

## Part C. Equal Business Opportunity Program

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### **Sec. 2-80.20. Policy, purpose, and objectives.**

It is the policy of the board of county commissioners of Palm Beach County, Florida that the County shall use its best efforts to ensure that all segments of its business population, including, but not limited to, small, local, minority, and women-owned businesses, have an equitable opportunity to participate in the County's procurement process, prime contract, and subcontract opportunities, and that no business shall be excluded from participation, denied benefits of, or otherwise discriminated against, in connection with the award and performance of any contracts with the County on the grounds of race, color, national origin, religion, ancestry, sex, age, marital status, familial status, sexual orientation, gender identity or expression, disability or genetic information. Moreover, the specific purposes and objectives of this Ordinance are as follows:

1. This Equal Business Opportunity Ordinance, and the PPM guidelines established pursuant to this Ordinance, shall serve the County's compelling interest to remedy the various ongoing effects of marketplace discrimination against S/M/WBEs that are ready, willing, and able to sell goods and services to the County.
2. The narrowly-tailored remedial efforts established in this EBO Program Ordinance are designed to promote greater availability, capacity development, and contract participation by S/M/WBEs in County contracts, and in doing so, enhance competition to the benefit of the County's residents and taxpayers.

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3. This EBO Program Ordinance is intended, in part, to further the County's compelling interest in ensuring that it is neither an active nor passive participant in private sector marketplace discrimination, and to actively promote equal opportunity for all segments of the contracting and business community to participate in County contract opportunities.
4. The County shall resort to the use of race- and gender-conscious means for addressing disparities within the realm of its contracting only when it is apparent that the use of race- and gender-neutral means alone will likely be insufficient to remedy the effects of identified discrimination.
5. Having found that it has a compelling governmental interest to remedy the effects of discrimination upon County contracts, the Board directs the County Administrator or designee, the Director of Purchasing or designee, and the Director of the Office of Equal Business Opportunity or designee to collaborate in periodically recommending to the Board possible future amendments necessary to fully effectuate the purposes and objectives established in this EBO Program Ordinance. Such proposed amendments shall also be narrowly-tailored in accordance with applicable law, and the specific barriers to S/M/WBE participation identified within the County's factual predicate as described above in Section 2-80.25 of this EBO Program Ordinance.
6. It is the policy of the County to take all necessary, reasonable, and legal action to prevent discrimination and to ensure that all businesses, including S/M/WBEs, are afforded the maximum practicable opportunity to participate in the County's purchasing and contracting processes.
7. As referenced in Section 2-80.24, it is the policy of the Board to ensure that the firms it engages in business with do not discriminate on the basis of race, color, national origin, religion, ancestry, sex, age, marital status, familial status, sexual orientation, gender identity or expression, disability, or genetic information in the solicitation, selection, hiring or commercial treatment of subcontractors, vendors, suppliers, or commercial customers, nor shall any such firms retaliate against any person for reporting instances of such discrimination. The firms shall provide equal opportunity for subcontractors,
8. The Office of EBO shall have primary oversight responsibility with the full support and cooperation of all other County offices and departments in the administration of the EBO Program, as well as in the administration of other economic inclusion policies contained in the PPM.

An inclusive, robust, and competitive local marketplace is consistent with the County's public interest in reducing the economic burden on the County residents and taxpayers it serves. In furtherance of its mission to efficiently and cost-effectively serve the public interest on behalf of the residents of Palm Beach County, the County seeks to promote the formation, growth, and competitive viability of its indigenous business population through the economic inclusion policies and procedures set forth in this EBO Program Ordinance.

(Ord. No. 2018-\_\_\_, § II, Part C, \_\_-\_\_-\_\_)

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### Sec. 2-80.21. Definitions.

*Acting as a conduit* means, in part, not acting as a regular dealer by making sales of material, goods or supplies from items bought, kept in stock and regularly sold to the public, as opposed to only government agencies, in the usual course of business. Brokers, manufacturer's representatives, sales representatives and non-stocking distributors are considered as conduits that do not perform a Commercially Useful Function.

*Affiliation* means that the entity applying for S/M/WBE certification controls, has the power to control, or is controlled by another entity or entities, or an identity of interests exists between the entity applying for S/M/WBE certification and another entity or entities. In determining whether an Affiliation exists, it is necessary to consider factors including, but not limited to, common ownership, common management, common use of facilities, equipment, and employees, contractual obligations and family interest in the business. Affiliated entities must be considered together in terms of gross receipts in determining whether a business entity meets S/M/WBE eligibility criteria.

