



## ADMINISTRATIVE PROCEDURE

### MINORITY BUSINESS PROCEDURES FOR STATE FUNDED PUBLIC SCHOOL CONSTRUCTION PROJECTS

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Procedure No.

February 23, 2015

Date

- I. **PURPOSE:** To fulfill the intent of the law by setting goals for minority business enterprise participation in every contract that includes State funding through the Public School Construction Program. Local Educational Agencies (LEAs) shall attempt to achieve the result that a minimum State goal of 29 percent and the Board of Education of Prince George's County (the Board) goal of an additional 1 percent for a total of 30 percent of the total dollar value of all construction contracts is made directly or indirectly with certified minority business enterprises when State Public School Construction Program (PSCP) funds are utilized, with a minimum of 7 percent from certified African American-owned businesses, a minimum of 4 percent from certified Asian American-owned businesses, and the balance from any certified minority business enterprises. All general contractors, including certified MBE firms, when bidding as general or prime contractors are required to attempt to achieve the MBE subcontracting goals from certified MBE firms.

This Minority Business Enterprise Procedure is applicable to all public school construction projects approved for partial State funding through the State Public School Construction Program.

- II. **BACKGROUND:** In 1978, the Maryland General Assembly passed legislation, which was signed into law to establish the State's Minority Business Enterprise Program. This new law set as a goal that at least 10 percent of each unit of State government's total dollar value of procurement contracts for purchases and/or contracts shall be awarded to minority business enterprises. This law was subsequently modified and the goal was increased to 14 percent. More recently, in 2013, the goal was increased to 29 percent with subcontracting sub-goals of 7 percent for certified African American-owned businesses and 4 percent for certified Asian American-owned businesses.

In 1979, the Rules, Regulations, and Procedures for the Administration of the School Construction Program were revised by the Board of Public Works to require each local board of education to adopt procedures to attempt to include minority business enterprises in State funded school construction projects. The State law was revised and now states: "The Interagency Committee on School Construction (IAC) shall require each local board of education to adopt procedures consistent with this chapter before obtaining funds for public school construction projects".

In May 2007, the Rules, Regulations, and Procedures were replaced by regulations. The regulations concerning project procurement (COMAR 23.03.03) indicate that the State's minority business enterprise goals and procedures apply to all State funded projects, irrespective of procurement method.

- III. **OVERVIEW:** This Minority Business Enterprise (MBE) procedure document was originally developed in response to a requirement set forth in the Rules, Regulations, and Procedures for the Administration of the School Construction Program. The MBE requirement was originally established under HB 64, which was passed in the 1978 session of the Maryland General Assembly and signed into law as Chapter 575 of the Acts of 1978.



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Since the Board adopted its original Minority Business Enterprise Procedures, there have been changes in State statutes, regulations adopted by the Board of Public Works, procedural requirements, project eligibility requirements and the level of State participation in school construction projects. This revised procedure is consistent with current legislation and the changes to the Code of Maryland Regulations (COMAR) requirements, effective November 7, 2005 and May 21, 2007.

#### IV. DEFINITIONS:

1. **Certification** means the determination that a legal entity is a minority business enterprise consistent with the intent of Subtitle 3 of the State Finance and Procurement Article.
2. **Certified Minority Business Enterprise** means a minority business that holds a certification issued by the Maryland State Department of Transportation (MDOT).
3. **Corporation**, as defined by MDOT, is an artificial person or legal entity created by or under the authority of the laws of any state of the United States, the District of Columbia or a territory or commonwealth of the United States and formed for the purpose of transacting business in the widest sense of that term, including not only trade and commerce, but also manufacturing, mining, banking, insurance, transportation and other forms of commercial or industry activity where the purpose of the organization is profit. For eligibility for certification, disadvantaged and/or minority individuals must own at least 51 percent of the voting stock and at least 51 percent of the aggregate of all classes of stock that have been issued by the corporation. (Note: stock held in trust is not considered as stock held by the disadvantaged businesspersons when computing the business person(s) ownership.)
4. **Managerial Control**, as defined by MDOT, means that a disadvantaged or minority owner(s) has the demonstrable ability to make independent and unilateral business decisions needed to guide the future and destiny of a business. Control may be demonstrated in many ways. For a minority owner to demonstrate control, the following examples are put forth, but are not intended to be all inclusive:
  - a. Articles of Incorporation, Corporate Bylaws, Partnership Agreements and other agreements shall be free of restrictive language which would dilute the minority owner's control thereby preventing the minority owner from making those decisions which affect the destiny of a business;
  - b. The minority owner shall be able to show clearly through production of documents the areas of the disadvantaged business owner's control, such as, but not limited to:
    - 1) Authority to sign payroll checks and letters of credit;
    - 2) Authority to negotiate and sign for insurance and/or bonds;



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- 3) Authority to negotiate for banking services, such as establishing lines of credit; and
    - 4) Authority to negotiate and sign for contracts.
  - c. Agreements for support services that do not lessen the minority owner's control of the company are permitted as long as the disadvantaged or minority business owner's authority to manage the company is not restricted or impaired.
5. **Minority Business Enterprise (MBE)** means any legal entity, except a joint venture, that is (a) organized to engage in commercial transactions, and (b) at least 51 percent owned and controlled by one or more individuals who are socially and economically disadvantaged including:
  - African Americans;
  - American Indian/Native Americans;
  - Asians;
  - Hispanics;
  - Physically or mentally disabled individuals;
  - Women; or
  - A non-profit entity organized to promote the interests of physically or mentally disabled individuals.
6. **Minority Business Enterprise Liaison** means the employee of the school system designated to administer the Minority Business Enterprise Procedures for State funded public school construction projects.
7. **Operational Control**, as defined by MDOT, means that the disadvantaged or minority owner(s) must possess knowledge necessary to evaluate technical aspects of the business entity. The primary consideration in determining operational control and the extent to which the disadvantaged or minority owner(s) actually operates a business will rest upon the specialties of the industry of which the business is a part. The minority owner should have a working knowledge of the technical requirements needed to operate in his/her industry. Specifically, in the construction industry and especially among small (one to five person firms) contractors, it is reasonable to expect the disadvantaged or minority owner(s) to be knowledgeable of all aspects of the business. Accordingly, in order to clarify the level of operational involvement which a minority owner must have in a business for it to be considered eligible, the following examples are put forth, but are not intended to be all inclusive:
  - a. The minority owner should have experience in the industry for which certification is being sought; and
  - b. The minority owner should demonstrate that basic decisions pertaining to the daily operations of the business are independently made. This does not necessarily preclude the disadvantaged or minority owner(s) from seeking paid or unpaid advice and assistance. It does mean that the



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minority owner currently must possess the knowledge to weigh all advice given and to make an independent determination.

