



**City of Charlotte**  
**Small Business Opportunity Program**  
**Version 2**

**Small Business Development Program**

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## Section I: Program Overview

1.1. **Program Background:** The City of Charlotte has a long history creating and implementing economic development strategies to support and encourage local business growth at all levels. Until January 2002, the Minority and Woman Business Development (MWBD) Program had been a major component of this strategy. This era was brought to an end, however, when a legal challenge forced the Charlotte City Council to terminate the race and gender conscious components of the local MWBD Program.

Immediately after terminating the race and gender conscious components of the local MWBD program, the Charlotte City Council appointed a Stakeholders Committee of citizens to study alternatives to the MWBD program. The Stakeholders Committee's charge was to:

- Determine community needs to promote equal opportunity for City contracting;
- Research other municipal programs;
- Recommend legal program options; and
- Review organizational structure and required resources.

The Stakeholders Committee, assisted by City staff, began its work in February 2002. Through a process that included gathering information from other municipalities, private sector experts and a public hearing, the Committee examined the challenges facing Charlotte's minority and woman owned business community.

What the Committee found was that many of the issues faced by minority and woman owned businesses were common to other small businesses in Charlotte. Further evaluation showed that these challenges were centered on the general business environment, access to capital and access to markets.

In June 2002, after careful consideration, the Stakeholders Committee made a number of recommendations to the Charlotte City Council. These

recommendations included the following components aimed at helping small businesses obtain access to capital and access to markets:

- Development of a small business center/virtual business center;
- Training and continuing education initiatives;
- A loan fund to increase access to equity and working capital;
- Development of a goals based good faith efforts small business enterprise utilization program;
- Review and revise City contracting and procurement processes; and
- Conduct small business outreach.

In July 2002, the City Council directed the City Manager to begin the process of implementing the Stakeholder Committee's recommendations. The purpose of this Small Business Opportunity Program (SBO Program) is to implement the following two Stakeholders Committee recommendations: (a) developing a goal based, good faith efforts small business utilization program, and (b) conducting small business outreach. The remaining recommendations of the Stakeholders Committee have been or are being implemented independent of this Program.

- 1.2. **Program Enabling Legislation:** On August 27, 2002, the North Carolina General Assembly ratified S.B. 1336 which added a new Section 8.88 to the Charlotte City Charter authorizing the City of Charlotte to establish a small Business Enterprise program to promote the development of small businesses in the Charlotte Metropolitan Statistical Area, and to enhance opportunities for small businesses to participate in City contracts (Session Law 2002-91). The bill authorizes the City to establish bid and proposal specifications that include goals and good faith efforts requirements to enhance participation by small businesses in City contracts. It also permits the City to consider a Bidder's compliance with such requirements in awarding contracts, and to refuse to award contracts to Bidders that fail to comply. In addition, the City has broad authority to engage in economic development and community development activities pursuant to G.S. 158-7.1 and G.S. 160A-456.

- 1.3. **Anti Discrimination.** The City is committed to promoting equal opportunities in City contracting. The City prohibits discrimination on the basis of race, gender, religion, national origin, ethnicity, age, disability, or any other form of unlawful discrimination in connection with a City contract, including discrimination in the solicitation, selection, hiring, or treatment of vendors, suppliers, subcontractors, brokers, joint venture partners or manufacturers. The City further prohibits retaliation against any person, business or other entity for reporting any incident of prohibited discrimination.
  
- 1.4. **Findings By City Council.** The Charlotte City Council finds that a race and gender neutral program employing goals and good faith efforts requirements to promote the utilization of small businesses in City contracts will benefit the City by: (a) promoting competition in City contracting; and (b) promoting economic growth and development in the Charlotte MSA. The Charlotte City Council further finds that small business standards set at roughly one quarter of the size standards established by the Small Business Administration (SBA) for businesses participating in SBA programs are reasonably reflective of business size in the Charlotte Metropolitan Statistical Area.
  
- 1.5. **Program Scope:** The SBO Program applies to all aspects of the City's contracting and procurement programs, including but not limited to the purchase of apparatus, supplies, materials, equipment, construction projects, all service contracts, and equipment rental and lease agreements. The provisions of the SBO Program take precedence over any conflicting departmental plans or procedures, except to the extent the SBO Program may conflict with the requirements of federal, state or local laws, rules or regulations. The SBO Program is intended to supplement and not replace existing requirements under North Carolina law relating to promoting minority and women business participation in City contracts. Any goals or efforts established to achieve minority and women business participation in City contracts consistent with North Carolina law shall take precedence over goals for small business participation established under the SBO Program.

1.6. **Program Objectives:** The SBO Program seeks to enhance competition in City contracting and promote economic growth and development in the Charlotte MSA by:

- Increasing small business enterprise business utilization in City contracting;
- Promoting existing small business growth and profitability in the Charlotte MSA;
- Promoting small business start-up and development in the Charlotte MSA;
- Monitoring SBE participation and contract compliance with the provisions of the SBO Program; and
- Evaluating and reporting contract activity subject to the provisions of the SBO Program to the City Manager's Office and to the City Council.

1.7. **Program Roles and Responsibilities:**

1.7.1. **The Charlotte City Council** is responsible for policy formation and funding of the SBO Program.

1.7.2. **The Charlotte City Manager** is primarily responsible for implementing SBO Program. The Manager shall:

- Determine the organization structure and appropriate staffing of the SBO Program Office;
- Establish lines of authority and reporting for successful program implementation;
- Recommend funding for SBO Program staffing, operations, training and outreach; and
- Assure the integration of the SBO Program components into the practices and processes of all City Key Business Units (KBU).

1.7.3. **The SBO Program Manager** is responsible for:

- Daily administration of all components of the SBO Program and supervision of the SBO Program staff;
- Developing such rules and guidelines as may be necessary to effectuate

the purposes of the SBO Program;

- Advising the City Manager on SBO Program issues;
- Consulting with Key Business Executives and their staffs on SBO Program implementation;
- Being the ombudsman for small business concerns associated with the SBO Program;
- Receiving reports of Federal Disadvantaged Business Enterprise Program (FDBEP) activities from the appropriate KBU and reporting the outcome of those activities to the City Manager; and
- Monitoring and reporting minority and women business participation as required by North Carolina law, including N. C. Gen. Stat. §143-128.3 (Minority business participation administration).

1.7.4. **Key Business Executives** (KBEs) are responsible for:

- Ensuring SBO Program compliance within their Key Business Unit (KBU);
- Developing and implementing strategies to achieve the annual and project participation goals established by the SBO Program;
- Integrating the SBO Program components into their practices and processes;
- Reporting SBE, DBE and/or MBE utilization as required by the SBO Program Manager; and
- Promoting the SBO Program and SBE participation in the contracting and procurement activities of their KBU.

1.7.5. **The City Attorney's Office** is responsible for:

- Reviewing the SBO Program, rules and guidelines to ensure their compliance with federal, state and local laws;
- Reviewing recommendations to reject a formal bid for non-compliance with SBO Program requirements and provisions; and
- Advising the City Council, City Manager, KBEs, and the SBO Program Manager on legal issues related to SBO Program and its implementation.

1.7.6. All Contractors (as defined in Section 2.15), are responsible for complying with the components of the SBO Program. Failure to comply with the SBO

Program may result in: (a) rejection of a bid, proposal or statement of qualifications, (b) payment of damages, (c) termination of a contract, or (d) rejection for certification or de-certification as a small business enterprise.

## Section II: Program Definitions

2. For purposes of the SBO Program, the following words and phrases shall have the meanings indicated below, unless otherwise clearly required by the context:

2.1. **Affiliate:** Business Enterprises are “Affiliates” of each other when:

- 2.1.1. One either directly or indirectly controls or has the power to control the other;
- 2.1.2. A third party or parties controls or has the power to control both; or
- 2.1.3. Other relationships between or among parties exist such that affiliation may be found.

A Business Enterprise is an “Affiliate” of an Eligible Owner when the Eligible Owner has possession, direct or indirect, of either (i) the ownership of or ability to direct the voting of, as the case may be, more than fifty percent (50%) of the equity interests, value or voting power of such Business Enterprise, or (ii) the power to direct or cause the direction of the management and policies of such Business Enterprise whether through the ownership of voting securities, by contract or otherwise.

In determining whether a Business Enterprise is an “Affiliate” with another Business Enterprise or with an Eligible Owner, consideration shall be given to all appropriate factors, including but not limited to common ownership, common management, contractual relationships and shared facilities. The SBO Program Manager may utilize, in the interpretation of this definition, the definition of affiliate set forth in 13 C.F.R. § 121.103 or successor regulation, as from time to time amended.

2.2. **Business Days:** Days on which the administrative offices of the City of Charlotte are open for the public to do business.



- 2.3. **Bid:** A bid or proposal submitted in response to an invitation to bid or request for proposal for a Formal Contract.
- 2.4. **Bid Documents:** The documents issued by the City to solicit bids or proposals for a Formal Contract, including but not limited to the invitation to bid, request for proposal, plans and specifications and proposed contract provisions.
- 2.5. **Bid Opening:** For Contracts that are subject to formal bidding requirements under the North Carolina bid statutes (G.S. 143-128 and 143-129 et. seq.), the Bid Opening shall be the date that Bids are opened by the City. For other Contracts, the Bid Opening shall mean the date that Bids are due.
- 2.6. **Bidder:** A Business Enterprise that submits a Bid to perform a Formal Contract.
- 2.7. **Broker:** A Business Enterprise that performs a Commercially Useful Function as an intermediary, for a fee, in the acquisition of materials, supplies or equipment, regardless of whether or not it takes title to such materials, supplies or equipment, for the City or a private owner or its contractors, consultants or Suppliers, but is not a Manufacturer or Regular Dealer. A Manufacturer's representative shall be deemed a Broker. Only bona fide commissions earned by a Broker for its activities in performing a Commercially Useful Function on City projects shall be counted toward the project goal as set out in Section 6.3.3.
- 2.8. **Business Enterprise:** A corporation, limited liability company, partnership, individual, sole proprietorship, joint stock company, joint venture, professional association or any other legal entity operated for profit that is properly licensed, as applicable, and otherwise authorized to do business in the State of North Carolina. The term "Business Enterprise" shall also include any non-profit corporation or organization that participates in a competitive process for a Contract, other than a Financial Partner or a Key Business Unit or department of the City.