*Affirmative Procurement Initiatives (API)* refers to various Equal Business Opportunity (EBO) Program tools and Solicitation incentives that are used to encourage greater prime and subcontract participation by Small Business Enterprise (SBE) firms or Minority / Women Business Enterprise (M/WBE) firms, including, but not limited to, bonding assistance, evaluation preferences, subcontracting goals, vendor rotations, and joint venture incentives. See the County's Equal Business Opportunity Program PPM for complete details on the operation of each and every API.

*Best Value Contracting* means any competitive method of procurement in which low price may be only one factor of several factors, but not necessarily the determining factor in the awarding of a contract, such as a Request for Proposals (RFP).

*Board* means the board of county commissioners of Palm Beach County, Florida.

*Business Category* means Construction; Professional Services procured pursuant to the Competitive Consultant Negotiations Act (CCNA); other professional services ("non-CCNA Professional Services"), Goods, and Other Services. For purposes of S/M/WBE eligibility criteria, a business entity shall be considered for certification eligibility in the business categories in which it successfully has performed and demonstrated capability.

*County Administrator* means the County Administrator for Palm Beach County.

CCNA refers to the Consultants Competitive Negotiation Act.

*Centralized Bidder Registration System (CBR)* means an electronic system of hardware and software programs, including, but not limited to, the VSS, by which the County requires all prospective respondents and subcontractors that are ready, willing, and able to sell goods or services to the County to register. All businesses awarded a County contract shall be required to register in the CBR. The CBR System assigns a unique identifier to each registrant that is then required for the purpose of submitting solicitation responses and invoices, and for receiving payments from the County. The CBR-assigned identifiers are also used by the Office of Equal Business Opportunity ("EBO") for measuring relative availability and tracking utilization of

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S/M/WBE and all other firms at the prime and subcontract levels by industry or commodity codes and for establishing annual Aspirational Goals and contract-by-contract subcontracting goals. The details regarding fields of information captured and the functionalities of the CBR system shall be reflected in the EBO Program PPM.

*Certification* means the process by which the Office of EBO determines a firm to be a bona-fide small, minority, and / or women business enterprise. Any firm may apply for multiple certifications that cover each and every status category e.g., SBE, MBE, or Women Business Enterprise (“WBE”) for which it is able to satisfy eligibility standards. The Office of EBO may contract these services to a regional certification agency

or other entity. For purposes of certification, the County may accept any firm that is certified by local government entities and other organizations identified by the Office of EBO that have adopted certification standards and procedures similar to those followed by the Office of EBO, provided the prospective firm satisfies the eligibility requirements set forth in the County’s Policies and Procedures Manual (PPM).

*Certified Small Minority Women Business Enterprise (S/M/WBE)* means a business which has been certified by the Office of Equal Business Opportunity as having satisfied all of the eligibility requirements for participation in the EBO Program as either a small, minority, and/or woman business enterprise.

*Code* means the Palm Beach County Code.

*Commercially Useful Function* is a term that means a Small, Minority, and/or Women Business Enterprise (S/M/WBE) firm is performing a Commercially Useful Function when it is responsible for execution of the work of the County’s contract and is carrying out its responsibilities by actually performing, staffing, managing and supervising the work involved. To perform a Commercially Useful Function, the S/M/WBE firm must also be responsible, with respect to materials and supplies used on the contract, and that are a subset of the broader scope of work that is the subject matter of the goods and services that are being purchased by the County under the terms of the prime contract. The S/M/WBE firm must also be responsible for negotiating price, determining quantity and quality, ordering the material, and installing (where applicable) and paying for the material itself. To determine whether an S/M/WBE firm is performing a Commercially Useful Function, an evaluation must be performed of the amount of work subcontracted, normal industry practices, whether the amount the S/M/WBE firm is to be paid under the contract is commensurate with the work it is actually performing and the S/M/WBE credit claimed for its performance of the work, and other relevant factors. Specifically, an S/M/WBE firm does not perform a Commercially Useful Function if its role is limited to that of an extra participant in a transaction, contract or project through which funds are passed in order to obtain the appearance of meaningful and useful S/M/WBE participation, when in similar transactions in which S/M/WBE firms do not participate, there is no such role performed.

*Committee* means the Equal Business Opportunity Advisory Committee (EBOAC).

*Construction* means the use of services and skilled trades for the assembly of materials necessary to build or improve land or infrastructure such as roads and bridges and paved surfaces, or to build, improve, or repair vertical structures such as buildings.