8. **Ownership**, as defined by MDOT, means that:
  - a. The minority owner(s) of the firm shall not be subject to any formal or informal restrictions, which limit the customary discretion of the owner(s). There shall be no restrictions through, for example, charter requirements, by-law provisions, partnership agreements, franchise or distributor agreements or any other agreements that prevent the minority owner(s), without the cooperation or vote of any non-minority, from making a business decision of the firm.
  - b. This means that the disadvantaged or minority persons, in order to acquire their ownership interests in the firm, have made real and substantial contributions of capital, expertise or other tangible personal assets derived from independently owned holdings without benefit of a transfer of assets, gift or inheritance from non-minority persons. Examples of insufficient contributions include a promise to contribute capital, a note payable to the firm or its owners who are not minority persons or the mere participation as an employee rather than as a manager. If the ownership interest held by a disadvantaged or minority person is subject to formal or informal restrictions, such as options, security interests, agreements, etc., held by a non-minority person or business entity, the options, security interests, agreements, etc., held by the non-minority person or business entity must not significantly impair the disadvantaged or minority person's ownership interest.
9. **Partnership** means an unincorporated association of two or more persons to carry on as co-owners of a business for profit. For a partnership to be deemed eligible for certification under the MDOT Program, the disadvantaged or minority person's interest must be at least 51 percent of the partnership capital.
10. **Socially and Economically Disadvantaged** means a citizen or lawfully admitted permanent resident of the United States who is socially disadvantaged and economically disadvantaged. The law establishes the level of personal net worth at \$1,500,000, above which an individual may not be found to be socially and economically disadvantaged.
11. **Sole Proprietorship**, as defined by MDOT, is a for-profit business owned and operated by a disadvantaged or minority person in his or her individual capacity. For a sole proprietorship to be deemed eligible for certification under the DBE/MBE Program, the disadvantaged or minority person must be the sole proprietor.



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#### V. MBE GOAL SETTING PROCEDURES:

1. The MBE program requires that all race-neutral measures be considered before making use of race-based measures. Using a combination of race-neutral and race-based measures for each specific school construction project will help ensure that certified MBE firms are afforded the opportunity to submit bids and be utilized to the greatest extent possible.
2. Race-neutral measures include any action taken by the LEA to make it easier for all contractors, including MBEs, to compete successfully for public school construction project contracts.
3. Race-based measures include setting an overall MBE goal and MBE sub goals, if applicable, based upon race, gender, ethnicity, etc., for a specific project.
4. The overall MBE goal and the sub goals, if applicable, should be set for each specific project, considering but not limited to, the following factors:
  - a. The extent to which the work to be performed can reasonably be segmented to allow for MBEs to participate in the project;
  - b. A determination of the number of certified MBEs that potentially could perform the identified work;
  - c. The geographic location of the project in relationship to the identified certified MBEs;
  - d. Information obtained from other State departments/agencies related to establishing a MBE goal and/or sub goals for similar construction projects or work in the jurisdiction;
  - e. Information obtained from other State departments/agencies related to MBE participation in similar construction projects or work in the jurisdiction; and
  - f. Any other activities or information that may be identified as useful and productive.
5. The LEA staff, including the MBE liaison, procurement personnel, and project staff, as well as the project architect and cost estimator should consider the factors cited in 4 above when establishing the MBE goal and sub goals, if applicable, for each project or segmented piece of a project that are reasonable and attainable.
6. It is recognized that by utilizing the factors cited in 4 above, the MBE goal and/or sub goals, if applicable, for a specific project or portion thereof may be significantly higher than the overall goals of the program (29% overall, with 7% from African American-owned businesses and 4% from Asian American-owned businesses). It is also recognized and possible that there will be MBE goals set that are lower than those stated above or even that no MBE goal and/or sub goals will be set for a specific project or the segmented piece of the project.



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7. Assistance in reviewing the factors cited in 4 above and setting a goal and/or sub goals, if applicable, for specific projects or a segmented piece of a project can be obtained by contacting the Public School Construction Program and/or the Governor's Office of Minority Affairs.
8. The basis and rationale for establishing the MBE goal and sub goals, if applicable, should be summarized and recorded and submitted in written form to the PSCP for review at the same time that the Construction Documents are submitted to the State for review.
9. For those projects that do not require a Construction Document submission and are over \$50,000, the basis and rationale for establishing the MBE goal and sub goals, if applicable, should be summarized and recorded and submitted in written form to the PSCP for review at the same time that the project is released for bids or proposals are solicited.
10. MBE prime contractors may count their participation on contracts with MBE goals for up to 50% of the established MBE contract goal and 100% of any one contract sub goal. MBE primes are required to adhere to good faith effort requirements for the portion of the contract goal they are not self-performing and are subject to all other MBE contract compliance requirements such as subcontractor prompt payment and monthly reports.

#### VI. **IMPLEMENTING PROCEDURES - \$50,000 OR LESS:**

For construction projects estimated to cost \$50,000 or less, the following procedures will be utilized:

1. A MBE goal and/or MBE sub goals are not required to be set for contracts that are anticipated to be for \$50,000 or less.
2. All advertisements, solicitations, and solicitation documents shall include the following statement:  

"Certified Minority Business Enterprises are encouraged to respond to this solicitation."
3. To encourage greater MBE participation the staff of the school system should send out notices of potential projects and a specific project to MBEs to solicit bids or proposals directly from minority business enterprise contractors that are certified.
4. A copy of the solicitation notice, preferably electronically, shall be sent to the Governor's Office of Minority Affairs at the same time the advertisement for the solicitation is released.
5. When a pre-bid or pre-proposal conference or meeting is held, the MBE liaison or designated representative shall explain that all bidders or offerors are encouraged





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to utilize certified MBEs for this project or segments of the project.

