



**Northeast Ohio Regional Sewer District
Small Business Enterprise (SBE) Program**

Policies and Procedures Manual

February 8, 2016

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INTRODUCTION

The Northeast Ohio Regional Sewer District (NEORS) has an interest in maintaining and advancing the public welfare by assuring that its public expenditures promote the financial growth and stability of small businesses. NEORS endeavors to increase economic opportunity for small businesses to advance the well-being of citizens of the greater Cleveland metropolitan area as well as Cuyahoga County and its surrounding counties.

NEORS has developed this SBE Program in order to administer a race- and gender-neutral contracting program for the benefit of all small businesses that meet the requirements under the program.

ARTICLE 1. **DEFINITIONS**

For the purpose of this SBE 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 NEORS 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 NEORS 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 NEORS for the annual aggregate participation of SBEs in NEORS Contracts.

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

“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 SBE 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 SBE 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 SBE 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 SBE 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 SBE participation.

Generally, if a SBE 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 SBE 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 SBE participation on a particular project or Contract based upon the availability of SBEs in the scopes of work of the project or Contract.

“Economically Disadvantaged” shall mean a firm with gross receipts that 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 SBE 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 SBE 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 for the District’s Minority- and Woman-Owned Business Enterprise (MBE/WBE) Program: the Metropolitan Statistical Areas of Cleveland-Elyria-Mentor, Ohio; Akron, Ohio; Canton-Massillon, 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.

“Non-Compliance” shall mean the condition that exists when a Bidder or Contractor has failed to meet the requirements of this SBE 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.

“Small Business Enterprise (SBE)” 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. **Operational Control.** The enterprise is in actual control of the management, major business decisions, and the conduct of the business and operations of the enterprise, independent from the control of another entity.
2. **Local Small Business.** The enterprise is qualified as a Local Small Business.

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

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

ARTICLE 2. **SBE PROGRAM ADMINISTRATION**

Definition and Purpose: The Office of Contract Compliance (OCC) is responsible for administering and enforcing the Small Business Enterprise Program (SBE Program) as established by this SBE Policy. The OCC shall periodically report to the Board of Trustees, the Chief Executive Officer and the Chief Financial Officer of NEORSD on all matters concerning the SBE Program.

Functions of the OCC: The OCC shall encourage contracting opportunities for SBEs, and strive to achieve the objectives of this SBE Policy and the SBE Program by, among other things:

1. Recommending written rules, regulations and procedures for adoption by NEORSD with respect to the administration of the SBE Program consistent with this SBE Policy.
2. Maintaining outreach assistance programs and Contractor advisory council(s) to promote contracting opportunities for SBEs, the efficacy of the SBE Policy, and the fair and equitable administration of the SBE Program.
3. Establishing, enhancing and maintaining relationships with agencies and stakeholders that share the goals of the SBE Program and, whenever possible, coordinating the operation of the SBE Program with the programs of such agencies and stakeholders.
4. Establishing uniform procedures and criteria for certifying, recertifying and decertifying businesses as SBEs, 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 SBEs and non-SBEs 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 SBE Policy and the SBE 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 SBEs 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 SBE 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 SBEs, 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.
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 SBEs, MBEs, and WBEs.
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 SBE 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 SBE CERTIFICATION

The following standards will be used by OCC in determining an applicant's eligibility to participate in the SBE 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 SBE Policy.

Affiliation. Only an independent firm may be certified as a SBE. 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 Economically Disadvantaged owner(s) of the applicant and non-certified firms or persons associated with non-certified firms compromise the applicant's independence.
3. Examine the applicant's relationships with non-certified firms to determine whether a pattern of exclusive or primary dealings with non-certified firm compromises the applicant's independence.
4. Consider the consistency of relationships between the applicant and non-certified firms with normal industry practice.

Certification. An applicant shall be certified only for specific types of work in which the Economically 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 SBEs and non-certified firms.

A firm may be certified under both the SBE Program and the District's MBE/WBE Program.

All applications for certification must be on NEORSD's SBE 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 NEORS D.

Recertification. The certification status of all SBEs 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 SBE certification to any firm that, within five (5) years prior to submission of the SBE certification application, is or has been:

1. In arrears or declared to be in default to the NEORS D upon any contract or debt, or has otherwise failed to perform faithfully, fully, and completely any previous contract with the NEORS D;
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 NEORS D; 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 SBE 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 Chief Executive Officer 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 Chief Executive Officer 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 SBEs on NEORSD Contracts and associated subcontracts shall be established each year by NEORSD.

Annual Aspirational Goals will be established by a committee appointed by the Chief Executive Officer 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 Chief Executive Officer 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 SBEs certified under the NEORSD SBE Program. Generally, SBE Contract Goals may be established on a Contract if there are at least three (3) SBEs certified to perform the anticipated subcontracting functions of the project. NEORSD may set Contract goals for SBEs in addition to MBEs and WBEs under the NEORSD MBE/WBE Program.