- 2.9. **Certification:** Completion by a Business Enterprise of an application procedure to be developed by the SBO Program office, and formal authorization by the Program Manager to participate as an SBE under SBO Program. Certification neither represents nor implies that a Business Enterprise is qualified to perform on a contract, nor that it performs a Commercially Useful Function.
- 2.10. **Charlotte MSA:** The Charlotte Metropolitan Statistical Area, as defined from time to time by the United States Office of Management and Budget (OMB).
- 2.11. **City:** The City of Charlotte, North Carolina, a North Carolina municipal corporation.
- 2.12. **Commercially Useful Function:** A function performed by a Business Enterprise when it is responsible for supplying goods or for execution of a distinct element of the work of a contract and carrying out its responsibilities by actually performing, managing and supervising the work involved. To determine whether an SBE is performing a Commercially Useful Function, the amount of work subcontracted, industry practices and other relevant factors shall be evaluated. Commercially Useful Function is measured for purposes of determining participation on a contract, not for determination of Certification eligibility.
- 2.13. **Conduit:** An SBE that knowingly agrees to pass the scope of work for which it is listed for participation and is scheduled to perform or supply on the contract, to a non-SBE firm. In this type of relationship, the SBE has not performed a Commercially Useful Function and the arranged agreement between the two parties is not consistent with standard industry practice. This arrangement does not meet the Commercially Useful Function requirement, and therefore the SBE's participation does not count toward the SBE goal.
- 2.14. **Contract:** Any contract or purchase order through which the City procures goods or services from a Business Enterprise, including but not limited to all contracts and purchase orders for:

- a. The purchase of apparatus, supplies, materials and equipment;
- b. Construction, re-construction and remodeling;
- c. Architectural work, engineering, testing, construction management and other professional services related to construction;
- d. Services of any nature (including but not limited to general consulting and technology-related services); and
- e. All equipment rental and lease agreements.

The term "Contract" shall also include: (i) construction manager at risk contracts as defined by N.C. Gen. Stat. 143-128.1; (ii) Design Build Contracts; and (iii) contracts for the construction and development of public facilities, for which the City provides significant funding, infrastructure or improvements. The term "Contract" shall not include acquisitions or leases of real estate.

- 2.15. **Contractor:** A Business Enterprise that is a party to a Contract under which it agrees to provide goods and/or services. The term "Contractor" shall include consultants, suppliers and other providers of goods and services, in addition to construction contractors.
- 2.16. **Covered Contract:** A Contract that was subject to the Mandatory Outreach, SBE Utilization Goal and Good Faith Efforts requirements of this SBO Program, whether by virtue of being a Formal Contract or pursuant to Section 14.3.
- 2.17. **Days:** Any reference to "days" in this Program shall mean calendar days, unless it is specifically indicated to be Business Days.
- 2.18. **Eligible Owner:** The term "Eligible Owner" is defined in Section 3.2.1.
- 2.19. **Key Business Executive (KBE) and Key Business Unit:** A Key Business Executive (or "KBE") is the manager or director of a City Key Business Unit. As used in this SBO Program, the term also applies to a person that the KBE may designate to take such actions as are required or permitted under this

Program. The term “Key Business Unit” or KBU refers to a department of the City.

- 2.20. **Design-Build Contract:** A contract for construction, reconstruction or remodeling of a public work in a single contract with a single design-build contractor or combination of such contractors that are capable of providing the necessary design and construction, reconstruction or remodeling services.
- 2.21. **Exempt Contracts:** Contracts that are entered into without a competitive process, or entered into based on a competitive process administered by an entity other than the City, including but not limited to Contracts that are entered into by sole sourcing, piggybacking, buying off the North Carolina State contract, buying from a competitive bidding group purchasing program as allowed under G.S. 143-129(e)(3), or using the emergency procurement procedures established by the North Carolina General Statutes.
- 2.22. **Financial Partner:** A non-profit agency or organization outside the City that receives funding from the City pursuant to a financial partner agreement to perform services that the City would otherwise be authorized to perform. An organization shall not be considered a Financial Partner for purposes of the SBO Program if City staff confirms that the organization maintains its own small or disadvantaged business, development program.
- 2.23. **Formal Contract:** A Contract that must be approved by City Council as a matter ~~or~~ of law or City policy, or that is subject to formal bidding requirements under the North Carolina bid statute (G.S. 143-128 and 143-129 et. seq.). The term “Formal Contract” shall not include Exempt Contracts, or Contracts that are excluded from coverage under the SBO Program pursuant to Section 13. Likewise, the term “Formal Contract” shall not include Contracts that are renewed without a competitive process (which are subject to Section 13.1 ), or to changes in the scope of work on an existing Formal Contract (which are subject to Section 10.3 ).

- 2.24. **Goals Committees:** Committees of citizens with expertise in construction and other relevant industries which may be appointed by the City Manager as set out in the SBO Program to advise the Program Manager as to SBE Utilization Goal setting.
- 2.25. **Informal Contract.** A contract or procurement that does not require City Council approval as a matter of law or City policy, and is not subject to formal bid requirements under the North Carolina bid statute (G.S. 143-129 et. seq.)
- 2.26. **Good Faith Efforts:** The requirements set forth in Section VIII of this SBO Program that a Bidder must satisfy to demonstrate having made good faith efforts to meet an SBE Utilization Goal.
- 2.27. **Joint Venture:** An association of two (2) or more Business Enterprises to constitute a single Business Enterprise to perform a City contract for which purpose they combine their property, capital, efforts, skills and knowledge and in which each Joint Venturer is responsible for a clearly defined portion of work, performs a Commercially Useful Function, and shares in the ownership, control, management responsibilities, risks and profits of the Joint Venture.
- 2.28. **Mandatory Outreach:** The requirements set forth in Section VI of this Program regarding Minimum Contacts with SBEs and good faith negotiation with SBEs.
- 2.29. **Manufacturer:** A Business Enterprise that operates or maintains a factory or establishment that produces, or substantially alters, on the premises the materials, supplies or equipment provided to Contractors, Subcontractors, Suppliers, or Brokers in connection with a Contract. The percentage of the value of the Commercially Useful Function performed by a Manufacturer on a Contract shall be counted toward the Contract goal in the same manner as for a Supplier.

- 2.30. **Minimum Contacts:** The minimum number of SBEs that a Bidder must solicit quotes from on a Formal Contract, as required by Section VI of this Program and the applicable Bid Documents.
- 2.31. **NAICS:** North American Industry Classification System (NAICS) are size standards expressed either in number of employees or annual receipts in millions of dollars by industry or service type. The number of employees or annual receipts indicates the maximum allowed for a business and its affiliates to be considered small.
- 2.32. **NIGP:** National Institute of Governmental Purchasing (NIGP) codes are used to describe commodities purchased by governmental agencies. Services firms provide are categorized by NIGP codes.
- 2.33. **Packager:** A Business Enterprise that performs a Commercially Useful Function in the packaging of goods used in or delivered under a Contract, but is not a Regular Dealer or a Manufacturer. A Packager shall be considered as, and treated as, a Broker.
- 2.34. **Program Manager:** The manager of the SBO Program Manager or the Program Manager's designee.
- 2.35. **Qualified SBE:** An SBE that has the financial ability, skill, experience and access to the necessary staff, facilities and equipment to complete a particular Contract or Subcontract, and otherwise meets the criteria for being a "responsible bidder" within the meaning of the North Carolina bid statutes. The Program Manager, with advice from the City Attorney, may develop methods and criteria for assessment of whether a particular SBE is Qualified for a particular contract or subcontract for the purposes of Section 6.2. Nothing contained herein shall in any respect supersede or invalidate rules and regulations that a KBE or City Division Director may promulgate with respect to pre-qualification of City Contractors. The City makes no representations as to the qualification of any Business Enterprise.

- 2.36. **Regular Dealer:** This shall mean a Business Enterprise that owns, operates or maintains a store, warehouse or other establishment in which the materials or supplies required for the performance of a Contract are bought, kept in stock and regularly sold to the public in the usual course of business. To be a Regular Dealer, the Business Enterprise must engage in, as a substantial and material portion of its business, and in its own name, the purchase and sale of the products in question. A Regular Dealer in such bulk items as steel, cement, gravel, stone and petroleum products need not keep such products in stock if it owns or operates distribution equipment. Brokers, Conduits, Packagers and Manufacturer's representatives shall not be regarded as Regular Dealers within the meaning of this term.
- 2.37. **Small Business Enterprise (SBE):** A Business Enterprise that is certified by the Program Manager under this SBO Program as meeting all of the requirements for Certification set forth in Section III.
- 2.38. **SBE Utilization Goal:** The goal established for SBE utilization on a Formal Contract.
- 2.39. **Subcontractor:** A Business Enterprise that either directly contracts with a Contractor or directly contracts with another subcontractor under such Contractor, to provide services or perform work in connection with a Contract.
- 2.40. **Supplier:** A Business Enterprise that either directly contracts with a Contractor or directly contracts with a Subcontractor under such Contractor to provide materials, supplies or equipment in connection with a Contract. A Supplier may be a Regular Dealer, Manufacturer or Broker.

## Section III: SBE Certification and Eligibility

3. The Program Manager shall establish reasonable procedures and methods for the Certification of applicant Business Enterprises as SBEs, in order to effectuate the purposes of this SBO Program.

3.1. **Certification by NIGP Codes.** SBEs shall be certified only for the Certification area(s) for which they apply and in which they have had sustained business activity for a minimum of three (3) months. Certification areas shall correspond to the major groups set forth in the National Institute of Governmental Purchasing (NIGP) commodity codes, the North American Industry Classification Standards (NAICS), 13 CFR§ 121.201, as amended, or successor regulation, or such other classification codes or standards as the Program Manager may designate from time to time.

3.2. **General Certification Requirements.** A Business Enterprise shall be eligible for Certification as an SBE only if it meets each of the following requirements:

3.2.1. **Ownership.** At least fifty-one percent (51%) of the legal and equitable interest in the Business Enterprise must be owned by one or more Eligible Owners. A person shall be deemed an "Eligible Owner" of all or a portion of a Business Enterprise if such person:

3.2.1.1. Owns in his or her own name the legal and equitable interest in the Business Enterprise;

3.2.1.2. Acquired the interest in a real and substantial arms-length transaction utilizing real and substantial consideration;

3.2.1.3. Acquired the interest with his or her own financial or equivalent resources or has put his or her own financial resources at risk in the operation of the Business Enterprise.

3.2.1.4. Together with his or her spouse have a combined personal net worth under \$750,000, excluding: (i) \$500,000 of their combined equity in their primary residence; and (ii) their combined ownership



interest in the applicant Business Enterprise; and (iii) the value of owner's and spouse's retirement savings account as defined by the United State Tax Code and the Internal Revenue Service, and

3.2.1.5. Is not currently an official, officer or employee of the City

**3.2.2. Management and control.** The daily business operations of the Business Enterprise shall be managed and controlled by one or more Eligible Owners (the "Managing Eligible Owners"). The Managing Eligible Owner(s) shall be deemed to manage and control the daily business operations only if:

3.2.2.1. Their management and control is specifically demonstrated to be real, substantial and continuing and goes beyond the pro-forma ownership of the Business Enterprise as reflected in its ownership documents;

3.2.2.2. They possess the power to and actually direct the management and policies of the Business Enterprise;

3.2.2.3. They make both routine and major decisions on matters of management, policy and operations; and

3.2.2.4. They are not subject to formal or informal restrictions that are inconsistent with the customary discretion of majority owners.