6. Upon request for a specific project, the school system shall provide one set of drawings and specifications (and addenda when issued) to minority business enterprise associations recognized by the Governor's Office of Minority Affairs. They will be available free of charge to be picked up at a location designated by the LEA. A review of the bid or proposal activity submitted by an association's members may be initiated to justify continuation of this service.
7. Minority Business Enterprise forms identified in Section VII of this procedure for projects over \$50,000, are not required to be submitted for these projects (\$50,000 or less).
8. The names of prime contractors obtaining drawings and specifications will be shared with certified MBEs and MBE associations, upon request.
9. At the time of the contract award, the MBE Liaison or a designated person will record any anticipated certified minority business enterprise participation data made available from the successful contractor.
10. A business that presents itself as a minority business may participate in a project but may not be counted toward MBE participation until it is a certified minority business enterprise. If the MBE is not certified at the time of contract award, it may not be counted at that time. Only the funds paid after MDOT certification can be counted as MBE participation in the project. If a certified MBE fails to meet the standards specified in State Finance and Procurement Article 14-301 (G) and (I), Annotated Code of Maryland, the payments made to the MBE can be recorded and counted under a contract entered into when the MBE was eligible and certified. Ineligibility of an MBE to participate in the MBE program may not be the sole cause of the termination of the MBE contractual relationship for the remainder of the term of the contract.
11. The contractor will complete the Standard Monthly Contractor's Requisition for Payment (IAC/PSCP Form 306.4), specifically page 3 of 16, Minority Business Enterprise Participation, with each requisition submitted for payment. If certified MBE firms are known at the time of contract award their names and other appropriate information should be entered on page 3 of the first and all subsequent requisitions for payment. Any MBEs identified during the life of the project should be added as soon as the contractor engages them.
12. Upon completion of the project the contractor will provide a summary of the total of all funds paid to certified MBE firms. This should be within the contractor's final requisition for payment.



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#### VII. IMPLEMENTING PROCEDURES - Over \$50,000:

For construction projects estimated to cost in excess of \$50,000, the following procedures will be utilized:

1. All advertisements, solicitations, and solicitation documents shall include the following statements:
  - a. "Certified Minority Business Enterprises are encouraged to respond to this solicitation notice."
  - b. "The contractor or supplier who provides materials, supplies, equipment and/or services for this construction project shall attempt to achieve the specific overall MBE goal of \_\_\_\_ percent established for this project. All prime contractors, including certified MBE firms, when submitting bids or proposals as general or prime contractors, are required to attempt to achieve this goal from certified MBE firms."
  - c. If sub goals have been established for this project then one of the following should be included:
    - 1) "The sub goals established for this project are \_\_\_\_ percent from African American-owned businesses and \_\_\_\_ percent from Asian American-owned businesses."
    - 2) "The sub goal established for this project is \_\_\_\_ percent from African American-owned businesses."
    - 3) "The sub goal established for this project is \_\_\_\_ percent from Asian American-owned businesses."
  - d. "The bidder or offeror is required to submit with its bid or proposal a completed Attachment 1 (State Attachment A) - Certified MBE Utilization and Fair Solicitation Affidavit and Attachment 2 (State Attachment B) - MBE Participation Schedule, as described in the solicitation documents.
  - e. If there is no overall MBE goal or MBE sub goals established for the project, then only 1.a. above is to be included.
2. Other Advertisement and Outreach Requirements
  - a. To encourage greater MBE participation the staff of the school system should send out notices of potential projects to MBEs or solicit bids or proposals directly from minority business enterprise contractors that are certified.
  - b. A copy of the solicitation notice, preferably electronically, shall be sent to the Governor's Office of Minority Affairs at the same time the





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- advertisement for the solicitation is released.
- c. Upon request for a specific project, the school system shall provide one set of drawings and specifications (and addenda when issued) to minority business enterprise associations recognized by the Governor's Office of Minority Affairs. They will be available free of charge to be picked up at a location designated by the LEA. A review of the bid or proposal activity by an association's members may be initiated to justify continuation of this service.
  - d. When a pre-bid or pre-proposal conference is held, the MBE Liaison or designated representative shall explain the MBE goal and sub goals, if applicable; the MBE provisions of the solicitation; the documentation required at the time of submission; its relationship to the responsiveness of the bidder or offeror; how to complete the required attachments, particularly 1(A), 2(B), and 3(C); and additional information and supporting documentation that may be required after the bid or proposal opening. All contractors who attend the pre-bid or pre-proposal conference should receive a list or information explaining how to obtain a listing of certified MBE firms who could perform the work or have expressed an interest in performing the school construction work required for the specific project in the jurisdiction.
  - e. The names of prime contractors obtaining drawings and specifications will be shared with certified MBEs and MBE associations, upon request.
  - f. The MBE liaison, in conjunction with the procurement officer or project staff, should respond to all applicable questions and concerns relating to the project's MBE requirements completely and in a timely fashion to ensure that all potential contractors and subcontractors can compete effectively.
3. All Solicitation Documents Shall Include the Following
- a. "Certified Minority Business Enterprises are encouraged to respond to this solicitation notice."
  - b. "The contractor or supplier who provides materials, supplies, equipment and/or services for this construction project shall attempt to achieve the result that a minimum of \_\_ percent of the total contract value is with certified Minority Business Enterprises, with a minimum of \_\_ percent from certified African American-owned businesses, a minimum of \_\_ percent from certified Asian American-owned businesses, and the balance from any certified Minority Business Enterprises. All contractors, including certified MBE firms, when submitting bids or proposals as prime contractors, are required to attempt to achieve the MBE goal and sub goals, if applicable, from certified MBEs." Note: see VII.1.c. above



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for variations that may be required.

