBEs as Prime Contractors, subcontractors and/or Joint Venture partners in connection with the award or performance of Contracts.

6. Establishing Contract Goals with User Departments.

7. Responding to inquiries at pre-bid/proposal conferences regarding Contract solicitations that include Contract Goals.

8. Attending kick-off meetings for major projects to explain this MBE/WBE Policy and the MBE/WBE Program and applicable Contract Goals.

9. Tracking Contractors' achievement of Project Specific Goals or Good Faith Efforts to meet Project Specific Goals.

10. Working with other NEORSD departments to monitor Contracts to ensure prompt payments to MBEs/WBEs and compliance with Contract Goals and commitments, including gathering data to facilitate such monitoring.

11. Monitoring the Program and the NEORSD's progress towards the Annual Goals.

12. Investigating written complaints regarding the administration of the MBE/WBE Program.

Functions of the User Departments: The User Departments that have responsibility for Contract management shall have the following duties and responsibilities with regard to the Program:

1. Assisting the OCC with setting Contract Goals

2. Assisting in the identification of available MBEs and WBEs, and providing other assistance in meeting the Contract Goals.

3. Performing other activities to support the Program.

4. Gathering and maintaining prime contracting and subcontracting data for those Contracts that they manage.

5. Submitting subcontracting data as required to OCC.

6. Evaluating Contractors' achievement of Project Specific Goals or Good Faith Efforts to meet Project Specific Goals.

7. Reporting Contractors' achievement of Project Specific Goals or Good Faith Efforts to meet Project Specific Goals.

ARTICLE 3.
RACE- AND GENDER- NEUTRAL MEASURES TO ENSURE EQUAL OPPORTUNITIES FOR ALL CONTRACTORS AND SUBCONTRACTORS

The NEORSD shall develop and use measures, whenever economically feasible and authorized by law, to facilitate the participation of all firms in NEORSD construction contracting activities. These measures shall include, but are not limited to:

1. Arranging solicitation times for the presentations of bids, quantities, specifications, and delivery schedules to facilitate the participation of interested firms.

2. Segmenting Contracts to facilitate the participation of MBEs, WBEs and other Local Small Businesses.

3. Providing timely information on contracting procedures, bid preparation and specific contracting opportunities.

4. Providing assistance to businesses in overcoming barriers such as difficulty in obtaining bonding and financing.

5. Holding pre-bid conferences, where appropriate, to explain the projects and to encourage Contractors to use all available firms as subcontractors.

6. Adopting prompt payment procedures, including, requiring by Contract that prime Contractors promptly pay subcontractors.

7. Reviewing retainage, bonding and insurance requirements to eliminate unnecessary barriers to contracting with the NEORSD.

8. Prohibiting the substitution of subcontractors without prior NEORSD approval.

9. At the discretion of the NEORSD, letting a representative sample of NEORSD construction Contracts without goals, to determine MBE and WBE utilization in the absence of goals.

10. Maintaining information on all firms bidding on NEORSD prime Contracts and utilization of subcontracts.

11. Referring complaints of discrimination to the appropriate authority(ies) for investigation.

ARTICLE 4.
ELIGIBILITY STANDARDS FOR MBE AND WBE CERTIFICATION

The following standards will be used by OCC in determining an applicant's eligibility to participate in the MBE/WBE Program. The determination of OCC shall be within the sole discretion of OCC, subject to review as herein provided. The applicant has the burden of persuasion by a preponderance of the evidence to prove that it meets the eligibility criteria set forth in the MBE/WBE Policy.

Social and Economic Disadvantage. Only a Local Small Business that is owned and managed 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.

3. 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 dispersing of funds.

4. 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.

5. 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 Disadvantaged owner(s) must retain the power to hire and fire any such person. The Socially Disadvantaged owner(s) must actually exercise control over the firm's operations, work, management and policy. The Socially 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 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.