*Contract* means all types of agreements, regardless of what they may be called (purchase orders, decentralized purchase orders (“DPOs”), agreements, etc.), for the procurement of goods and services; narrow definition: a written agreement signed by all parties for the procurement of professional services or construction. Narrow definition of word will be capitalized.

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*Contract Request* means a requisition for the procurement of professional services or construction services.

*Control* means the authority of a person or business owner to sign responses to solicitations and contracts, make price negotiation decisions, sell or liquidate the business, and have the primary authority to direct the day-to-day management and operation of a business enterprise without interference from others.

*County* means Palm Beach County.

*Days* means business days, unless specified otherwise.

*Decentralized Purchase Order (DPO)* refers to the method of procurement for County small purchase of a good or service that is valued below \$5,000.

*Domiciled* in the county means the business holds a valid Palm Beach County business tax receipt and has a Significant Business Presence in the county. In order to establish a Significant Business Presence in the county, the business must:

- (1) Demonstrate that business has been conducted at the county location, and sufficient full-time employees are maintained in the county to perform the contracted work;
- (2) The county business tax receipt bears the county address, and the county location is in an area zoned for the conduct of such business;
- (3) The county location must be verifiable through documentation such as property tax bill or lease agreement; and
- (4) The county location should be identifiable through signage, telephone listing, and/or website or social media. On-site visits may be conducted at any time to determine continued adherence to requirements and additional documentation may be requested on a case-by-case basis. A county telephone number or post office box in the county shall not be sufficient without further documentation, to establish the domicile requirements and other requirements of the code.

*Equal Business Opportunity Advisory Committee (EBOAC)* refers to a citizen committee made up of no more than fifteen (15) representatives of trade groups and members of the general business community designated and appointed by the County Administrator, the Office of EBO, and the County Board as specified in the PPM. This advisory group shall: (a) assist the Director of the Office of Equal Business Opportunity or designee, the County Administrator or designee, and the Board in reviewing the continuing policies, practices, and programs for vendors, prime contractors, and subcontractors that promote S/M/WBE participation; and (b) make recommendations to the Director of the Office of EBO, the County Administrator or designee, and the Board concerning modifications of such policies, programs, and practices established pursuant to this EBO Program Ordinance.

*Evaluation Preference* means an API that may be applied by the Goal Setting Committee to Requests for Proposals for Construction, Professional Services, Other services, and Goods contracts that are to be awarded on a basis that includes factors other than lowest price and wherein responses that are submitted to the County by S/M/WBE firms or firms that have teamed with S/M/WBE firms may be awarded additional points in the evaluation process in the scoring and ranking of their proposals against those submitted by other prime respondents.

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*Formal Solicitations* means Solicitations for contracts that are valued at contracts valued at \$100,000 or greater.

*Front* shall mean a business which purports to be a S/M/WBE business but which is actually owned and/or controlled in a manner which does not comply with the county's requirements of certification, or a business that purports to be performing a portion of work under a contract as a certified S/M/WBE firm, but is not performing a Commercially Useful Function.

*Goals* refers to the level of S/M/WBE participation projected to be obtained either annually within a business category, or in the performance of a specific contract, and is expressed as a percentage of the total dollar volume of participation of all businesses in the County's procurement of goods, services and construction either annually within a given business category, or within a specific contract. In the absence of waivers or exclusions, the standard SBE contract-specific subcontracting goals are 20% regardless of industry segment. M/WBE contract-specific subcontracting goals are set on a case-by-case basis by the Goal Setting Committee, and are subject to waiver requests from Originating Departments and prospective bidders. Such contract-specific S/M/WBE subcontracting goals are set based upon various criteria, including the relative availability of qualified S/M/WBE subcontractors to perform the scope of work required for performance of a particular contract.

*Goal Setting Committee (GSC)* means a committee, or series of committees, appointed and chaired by the County Administrator or designee that includes, at a minimum, the Director of the Equal Business Opportunity Office or designee, the Director of Purchasing, and Director of Facilities Development and Operations (FDO) or their designees, and the Director or designee of the Originating Department (if the Originating Department is neither the Purchasing Dept. nor FDO) all without duplication of designees. The County Administrator or designee may also appoint two ex-officio members of the EBOAC to serve on any GSC purely in an advisory and non-voting capacity. The GSC establishes S/M/WBE Program Goals for Palm Beach County (e.g., Annual Aspirational Goals and Contract-by-Contract Subcontracting Goals) based upon Industry Categories, vendor availability and project-specific characteristics. The GSC also makes determinations about which Affirmative Procurement Initiatives (APIs) are to be applied to specific contracts based upon various criteria.