- c. Each bid or offer submitted, including a submittal from a certified MBE in response to this solicitation, shall be accompanied by a completed Attachment 1 (State Attachment A) - Certified MBE Utilization and Fair Solicitation Affidavit and a completed Attachment 2 (State Attachment B) - MBE Participation Schedule. These two attachments must be accurate and consistent with each other.
- 1) Attachment 1 (State Attachment A) and Attachment 2 (State Attachment B) shall be submitted with the sealed bid price or proposal at a place, date, and time specified in the solicitation document.
  - 2) As an alternative, and at the discretion of the school system, Attachment 1 (State Attachment A) could be submitted with the sealed bid price or proposal at a place, date, and time specified in the solicitation document. The sealed bids or proposals received by the time specified could be held, unopened for a maximum of 30 minutes. Within that time (30 minutes) each bidder or offeror must submit Attachment 2 (State Attachment B), in a separate sealed envelope. The sealed price envelopes from each bidder or offeror who submits both the sealed bid and proposal and the envelope with Attachment 2 (State Attachment B) will then be opened and reviewed and recorded as a viable submission. Any contractor that fails to submit the second envelope, with Attachment 2 (State Attachment B), prior to the specified time allowed (30 minutes) after the submittal of the sealed bid or proposal will not be opened or considered.
- d. The submittal of a completed and signed Attachment 1 (State Attachment A) - Certified MBE Utilization and Fair Solicitation Affidavit and a completed and signed Attachment 2 (State Attachment B) - MBE Participation Schedule indicates the bidder's or offeror's recognition and commitment to attempt to achieve the MBE goal and/or MBE sub goals, if applicable, for the specific project.
- 1) The bidder or offeror recognizes that their efforts made to initiate contact, to solicit, and to include MBE firms in this project will be reviewed carefully and evaluated based upon the actions taken by them prior to and up to 10 days before the bid or proposal opening. Follow-up actions taken by the bidder or offeror within the 10 days prior to the bid opening will also be considered.
  - 2) Based upon this review and evaluation it will be determined, by the MBE liaison, procurement officer, or a designated person, if a good



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faith effort was made by the apparent low bidder or apparent successful offeror.

- e. The bidder or offeror must check one of the three boxes on Attachment 1 (State Attachment A), which relates to the level of MBE participation achieved for the project. The bidder's or offeror's signature indicates that in the event that they did not meet the MBE goal or sub goals, if applicable, that:
  - 1) They are therefore requesting a waiver, and
  - 2) Documentation of their good faith efforts will be provided to the school system staff within 10 days of being notified that they are the apparent low bidder or apparent successful offeror.
- f. The bidder or offeror must submit Attachment 2 (State Attachment B) (as and when described above), which lists and provides information related to each certified MBE firm that the bidder or offeror will utilize on this project. A completed and accurate Attachment 2 (State Attachment B) is required. All of the work specified to be performed by each MBE firm, the contact information, MDOT certification number, minority code, the dollar values, and percentages must be correct.
- g. Attachment 2 (State Attachment B) should be completed and submitted with all calculations utilizing the base bid or offer only. A revised Attachment 2 (State Attachment B) should be submitted by the successful bidder or offeror once a determination is made as to the acceptance and/or rejection of any alternates.
- h. If a request for a waiver has been made, the appropriate box on Attachment 1 (State Attachment A) has been checked and the attachment signed, then the LEA should obtain and review the apparent low bidder's or successful offeror's supporting documentation of the good faith efforts to justify the granting of the waiver, prior to submitting the contract award for approval to the board of education.
- i. The following documentation shall be considered as part of the contract, and shall be furnished by the apparent low bidder or successful offeror to the MBE Liaison or designated person, within ten (10) working days from notification that the firm is the apparent low bidder or successful offeror:
  - 1) A completed Attachment 4 (State Attachment D) - Minority Business Enterprise Subcontractor Project Participation Statement shall be completed and signed by the prime contractor and each MBE firm listed on Attachment 2 (State Attachment B) - MBE Participation Schedule and Attachment 3 (State Attachment C) - Outreach Efforts Compliance Statement shall be signed and completed by the bidder or



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offeror.

- 2) Notification for purposes of this procedure means the earliest of the following methods of communication: orally in person, orally by telephone, orally by a telephone message, a faxed communication, a letter by date received or an electronic communication.
- 3) The ten (10) working days do not include the day the notification is received, weekends or holidays (State or Federal), but the material submitted must be received by the close of business on the tenth day.
- 4) The requirement to submit the above-listed documentation within the time frame specified will be considered by the IAC in its review of the request for contract award for the project. Failure to submit the required documentation within the time frame specified may result in a delay of the approval of the award of the contract, or the materials being returned without the approval of the award of the contract.

#### 4. Waiver Procedures

- a. If the apparent low bidder or successful offeror has determined that they are unable to meet the overall MBE goal or sub goals, if applicable, for the project at the time of submission of a bid or offer, they must check either of the two boxes on Attachment 1 (State Attachment A). The signature recognizes and acknowledges that a request for a waiver is being made. The apparent low bidder or successful offeror will therefore be required to submit information and substantiating documentation that will be reviewed to justify the granting of a waiver.
- b. If the apparent low bidder or successful offeror is unable to achieve the overall MBE contract goal and/or the MBE sub goals, if applicable, from certified African American-owned businesses and/or from certified Asian American-owned businesses, the apparent low bidder or successful offeror shall submit, within 10 working days from notification that the firm is the apparent low bidder or successful offeror, a completed Attachment 3 (State Attachment C) - Outreach Efforts Compliance Statement, Attachment 5 (State Attachment E) - Minority Subcontractors Unavailability Certificate, and Attachment 6 (State Attachment F) - MBE Waiver Documentation which shall include the following:
  - 1) A detailed statement of the efforts made by the bidder or offeror to identify and select portions of the work proposed to be performed by subcontractors in order to increase the likelihood of achieving the stated goal;
  - 2) A detailed statement of the efforts made by the bidder or offeror prior to and up to at least ten (10) days before the bid or proposal opening