**3.2.3. Experience and Involvement of Eligible Owners.** One or more Managing Eligible Owners must:

3.2.3.1. Hold the professional license or contractor license necessary for operation of each type of business for which the Business Enterprise seeks Certification;

3.2.3.2. Have substantial experience in the trade or industry which would be necessary to make routine and major decisions for the Business Enterprise; and

3.2.3.3. Regularly hold themselves out to the public and sign important documents and financial instruments in a manner that is indicative of primary management and control of daily business operations and responsibility for routine and major decisions.

**3.2.4. Actively in business for three (3) months.** The Business Enterprise may not be certified until three (3) months after the satisfaction of each of the following:

- 3.2.4.1. Formation of the Business Enterprise;
- 3.2.4.2. Commencement of sustained business activity in each trade or profession described on the Certification application; and
- 3.2.4.3. Commencement of ownership, management and control of daily business operations by the Eligible Owner(s).

**3.2.5. Perform a Commercially Useful Function.** The Business Enterprise must be a for-profit business that performs a Commercially Useful Function. A Business Enterprise does not perform a Commercially Useful Function if it merely acts as a Conduit by passing the scope of work for which it is scheduled to perform or supply on the contract to a non-SBE firm.

**3.2.6. Geographic Restriction.** The Business Enterprise must have its principle place of business within the Charlotte Metropolitan Statistical Area throughout the period the Business Enterprise is certified as an SBE. If after a Business Enterprise becomes certified as an SBE the Charlotte Metropolitan Statistical Area changes so as to exclude the area where the SBE's principle place of business is located, the SBE shall be entitled to retain its certification until the date on which it is required to re-apply under this program (assuming that all other requirements for retaining its certification are satisfied).

**3.2.7. Threshold Size and Graduation Standards**

- 3.2.7.1. No applicant Business Enterprise shall be certified as an SBE, and following Certification of an SBE, no Certification shall be renewed if on the effective date of the application or renewal the applicant Business Enterprise or SBE (combined with all Affiliates) has achieved a size standard based on annual receipts averaged over the three (3) preceding fiscal years, or has otherwise achieved a

size standard based upon number of employees or other criteria, applicable to any of the work activities for which the applicant Business Enterprise is certified or seeks Certification, which exceeds twenty-five percent (25%) of the applicable size standards established by the Small Business Administration at 13 CFR § 121.201, as amended, or successor regulation or classification system. The U.S. Government SBA size standard classifications as they may be modified or amended from time to time, or any successor classification system, are incorporated herein by reference.

- 3.2.7.2. If an SBE has been certified by the City in more than one (1) NAICS or NIGP major group or has an Affiliate which has been certified by the City in a NAICS or NIGP major group other than that of the SBE, then the annual receipt level or employee or other criterion used as the graduation criterion for such SBE shall apply separately to each NAICS or NIGP major group for which the SBE and its Affiliate have been certified. Such an SBE and any Affiliate that has exceeded the graduation criteria in one (1) NAICS or NIGP major group shall be deemed to be graduated from the SBE contracting program as to that major group, and may continue to be certified in another NAICS major group having a higher monetary or employee number graduation level but shall no longer be considered eligible to be or remain certified in the NAICS or NIGP major group with the lower size standard. Such an SBE or any Affiliate that has exceeded the graduation criteria for the largest NAICS or NIGP major group applicable to its activities shall be deemed to be permanently graduated from the SBE contracting program for all purposes. Utilization of SBEs shall count toward goals, if any, to the extent that an SBE is performing a Commercially Useful Function corresponding to a NAICS or NIGP major group in which it is certified.

3.2.7.3. Graduation of an SBE shall not affect the contribution made by the SBE toward satisfaction of a contract goal if the work was bid or proposed to be performed by the SBE prior to the date of ineligibility for Certification based on achievement of the graduation criterion.

3.2.8. **Application to Affiliates.** The graduation criteria set forth above shall be deemed to apply to the Eligible Owners and all Affiliates of the Eligible Owners. No Business Enterprise shall be certified based upon an Eligible Owner who was an Affiliate of an SBE that has become ineligible for renewed Certification because of the achievement of graduation criteria.

3.3. **Interviews, investigation and onsite visits.** The SBO Program office shall interview all persons upon whom eligibility for Certification is based, and is empowered to interview such other persons and conduct such onsite visits and investigations as may be appropriate in its sole discretion to verify eligibility for Certification. A Business Enterprise wishing to be certified as an SBE shall cooperate with the SBO Program office in supplying additional information that may be requested in order to make a determination.

3.4. **Attendance At Orientation Meetings.** The City shall conduct periodic meetings to educate SBEs about SBO Program requirements, and about general matters relating to participating in City contracts. SBEs shall be required to attend at least one such meeting prior to or within ninety (90) days after becoming certified. The Program Manager may by rule or regulation require SBEs to attend follow-up meetings on a periodic basis, but no more than once every two years. Failure to attend such meetings shall be grounds for decertification for such period as shall be determined by the Program Manager.

3.5. **Continued eligibility and renewal of Certification.** An SBE Certification shall be valid for a three (3) year period. Following initial Certification, an SBE that desires to continue its Certification for each subsequent year shall, no later than thirty (30) calendar days prior to each annual anniversary of the Certification, submit an affidavit of no change of circumstances which shall update and reaffirm all requirements for Certification. No later than thirty (30) calendar days

prior to its third year anniversary of Certification, an SBE must submit a renewal application. A Certification shall terminate automatically and without notice upon the failure of the Business Enterprise to satisfy any requirement set forth in this section.

- 3.6. **Program participation required by SBEs.** All firms certified as SBEs under the SBO Program are required to respond to all solicitations by the City or Bidders soliciting goods or services for which the SBE is certified. SBEs are required to respond to the solicitation on or before the date indicated in the solicitation. Failure to respond to one or more solicitations on four (4) or more Contracts within a one hundred and twenty (120) day period shall be grounds for decertification for such period as shall be determined by the Program.

## **Section IV: Participation Goals For Informal Contracts**

4. SBO Program goals for Informal Contracts shall be established using the method described below.

- 4.1. **Program Manager Recommends City Wide Goals.** At the beginning of each City business planning cycle, the Program Manager will recommend SBE Utilization Goals for Informal Contracts to the City Manager. The Program Manager, as a basis for the establishment of annual goals, shall determine the present availability of all SBEs doing business in the City by profession and trade groupings. In addition, the Program Manager shall conduct such inquiries, studies and hearings, and utilize information and assistance from such persons, consultants, entities or organizations including but not limited to the KBEs, as necessary to establish recommended goals.

- 4.2. **Review and Approval By City Manager.** The City Manager and City Council shall review the annual SBE Utilization Goals recommended by the Program Manager, may undertake such additional inquiries, as they deem appropriate, and may approve, disapprove or modify the recommended annual goals. Until

the City Council approves, disapproves or modifies the annual goals in a succeeding year, the established annual goal shall continue in effect.

- 4.3. **Goals Then Established For KBUs.** Based on the overall annual goals for SBE participation for Informal Contracts, the City Manager, with advice and input from the Program Manager and KBEs, shall then establish annual SBE Utilization Goals for Informal Contracts for each KBU. The City Manager shall further take such steps as are appropriate to ensure accountability in meeting such goals by the KBU's.

## **Section V: Setting SBE Utilization Goals for Formal Contracts**

5. **Goal setting.** For each Formal Contract, the Program Manager shall assign an SBE Utilization Goal based upon a percentage of the dollar value of all services and goods to be provided under such Contract; provided that, if the Program Manager or City Manager (or for Contracts for Legal Services, the City Attorney) determines it to be in the best interests of the City, the Program Manager may waive the goal requirement for a given Contract. No goals shall be set for Contracts where subcontracting is not anticipated, or where there are no SBEs certified in the areas where subcontracting is anticipated. The Program Manager shall establish a methodology for setting SBE Utilization Goals for Formal Contracts, including the methodology to be followed by the Goals Committees, through rules and guidelines for the implementation of the SBO Program. Such methodology shall take into account the reasonably known availability of SBEs in specific industry groupings that are associated with individual projects. In the event a City Key Business Executive issuing a Formal Contract disagrees with the goal set by the Program Manager, the matter shall be resolved by the City Manager or an Assistant City Manager.

- 5.1. **Goals Committees By Type.** The City Manager shall appoint the following three (3) Goals Committees to advise and assist the Program Manager in the determination of SBE Utilization Goals for Formal Contracts.

- 5.1.1. **General Construction Goals Committee:** The General Construction (vertical construction, treatment plants, pumping stations, repair,

remodeling, reconstruction, etc.) Goals Committee shall advise and assist the Program Manager with respect to setting SBE Utilization Goals for general construction projects.

5.1.2. **Horizontal Construction Goals Committee:** The Horizontal Construction (transportation, transit, water, sewer and storm water) Goals Committee shall advise and assist the Program Manager with respect to setting SBE Utilization Goals for transportation and utility construction projects.

5.1.3. **Professional Services in Construction Goals Committee:** The Professional Services (architectural, engineering, survey, etc.) Goals Committee shall advise and assist the program with respect to setting SBE Utilization Goals for professional design and construction services projects except for construction management services.

5.2. **Meetings and Members of Goals Committees.** The Goals Committees shall meet on a regular basis on a schedule established by the Program Manager to consider and recommend SBE Utilization Goals for Formal Contracts pursuant to guidelines developed by the SBO Program office. Members of the General Construction Goals Committee shall be or have been directly engaged in the general construction industries, members of the Horizontal Construction Goals Committee shall be or have been directly engaged in the transportation or utility construction industry, and members of the Professional Services Goals Committee shall be or have been directly engaged in the professional design and construction services industry.

Meetings of the Goals Committees shall be open to the public and all advisory statements or recommendations made by the Goals Committees to the Program Manager shall be publicly posted by the Program Manager. In rendering advice on SBE Utilization Goals, the Goals Committees shall consider data as to availability of types of SBEs doing business in the City with respect to the substantive work requirements of each Formal Contract under consideration. The Program Manager may use such advice and assistance from the Goals Committees to the extent that the Program Manager deems it to be appropriate and consistent with the purposes of SBO Program.. The Program Manager may

acquire such other information helpful to a determination as to project goals, and shall in his or her sole discretion establish an individual project goal for each contract in Bid instructions or as otherwise promulgated by regulations.

## **Section VI: Mandatory Outreach for Formal Contracts**

~~6. Each Bidder that seeks to enter into a Formal Contract with the City shall comply with the requirements set forth in this Section VI (the "Mandatory Outreach" requirements). Failure to do so shall constitute grounds for rejecting a Bid.~~

6. Each Bidder that seeks to enter into a Formal Contract with the City shall comply with the requirements set forth in this Section VI (the "Mandatory Outreach" requirements. Failure to do so shall constitute grounds for rejecting a Bid. Notwithstanding the forgoing, the Program Manager may grant waivers of the Mandatory Outreach requirements under the conditions set forth in Sections 8.4 or 14.6. of this Program.