6. 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 Disadvantaged owner(s) must possess the required license or credential. If state law or other law or regulations or statute does not require that the owner posses 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 Disadvantaged owner(s) actually controls the firm.

7. A Socially 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.

Affiliation. 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 OCC 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 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.

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

The NEORSD shall certify the eligibility of Joint Ventures involving MBEs or WBEs and non-certified firms.

A firm owned by a Minority and Woman Individual or Individuals may be certified as both a MBE and a WBE.

All applications for certification must be on NEORSD's MBE/WBE certification forms and any required affidavits must be properly completed and accompanied by notarized signatures.

In lieu of conducting its own certifications, the OCC by rule may accept formal certifications by other entities as meeting the requirements of the Program, if the OCC determines that the certification standards of such entities are comparable to those of the NEORSD.

Recertification. The certification status of all MBEs/WBEs shall be reviewed biannually by the OCC. Failure of the firm to seek recertification by filing the necessary documentation shall result in decertification.

It is the responsibility of the certified firm to notify the OCC of any change in its circumstances affecting its continued eligibility for the Program. Failure to do so may result in the firm's decertification.

Certification Denial and Decertification. Notwithstanding the ability of an applicant to meet these standards, the OCC reserves the right to deny MBE/WBE certification to any firm that, within five (5) years prior to submission of the MBE/WBE certification application, is or has been:

1. In arrears or declared to be in default to the NEORSD upon any contract or debt, or has otherwise failed to perform faithfully, fully, and completely any previous contract with the NEORSD;

2. In arrears or declared to be in default to another public or private entity upon any contract or debt, or has otherwise failed to perform faithfully, fully, and completely any previous contract with another public or private entity;

3. In default, as surety or otherwise, upon any obligation to the NEORSD; or

4. In default, as surety or otherwise, upon any obligation to another public or private entity.

This provision shall include, but not be limited to, a firm that has common ownership or control, or right of control, of any person, firm, corporation, joint venture, or joint venture partner that committed any of the above within the last five (5) years. Further, this paragraph shall apply equally to any firm that has committed any of the above while performing as a prime contractor, a subcontractor, or as a joint venture partner under a joint venture arrangement, even if such firm is submitting an application for MBE/WBE certification as a partner in a different joint venture arrangement, and regardless of whether the firm was the managing joint venture partner under the prior joint venture.

The OCC shall decertify a firm that does not continuously meet the eligibility criteria.

OCC may move to decertify a firm that repeatedly fails to respond to requests for quotations from Bidders who timely solicit participation on a Contract, that repeatedly fails to attend relevant pre-Bid conferences, or that repeatedly fails to honor quotations in good faith.

If an applicant is denied certification or recertification, it may not reapply for certification for a period of one (1) year from the date of the notice of denial. An applicant whose application for certification or recertification is denied may appeal the denial by filing a hearing application to the Executive Director within thirty (30) calendar days after of the notice of denial.

Decertification by another agency shall create a *prima facie* case for decertification by the OCC. The challenged firm shall have the burden of proving that its NEORSD certification should be maintained.

Such challenges to eligibility shall be subject to an appeal. The Executive Director shall be the final arbiter of all challenges. The presumption that the challenged firm is eligible shall remain in effect until the NEORSD renders a final decision.

ARTICLE 5.
ESTABLISHMENT OF GOALS

Annual Aspirational Goals. Annual Aspirational Goals for the utilization of MBEs and WBEs on NEORSD Contracts and associated subcontracts, as supported by the Disparity Study, shall be established each year by NEORSD.

Annual Aspirational Goals will be established by a committee appointed by the Executive Director made up of representatives from the Departments of Finance

(OCC and Purchasing), Engineering and Construction, and Law. The committee will review utilization data of the prior year and analyze NEORSD needs for procurement for the upcoming year. The committee will submit goal recommendations to the Executive Director who will determine utilization goals for the upcoming year and report such goals to the Board of Trustees.