*Good Faith Efforts (GFE)* means documentation of the Respondent's intent to comply with EBO Program Goals and procedures including, but not limited to, the following: (1) documentation as stated in the solicitation reflecting the Respondent's commitment to comply with SBE or M/WBE Goals as established by the Office of EBO for a particular contract; or (2) documentation of efforts made toward achieving the SBE or M/WBE Program Goals (e.g., solicitations of bids/proposals/qualification statements from all qualified SBE firms or M/WBE firms listed in the Office of EBO's directory of certified SBE or M/WBE firms; correspondence from qualified SBE or M/WBE firms documenting their unavailability to perform SBE or M/WBE contracts; documentation of efforts to subdivide work into smaller quantities for subcontracting purposes to enhance opportunities for SBE or M/WBE firms; documentation of a Prime Contractor's posting of a bond covering the work of SBE or M/WBE Subcontractors; documentation of efforts to assist SBE or M/WBE firms with obtaining financing, bonding or insurance required by the Respondent; and documentation of consultations with trade associations and consultants that represent the interests of SBE and/or M/WBEs in order to identify qualified and available SBE or M/WBE Subcontractors). Scoring of Good Faith Efforts documentation and administrative determinations regarding the adequacy of such Good Faith Efforts is the responsibility of the Office of EBO. The Office of EBO's scoring, determinations, and any appeals of such GFE determinations by the Office of EBO shall be in accordance with the procedures established in the PPM.

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*Goods* means commodities, merchandise, other tangible materials, and/or manufactured products that are bought and sold in commerce.

*Graduation* means when an S/M/WBE firm graduates from the County's EBO program because it has met the criteria for graduation as set forth in the County's Policies and Procedures Manual (PPM). A firm's graduation from participation as an S/M/WBE firm in the EBO Program does not permanently affect its eligibility to be recertified and to participate in the County's EBO program as an S/M/WBE. Graduated S/M/WBE firms shall be eligible to apply for S/M/WBE re-certification following the expiration of the two-year period immediately following graduation. Such application for S/M/WBE re-certification shall only be granted on condition that the graduated S/M/WBE firm presents documentation as required by the Office of EBO that establishes that the S/M/WBE firm's annual revenues have fallen below the small business size standards for the relevant industry as reflected in Exhibit Q of the PPM for two consecutive years following the initial post-graduation period.

*Gross receipts* means the total annual sales or revenues for the firm or certification applicant as stated on its federal income tax return, or for a new business that has not yet filed a federal income tax return, on its audited financial statements before deductions for returned items, allowances and discounts.

*Home business* means a small business that operates from the business owner's home. Home businesses usually have a very small number of employees that are often members of the business owner's family. A home business is not affiliated with, nor a subsidiary of another company located outside of the home. Home businesses meeting this definition are eligible for certification as a small business, provided they meet all other certification criteria. Home offices of an employee working for a company located in another county do not establish domicile in Palm Beach County.

*ILA* means interlocal agreement; agreement between government entities.

*Independent business* is a business that operates free of control or reliance on another business. Recognition of the business as a separate legal entity for tax or corporate purposes is not necessarily sufficient for recognition as an independent business. In determining whether a potential small business is an independent business, the county shall consider all relevant factors, including but not limited to, the date the business was established, the adequacy of its resources for the type of work specified, relationships with affiliates and subsidiaries, and the degree to which financial, equipment leasing and other relationships with other businesses vary from established industry practices. If there has been a recent change in ownership of the business, a review of whether the acquisition of the business was done pursuant to an arm's length transaction will also be considered in determining independence of the business.

*Independent contractor* means a person who contracts to do work for another person according to his or her own processes and methods and is not subject to the control of the other person except for what is specified in the agreement for a specific job.

*Individual* means an adult person that is of legal majority age.

*Informal Solicitation* means any Solicitation for Construction Services, Professional Services, Goods, or Other Services that are valued at \$5,000 or greater, but below \$100,000.

*Joint venture* means an association or teaming of two (2) or more persons or businesses to carry out a single business enterprise for profit for which purpose they combine their property, capital, efforts, skills and knowledge.