**6.1. Minimum SBE Contacts.** At least seven (7) calendar days prior to Bid Opening, Bidders must contact the required minimum number of SBEs as specified in the Bid Documents (the "Minimum Contacts"). The Minimum Contacts shall be based on guidelines established by the Program Manager from time to time. Such guidelines may establish a total number of Minimum Contacts for the Contract as a whole, or may establish the Minimum Contacts on a per category basis for each category of work for which there are SBEs. In establishing the guidelines, the Program Manager shall seek, advice and input from the Goals Committees or other knowledgeable persons.

**6.1.1. Contact Method:** The Minimum Contacts shall be made by facsimile transmission, e-mail, telephone communication, U.S. Mail, overnight courier service or in-person discussion. Regardless of the method of contact, the information specified in Section 6.1.2 must reach the recipient at least seven (7) days prior to Bid Opening. Contacts that are made by U.S. Mail shall be presumed to reach the SBE by the required deadline if they are: (a) are mailed at least ten (10) days prior to the Bid Opening; and (b) documented as required by Section 6.1.3.



6.1.2. **Contact Content:** For a Bidder to receive credit for a contact under this Section, the substance of the contact must be sufficient to put the SBE on notice that the Bidder is soliciting a bid from the SBE to participate in the Contract up for award in one or more of the areas for which the SBE is certified.

6.1.3. **Documentation Requirements:** To document compliance with the Minimum Contacts requirement, a Bidder must submit a Minimum Contacts Form ("Form 2"). Form 2 must be submitted at the same time as the Good Faith Efforts Compliance Form, as specified in Section 8.3. Form 2 shall require the Bidder to document in writing for each Minimum Contact required by this Section: (a) the mode of contact, (b) the date of the contact, (c) the name of the SBE contacted, and (d) the NIGP Code identifying the goods or services solicited from the SBE. Additionally, Bidders must provide with Form 2 the following information and documentation depending on the mode of contact:

6.1.3.1. **For contacts made by facsimile:** A confirmed fax transmission record showing that a fax meeting the content requirements of this Section was transmitted to a fax number maintained by the SBE.

6.1.3.2. **For contacts made by email:** A copy of an email meeting the content requirements of this Section, showing that it was sent to an email address maintained by the SBE.

6.1.3.3. **For telephone conversations and in person contacts:** An affidavit confirming that the contacts were made in accordance with the requirements of Section VI, and stating the name of the SBE representative that the Bidder spoke with for each contact. The City may further require that the Bidder provide on a case-by-case basis copies of telephone bills confirming that the calls were made, and showing that the date and duration of the required calls. Voice mail messages shall be deemed an acceptable mode of contact within the

meaning of this Section, provided that the voicemail meets the content requirements set forth in Section 6.1.2.

6.1.3.4. **For contacts made by U.S. Mail:** (a) A copy of the document mailed (which meets the content requirements of this Section); and (b) a Certificate of Mailing from the U.S. Postal Service certifying the date on which the document was mailed; and (c) an affidavit stating that the document was mailed to the address of each SBE recipient on the date indicated in the Certificate of Mailing.

6.1.3.5. **For contacts made by overnight courier:** (a) A copy of the document sent by overnight courier (which meets the content requirements of this Section); and (b) A routing slip from the overnight courier showing the date on which the document was sent and the address of the SBE recipient.

6.1.4. **Additional Documentation.** From time to time the City may request additional information to verify the contacts listed on Form 2. If requested, the Company shall provide such information within three (3) Business Days after receiving a written request from the City, or within in such longer time as the City may agree in writing.

6.1.5. **Verification.** To confirm that contacts were made, the City may conduct such verification as the City deems appropriate, including but not limited to conducting a random sample of the SBEs listed by the Bidder.

6.1.6. **Except as provided in Section 6.3, Bidders shall not receive credit for any contacts that are not documented to the City within the time period required by this SBO Program (see Sections 6.1 and 6.3).**

6.2. **Good Faith Negotiation.** Each Bidder must negotiate in good faith with each SBE that responds to the Bidder's solicitation and each SBE that contacts the Bidder on its own accord ("Interested SBEs"). To demonstrate good faith negotiation, the Bidder must submit a Good Faith Negotiation Form ("Form 2") to

the City within the time period set forth in Section 8.3 for submitting the Good Faith Efforts Compliance Form. Form 2 shall require the Bidder to verify in writing one of the following for each Interested SBE that the Bidder did not contract with either: (a) the SBE did not submit the lowest bid; or (b) the SBE was not a "Qualified SBE" within the meaning of Section 2.35; or (c) if the Contract at issue is not subject to formal bid requirements under the North Carolina bid statutes or is a contract for architectural, engineering or surveying services within the meaning of G.S. Section 143-64.31 *et. seq.* the Bidder may verify in writing that the entity it elected to contract with is more qualified than the SBE to provide the goods or services at issue. If the Bidder reports that an SBE is not a Qualified SBE or is not as qualified as the candidate selected, the Bidder must state its reasons for reaching this conclusion. For those SBEs that the Bidder lists as not having submitted the lowest bid, the City may request on a case-by-case basis documentation sufficient to prove that the SBE was not the lowest bid. The Bidder must provide this information within three (3) Business Days after receiving a request, unless a longer period of time is agreed to in writing by the City.

To demonstrate Good Faith Negotiation, the Bidder shall also report on Form 3 all non-SBE firms being used as Subcontractors, Suppliers, Manufacturers, Brokers or members of a Joint Venture, where the Bidder estimates payment to the non-SBE in excess of a certain amount which shall be specified by the City. In each case the Bidder shall identify the name and general location of the non-SBE, and the nature of the products or services the non-SBE is to provide. If requested by the City, the Bidder shall also document the amount it estimates paying to each non-SBE.

**6.3. Extension of Deadline for Making Minimum Contacts If Key Bid Documents are not Issued at Least 28 Days Prior To Bid Opening.** The deadlines for making the Minimum Contacts are based on the assumption that certain Key Bid Documents will be available at least 28 days prior to Bid Opening. For purposes of this Section, the term "Key Bid Documents" means the essential components of the Invitation To Bid or Request For Proposal. For construction projects, the term Key Bid Documents also includes the essential plans and specifications for

the project. If the Key Bid Documents have not been issued at least 28 days prior to the Bid Opening, a Bidder may, within seven days after the Bid Documents are issued, request that the City extend the Bid Opening date to allow adequate time to make the Minimum Contacts. Such request shall be issued to the Key Business Executive of the City KBU that will be awarding the Contract. If the Key Business Executive finds that the key Bid Documents have not been issued at least 28 days prior to the bid opening, the City shall issue an addendum to the Bid Documents extending the Bid Opening.

In certain circumstances (referred to in this Section as an “Expedited Procurement”), it may not be practical for the City to make the Key Bid Documents available at least 28 days prior to Bid Opening. For example, it may be necessary to procure goods or services on an expedited schedule due to public safety (such as repair of a sinkhole or other dangerous condition), homeland security issues or business continuity (such as the repair of a building or other infrastructure necessary to keep operations underway). In the event of Expedited Procurement, the City shall either modify those provisions of the SBO Program that cannot reasonably be complied with under the expedited schedule, or exempt Bidders from compliance with such provisions. In the event of Expedited Procurement, the first paragraph of this Section 6.3 shall not apply.

## **Section VII: Meeting the SBE Utilization Goal**

7. For each Formal Contract, the Bidder must comply with the Mandatory Outreach requirements and either: (a) meet the SBE Utilization Goal in the manner set forth in this Section, or (b) comply with the Good Faith Efforts requirements set forth in Section VIII. Failure to do so shall constitute grounds for rejecting a Bid.

- 7.1. **What Counts Toward SBE Goal.** Bidders may receive credit toward the SBE Utilization Goal only for SBE utilization that is documented by: (a) inclusion on Form 3 submitted with the Bid; and (b) a “Letter of Intent” as defined in Section 7.2, that is submitted to the City within the time period set forth in Section 7.2. Only that level of SBE utilization demonstrated in accordance with this Section

may be counted in satisfaction of the SBE Utilization Goal for purposes of determining whether the a Bid complies with the SBO Program.

7.2. **Letter of Intent.** Within three (3) Business Days after receiving a request from the City (or within such longer time as may be agreed by the City in writing), Bidders must submit a separate Letter of Intent on a form provided by the City ("Form 4") executed by each SBE listed by the Bidder on Form 3 toward satisfaction of the SBE Utilization Goal. Bidders may use a Letter of Intent form other than Form 4 if it contains the same information as Form 4 and is executed by each SBE required by this Section. Proposed SBE participation for which there is no Letter of Intent by this deadline shall not be counted toward satisfaction of the SBE Utilization Goal. If such failure results in the Bidder not satisfying the SBE Utilization Goal, then the Bid in question will be deemed non-compliant with the SBO Program unless: (a) the SBE acknowledges to the City that it originally agreed to participate in the Contract at the dollar level reported by the Bidder, but subsequently declined to do so; or (b) the Bidder demonstrates compliance with Good Faith Efforts.

7.3. **Commercially Useful Function.** A Bidder may only get credit toward the SBE Utilization Goal for those SBEs that actually perform a Commercially Useful Function in connection with the Contract within the area(s) for which they are certified. An SBE does not perform a Commercially Useful Function if it acts solely as a Conduit.

7.4. **Calculating SBE Participation.**

7.4.1. If the Bidder utilizes an SBE as a Subcontractor to perform services, the value of the Commercially Useful Function to be performed by such SBE shall count 100% toward satisfaction of the SBE goal.

7.4.2. All expenditures for materials, supplies and equipment obtained from an SBE Manufacturer or Supplier (other than a Broker) shall count 100% toward the SBE goal.

7.4.3. Expenditures for materials, supplies and equipment paid to SBEs that are Brokers or to SBEs that are not Manufacturers or Suppliers may count toward an SBE goal only to the extent of fees or commissions charged for providing a bona fide service, such as professional, technical, consultant or managerial services and assistance in the procurement of essential personnel, facilities, equipment, materials or supplies required for performance of the Contract, provided that the fee or commission is determined by the Program Manager to be reasonable and not excessive as compared with fees customarily allowed for similar services.

7.5. **Self-Performance By SBEs.** If the Bidder is an SBE, the value of the Commercially Useful Function to be self-performed by the SBE shall not count toward the Bidder's satisfaction of the SBE Utilization Goal. However, the Program Manager will include the value of the Commercially Useful Function of the successful SBE Bidder in reporting the overall participation of SBEs in City procurement activities.

7.6. **Joint Ventures.** If the Bidder submits a Joint Venture agreement that includes one (1) or more SBEs, the value of the Commercially Useful Function to be performed by the SBEs in the Joint Venture shall count 100% toward satisfaction of the SBE Utilization Goal. The Joint Venture is subject to the review and approval by the Program Manager. The Program Manager should complete the review of the proposed Joint Venture within five (5) Business Days after the submittal of the Joint Venture proposal.