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to solicit minority business enterprises through written notices that describe the categories of work for which subcontracting is being solicited, the type of work to be performed and specific instructions on how to submit a bid or proposal;

- 3) Follow-up actions taken by the bidder or offeror within the 10 days prior to the bid or proposal opening will also be considered.
  - 4) A detailed statement of the bidder's or offeror's efforts to make personal contact with MBE firms identified for item (2) above;
  - 5) A record of the name, address, telephone number and dates contacted for each MBE identified under items (2) and (3) above;
  - 6) A description of the information provided to MBEs regarding the drawings, specifications and the anticipated time schedule for portions of the work to be performed;
  - 7) Information on activities to assist minority business enterprises to fulfill bonding requirements or to obtain a waiver of these requirements;
  - 8) Information on activities to publicize contracting opportunities to minority business enterprises, attendance at pre-bid or pre-proposal meetings or other meetings scheduled by the MBE Liaison or designated representative; and
  - 9) As to each MBE that placed a subcontract quotation or offer which the apparent low bidder or successful offeror considers not to be acceptable, a detailed statement of reasons for this conclusion.
- c. In addition to any waiver documentation the apparent low bidder or successful offeror shall submit one completed Attachment 4 (State Attachment D) - Minority Business Enterprise Subcontractor Project Participation statement for each MBE firm that will participate in the project consistent with the information previously provided at the time of the submission of Attachment 2 (State Attachment B) or the revised Attachment 2 (State Attachment B).
- d. A waiver of an MBE contract goal or sub goal, if applicable, may be granted by the school system only upon receipt of Attachment 3 (State Attachment C) - Outreach Efforts Compliance Statement, Attachment 5 (State Attachment E) - Minority Subcontractors Unavailability Certificate, and Attachment 6 (State Attachment F) - MBE Waiver Documentation as described above in items 1) through 9).



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- 1) The MBE Liaison will review and accept or reject the minority business enterprise material that is submitted, and could obtain legal advice or assistance from their attorney.
  - 2) The MBE waiver request may not be considered unless all of the documentation specified above has been submitted in a timely fashion by the apparent low bidder or successful offeror.
  - 3) Assistance in the review of a request for a waiver (the documentation and justifications) may be requested from the Public School Construction Program and/or the Governor's Office of Minority Affairs.
  - 4) If a determination is made that the apparent low bidder or successful offeror did make a good faith effort, based upon a review of the documentation submitted, then the waiver must be granted. The award of contract shall then be made. The material and information submitted, including the LEA's review and analysis notes and conclusion shall be retained in the project file.
  - 5) If a determination is made that the apparent low bidder or successful offeror did not make a good faith effort, based upon a review of the documentation submitted, then the waiver should not be granted. The material and information submitted, including the LEA's review and analysis notes and conclusion, shall be retained in the project file. The award of contract shall then be made to the next lowest bidder or offeror, who meets the contractual requirements, including the MBE requirements.
  - 6) When a waiver is granted, a copy of Attachment 5 (State Attachment E) - MBE Waiver Documentation, accepted and signed by a school system representative and with the reasons for the determination, shall be forwarded to the Governor's Office of Minority Affairs and the Public School Construction Program within ten (10) days after approval of the contract award by the board of education. Failure to submit the required documentation within the time frame specified may result in delayed approval of the award of contract by the IAC.
5. All Contracts Shall Include the Following
- a. "The contractor shall perform the contract in accordance with the representations made in Attachment 1 (State Attachment A) - Certified Minority Business Enterprise Utilization and Fair Solicitation Affidavit and Attachment 2 (State Attachment B) - MBE Participation Schedule, submitted as part of the bid or proposal".





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- b. “Failure to perform the contract as specified and presented in the bid or proposal submission without prior written consent of the owner shall constitute a violation of a material term of the contract.”
- 1) The contractor shall structure his/her operations for the performance of the contract to attempt to achieve the MBE goals as stated in the solicitation document.
  - 2) The contractor agrees to use his/her best efforts to carry out these requirements consistent with the efficient and effective performance of the contract.
  - 3) The contractor must ensure that all certified MBEs shall have the maximum practical opportunity to compete for additional subcontract work under the contract, even after the award of the contract.
  - 4) The contractor shall submit monthly to the MBE Liaison or the school system’s designated representative a report listing any unpaid invoices, over 30 days old, received from any certified MBE subcontractor, the amount of each invoice and the reason payment has not been made.
  - 5) The contractor shall included in its agreements with its certified MBE subcontractors, a requirement that those subcontractors submit monthly to the MBE Liaison or appropriate representative a report that identifies the prime contract and lists all payments received from the contractor in the preceding 30 days, as well as any outstanding invoices, and the amount of those invoices.
  - 6) The contractor shall cooperate in any reviews of the contractor’s procedures and practices with respect to minority business enterprises, which the MBE Liaison, the Public School Construction Program, and/or the Governor’s Office of Minority Affairs may, from time to time, conduct.
  - 7) The contractor shall maintain such records as are necessary to confirm compliance with its MBE participation obligations. These records must indicate the identity of certified minority and non-minority subcontractors employed on the contract, the type of work performed by each, and the actual dollar value of work performed. Subcontract agreements documenting the work performed by all MBE participants must be retained by the contractor and furnished to the MBE Liaison and or appropriate representative on request.
  - 8) All records concerning MBE participation must be retained by the contractor for a period of five years after final completion of the contract, and will be available for inspection by the MBE Liaison,



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representatives from the Public School Construction Program and/or other designated official entities.