Contract Goals. OCC and the User Department, shall establish Contract Goals for Contracts based upon the availability of MBEs and WBEs certified under the NEORSD MBE/WBE Program. Contract goals may only be established on a Contract if there are at least three (3) MBEs and three (3) WBEs certified to perform the anticipated subcontracting functions of the project. The OCC may further consider the NEORSD's utilization of MBEs and WBEs to date. Contract goals may be set separately for MBEs and WBEs or for MBEs and WBEs combined. NEORSD may also set Contract goals for MBEs and WBEs in conjunction with a Small Business Enterprise (SBE) goal under the NEORSD SBE Program.

ARTICLE 6.
COUNTING MBE AND WBE PARTICIPATION

OCC will count the entire amount of any of the following:

1. The portion of a Contract that is performed by the MBEs or WBEs own forces, 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).

2. 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.

3. One hundred percent of the cost of the materials or supplies obtained from a MBE or WBE Manufacturer or Regular Dealer. One hundred percent of the fees or transportation charges for the delivery of materials or supplies required on a job site will be counted only if the payment of such fees is a customary industry practice and are commensurate with fees customarily charged for similar services. Fees to Brokers will not be counted toward a MBE or WBE goal.

4. **Joint Ventures.** When a MBE or WBE performs as a participant in a Joint Venture, OCC will count 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. The Joint Venture partner's work cannot be double counted towards subcontractor participation.

The MBE or WBE must be certified at the time of bid or proposal submission to be counted towards meeting a Contract Goal.

The participation of a firm that is certified as a MBE and a WBE may be counted towards either goal in the Bidder's discretion, but cannot be double counted or split between the MBE and the WBE goal.

OCC will count only expenditures to a MBE or WBE that is performing a Commercially Useful Function. 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.

If a firm ceases to be certified 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.

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

ARTICLE 7.
CONTRACT AWARD PROCEDURES

Meeting Goals. All Contractors must make Good Faith Efforts to attain Contract Goals. A MBE or WBE performing as a Prime Contractor may count its own participation towards meeting the goal for which it qualifies. Bidders are required to complete all forms and submit all documents as described in the solicitation regarding MBE/WBE participation at the time of the submission of the bid or proposal. Such information shall include:

1. A list of all MBEs/WBEs and other subcontractors to be utilized on the Contract.

2. A list of MBEs/WBEs who provided quotes for the project, but were not chosen to perform the work.

3. The dollar amount and percentage of Contract funds related to each first- and second-tier MBE/WBE and non-MBE/WBE subcontractor.

Unless otherwise stated in the solicitation, proposed MBE/WBE utilization toward special allowance or general allowance work will not be counted at the time of

award. Subsequent utilization of MBEs/WBEs for special allowance and general allowance work during performance of a Contract will be counted toward fulfillment of the MBE/WBE Contract goal.

Evaluation of Good Faith Efforts. In the event that a Bidder is unable to meet the Contract Goal, the Bidder must demonstrate that it made a Good Faith Effort to meet the Contract Goal. The Bidder must submit all NEORSD-required Good Faith Effort forms, including any affidavits and MBE/WBE utilization plans that NEORSD may require, at the time specified in the bid documents or requests for proposal. All Good Faith Efforts must be thoroughly documented. The Bidder must document all solicitations and responses of MBEs/WBEs, including the names, contact information, method of contact, dates, a description of the information provided regarding the plans and specifications for the work selected for subcontracting, and reasons for failure to reach agreement. The Bidder may not reject MBEs/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/WBEs is not in itself sufficient reason for a Bidder's failure to meet the Contract Goals, as long as such costs are reasonable. The ability or desire of a Bidder 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 subcontractable scopes of work.

The OCC will evaluate not only the kinds of efforts made by a Bidder, but also the quantity and intensity of such efforts. In evaluating whether a Bidder has made a good faith effort to achieve the Contract Goal, the OCC will evaluate at a minimum the Bidder'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/WBEs certified in the scopes of work of the Contract. The Bidder shall provide interested MBEs/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 Bidder must follow up initial solicitations with interested MBEs/WBEs.