## **Section VIII: Good Faith Efforts**

8. If a Bidder has not fully met the SBE Utilization Goal established for a Contract, then it must demonstrate that it has made Good Faith Efforts to meet such goal in compliance with this Section. Failure to do so shall constitute grounds for rejection of a Bid.

8.1. **Good Faith Efforts Points.** For each Formal Contract, the Program Manager or the City Key Business Executive issuing the Contract shall: (a) assign points to

each Good Faith Effort category listed in Section 8.2; and (b) establish a minimum number of points that a Bidder must obtain in order to meet the Good Faith Efforts requirements. The Program Manager or City Key Business may exclude or modify certain Good Faith Efforts categories based on the nature and amount of the Formal Contract and the surrounding circumstances. The minimum number of Good Faith Efforts points and the number of points assigned to each Good Faith Efforts category shall be set forth in the Bid Documents. Unless a Bidder meets the SBE Utilization Goals established for a Contract, failure to achieve the points necessary to demonstrate Good Faith Efforts shall render its bid non-compliant with the SBO Program.

**8.2. Statement of Good Faith Efforts Compliance.** For each Formal Contract, Good Faith Efforts points shall be distributed among the following categories:

**8.2.1. Making Plans Available.** Making any project descriptions, construction plans, specifications or requirements applicable to the project available for review by the prospective SBEs, or providing these documents to them at least seven (7) calendar days before Bid Opening. To meet this requirement, Bidders must: (a) provide necessary physical access and adequate time for SBEs to fully review all pertinent documents at the Bidder's place of business within Mecklenburg County or, if the Bidder has no place of business within Mecklenburg County, at an alternate location in Mecklenburg County where the plans and specifications can be reviewed at no cost to SBEs; and (b) notify all SBEs contacted pursuant to Section 6.1 of the locations (including the address) where plans and specifications can be reviewed.

**8.2.2. Breaking Down Work.** Notifying SBEs as part of a Bidder's Minimum Contacts that the Bidder is willing to break down or combine elements of work into economically feasible units on a case-by-case basis, and negotiating in good faith with any SBEs that request such breakdowns to facilitate SBE participation.

**8.2.3. Pre-Bid.** Attending any pre-bid meetings scheduled by the City.

- 8.2.4. **Conducting a Pre-Bid for SBEs.** Conducting a pre-bid meeting for SBEs at least three (3) days prior to Bid Opening. The pre-bid meeting must take place within Mecklenburg County, and the time and location of the meeting must be communicated to all SBEs that must be contacted under the Minimum Contact requirements of Section 6 at least 48 hours in advance of the meeting.
- 8.2.5. **Training and Mentoring.** Providing training or mentoring to at least two (2) SBEs within one hundred and twenty (120) days prior to Bid Opening. To receive credit for this item, the Bidder must have the training or mentoring certified by the Program Manager. The Program Manager shall have the discretion to deny credit for training or mentoring that is not significant or is not reasonably calculated to assist the SBE in developing its capabilities.
- 8.2.6. **Notification of Subcontracting Opportunities.** Providing to the City not later than seven (7) calendar days prior to Bid Opening a list of the areas in which the Bidder intends to seek subcontractors. The Bidder may report this information on Form 1 or on another document providing the same information as Form 1.
- 8.2.7. **Working With SBE Assistance Organizations.** Working with trade or community organizations that provide assistance in the recruitment, education, and capacity building of Small Business Enterprises, including but not limited to the National Association of Women Business Owners, the Metrolina Minority Contractors Association, and the Association of General Contractors, ("SBE Assistance Organizations"). To receive credit for this item, Bidders must document that they have done one of the following within the one hundred and twenty (120) day period preceding the Bid Opening:



8.2.7.1. Participated in an educational seminar or workshop sponsored by the SBE Assistance Organization for the purpose of increasing the capacity or skill level of SBEs, or assisting SBEs in obtaining work; or

8.2.7.2. Worked with an SBE Assistance Organization to identify an SBE that the Bidder subsequently contracted with (whether on a City Contract or other contract), provided the Bidder had not previously worked with that SBE.

**8.2.8. Bonding or Insurance Assistance on Another Contract.** Assisting an SBE in obtaining its own bond or insurance coverage for a City Contract or other contract. To receive credit for this item: (a) the assistance must be direct and documented, (b) the SBE must not have had access to the bond or insurance coverage prior to the assistance; and (c) the assistance must have been provided at some point within one hundred and twenty (120) days prior to the Bid Opening. The documentation submitted by the Bidder must include: (a) the name of the SBE; (b) a description of the assistance provided; (c) the date the assistance was provided; (d) the name of a contact person with the SBE who can verify that the assistance was provided; and (e) any additional information requested by the City.

**8.2.9. Covering Subcontractors Under Bidder's Bond or Insurance on the Contract Up for Award.** Committing to cover one or more SBEs under the Bidder's bond or insurance if awarded the Contract in question on work for which prime contractors would typically require a bond, without requiring the SBEs to provide their own bond or insurance coverage. To receive credit for this item, the Bidder must: (a) identify the SBE(s) to which the commitment was made; and (b) document that such commitment was communicated to the SBE(s) prior to the Bidder's receipt of the SBE's bid.

**8.2.10. Joint Venture Agreements.** Entering into Joint Venture and partnership arrangements with SBEs in order to increase opportunities for SBE business participation, whether on City Contracts or other contracts. To receive credit for this item, Bidders must document that they have entered

into such an arrangement within one hundred and twenty (120) days prior to the Bid Opening. Such documentation must include: (a) the name of the SBE; (b) a description of the Joint Venture or partnership arrangement; (c) evidence of the date the arrangement was entered into; and (d) the name of a contact person with the SBE who can verify that the arrangement.

Another way to receive credit for this item is by facilitating a joint venture agreement between SBEs that would not otherwise be able to participate in the Contract. To receive credit for this item, the Bidder must document: (a) the names of the two SBEs that it facilitated a joint venture between; (b) what steps the Bidder took to facilitate the joint venture; and (c) that at least one of the SBEs would not have been able to participate in the Contract but for the joint venture. Additionally, the joint venture must pertain to the Formal Contract for which the Bid is submitted.

**8.2.11. Financial Assistance.** This item includes providing the following types of assistance to an SBE within ninety (90) days prior to Bid Opening; (a) assistance in obtaining equipment, a loan, capital, lines of credit, (b) joint pay agreements or guaranties to secure loans, the purchase of supplies, or letters of credit, including waiving credit that is ordinarily required; or (c) assistance in obtaining the same unit pricing with the Bidder's Suppliers as the Bidder. Such assistance may be in connection with a City Contract or any other contract. To receive credit for this item, Bidders must document: (a) the name of the SBE; (b) a description of the assistance provided; (c) the date the assistance was provided; and (d) the name of a contact person with the SBE who can verify that the assistance was provided.

**8.2.12. Quick Pay Agreements On The Contract Up For Award.** Providing quick pay agreements and policies to enable SBEs contractors and Suppliers to meet cash-flow demands. For purposes of this Section the term "quick pay agreement" means a commitment to pay all SBEs participating in the Contract within twenty (20) days after confirmation that

performance has been properly completed. To receive credit for this item, Bidders must either:

- 8.2.12.1. Document a legally binding commitment to provide quick pay to the SBEs in connection with the Contract up for award; or
- 8.2.12.2. Document (a) that it has adopted a quick pay policy for the Contract up for award that would include all SBEs, and (b) that it has notified SBEs of that policy.

Including a statement in a bid solicitation letter indicating that the Bidder will consider entering into quick pay agreements will not suffice.

**8.2.13. Attendance at City SBO Workshops.** Attending workshops or seminars held by the City for the purpose of (a) educating Bidders or SBEs about the requirements of the SBO Program, or how to utilize SBEs; (b) increasing the capacity or skill level of SBEs, or (c) providing networking opportunities for SBEs. To receive credit for this item, Bidders must document that they attended such a workshop or seminar within ninety (90) days prior to Bid Opening. Pre-bid conferences shall not qualify as seminars or workshops for purposes of this section.

**8.2.14. Follow-up Contacts.** Following up with each SBE that the Bidder was required to contact as part of the Minimum Contacts requirements, that did not indicate an unwillingness to bid on the Contract following the initial contact. To receive credit for this item, each follow-up contact must: (a) be made subsequent to the initial contact and at least 48 hours prior to bid opening; (b) be made by telephone or in person and documented in accordance with Section 6.1.3. The City may request additional documentation in accordance with Section 6.1.4, and may verify the contacts in accordance with Section 6.1.5.

**8.2.15. Achieving 50% of SBE Participation Goal.** Achieving at least fifty percent (50%) of the SBE Participation Goal.

**8.2.16. SBE Participation On Non-City Contracts.** Providing SBEs with a specified dollar volume of business on non-City contracts during a specified time period. The specified dollar volume and time period shall be specified in the Bid Documents. The dollar value may be roughly based on the SBE Participation Goal for the particular Contract, or on such other criteria as the Program Manager deems appropriate. To receive credit for this item, Bidders must submit in writing for each non-City contract counted as part of the total: (a) the name of the project and the parties to the contract; (b) the name of the SBE; (c) the amount paid to the SBE; and (d) any additional documentation requested by the Program Manager for verification purposes.

**8.3. Documentation of Good Faith Efforts Compliance.** To demonstrate Good Faith Efforts compliance, a Bidder shall complete a Good Faith Efforts Compliance Form ("Form 5"), which shall address each of the criteria for Good Faith Efforts compliance outlined in this Section and any additional criteria that the Program Manager may establish by rule or guideline from time to time consistent with the Program Manager's authority under this SBO Program. The Good Faith Efforts Compliance Form must be submitted within the time period specified by the City in the Bid Documents. For Formal Contracts for the construction or repair of buildings, roads, utilities or related infrastructure, the City shall provide in the Bid Documents that Good Faith Efforts Compliance Form is due within three (3) Business Days after the City requests it. In such instances the City shall: (a) request the Good Faith Efforts Compliance Form after the lowest responsible Bidder has been identified, (b) initially limit such request to the two lowest Bidders, and (c) expand the request to additional Bidders as the City deems appropriate. For other Formal Contracts the City may follow a similar procedure (which may be modified to fit the circumstances), or shall specify that the Good Faith Efforts Compliance Form be submitted with the Bid. Upon receipt of the Good Faith Efforts Compliance Form, the City shall be entitled to request any further documentation or information that the City deems reasonably necessary to verify a Bidder's compliance with the Good Faith Efforts requirements. The Bidder shall provide such information within three (3) Business Days after receiving a request from the City, unless otherwise agreed in writing by the City.

In the event the Good Faith Efforts Compliance Form is not due with the Bid, the Bidder shall: (a) certify in its Bid that it has complied with the Good Faith Efforts Requirement; and (b) agree in writing that failure by the Bidder to provide documentation evidencing such compliance within the time period required by the City shall constitute a forfeiture of the Bidder's bid bond, and shall entitle the City to recover under the bid bond as though the Bidder had refused to execute a contract with the City to perform the Bid.