ARTICLE 6.
COUNTING SBE PARTICIPATION

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

1. The portion of a Contract that is performed by the SBEs own forces, including the cost of supplies and materials obtained by the SBE for the work of the Contract, and supplies purchased or equipment leased by the SBE (except supplies and equipment the SBE purchases or leases from the prime Contractor or the prime Contractor's Affiliate).
2. The entire amount of fees or commissions charged by a SBE 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 SBE 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. A SBE certified in the area of trucking that is delivering bulk items such as petroleum products, steel, cement, gravel, stone, or asphalt, do not require additional certification in order for the cost of such bulk items to be counted toward a SBE goal. Fees to Brokers will not be counted toward a SBE goal.
4. **Joint Ventures.** When a SBE 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 SBE with its own forces and for which it is separately at risk.

The SBE 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 SBE and a MBE or WBE may be counted towards either goal in the Bidder's discretion, but cannot be double counted or split between such goals.

OCC will count only expenditures to a SBE that is performing a Commercially Useful Function. If a SBE 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 SBE 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 a 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 SBE shall not be counted until that amount has been paid to the SBE.

ARTICLE 7. **CONTRACT AWARD PROCEDURES**

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

1. A list of all SBEs and other subcontractors to be utilized on the Contract.
2. A list of SBEs 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 SBE and non-SBE subcontractor.

Unless otherwise stated in the solicitation, proposed SBE utilization toward special allowance or general allowance work will not be counted at the time of award. Subsequent utilization of SBEs for special allowance and general allowance work during performance of a Contract will be counted toward fulfillment of the SBE 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 SBE 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 SBEs, 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 SBEs 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 SBEs 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 SBEs certified in the scopes of work of the Contract. The Bidder shall provide interested SBEs with timely, adequate information about the plans, specifications, and requirements of the Contract to allow SBEs to respond to the solicitation. The Bidder must follow up initial solicitations with interested SBEs.
2. Seek the OCC's assistance when experiencing difficulty identifying subcontracting opportunities or available SBEs.
3. Identify portions of the Contract capable of being performed by SBEs and, where appropriate, breaking out work items into economically feasible units to facilitate SBE 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 SBEs and to select those portions of the work or material needs consistent with the availability of SBEs to facilitate their participation.
4. Assist interested SBEs 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 SBEs, including SBE assistance groups, governmental business assistance offices, NEORSD-sponsored training programs, and other organizations that provide assistance in the recruitment and placement of SBEs.

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 SBE 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 SBE, describing the work, materials, equipment or services to be performed or provided by the SBE 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 SBE documents before award, including the scope of work and the letters of intent from SBEs. 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 SBE 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 SBEs and other subcontractors, including, but not limited to, completing on-line reporting of payments made to such SBEs 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 SBE participation and the status of any SBE 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 SBE. A SBE 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 shall not make changes to the Utilization Plan or substitute SBEs named in the Utilization Plan without the prior written notification to OCC and the User Department. Changes or substitutions made without such notification shall be a violation of this Policy and may constitute a breach of Contract, subject to the breach provisions contained in the Contract.

All notifications of changes or substitutions of a SBE 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 such change or substitution. A Contractor shall not allow a substituted subcontractor to begin work until notification has been given to OCC and the User Department.

Substitutions of a SBE 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.

Where the Contractor notifies the District of its intention to change or substitute a SBE subcontractor, the Contractor shall make Good Faith Efforts to fulfill the Utilization Plan, if achievement of the SBE Goal is affected. The Contractor may

seek the assistance of OCC in obtaining a new SBE. 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 SBEs 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 SBE Contract Goal.

Before Contract closeout, OCC shall evaluate the Contractor's fulfillment of the Contracted Goals, taking into account all substitutions, terminations and changes to the Contract's scope of work. If OCC determines that Good Faith Efforts to meet the SBE 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 NEORS D rules.

ARTICLE 9. **REMEDIES, SANCTIONS AND PENALTIES**

Scope and Applicability. Any SBE allegedly aggrieved by the provisions of this SBE 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 SBE Hearing Panel. The SBE Hearing Panel shall be empowered to hear all grievances concerning certification, de-certification, and any other grievances relative to the SBE Program.

Notice of Hearing. Upon receipt of a written complaint from the Complainant, NEORS D shall schedule a hearing before the SBE Hearing Panel within a reasonable time after receipt of such complaint. NEORS D 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 SBE Policy. NEORS D shall have no obligation to provide a rescheduled hearing for any Complainant who fails to appear at a properly scheduled hearing.

Hearing Conduct. The SBE Hearing Panel shall consist of at least three (3) manager- or director-level NEORS D officials, who shall be appointed by the Chief

Executive Officer. The Chief Executive Officer shall have the discretion to serve on the Panel as one of the Panel members. The Chief Executive Officer may designate Panel members on a hearing-by-hearing basis, or at any other interval. Hearings before the designated SBE 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 SBE 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 SBE Policy is an affirmative defense to any statutory, legal or equitable proceeding that may arise.

Advisory Recommendations. The designated SBE 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 SBE 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 SBE 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 Chief Executive Officer determines that a shorter time period is warranted. The Chief Executive Officer 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 Chief Executive Officer deems appropriate under the circumstances, until compliance or remedial action has been accomplished by the Contractor to the satisfaction of the Chief Executive Officer.

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 SBE 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 SBE 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.
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.

ARTICLE 11.
CONTRACT-SPECIFIC MODIFICATIONS TO THIS POLICY

Upon approval of the NEORSD's Chief Executive Officer and Manager of OCC, a User Department may make Contract-specific modifications to this Policy for a particular project. Such modifications shall be set forth in the NEORSD solicitation for bids or proposals.