- 9) At the option of the MBE Liaison or appropriate agency representative, upon completion of the contract and before final payment and/or release of retainage, the contractor shall submit a final report in affidavit form and under penalty of perjury, of all payments made to, or withheld from MBE subcontractors.
- 10) If at any time after submission of a bid or proposal and before execution of a contract, the apparent successful bidder or offeror determines that a certified MBE listed on Attachment 2 (State Attachment B) - MBE Participation Schedule has become or will become unavailable, then the apparent successful bidder or offeror shall immediately notify the procurement officer and provide such officer with a reason(s) why the change has occurred. Any desired change in Attachment 2 (State Attachment B) - MBE Participation Schedule shall be approved in advance by the procurement officer and shall indicate the contractor's efforts to substitute another certified MBE subcontractor to perform the work. Desired changes occurring after the date of contract execution may occur only upon written approval by the LEA.
- 11) A business that presents itself as a minority business may participate in a project but the contract value may not be counted toward the MBE goal or sub goals, if applicable, until the business is certified by MDOT. If it is not certified at the time of contract award it may not be counted toward the goal or sub goals, if applicable, at that time. Only the funds paid after MDOT certification can be counted toward meeting the MBE goal or sub goals, if applicable. If a certified MBE fails to meet the standards specified in State Finance and Procurement Article.14-301, Annotated Code of Maryland, the payments made to the MBE can be recorded and counted under a contract entered into when the MBE was eligible and certified. Ineligibility of an MBE to participate in the MBE program may not be the sole cause of the termination of the MBE contractual relationship for the remainder of the term of the contract.
- 12) Contractors are encouraged to seek additional MBE participation in their contracts during the life of the project. Any additional MBE participation from certified MBEs should be reported to the MBE liaison and should be included in subsequent monthly requisitions for payment.
- 13) The contractor shall complete the Standard Monthly Contractor's Requisition for Payment (IAC/PSCP Form 306.4), specifically Attachment 8 (State Attachment H), Minority Business Enterprise



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Participation, with each requisition submitted for payment. This submittal should accurately reflect the payments to be made that month to MBEs, and the cumulative total for the period specified. Any and all MBE firms that are identified on Attachment 2 (State Attachment B) – MBE Participation Schedule should be included on Attachment 8 (State Attachment H) of the first and all subsequent requisitions for payment. Any MBEs identified during the life of the project should be added as soon as the contractor engages them.

- 14) At the completion of the project the contractor shall prepare a written summary of the final certified MBE participation in the contract as compared to the proposed participation at the time of contract award. This should include the name of each certified MBE, the amount that was anticipated to be paid at the time of contract award, the amount actually paid, and an explanation of any differences that have occurred. Special attention should be given to any situations where the final payment(s) to any MBE was below the level of commitment at the time of contract award.

#### 6. Projects Utilizing a Construction Manager Delivery Method

This section of the procedure has been prepared based upon the utilization of Construction Manager Agency method of delivery. If another alternative method of project delivery is being considered, then these procedures would need to be adapted in consultation with the PSCP before proceeding.

- a. For projects that are being designed and solicited utilizing a Construction Manager Agency delivery method with multiple prime contracts, the school system can structure its procedures to attain the overall MBE goal and sub goals, if applicable, for the project as presented below.
- b. The MBE liaison and other school system staff should work with the project's construction manager, cost estimator, and architect, along with any other individuals who could provide assistance, to determine the overall MBE utilization strategy for the work required, appropriate bid packages, and an appropriate overall MBE goal and sub goals, if applicable, for each specific bid or proposal package.
- c. The overall MBE goal and sub goals, if applicable, for the project shall represent the aggregate of the individual goals and sub goals, if applicable, set for each bid or proposal package.
- d. In setting the specific goals and sub goals, if applicable, for each solicitation package consideration should be given to the potential for MBE participation to the maximum extent possible. The information and procedures provided in Section V MBE Goal Setting Procedures should



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be consulted and followed for these types of projects.

- e. Prior to submitting the construction documents for State review and authorization to solicit bids or proposals, the school system's representative will prepare a complete list of the individual solicitation packages and indicate the MBE goal and sub goals, if applicable, for each solicitation package. This would include the overall MBE goal and sub goals, if applicable, established in the solicitation documents, the estimated cost for each solicitation package, and the estimated MBE dollar amounts for each solicitation package. A copy of this list should be submitted with the construction documents. The list should be retained as a record by the school system for comparison to the actual contracts awarded with MBE participation, and the final actual MBE participation at the completion of the project.
  - f. Contractors submitting bids or proposals for solicitation packages that do not include a MBE goal and sub goals, if applicable, would not be required to submit any of the MBE attachments that are otherwise required nor would they be required to indicate that they are requesting a waiver. The school system representative would, however, request information from the contractor at the completion of the project to determine if any certified MBE firms had participated in the contract.
  - g. All other submittals of MBE materials and reporting requirements are applicable for the project, including the submittal of Attachments 1 (State Attachment A) and 2 (State Attachment B) as described above in Section VII., this includes the documentation for a request for a waiver, if applicable and appropriate.
7. Projects Utilizing an Indefinite Delivery/Indefinite Quantity (IDIQ) or Job Order Contracting (JOC) Method of Delivery
- a. The solicitation should be prepared and the overall MBE goal and sub goals, if applicable, established based upon the type of work that is anticipated to be specified or performed under the contract and the availability of certified MBEs. This could include an analysis of the percentages of the different types of work, the estimated dollar value in the entire contract, and the availability of MBEs.
  - b. If an overall goal and sub goals, if applicable, are set the bidders or offerors would be required to submit Attachment 1 (State Attachment A) - Certified Minority Business Enterprise Utilization and Fair Solicitation Affidavit in which they could indicate their anticipated MBE participation based upon the entire contract amount and the types of work specified. The award of contract can be made based upon their estimate of MBE participation since there is no specific task order or description of work to be performed and subcontractors have not been identified or engaged