**8.4. Waiver of Good Faith Efforts and Mandatory Outreach.** The Program Manager shall be entitled (but not required) to waive the Good Faith Efforts and the Mandatory Outreach requirement in a situation where the lowest Bidder failed to comply with the Good Faith Efforts and Mandatory Outreach ("Non-Compliant Bidder") but has either

**8.4.1.** Proposed SBE Subcontractor Utilization that meets or exceeds the established SBE Subcontractor Utilization Goal or

**8.4.2.** Has proposed SBE Subcontractor Utilization that is greater than that proposed by the Bidder that complied with the Good Faith Efforts and the Mandatory Outreach Requirements and would otherwise be awarded the Contract ("Compliant Bidder").

**8.4.3.** In determining **whether** to grant such waiver, the Program Manager will take into account

**8.4.3.1.** The cost difference to the City between the two Bids.

**8.4.3.2.** The difference in the level of SBE Subcontractor Utilization proposed by the Compliant and Non-Compliant Bidders.

**8.4.3.3.** The level of effort the Compliant and Non-Compliant Bidders undertook to meet the Good Faith Efforts requirement.

**8.4.3.4.** The consistency in subcontractors the Non-Compliant Bidder has proposed on City projects (i.e. whether the or not the Bidder consistently uses the same subcontractors on every bid) and

**8.4.** Instances of past non-compliance with the Good Faith Efforts requirement and any other factors deemed relevant by the Program Manager on the part of the Non-Compliant Bidder.

~~**8.4 Waiver of Good Faith Efforts.** The Program Manager shall be entitled (but not required) to waive the Good Faith Efforts requirement in a situation where the lowest Bidder has a proposed SBE participation percentage that is greater than that proposed by the Bidder that would otherwise be awarded the Contract. In~~

~~determining whether to grant such waiver, the Program Manager will take into account the cost difference to the City between the two bids or proposals, the difference in the level of SBE participation proposed by the respective Bidders, the level of effort the respective Bidders undertook to meet the Good Faith Efforts requirement, and instances of past non-compliance with the Good Faith Efforts requirement and any other factors deemed relevant by the Program Manager.~~

#### 8.5.8.4. **Self-Performance.**

8.5.1.8.4.1. **Self Performance Does Not Exempt Bidders from Mandatory Outreach or Good Faith Efforts Requirements.** Bidders that do not meet the SBE Utilization Goal for a Formal Contract and desire to self-perform all or part of the Contract must nevertheless demonstrate that they complied with the Mandatory Outreach and Good Faith Efforts requirements as provided in this Section.

8.5.2.8.4.2. **Documenting Good Faith Efforts For Self Performed Work.** Bidders that elect to self-perform all or part of a Formal Contract must: (a) select "Target Areas" of subcontracting for which the City has identified potential SBE participants and which, taken collectively, would reasonably be expected to generate subcontracting opportunities sufficient to meet the SBE Utilization Goal for the Contract; (b) comply with the Good Faith Efforts requirements for each of the Target Areas; and (c) include as an attachment to Form 5 submitted pursuant to Section 8.3 documentation sufficient to demonstrate a valid business reason for self-performing each such item of work within the Target Areas as opposed to subcontracting with an SBE. Such information may include but is not limited to data relating to the Bidder's internal operations, costs, staff qualifications and other matters relevant to determining whether the Bidder has a valid business reason for performing such work in-house.

8.5.3.8.4.3. **Trade Secrets.** Trade secrets are exempt from disclosure requirements under the North Carolina public records laws (N.C. Gen. Stat.

132-1 et. seq. and 66-152 et. seq.). If a Bidder believes that all or part of the information requested pursuant to this Section is a trade secret, the Bidder shall: (a) clearly mark each page of such trade secret materials with a notation to the effect of "CONFIDENTIAL TRADE SECRETS / DO NOT DISCLOSE;" and (b) submit such trade secret materials in separate envelope from non-trade secret materials. Any materials not designated as trade secrets in this manner may be disclosed as public records.

## **Section IX: Mandatory Subcontractor Requirements**

**9.1 Authorization and Intent.** Section 8.82 of the Charlotte City Charter authorizes the Charlotte City Council to establish specifications requiring Contractors to subcontract a certain percentage of the work in construction and repair Contracts. City Council desires to use this authority to enhance SBE participation in construction and repair Contracts to the extent doing so is reasonably practicable in light of industry practice and consistent with the City's best interests.

**9.2 Guidelines and Recommendations.** The Program Manager will develop guidelines for identifying those Contracts where establishing mandatory subcontracting requirements would: (a) be practicable in light of industry practice and (b) provide significant opportunities for SBEs. Based on these guidelines, the Program Manager will from time to time recommend that City Council establish mandatory subcontracting requirements for particular Contracts. If City Council establishes mandatory subcontracting requirements for a Contract, all Bidders submitting bids or proposals on the Contract shall be required to: (a) subcontract out the amount of work specified by City Council; and (b) use Good Faith Efforts to subcontract out such work to SBEs. In the event a Contractor is unable to subcontract out the designated percentage of work to SBEs, the Contractor shall nevertheless be required to subcontract out the designated percentage of work to other third party contractors.

## **Section X: General Program Requirements**

10. This Section contains general requirements relating to administration and enforcement of the SBO Program. The Program Manager is authorized to adopt and implement through published rules and guidelines such additional general requirements as the Program Manager deems consistent with the Program's scope and intent.

**10.1 Schedule of Work to be Performed by SBEs.** On or before the fifth Business Day following commencement of work on a Covered Contract (or within such longer time as may be agreed in writing by the City), the Contractor shall submit to the Program Manager a duplicate of the project schedule, which sets forth in detail the anticipated utilization of all Subcontractors and Suppliers on the project. In the event of a Covered Contract performance delay of more than one-third (1/3) of the originally estimated length of time between project notice to proceed and completion, such Contractor shall submit to the Program Manager not later than the originally estimated date of project completion, a revised schedule for utilization of all SBEs on the project. For Covered Contracts that do not involve the construction or repair of buildings, roads, utilities or related infrastructure, this requirement may be modified or waived to fit the circumstances.

**10.2 Compliance With Committed SBE Utilization Level Required Throughout Performance of Contract.**

10.2.1 The SBO Program office shall review all Covered Contracts for compliance with the SBO Program. This review shall include, but not be limited to, whether the proposed SBE participation (in both dollar amounts and percentages) and committed goal level upon which the Covered Contract was awarded are maintained over the duration of the Contract.

10.2.2 For any Covered Contract, it shall be an ongoing, affirmative obligation of the Contractor to maintain, at a minimum, compliance with the proposed level of SBE participation upon which the Contract was awarded, for the duration of the Contract, unless the City initiates a material alteration to the scope of work affecting SBEs performing on the Contract through change order, Contract amendment, force account or as otherwise described in Section 10.3 below.



10.2.3 The SBO Program office shall evaluate the utilization of SBEs on Covered Contracts to determine whether such SBEs are performing a Commercially Useful Function on a given Covered Contract. The evaluation shall examine the amount of work subcontracted, industry practice and other relevant factors. The amount of SBE participation credited toward a goal shall be based upon an analysis of the specific duties performed by the SBE, and the extent to which such duties constitute a Commercially Useful Function. The Program Manager may undertake such inquiries or studies, engage such employees or retain such consultants as may be necessary to assist the Program Manager in rendering these determinations. The work performed by an SBE not providing a Commercially Useful Function or functioning as a Conduit shall not count toward meeting an SBE project goal.

**10.3 Changes in Scope of Work.** Key Business Units shall have a continuing obligation to immediately inform the SBO Program office in writing of any increase or decrease in the scope of work of a Covered Contract. Any increase in the scope of work on a Covered Contract whether by amendment or any other addition of special, additional or other services to the Covered Contract, which increases the dollar value of the Covered Contract, shall be contemporaneously submitted to the SBO Program office, regardless of whether or not such change is within the scope of work designated for performance by an SBE at the time of contract award. If the change involves an increase in the scope of work that cannot be performed by existing Subcontractors, Joint Venturers, Suppliers, Manufacturers or Brokers, or by the Contractor, the SBO Program Manager shall specify an SBE Utilization Goal for the additional work. The Contractor shall either: (a) satisfy such SBE Utilization Goal; or (b) document that it has attempted to satisfy such SBE Utilization Goal by complying with the Modified Good Faith Efforts requirements set out in Section 11.2 hereof.

**10.4 Payments to Subcontractors, Joint Venturers, Suppliers, Manufacturers and Brokers.** All Contractors shall promptly render payment to all Subcontractors, Joint Venturers, Suppliers, Manufacturers and Brokers on a Covered Contract. Each Contractor shall provide with each pay request to the City or private owner on each Covered Contract, and beginning with the second pay request, partial claim releases

from all Subcontractors, Joint Venturers, Suppliers, Manufacturers and Brokers in form and content satisfactory to the City, or shall provide, at the City's sole option, alternative proof of payment to Subcontractors, Joint Venturers, Suppliers, Manufacturers and Brokers, in form and content approved by the KBE or his/her designee and the Program Manager, evidencing that all Subcontractors, Suppliers, Manufacturers and Brokers have been duly paid out of the proceeds of the Contractor's payments from the City or private owner under the Covered Contract, unless a bona fide dispute, documented in writing, exists between the Contractor and the unpaid Subcontractor, Joint Venturer, Supplier, Manufacturer or Broker. In the event of a bona fide dispute, the Contractor shall provide written documentation of such dispute to the KBE or his designee responsible for the Contract. The City may withhold all payments under a Covered Contract until all claim releases and other documentation required by this Section has been provided in a form satisfactory to the City.

Each Covered Contract shall contain the following provision acknowledging the City's right to withhold payment under this Section:

The parties agree that the City shall be entitled to withhold periodic payments and final payment due to the Contractor under this Agreement until the City has received in a form satisfactory to the City all claim releases and other documentation required by the City's Small Business Opportunity Program, and in the event payments are withheld under this provision, Contractor waives any right to interest that might otherwise be warranted on such withheld amount under G.S. 143-134.1.

Nothing in this Section shall be construed to relieve a Contractor from any obligation it may have under N.C. Gen. Stat. 143-134.1 regarding the payment of subcontractors.

## **Section XI: Replacing An SBE On A Contract or Adding Subcontracting Opportunities**

11. Contractors that desire to add subcontractors, replace an SBE or terminate an SBE under a Covered Contract shall comply with the following requirements if the SBE's participation was counted toward the SBE Utilization goal.