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*Joint Venture Incentives* means an Affirmative Procurement Initiative (“API”) that provides inducements for non-Small Minority or Women Business Enterprise (S/M/WBE) firms to collaborate with S/M/WBE partners in responses to solicitations and for purposes of performing a Prime Contract to supply Goods to, or to perform Construction, Professional, or Other Services on behalf of the County. Joint Ventures are established by written agreements between two or more Independently Owned and Controlled business firms to form a team or a third business entity solely for purposes of undertaking distinct roles and responsibilities in the completion of a given contract. Under this business arrangement, each Joint Venture partner shares in the management of the Joint Venture and also shares in the profits or losses of the Joint Venture enterprise commensurately with its contribution to the venture. Incentives under this API may include Evaluation Preferences that are tied to the percentage of SBE or M/WBE participation in the joint venture, and extra contract option years or mobilization fees provided to qualifying Joint Ventures in certain Construction Services, Professional Services, Goods and Other Services contracts.

*Leased employee* means the employee of a leasing company leases professional employees to work for another business organization on a contractual basis. The business organization maintains management of the work performed by the leased employee. The leasing company handles administrative responsibilities such as, but not limited to, payroll, compliance with state and federal regulations and unemployment insurance.

*Manufacturer* means a firm or business entity that produces an item from raw materials or that substantially alters the form of a product in order to make it suitable for a particular use.

*Minority Business Enterprise (MBE)* means any legal entity, except a joint venture, that is organized to engage in for-profit transactions, which is certified as being at least fifty-one percent (51%) owned, managed and controlled by one or more Minority Group Members, and that is ready, willing, and able to sell goods or services that are purchased by the County. To qualify as an MBE, the enterprise’s annual revenues and number of employees shall be no greater than the business size standards for its industry as specified in Exhibit Q of the PPM, and the MBE shall meet the Significant Business Presence requirements as defined herein. In order to be eligible for participation in S/M/WBE APIs, the MBE firm shall be currently certified as being in compliance with the size standards as reflected in Exhibit Q, and as having satisfied all eligibility requirements to participate in the EBO Program. Unless otherwise stated, the term MBE as used in this Program is not inclusive of women-owned business enterprises (WBE).

*Minority Group Members* means African-Americans, Hispanic Americans, Asian-Pacific Americans, and Native Americans legally residing in, or that are citizens of, the United States or its territories, as defined below:

African-Americans: Persons with origins in any of the black racial groups of Africa.

Hispanic-Americans: Persons of Mexican, Puerto Rican, Cuban, Spanish, or Central and South American origin.

Asian-Pacific Americans: Persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands.

Native Americans: Persons that are members of a federally recognized Indian tribe or that have no less than one-sixteenth (1/16<sup>th</sup>) percentage origin in any of the Native American Tribes, as recognized by the U.S. Department of the Interior, Bureau of Indian Affairs and as demonstrated by possession of personal tribal role documents. A "federally recognized Indian tribe" means an Indian tribe, band, nation,



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rancheria, pueblo, colony or other organized group or community, including any Alaska native village, which was recognized by the secretary of the interior on October 1, 1985, as having special rights and is recognized as eligible for the services provided by the United States to Indians because of their status as Indians, and any tribe that has a pending application for federal recognition on October 1, 1985, as having special rights and is recognized as eligible for the services provided by the United States to Indians because of their status as Indians, and any tribe that has a pending application for federal recognition on October 1, 1985.

*Minority/Women Business Enterprise (M/WBE)* means a firm that is certified as either a minority business enterprise or as a women business enterprise for purposes of the EBO Program as being at least fifty-one percent (51%) owned, managed, and controlled by minority group members and/or women of legal majority age that are lawfully residing in, or are citizens of, the United States or its territories, that is ready, willing, and able to sell goods or services that are purchased by the County, and that meets the Significant Business Presence requirements as defined herein. In order to be eligible for participation in S/M/WBE APIs, the M/WBE firm shall be currently certified as being in compliance with the size standards as reflected in Exhibit Q of the PPM, and as having satisfied all eligibility requirements to participate in the EBO Program. Unless otherwise stated, the term MBE as used in this Program is not inclusive of women-owned business enterprises (WBE).

*M/WBE Segmented Subcontracting Goals* means the application of multiple goals for M/WBE participation within annual Aspirational Goals or for M/WBE subcontracting goals on an individual County contract wherein an overall aggregated M/WBE goal is accompanied by subsets of one or more smaller goals. Such segmented goals specifically target the participation of a particular segment of business enterprises owned and controlled by WBEs or certain Minority Group Members (e.g., African-Americans or Hispanic-Americans) based upon relative availability and significantly greater patterns of underutilization and disparity within an industry as compared to other gender and Minority Group member categories of M/WBEs. The application of Segmented M/WBE goals is intended to ensure that those segments of M/WBEs that have been most significantly and persistently underutilized receive a fair measure of remedial assistance.

*Other Services* means services that are neither Professional nor construction-related.