2. Seek the OCC's assistance when experiencing difficulty identifying subcontracting opportunities or available MBEs/WBEs.

3. Identify portions of the Contract capable of being performed by MBEs/WBEs and, where appropriate, breaking out work items into economically feasible units to facilitate MBE/WBE participation, even when the Bidder would otherwise prefer to perform these work items with its own forces. It is the Bidder's responsibility to make a portion of the work available to MBEs/WBEs and to select those portions of the work or material needs consistent with the availability of MBEs/WBEs to facilitate their participation.

4. Assist interested MBEs/WBEs in obtaining bonding, lines of credit, insurance, necessary equipment, supplies, materials, or related assistance or services, or technical assistance, as may be required for performance on the Contract.

5. Utilize resources available to identify available MBEs/WBEs, including MBE/WBE assistance groups, governmental business assistance offices, NEORSD-sponsored training programs, and other organizations that provide assistance in the recruitment and placement of MBEs/WBEs.

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

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 as specified in the solicitation.

OCC shall timely review the MBE/WBE documents before award, including the scope of work and the letters of intent from MBEs/WBEs. OCC may request clarification in writing of items listed in the documents, provided such clarification shall not include the opportunity to augment listed participation or Good Faith Efforts.

If OCC finds that a Bidder did not make sufficient Good Faith Efforts, the Bidder may be deemed non-responsive.

Good Faith Effort Requirements Ongoing. In the event that a Bidder is awarded a Contract without meeting the Contract Goal(s), such Contract award does not relieve the Bidder from the continuing contractual obligation to exercise Good Faith Efforts throughout performance of the Contract in order to meet the Contract Goal(s) before Contract completion. Failure to comply with this provision may subject a Contractor to the sanctions and penalties set forth in the Contract and/or this MBE/WBE Policy.

Determination of Non-Responsiveness or Lack of Responsibility. In addition to other factors in its evaluation, NEORSD may declare a bid or proposal to be non-responsive or not the “best”, or the Bidder to not be responsible where it is determined that a Bidder has not submitted with its bid or proposal any

form, affidavit, or other document required by the solicitation, this Policy or requested by NEORSD.

ARTICLE 8.
CONTRACT PERFORMANCE PROCEDURES

Upon award of a Contract by the NEORSD that includes Contract Goals, the Contract Goals shall become covenants of performance by the Contractor in favor of the NEORSD.

Reporting Requirements. Prime Contractors performing under NEORSD Contracts shall comply with all reporting requirements of NEORSD related to utilization of MBE/WBE and other subcontractors, including, but not limited to, completing on-line reporting of payments made to such MBEs/WBEs and other subcontractors.

OCC and the User Department shall monitor subcontractor participation during the course of the Contract. The NEORSD 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/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 NEORSD for any purpose.

Contract Assignment by MBE/WBE. A MBE/WBE performing as a Prime Contractor or a subcontractor shall not be prohibited from assigning its interest in any NEORSD Contract or subcontract for the purpose of obtaining assistance from a financial institution.

Changes to Utilization Plans. The Contractor cannot make changes to the Utilization Plan or substitute MBEs/WBEs named in the Utilization Plan without the prior written approval of OCC and the User Department. Unauthorized changes or substitutions shall be a violation of this Policy and may constitute a breach of Contract, subject to the breach provisions contained in the Contract.

All requests for changes or substitutions of a MBE/WBE subcontractor(s) named in the Utilization Plan shall be made to OCC 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/WBE subcontractor or perform the work designated for a MBE/WBE subcontractor with its own forces unless and until OCC and the User Department approve such substitution in writing. A Contractor shall not allow a substituted subcontractor to begin work until OCC and the User Department have approved the substitution.

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/WBE or other subcontractor to resolve the problem. Where there has been a mistake or disagreement about the scope of work, the MBE/WBE or other subcontractor can be substituted only where an agreement cannot be reached for a reasonable price for the correct scope of work.