**11.1 Allowed SBE Substitutions.** If, following Contract award, an SBE has its Certification terminated for reasons other than expiration of Certification, or graduation from Certification under Section III, or an SBE fails to perform a Commercially Useful Function, the value of which was originally counted for that SBE in awarding the Covered Contract, or an SBE voluntarily withdraws its SBE participation on the Covered Contract and the Contractor can demonstrate that such termination or failure did not result from any action or inaction, whether direct or indirect, of or by the Contractor, such termination of Certification or failure to perform a Commercially Useful Function shall not be deemed to affect compliance with the project goals, and shall not be deemed a breach of the Contract; provided, however, that the terminated SBE is substituted with another SBE performing the same Commercially Useful Function and dollar amount, or that Modified Good Faith Efforts to substitute another SBE, as defined in Section 11.2 hereof, are demonstrated.

**11.2 Modified Good Faith Efforts.** In the event that (a) a Contractor must add or replace an SBE Subcontractor, Joint Venturer, Supplier, Manufacturer or Broker on a Covered Contract; or (b) in the event a Contractor elects to subcontract any portion of a Covered Contract not previously identified to the City as an area that would be subcontracted, then, unless the Program Manager determines that the Contractor is on track to meet the SBE Utilization Goal established for the Contract, the following Modified Good Faith Efforts must be completed. If the Program Manager has not determined that a Contractor is on track to meet the SBE Utilization Goal following the occurrence of subparts (a) or (b) above, then failure by the Contractor to show any one (1) of the applicable categories of Modified Good Faith Efforts set forth in this Section shall constitute a violation of the SBO Program.

**11.2.1 Written Notice If Terminating SBE.** If the Contractor is replacing or terminating an SBE on the Covered Contract, the Contractor must provide verification in writing to the SBO Program office of the Contractor's or consultant's intention to terminate or replace an SBE originally identified for participation in the Bid, upon which the Contract was awarded. The reason for

the termination or replacement must be stated and the type of work or services must be identified.

**11.2.2 Mandatory Outreach.** For each area of work or performance covered by subpart (a) or (b) of Section 11.2, the Contractor must comply with the Mandatory Outreach requirements set forth in Section VI of this SBO Program. At the Contractor's request, the Program Manager may adjust the required minimum number of SBEs to be contracted based on changes in the market that occur between the time the required minimum percentage was set and the need for the applicable area(s) of work arises.

Documentation of the Modified Good Faith Effort must be submitted to the SBO Program office prior to the City making the next payment or fund release under the Contractor's Covered Contract.

## **Section XII: Violations and Enforcement**

12. Alleged violations of the SBO Program shall be addressed as set forth in this Section.

**12.1 Violations during Bid process:** Bidders that submit Bids on a Formal Contract shall not:

12.1.1 Make any false statements or material misrepresentations regarding any matter relevant to the SBO Program; or

12.1.2 Fail to comply with the Mandatory Outreach, SBE Utilization Goal or Good Faith Efforts requirements set forth in the SBO Program; or

12.1.3 List an SBE intended to serve as a Conduit to satisfy an SBE Utilization Goal; or

12.1.4 Commit any other violations of the SBO Program, or rules and guidelines promulgated there under.

**12.2 Violations during Contract performance.** A Contractor that has been awarded a Contract shall not, at any time before or during the performance of such Contract:

- (a) Make any false statements or material misrepresentations regarding any matter relevant to the SBO Program; or
- (b) Fail to utilize an SBE that the Bidder listed on Form 3 for a Covered Contract and provided a Letter of Intent for, in the dollar amount documented on Form 3 and the Letter of Intent unless the Bidder:
- (c) Substitute another SBE performing the same Commercially Useful Function at the same or greater dollar amount (after taking into account any payments that have already been made), or
- (d) Fail to demonstrate compliance with each element of Modified Good Faith Efforts, as defined in Section 11.2, in attempting to substitute another SBE; or
- (e) Fail to allow an SBE to perform the Commercially Useful Function, the value of which was originally counted for that SBE in awarding a Covered Contract, unless the Bidder shows that the SBE failed to perform in a reasonably satisfactory manner; or
- (f) Modify or eliminate all or a portion of the scope of work attributable to an SBE upon which a Covered Contract was awarded, unless directed by the City; or
- (g) Participate in a Conduit relationship with an SBE scheduled to perform work on a Covered Contract; or
- (h) Commit any other violations of the SBO Program or the rules and guidelines promulgated there under, in connection with any Contract.

**12.3 Reporting of Violations and Unfair Practices.** SBEs shall report any alleged SBO Program violations or unfair practices involving the SBO Program within three (3) Business Days after the SBE first became aware of the act or omission in question. The Program Manager may reject as untimely any report submitted after such date. The SBO Program office shall not accept reports of violations or unfair practices that are submitted more than thirty (30) calendar days after the SBE first became aware of the act or omission in question.

**12.4 Burden of proof.** Any Business Enterprise affected by the operation of the SBO Program shall have the burden of proving its compliance with the requirements and obligations of the Program. The SBO Program office is empowered to receive and investigate complaints and allegations by SBEs, third parties and/or City personnel, and/or to initiate its own investigations regarding compliance with the requirements and obligations of the SBO Program and the rules and guidelines promulgated there under. In the event the SBO Program office determines in its sole discretion that an investigation is warranted, the Program Manager shall notify the party being investigated. Upon written notice of such investigation, the affected party shall be obligated to cooperate fully with the investigation and shall have a continuing burden of providing complete, truthful information to the Program Manager and of otherwise proving compliance with the requirements and obligations of the SBO Program.

**12.5 Remedies for Violations In the Procurement Process.** A violation of the SBO Program in the bid phase of a Covered Contract shall be grounds for rejection of a Bidder's Bid. If the violation involves bad faith or dishonesty or may otherwise be indicative of the Bidder's qualification to perform certain future Contracts, the City may consider such violation in awarding such future Contracts.

**12.6 Remedies for Violations After Contract Execution.** A violation of the SBO Program by a Contactor shall constitute a material breach of the Contract, and shall entitle the City or private owner to:

12.6.1 Exercise all rights and remedies that it may have at law or at equity for material breach of the Contract:

12.6.2 Exercise all rights and remedies that it may have under the Contract, including but not limited to termination of the Contract and any other rights set forth in Section 12.7 below; and

12.6.3 Exercise any other rights or remedies available under the SBO Program or the rules and guidelines promulgated thereunder.

The remedies set forth herein shall be deemed cumulative and not exclusive and may be exercised successively or concurrently, in addition to any other available remedy. They apply to all Contracts in which any aspects of the SBO Program are incorporated.

**12.7 Contract Provisions.** Each Formal Contract shall include the provisions set forth in this Section. KBEs may elect to include such provisions in Informal Contracts or Exempt Contracts in their discretion.

**12.7.1 Small Business Opportunity Program.** The City has adopted a Small Business Opportunity Program, which is posted on the City's website and available in hard copy form upon request to the City. The parties agree that:

(a) The terms of the City's Small Business Program, as revised from time to time, together with all rules and guidelines established under such program (collectively, the "SBO Program") is incorporated into this Agreement by reference; and

(b) A violation of the SBO Program shall constitute a material breach of this Agreement.

**12.7.2 Remedies for Violation of SBO Program.** The parties further agree that in addition to any other remedies the City may have at law or in equity or under this Agreement for material breach, the City shall be entitled to exercise any one or more of the following remedies if the Contractor violates the SBO Program:

(a) Terminate this Agreement for default;

- (b) Suspend this Agreement for default;
- (c) Withhold all payments due to the Contractor under this Agreement until such violation has been fully cured or the City and the Contractor have reached a mutually agreeable resolution;
- (d) Assess liquidated damages as provided in the following Section; and/or.
- (e) Offset any liquidated damages and/or any amounts necessary to cure any violation of the SBO Program from any retainage being held by the City on the Contract, or from any other amounts due to the Contractor under the Contract.

The remedies set forth herein shall be deemed cumulative and not exclusive and may be exercised successively or concurrently, in addition to any other available remedy.

**12.7.3 Liquidated Damages.** The City and the Contractor acknowledge and agree that the City will incur costs if the Contractor violates the SBO Program in one or more of the ways set forth below. The parties further acknowledge and agree that the City will incur damages as a result of such failure, but that the costs the City might reasonably be anticipated to accrue as a result of such failures are difficult to ascertain due to their indefiniteness and uncertainty. Accordingly, the Contractor agrees to pay the City liquidated damages at the rates set forth below for each specified violation of the SBO Program. The Company further agrees that for each specified violation the agreed upon liquidated damages are reasonably proximate to the loss the City will incur as a result of such violation:

- (a) Failing to utilize an SBE that was originally listed at bid opening or proposal submission in order to satisfy Contract goals, or failing to allow such SBE to perform a Commercially Useful Function, in violation of Sections 12.2.2 or 12.2.3 of the SBO Program: \_\_\_% of the amount originally counted for the SBE at bid opening or proposal submission;



- (b) Modifying or eliminate all or a portion of the scope of work attributable to an SBE upon which the Contract was awarded, in violation of Section 12.2.4 of the SBO Program: \_\_\_ % of the amount of work modified or eliminated;
- (c) Terminating an SBE originally utilized as a Subcontractor, Joint Venturer, Supplier, Manufacturer or Broker in order to be awarded the Contract without replacing such SBE with another SBE performing the same Commercially Useful Function and dollar amount, or demonstrating each element of Modified Good Faith Efforts to do so, in violation of Section XI of the SBO Program: % of the amount originally counted for the SBE at bid opening or proposal submission;
- (d) Participating in a Conduit relationship with an SBE scheduled to perform work on Contract: \_\_\_% of the amount counted for the SBE at bid opening or proposal submission;
- (e) Failing to provide any documentation or written submissions required under the SBO Program within the time period set forth therein: \$10 per day for each day that such documentation or written submission is overdue.

The percentage amounts for liquidated damages left blank in the above sections shall be filled in on a case-by-case basis based on guidelines to be established by the Program Director from time to time.

**12.8 Suspension, Revocation or Modification of SBE Certification.** The SBO Program office may suspend or revoke an offending SBE's eligibility for Certification, and may suspend its participation from counting toward a project goal, based upon such SBE's acting as a Conduit, failing to comply with the provisions of SBO Program, failing to perform a Commercially Useful Function on a project, failing to submit information as required by Sections VI, VII and VIII, submitting false, misleading or materially incomplete statements, documentation or records, or failing to cooperate in investigations. The SBO Program office may further modify the list of areas for which an SBE is certified, if the SBE is routinely failing to submit bids or proposals for work in particular area, or if it becomes apparent that the SBE is not qualified to perform work in a

particular area. However, nothing in this SBO Program or in any action or inaction by the SBO office or the Program Manager shall be deemed a representation or certification that a particular SBE is qualified to perform work in a particular area.

**12.9 City Process For Exercising Remedies.** The Program Manager shall make all decisions regarding the suspension or revocation of a Business Enterprise's SBE Certification, and the duration of such suspension or revocation. The Program Manager shall make a recommendation to the KBE regarding appropriate remedies for the City to exercise in the event a Proposer, Bidder or Contractor violates the SBO Program, and the KBE responsible for the affected procurement process or Contract shall make the decision as to what remedies will be exercised.