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- through any type of commitment or subcontract.
- c. Since MBE participation is only anticipated in a general sense as an objective and specific contracts to MBEs have not been signed, then the contract award would not be included in any reporting to the PSCP or subsequent reporting to GOMA.
  - d. However, as the contract proceeds and individual task orders and/or purchase orders are issued, the contractor should submit Attachment 2 (State Attachment B) - MBE Participation Schedule for any and all projects or work where MBE subcontractors and/or suppliers might reasonably be utilized. Discussions between the contractor or offeror and the LEA as the task orders and/or purchase orders are being developed should address this aspect of the contract requirements.
  - e. Any MBE participation should be recorded by the MBE liaison and reported to the PSCP MBE Liaison as the task orders and/or purchase orders are approved.
  - f. The contractor shall complete the Standard Monthly Contractor's Requisition for Payment (IAC/PSCP FORM 306.4), specifically page 3 of 16, Minority Business Enterprise Participation, with each requisition submitted for payment. This submittal should accurately reflect the payments to be made that month to MBEs, and the cumulative total for the period specified. Any and all MBE firms that are identified on Attachment 2 (State Attachment B) - MBE Participation Schedule should be included on page 3 of the first and all subsequent requisitions for payment. Any MBEs identified during the life of the project should be added as soon as the contractor engages them.
  - g. At the completion of the contract period or the full utilization of the contract's value a report should be prepared by the LEA MBE Liaison and submitted to the PSCP MBE Liaison summarizing the MBE participation in each and all of the task orders or purchase orders issued under the contract. This should include the anticipated MBE participation prior to the issuance of the solicitation, the MBE participation anticipated at the time of contract award and the actual MBE participation at the completion of the contract.
8. Projects Utilizing the Design/Build Delivery Method
- a. The solicitation is for both A/E services and the actual construction of a public school project. The solicitation should be prepared and the MBE goal and sub goals, if applicable, established for the construction work that is anticipated for the project. The goal setting procedures described in Section V above should be utilized for these types of projects.



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- b. The bidders or offerors should be required to submit Attachment 1 (State Attachment A) - Certified Minority Business Enterprise Utilization and Fair Solicitation Affidavit on which they would indicate their anticipated MBE participation based upon the construction work anticipated and their understanding of the MBE goal and sub goals, if applicable, the types of work involved, and the availability of certified MBEs for the project. Since there are no detailed plans or designs for the project and there are no contracts or subcontracts for the actual construction work there is no need to submit any other MBE attachments, at this time.
- c. If the bidder or offeror, who is to be awarded this contract, has indicated that they do not anticipate achieving the overall MBE participation goal and sub goals, if applicable, for this project on Attachment 1 (State Attachment A), then they are in effect requesting a waiver. They will be required to submit documentation at a later date to justify this request.
- d. As the project proceeds through the design phase and the project is nearing the completion of the construction documents for submission to the State to review, the Design/Build Team (team) in consultation with LEA representatives should discuss the opportunities and potential for certified MBEs to participate in the project.
- e. The team should begin to identify potential contractors and subcontractors, opportunities to segment the project, and MBEs that could participate in the project.
- f. At a point in time that is approximately 30 days prior to the anticipated CD submission to the State, the team should complete and submit Attachment 2 (State Attachment B) - MBE Participation Schedule to the LEA for their review and approval.
- g. If the team had indicated on Attachment 1 (State Attachment A) that they would meet the goals and the information on Attachment 2 (State Attachment B) indicates that they did meet the goals then the team should proceed with the construction of the project.
- h. If the team had indicated on Attachment 1 (State Attachment A) that they did not anticipate meeting the overall MBE goal and sub goals, if applicable, or only a portion of the goal and sub goals, if applicable, then Attachment 1 (State Attachment A) should be reviewed by the LEA. The team should, at this time, submit their documentation in support of the waiver requested.
- i. The proposed MBE participation should be reviewed and a determination made as to whether the team has made a good faith effort to meet the MBE goals and sub goals, if applicable, established for the project and as





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stated on Attachment 1 (State Attachment A), and previously submitted.

- j. If a request for a waiver is made and approved, Attachment 6 (State Attachment F) – MBE Waiver Documentation should be signed by a school system representative and submitted to the PSCP and the Governor’s Office of Minority Affairs.
- k. Since there was no MBE participation reported at the time of the award of the Design/Build contract, the LEA would submit the entire package of information, including all of the MBE related attachments to the PSCP within ten (10) days of the team being directed to proceed with the actual construction work.
- l. All other submittals of MBE materials and reporting requirements are applicable for the project, as described above in Section VII.

### VIII. LIQUIDATED DAMAGES/FAILURE TO PERFORM WORK

The successful bidder accepts this contract with the understanding that should they fail to complete the work in an acceptable manner and in the time stated, they shall be subject to the payment of liquidated damages as stated in the bid document.

#### Liquidated Damages Schedule - Amount Per Day

\$25,000 and under	\$100.00
\$25,000 - \$100,000	\$250.00
\$100,000- \$500,000	\$500.00
\$500,000- \$1,000,000	\$550.00
\$1,000, 000-\$2,500,000	\$750.00
\$2,500,000-\$5,000,000	\$1,000.00
\$5,000,000-\$10,000,000	\$1,500.00
\$10,000,000-\$15,000,000	\$2,000.00
\$15,000,000 and More	\$2,500.00

Liquidated Damages Provision for State Funded Contracts Containing Minority Business Enterprise Participation Goals:

Liquidated Damages. This contract requires the contractor to make good faith efforts to comply with the Minority Business Enterprise (“MBE”) Program and contract provisions. The Board and the Contractor acknowledge and agree that the Board will incur damages, including but not limited to loss of goodwill, detrimental impact on economic development, and diversion of internal staff resources, if the Contractor does not make good faith efforts to comply with the requirements of the MBE Program and MBE contract provisions. The parties further acknowledge and agree that the damages the Board might reasonably be anticipated to accrue as a result of such lack of compliance are difficult to



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ascertain with precision.

Therefore, upon a determination by the Board that the Contractor failed to make good faith efforts to comply with one or more of the specified MBE Program requirements or contract provisions, the Contractor agrees to pay liquidated damages to the State at the rates set forth below. The Contractor expressly agrees that the Board may withhold payment on any invoices as a set-off against liquidated damages owed. The Contractor further agrees that for each specified violation, the agreed upon liquidated damages are reasonably proximate to the loss the Board is anticipated to incur as a result of such violation.