Substitutions of a MBE/WBE subcontractor shall be permitted only on one or more of the following bases:

1. Unavailability after receipt of reasonable notice to proceed.
2. Failure of performance.
3. Financial incapacity.
4. Refusal by the subcontractor to honor the bid or proposal price.
5. 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.
6. Failure of the subcontractor to meet insurance, licensing or bonding requirements.
7. The subcontractor's withdrawal of its bid or proposal.

NEORSD's 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 User Department.

Where the Contractor has established the basis for the substitution to the satisfaction of the NEORSD, the Contractor shall make Good Faith Efforts to fulfill the Utilization Plan, if achievement of the MBE or WBE Goal is affected. The Contractor may seek the assistance of OCC in obtaining a new MBE or WBE. If the Contract Goal(s) cannot be reached and Good Faith Efforts have been made, the Contractor may substitute with a non-Certified Firm.

If NEORSD 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 OCC in obtaining a new MBE or WBE subcontractor. If the Contract Goal(s) cannot be reached and Good Faith Efforts have been made, the Contractor may substitute with a non-Certified Firm.

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 OCC and the User Department to modify the Utilization Plan and

must make Good Faith Efforts to ensure that MBEs/WBEs have a fair opportunity to bid on the new scope of work.

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 Contract Goal**.**

Before Contract closeout, OCC 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 OCC determines that Good Faith Efforts to meet the MBE or WBE contractual commitments were not made, or that fraudulent misrepresentations have been made, or any other breach of the Contract or violation of this Policy has occurred, a remedy or sanction may be imposed, as provided in the Contract or other NEORSD rules.

ARTICLE 9.
REMEDIES, SANCTIONS AND PENALTIES

Scope and Applicability. Any MBE/WBE allegedly aggrieved by the provisions of this MBE/WBE Program may submit a written complaint to the OCC, setting forth the bases of such complaint. After receipt of a written complaint, the allegedly aggrieved party (the Complainant) may be afforded a hearing before the MBE/WBE Hearing Panel. The MBE/WBE Hearing Panel shall be empowered to hear all grievances concerning certification, de-certification, and any other grievances relative to the MBE/WBE Program.

Notice of Hearing. Upon receipt of a written complaint from the Complainant, NEORSD shall schedule a hearing before the MBE/WBE Hearing Panel within a reasonable time after receipt of such complaint. NEORSD shall provide notice of the date, time, and location of the hearing to the Complainant via registered mail. A Complainant may make one (1) request to reschedule a hearing after receipt of any hearing notice provided under this MBE/WBE Policy. NEORSD shall have no obligation to provide a rescheduled hearing for any Complainant who fails to appear at a properly scheduled hearing.

Hearing Conduct. The MBE/WBE Hearing Panel shall consist of at least three (3) manager- or director-level NEORSD officials, who shall be appointed by the Executive Director. The Executive Director shall have the discretion to serve on the Panel as one of the Panel members. The Executive Director may designate Panel members on a hearing-by-hearing basis, or at any other interval. Hearings before the designated MBE/WBE Hearing Panel shall be informal. The Complainant may appear in person or via a representative designated by the Complainant. The Complainant may present evidence and witness testimony in support of the Complainant's alleged grievances. The Complainant may bring legal counsel. All hearings shall comply with State of Ohio law relative to the Open Meetings Act. Abusive or otherwise disruptive language or behavior at a

hearing by a Complainant will be grounds for discontinuance and/or forfeiture by the Complainant of any hearing described under this Policy.

Hearing Decisions. The designated MBE/WBE Hearing Panel shall issue a written opinion setting forth the Panels' findings and recommendations within a reasonable time after the hearing.

Exhaustion of Legal Remedies. A Complainant must comply with the hearing process outlined above in order to exhaust its administrative remedies. Thereafter, a Complainant may seek any other statutory, legal or equitable remedies that may be available. Failure to exhaust all administrative remedies listed in this MBE/WBE Policy is an affirmative defense to any statutory, legal or equitable proceeding that may arise.