### **Section XIII: Exclusions and Special Provisions**

**13. Exclusion.** This SBO Program shall not apply to any contract that is subject to: (a) the U.S. Department of Transportation Disadvantaged Business Enterprise Program as set forth in 49 CFR Part 26 or any successor legislation, or (b) the goal requirement set forth in G.S. 143-128.2(a) for minority and women business participation in certain building projects that receive funding from the State of North Carolina

**13.1 Special Provisions for Renewal of Formal Contracts:** In the event the City renews a Formal Contract without a competitive Bid process, the City Key Business Unit or department responsible for monitoring the Contract shall establish the following, subject to review and approval by the SBO Program Manager: (a) an SBE Utilization Goal for the renewal period, and (b) a modified version of the Good Faith Efforts set forth in Section VII that the Contractor will be required to satisfy if it does not meet the SBE Utilization Goal, (which may include elements of the Mandatory Outreach requirements); and (c) the required minimum Good Faith Efforts points that the Contractor will be required to document in attempting to meet the SBE Utilization Goal. The SBE Utilization Goal, modified version of the Good Faith Efforts Requirements and the required number of minimum Good Faith Efforts points shall be added into the Contract renewal document. The Contractor entering into the renewal shall be required to either meet the SBE Utilization Goal or document that it has satisfied the modified version of the Good Faith Efforts requirements. Failure to do so shall: (a) subject the Contractor to

any of the remedies set forth in Sections 12.6 or 12.7 of this SBO Program; and / or (b) result in rebid of the Contract being renewed.

**13.2 Special Provision for Exempt Contracts.** Sections VI, VII and VIII of this Program shall not apply to Exempt Contracts. However, Business Enterprises that enter into Exempt Contracts shall be required to:

13.2.1 Notify SBEs of any subcontracting opportunities that may exist on the Exempt Contract for which there are Qualified SBEs listed in the City's database; and

13.2.2 Report to the City the total dollars of SBE utilization on the Exempt Contract. The City on a periodic basis or upon completion of the Exempt Contract, and may condition payment to submission of an accurate and properly prepared report.

Failure to comply with this Section shall be deemed a material breach of contract. In the event the Business Enterprise fails to comply with this Section, the City shall be entitled to terminate or suspend the Exempt Contract, withhold payment under the Exempt Contract, impose any liquidated damages that may be included in the Exempt Contract or impose any other remedy allowed under the Exempt Contract, at law or in equity for material breach of contract.

**13.3 Special Provisions For Financial Partners.** Sections VI, VII and VIII of this Program shall not apply to Financial Partners. However, Financial Partners shall be required to:

13.3.1 Notify SBEs of any subcontracting opportunities that may exist in the Financial Partner's business for which there are Qualified SBEs listed in the City's database; and

13.3.2 Report to the City on an annual basis the total amount of dollars paid by the Financial Partner to SBEs; and

13.3.3 Beginning on July 1, 2005, Financial Partners will be required to set annual goals for SBE utilization. Such goals shall be established for Financial Partners in the same manner as goals are set for City KBUs under Section IV of this SBO Program, except that the goals for Financial Partners shall include all contracting dollars instead of just the Informal Contract dollars. The City shall take such steps as are appropriate to ensure accountability in meeting such goals by KBUs.

Failure to comply with this Section shall be deemed a material breach of contract. In the event Financial Partner fails to comply with this Section, the City shall be entitled to terminate or suspend the Financial Partner's contract, withhold payment under the contract, impose any liquidated damages that may be included in the contract or impose any other remedy allowed under the contract, at law or in equity for material breach of contract. Notwithstanding the forgoing, failure to meet an SBE Utilization Goal shall not be deemed a material breach if the Financial Partner demonstrates to the City's reasonable satisfaction that it used diligent efforts to meet the goal.

## **Section XIV: Small Business Opportunity Program Administration**

**14.1 Quarterly reports.** The Program Manager shall prepare written reports four (4) times each year during the term hereof which shall describe progress in meeting the annual goal and project goals set out in Section IV and V. Copies of such reports shall be provided to the affected KBUs, the City Manager and City council.

14.1.1 The quarterly report shall include a project-by-project report and justification of individual SBE goals by project including all change orders, amendments and modifications. It shall also address the City's progress in implementing the SBO Program, any problems or issues that have arisen in implementing the SBO Program and the City's plans for addressing such problems.

14.1.2 The quarterly report shall also provide a summary of Formal and Informal Contract activities conducted by KBU purchasing agents for contracting and purchasing of construction, goods and services .

14.1.3 In calculating SBE participation, all funds paid to SBEs during the year shall be counted whether or not such funds were used to accomplish contract goals applicable at the time of bid opening, date of final project-specific proposal in the case of a competitive selection process, or other proposal receipt.

**14.2 Annual report; explanation of failure to achieve annual goal.** If the annual goal and project goals established by Section IV and V are not met in any year during the term hereof, then by August 31 of the following fiscal year, the Program Manager shall submit to the City Manager and City Council a report comparing SBE utilization achieved in the year to the annual goals, stating the reasons why the goals were not met, and advising and making recommendations as to continuing or further efforts that the City should make in providing opportunity in City contracting and procurement activities and recommending what should be done to assist in meeting such goals in the future.

**14.3 Extension of Formal Contract Requirements To Informal Contracts and Exempt Contracts.** KBEs may in their discretion elect to include in bids or proposals for Informal Contracts a requirement that Bidders comply with all SBO Program requirements applicable to Formal Contracts. KBEs may further in their discretion elect to establish SBE Utilization Goals for Exempt Contracts, and to include in such contracts any provisions of the SBO Program that the KBE deems appropriate.

**14.4 Rules and guidelines.** The Program Manager shall have the power and authority and may adopt rules and guidelines to effectuate the purpose and operation of the SBO Program, including by way of example but not by way of limitation, rules and guidelines relating to: (a) qualification of a Business Enterprise as a Small Business Enterprise; (b) composition of the Goals Committees and/or the procedure for inquiries, studies or hearings with respect to the establishment of annual SBE goals for Informal Contracts and individual SBE Utilization Goals for Formal Contracts; (c) determination of Mandatory Outreach and Good Faith Efforts criteria and the required documentation; and (d) determination of whether an SBE Utilization Goal has been met and the required

documentation; (e) definition of aspects of Commercially Useful Function and/or Conduit activity; (f) the procedures, methods and criteria for Certification and decertification of SBEs, including but not limited to: the procedures and methods of Certification, questions of ownership, management and control, affiliation, independence, continued eligibility and renewal of Certification, interviews, complaints, investigations and onsite visits, burden of proof, denial or granting of Certification, suspension and/or revocation of Certification; and graduation size standards and other criteria.

**14.5 Authority To Modify Forms and Documentation Requirements.** The Program Manager shall have the power and authority to amend this SBO Program to modify any forms or documentation requirements that are required by this SBO Program, including but not limited to the forms required to document Mandatory Outreach, attainment of SBE Utilization Goals or Good Faith Efforts. Such modifications may increase, decrease or change the forms and/or documentation requirements established by this SBO Program in such manner as the Program Manager deems appropriate in his or her discretion to promote the purpose and intent of the Program, including but not limited to: (a) promoting outreach to SBEs; (b) promoting the utilization and development of SBEs; and (c) accomplishing (a) and (b) in a manner that minimizes the burden on Bidders and, SBEs minimizes the cost of administering the Program to City taxpayers.

**14.6. Waiving Non-Compliance.** In addition to and without limiting the Program Manager's power and authority to grant waivers under Section 8.4 of the Program, the Program Manager shall have the power and authority to waive non-compliance with this Program in recommending award of a Contract if:

- (a.) The non-compliance is minor in nature
- (b.) Waiving the non-compliance would not put Bidders that complied with the SBO Program at a competitive disadvantage; and
- (c.) The non compliance does not reflect a lack of diligence on the Bidder's part in complying with the Program. For example, a repeated violation of the same Program provision on two or more bids might be deemed a lack of diligence in complying with the Program.
- (d.) The conditions set forth in subsections (a) through (c) of this Section shall not apply to waivers granted pursuant to Section 8.4.

The waivers referenced in this Section may be granted without notice to City Council. Nothing in this Section shall require the Program Manager to grant a waiver in any situation, or give rise to a suggestion that the Program Manager might be inclined to grant a waiver in a certain situation. Likewise, the City shall not be bound by any oral representation made by any City employee, official, agent or representative that a waiver will be granted for a particular instance or for a category of instances.

**14.6 Waiver of Program Requirements.** ~~The Program Manager shall have the power and authority to waive non-compliance with the SBO Program in recommending award of a Contract if: (a) the non-compliance is extremely minor in nature; (b) waiving the non-compliance would not put Bidders that complied with the SBO Program at a competitive disadvantage; and (c) the non-compliance does not reflect a lack of diligence on the Bidder's part in complying with the Program.~~

~~The waivers referenced in this Section may be granted without notice to City Council. Nothing in this Section shall require the Program Manager to grant a waiver in any situation, or give rise to a suggestion that the Program Manager might be inclined to grant a waiver in a certain situation. Likewise, the City shall not be bound by any oral representation made by any City employee, official, agent or representative that a waiver will be granted for a particular instance or for a category of instances.~~

**14.7 Reviews.** Any person or entity who is the subject of and is directly and adversely affected by a determination of the Program Manager on behalf of the City under the SBO Program, pursuant to and by authority of the Program Manager, may seek review of such decision by the City Manager through a written request for such review within thirty (30) calendar days of the determination by the Program Manager or as otherwise provided by law. This paragraph shall not be construed to create a right of standing that does not otherwise exist under North Carolina law.

**14.8 Program Assessment.** The Program Manager will conduct an assessment of the SBO Program impact on the SBE community bi-annually. The findings of the assessment and any recommended modifications to the SBO Program will be reported to the City Manager and City Council. The City Manager is authorized to amend this SBO Program as he or she deems appropriate from time to time.

## **Section XV: Small Business Enterprise Outreach, Assistance And Business Development**

The SBO Program office, in cooperation with KBEs or their designees, is authorized to develop programs and activities to provide outreach to developing small Business Enterprises, and to assist the business development of such enterprises. These activities may include, but are not limited to:

15.1 Communicating information on the SBO Program through newsletter, the Internet, workshops, training activities, and other outreach activities conducted by the City or by other public or private entities in collaboration with the City.

15.2 Development of a resource directory to be provided to the small business community in the Charlotte MSA with information as to assistance in bonding, financial management and/or accounting, continuing education, professional organization and other resources that improve small business market access or capacity.

15.3 Such other programs or activities as the Program Manager may from time to time recommend.

## **Section XVI: Severability**

If any provision of the SBO Program or any application thereof is held invalid or unenforceable, such invalidity or unenforceability shall not affect other provisions or applications of the SBO Program which can be given effect without the invalid provisions or applications and the remaining provisions are to be severable and shall remain in full force and effect.