- a. Failure to submit each monthly payment report in full compliance with COMAR 21.11.03.13B (3): \$ \_\_\_\_\_ per day until the monthly report is submitted as required.
- b. Failure to include in its agreements with MBE subcontractors a provision requiring submission of payment reports in full compliance with COMAR 21.11.03.13B (4): \$ \_\_\_\_\_ per MBE subcontractor.
- c. Failure to comply with COMAR 21.11.03.12 in terminating, canceling, or changing the scope of work/value of a contract with an MBE subcontractor and/or amendment of the MBE participation schedule: the difference between the dollar value of the MBE participation commitment on the MBE participation schedule for that specific MBE firm and the dollar value of the work performed by that MBE firm for the contract.
- d. Failure to meet the Contractor's total MBE participation goal and subgoal commitments: the difference between the dollar value of the total MBE participation commitment on the MBE participation schedule and the MBE participation actually achieved.
- e. Failure to promptly pay all undisputed amounts to an MBE subcontractor in full compliance with the prompt payment provisions of this contract: \$ \_\_\_\_\_ per day until the undisputed amount due to the MBE subcontractor is paid. This section does not apply to contracts that are subject to section 15-226 of the State Finance and Procurement Article – Construction Contracts – Prompt Payment of Subcontractors.

Notwithstanding the use of liquidated damages, the State reserves the right to terminate the contract and exercise all other rights and remedies provided in the contract or by law.

#### IX. RECORDS AND REPORTS:

1. The MBE Liaison shall maintain such records as are necessary to confirm compliance with its Minority Business Enterprise Procedures and activities. The records shall be maintained until the project is audited by the Public School Construction Program. These records shall include by project:
  - a. The contractor report submitted at the completion of the project;



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- b. The identity of the minority contractors employed on the project;
  - c. The type of work performed;
  - d. The actual dollar value of the work, services, supplies or equipment; and
  - e. The MBE percentage of the total contract.
2. The MBE Liaison will maintain a record of all waivers approved for each project or solicitation package where the prime contractor was unable to achieve the established overall goal or sub goals, if applicable. The MBE Liaison will, however, report to the PSCP all MBE participation by MDOT certified firms who are prime contractors, subcontractors, suppliers, or otherwise making an economically viable contribution to each project. This information shall be reported to PSCP within ten (10) days after approval of the award of the contract by the Board of Education.
  3. The LEA shall submit the “Certified Minority Business Enterprise Participation Standard Monthly Contractor’s Requisition for Payment” (IAC/PSCP Form 306.4 page 3 of 16, located in the Administrative Procedures Guide), which is Attachment 7 (State Attachment G) in this procedure, to the PSCP Director of Fiscal Services as part of the regular monthly request for payment for the project.
  4. The LEA shall submit the “Close-Out Cost Summary” (IAC/PSCP Form 306.6 located in the Administrative Procedures Guide), which is Attachment 8 (State Attachment H) of this procedure, along with the “Certified Minority Business Enterprise Participation Standard Monthly Contractor’s Requisition for Payment” (IAC/PSCP Form 306.4) to the PSCP Director of Fiscal Services within 180 days of completion of the project.
  5. Each fiscal year end, PSCP Fiscal Services will create a report “Payments Made to Contractors during The Fiscal Year” and maintain such records as are necessary to confirm compliance with its minority business enterprise procedures and activities.
  6. Each fiscal year end, PSCP Fiscal Services will create a report “Projects Completed during the Fiscal Year” and maintain such records as are necessary to confirm compliance with its Minority Business Enterprise Procedures and activities. This report will compare the overall MBE goal and sub goals, if applicable, for each specific project with the MBE participation anticipated at the time of contract award and the actual MBE participation at the completion of the project.

#### X. MONITORING:

1. The LEA’s procurement personnel or project staff shall verify that the certified MBE’s listed in the MBE participation schedule are actually performing the work.
2. The LEA’s procurement personnel shall ensure that MBE subcontractors are receiving compensation as set forth in the MBE participation schedule by ensuring



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that the contractor submits monthly reports, listing any unpaid invoices over 30 days old received from any certified MBE subcontractor, the amount of each invoice, and the reason payment has not been made.

3. The MBE Liaison and/or the Public School Construction Program will conduct reviews as deemed necessary to confirm compliance with the minority business enterprise participation requirements.
4. The MBE Liaison will maintain appropriate records, and shall assist the Public School Construction Program in on-site or post-audit reviews upon request.
5. Auditors from the Public School Construction Program will have access to and the ability to audit MBE participation for specific projects, information retained by the LEA, and/or submitted to the IAC in reports/forms filed by the LEA as referenced above.

#### XI. **MINORITY BUSINESS ENTERPRISE LIAISON:**

1. The Chief Executive Officer shall designate an individual to be identified as the MBE Liaison for the school system.
2. The MBE Liaison will be the contact person who will work with the Public School Construction Program and the Governor's Office of Minority Affairs to implement the Minority Business Enterprise Program for the school system and the State of Maryland.
3. The Chief Executive Officer will immediately notify the Public School Construction Program if there is a change in the MBE Liaison for the school system.

#### XII. **RELATED PROCEDURES:** Administrative Procedure 3325, Minority Business Enterprise Procurement Procedures.

#### XIII. **MAINTENANCE AND UPDATE OF THESE PROCEDURES:** These procedures originate with the State of Maryland Public School Construction Program and will be reviewed and updated by the Department of Purchasing and Supply as the need may develop.

#### XIV. **CANCELLATIONS AND SUPERSEDURES:** This Administrative Procedure cancels and supersedes Administrative Procedure 7419, dated July 1, 2014.

#### XV. **EFFECTIVE DATE:** February 23, 2015.



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### Attachments:

1. Certified Minority Business Enterprise Utilization and Fair Participation Affidavit;
2. Minority Business Enterprises Participation Schedule;
3. Minority Business Enterprises Outreach Efforts Compliance Statement;
4. Minority Business Enterprises Subcontractor Project Participation Statement;
5. Minority Subcontractor Unavailability Certificate;
6. Minority Business Enterprise Waiver Documentation;
7. Minority Business Enterprise Participation Standard Monthly Contractor's Requisition for Payment;
8. Close Out Cost Summary

### Distribution:

Lists 1, 2, 3, 4, 5, 6, 10, and 11