Advisory Recommendations. The designated MBE/WBE Hearing Panel shall have authority to render advisory recommendations to NEORSD, absent a hearing, upon the request of the NEORSD Contract Compliance Manager.

Sanctions. Any Bidder or Contractor who violates any provision of this MBE/WBE Policy may be subject to administrative sanctions. Violations of this Policy that may result in a breach of Contract include, but are not limited to, providing false or misleading information to NEORSD 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.

In addition, violations of this MBE/WBE Policy and Program may constitute a material breach of Contract, enforceable at law or in equity, and subject to the remedies contained in the Contract, including the imposition of penalties. A Contractor or subcontractor may be subject to sanctions and penalties if it is found by NEORSD 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 Contract Goals, thereby materially breaching the Contract; or

4. Failed to comply in good faith with substantive provisions of this Policy.

In addition to the breach of Contract remedies available to NEORSD, the following sanctions and penalties are established for the enforcement of this Program:

1. Suspension for not to be less than two (2) years, unless the Executive Director determines that a shorter time period is warranted. The Executive Director may impose suspensions in excess of two (2) years in cases involving intentional or fraudulent misrepresentation or concealment of material facts, multiple acts in breach of the Program, cases where the Participant has been previously suspended, or other similarly situated misconduct.

2. Other appropriate sanctions as the Executive Director deems appropriate under the circumstances, until compliance or remedial action has been accomplished by the Contractor to the satisfaction of the Executive Director.

Guidelines for Imposition of Sanctions. The sole authority and power for imposition of sanctions shall lie with NEORSD. NEORSD's procurement policies shall apply to sanctions under this Policy.

1. **Severity of Sanctions.** In determining the length of any suspension, NEORSD shall consider the following factors:

   a. Whether the failure to comply with applicable requirements involved intentional conduct or, alternatively, may be reasonably concluded to have resulted from a reasonable misunderstanding on the part of the Bidder or Contractor of the requirements of this Program.

   b. The number of specific incidences of Non-Compliance of this Policy by the Bidder or Contractor.

   c. Whether the Bidder or Contractor has been previously suspended or has a history of violations of this Policy.

   d. Whether the Bidder or Contractor has failed or refused to provide NEORSD with any information required or requested pursuant to the MBE/WBE Program.

   e. Whether the Bidder or Contractor has materially misrepresented any applicable facts in any filing or communication to NEORSD.

   f. Whether any subsequent restructuring of the Bidder's or Contractor's business or other action has been undertaken to cure the deficiencies in meeting applicable requirements.

2. **Prohibition Against False Statements**. It shall be unlawful for any person, knowingly, willfully and with intent, to mislead or to make any false or fraudulent representations to NEORSD. NEORSD may impose

sanctions against any person making such false representation in connection with the MBE/WBE Program. In addition, knowingly providing false information to a public official is punishable as a first degree misdemeanor, pursuant to O.R.C. § 2921.13.

ARTICLE 10.
PROGRAM REVIEW AND SUNSET

The NEORSD Board of Trustees (Board) shall receive quarterly and annual reports from OCC detailing NEORSD's performance under this Policy. The Board shall review these reports, including the Annual Aspirational Goals and NEORSD's progress towards meeting those Goals and eliminating discrimination in its contracting activities and Marketplace.

The MBE/WBE Program shall automatically terminate six (6) years after the date of adoption by the Board, unless reauthorized by the Board. The Board shall determine whether there exists strong evidence of discrimination such that the Program should be continued and ensure that the Program's goals and operations remain narrowly tailored based upon evidence from a new Disparity Study.

ARTICLE 11.
SEVERABILITY

If any of the provisions set forth in this Policy or any section, subsection, paragraph, sentence, clause, phrase, or word thereof shall be found to be invalid, illegal or unenforceable for any reason, the application of the remainder of this Program shall not be affected by such invalidity.