*Owned*, for the purpose of determining whether a business is a minority or women business enterprise, shall mean that the minorities or women, as the context requires, shall possess an ownership interest of at least fifty-one (51) percent.

*Points* means the quantitative assignment of value for specific evaluation criteria in the vendor selection process used in some construction, professional services, other services, and goods contracts (e.g., 15 points out of a total of 100 points assigned for S/M/WBE participation as stated in response to a Request for Proposals.)

*Policies and Procedures Manual (PPM)* refers to the administrative policies and procedures manual for the Equal Business Opportunity Program.

*Prime Contractor* means the vendor or contractor to whom a purchase order or contract is issued by the County for purposes of providing goods or services to the County.

*Professional Services* means any narrow discipline wherein a practitioner is required to have attained an advanced educational degree and/or credentials certifying a certain level of competency in the field that have been issued by an independent private body or board on behalf of the profession, prior to representing themselves to the public as a practicing member of that narrow discipline; a practitioner of a Professional

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Service has, through education and practical experience related to a particular field, developed expert advisory and programming skills as a vocation; this term also refers to any narrow discipline that has been recognized at the discretion of the Director of Purchasing, (or has been specified within the Purchasing Code or Purchasing PPM) as one where the high level of skills, technical expertise in the field, and/or the advanced complexity and quality of advice provided by the potential or known practitioner(s) warrants a competitive proposal or submittal process wherein the strength of professional credentials are weighed heavily in the selection process (e.g., accounting, legal services, mapping, laboratory testing services, physician services, nursing services, pharmacists, scientists, dentistry, financial advisory services, realtors, surveying services, landscape design services, appraisers, engineers, architects, etc.).

*Race-Conscious (R/C)* means any business classification or API wherein the race or gender of business owners is taken into consideration (e.g., references to M/WBE programs and APIs that are listed herein under the heading of "Race-Conscious").

*Race-Neutral (R/N)* means any business classification or API wherein the race or gender of business owners is not taken into consideration (e.g., references to SBE programs and APIs that are listed herein under the heading of "Race-Neutral").

*Relevant Marketplace* means the geographic market area affecting the EBO Program as determined for purposes of collecting data for the 2017 Disparity Study, and for determining eligibility for participation under various programs established by this EBO Program Ordinance, and is defined as Palm Beach County.

*Request for Proposal (RFP)* means a competitive Solicitation where price is not the sole factor in determining contract award; see also Best Value Contracting.

*Requestor or Originating Department* means the person or unit requesting item to be purchased.

*Responsive Bidder or Offeror* - a person/firm that has submitted a bid or proposal which conforms in all material respects to the requirements set forth in the invitation to bid, or request for proposal, including, but not limited to, the requirements and specifications of the EBO Program.

*Responsible Bidder or Offeror* - a person/firm with the capability in all respects to perform fully the contract requirements, and the tenacity, perseverance, experience, integrity, reliability, capacity, facilities, equipment, financial responsibility and credit which will assure good faith performance.

*Significant Business Presence* means that in order to qualify for participation as an S/M/WBE firm in the EBO Program, the initial designated street address of the S/M/WBE firm's principal office as stated in its filings with the Florida Department of State must be located within Palm Beach County, or the firm must have a *significant business presence* for at least one year within Palm Beach County, defined as: an established place of business in Palm Beach County, from which at least 50% of its total full-time, part-time and contract employees are domiciled and regularly based in Palm Beach County, and from which a substantial role in the S/M/WBE's performance of a Commercially Useful Function on the County contract is conducted. A location utilized solely as a post office box, mail drop or telephone message center or any combination thereof, with no other substantial work function, shall not be construed to constitute a significant business presence.

*Small Business Enterprise (SBE)* means a corporation, partnership, sole proprietorship, or other legal entity for the purpose of making a profit that: (1) is independently owned and operated by individuals legally

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residing in, or that are citizens of, the United States or its territories; and (2) is currently certified as having annual revenues and / or number of employees that satisfy S/M/WBE size standards on an industry-specific basis (i.e., Construction, CCNA Professional Services including Architectural and Engineering Design firms, Professional Services, Goods, and Other Services) that are reflected in Exhibit Q to the PPM; and (3) also is domiciled in Palm Beach County and satisfies the Significant Business Presence and other eligibility requirements for participation in the EBO Program as defined herein. The initial size standards for SBE firms are as follows, and may be periodically revised by the Director of the Office of EBO as necessary to satisfy and better serve the purposes and objectives of this EBO Program Ordinance, and shall thereafter be reflected in Exhibit Q of the PPM:

- (1) For a provider of Construction Services, the annual gross revenue shall not exceed nine million dollars (\$9,000,000.00) (averaged over the previous three (3) most recent years, or if in business less than three (3) years, averaged over the duration of the provider's existence).
- (2) For a provider of Goods, the annual gross revenue shall not exceed five million dollars (\$5,000,000.00) (averaged over the previous three (3) most recent years, or if in business less than three (3) years, averaged over the duration of the provider's existence)
- (3) For a provider of Professional Services procured pursuant to the CCNA statute, the average annual gross revenues shall not exceed five million dollars (\$5,000,000.00) (averaged over the previous three (3) most recent years, or if in business less than three (3) years, averaged over the duration of provider's existence).
- (4) For a provider of other Non-CCNA Professional Services, the average annual gross revenue shall not exceed four million dollars (\$4,000,000.00) (averaged over the previous three (3) most recent years, or if in business less than three (3) years, averaged over the duration of the provider's existence).
- (5) For a provider of Other Services, the average annual gross revenue shall not exceed four million dollars (\$4,000,000.00) (averaged over the previous three (3) most recent years, or if in business less than three years, averaged over the duration of the provider's existence).

In addition, the Director of the Office of EBO is authorized to establish a second tier size standard for Emerging SBEs that are eligible for small sheltered market contracts; and whose size standards are 50% or less than the size standards for SBEs. If, and when, established, the size standards for Emerging SBEs and Emerging M/WBEs shall be 50% or less of the sizes of SBE size standards, and shall also be the posted in the PPM in Exhibit Q.

*Small/Minority/Women Business Enterprise (S/M/WBE)* means any for-profit business firm that is certified as being either small, minority, and/or women-owned, controlled, and managed.

*S/M/WBE Directory* means a compilation of certified, graduated, and/or suspended small businesses and M/WBEs which is maintained electronically and posted on the County website by the Office of Equal Business Opportunity and made available to contractor(s) or vendor(s) for use in identifying subcontractors, material suppliers, etc.

*Solicitation* is a generic term for an invitation that is issued by the County to prospective bidders, vendors, or contractors asking them to compete for County commercial contract awards for specified goods or services through response to either an Invitation for Bid or a Request for Proposal.

*Subcontractor* means any vendor or contractor that is providing goods or services to a prime contractor

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in direct furtherance of the prime contractor's performance of a defined scope of work or deliverables under a contract or purchase order with the County. A copy of the executed binding agreement between the prime contractor and the subcontractor shall be submitted prior to the County's issuance of a notice to proceed to the prime contractor.

*Subsidiary* means a company whose controlling interest is owned by another company. A subsidiary cannot be considered an independent business.

*Supplier* means a business that supplies goods or materials. A supplier may be distinguished from a contractor or subcontractor who commonly adds specialized services or input to deliverable commodities.

*Women Business Enterprise (WBE)* means any legal entity, except a joint venture, that is organized to engage in for-profit transactions, that is certified for purposes of the EBO Program as being at least fifty-one percent (51%) owned, managed, and under the control of one (1) or more non-minority women individuals of legal majority age that are lawfully residing in, or are citizens of, the United States or its territories, that is ready, willing, and able to sell goods or services that are purchased by the County, and that meets the domicile and Significant Business Presence requirements as defined herein. In order to be eligible for participation in S/M/WBE APIs, the WBE firm shall be currently certified as being in compliance with the size standards as reflected in Exhibit Q, and as having satisfied all eligibility requirements to participate in the EBO Program. Unless otherwise stated, the term WBE as used in this Program is not inclusive of minority-owned business enterprises (MBE).

All terms not specifically defined herein, but defined in the county's purchasing ordinance, chapter 2, article III, division 2, part A of the County Code, as may be amended, shall carry the definition therein described.

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### **Sec. 2-80.22. Scope and Exclusions.**

This Part shall apply to the Solicitation of all goods, services and construction by the county which are governed by the County purchasing ordinance (sections 2-51—2-57 of the County Code, as may be amended). including, but not limited to, every contract or other agreement between the County and any governmental agency, quasi-governmental agency, corporation, vendor, or contractor, under which the agency, corporation, vendor, or contractor directly or indirectly receives any fiscal assistance or remuneration from the County for the purpose of contracting with businesses to perform construction, professional services, goods, or other services contracts, or for the purpose of directly or indirectly purchasing goods or services for use by the County. As such, the County shall require the agency, corporation, vendor, or contractor to comply with this EBO Program Code in the solicitation, the award, and administration of that contract or agreement, provided; however, that the following categories of contracts shall be excluded from the scope and application of this EBO Program:

- a. Contracts for the purchase of goods or services of a unique nature for which the County's Purchasing Department determines and confirms there is only a sole source of supply;
- b. Contracts for electricity or water and sewage services from a municipal utility district or governmental agency;
- c. Emergency contracts for goods or supplies that the County Administrator or designee determines are necessary for the preservation of public health or safety and whose immediacy of need is so great that it is impractical for the County to apply the terms of this EBO Program to the contract;
- d. Contracts for the County's lease or purchase of real property where the County is lessee or purchaser;
- e. Contracts for personal services involving the unique abilities or style of a particular individual;
- f. Contracts or grants where conditions established by law or by external sources of funding prohibit application of the EBO Program; and
- g. Any other contracts or agreements that are expressly excluded from, or beyond the scope of, the Purchasing Code.

### **Sec. 2-80.23. Office of Equal Business Opportunity.**

The Equal Business Opportunity ("EBO") Program will be administered and managed by the Director of the Office of EBO. The Director of the Office of EBO shall be managed by, and report directly to, the County Administrator. The Director of the Office of Equal Business Opportunity or designee shall attend all County Board meetings to address any Equal Business Opportunity Program issues that are addressed by the Board's meeting agenda. The Office of EBO also shall be primarily responsible for the application of Affirmative Procurement Initiatives under the EBO Program preferences, the Local Business Enterprise preferences, recommendations to the Purchasing Department and the Office of the County Attorney regarding imposition of corrective actions and sanctions for non-compliance with EBO Policies, Programs, and Procedures, and other administrative reforms that serve the objectives of this Part.

A representative of the Office of EBO shall serve as a voting selection panel member for the award of

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all “best value” contracts of the County where low price is not the sole determining factor in contract award decisions. The role of the Office of EBO representative on such selection panels is to promote fairness in scoring that does not improperly favor large and incumbent firms over the comparable meaningful qualifications of S/M/WBE firms.

In addition, all prospective Formal Solicitations shall be reviewed in advance by the Office of EBO for the purpose of recommending elimination of unnecessarily restrictive contract specifications that may serve as barriers or impediments to S/M/WBE participation. The Office of EBO shall, when appropriate, recommend de-bundling of large contracts to the Purchasing Department and the Originating Department when such de-bundling may substantially increase S/M/WBE contract opportunities and participation without imposing an undue burden on the County in terms of contract management or cost.

The Goal Setting Committee shall determine which, if any, Affirmative Procurement Initiatives shall be applied to each County Solicitation. The County Administrator shall make the final determination whenever consensus cannot be reached between the Office of EBO, the Purchasing Department, and the Originating Department regarding proposed contract specifications and modifications to same.

#### **Sec. 2-80.24. Commercial Nondiscrimination Policy.**

##### a. Statement of Policy

It is the policy of the County not to enter into a contract or to be engaged in a business relationship with any business entity that has discriminated in the solicitation, selection, hiring or commercial treatment of vendors, suppliers, subcontractors or commercial customers on the basis of race, color, national origin, religion, ancestry, sex, age, marital status, familial status, sexual orientation, gender identity or expression, disability, or genetic information, or on the basis of any otherwise unlawful use of characteristics regarding the vendor's, supplier's or commercial customer's employees or owners; provided that nothing in this policy shall be construed to prohibit or limit otherwise lawful efforts to remedy the effects of discrimination that have occurred or are occurring in the relevant marketplace for Palm Beach County.

##### b. Policy Implementation

The Office of EBO shall implement this policy by periodically conducting outreach and by distributing educational materials to the County's contracting and vendor community and related trade associations to advise such contractors, vendors and prospective respondents of this policy and the procedures to be followed in submitting complaints alleging violations of this policy. In addition, the County Administrator, the Director of Purchasing, and the Office of the County Attorney shall ensure that the following commercial nondiscrimination clause language is set forth in, and incorporated into, all the County contracts that result from Formal Solicitations:

#### **Every contract and subcontract shall contain a nondiscrimination clause that reads as follows:**

"As a condition of entering into this agreement, the company represents and warrants that it will comply with the County's Commercial Nondiscrimination Policy as described under Part C, Section 2-80.24 of the County's Purchasing Code. As part of such compliance, the company shall not discriminate on the basis of race, color, national origin, religion, ancestry, sex, age, marital status, familial status, sexual orientation, gender identity or expression, disability, or genetic information in the solicitation, selection, hiring or commercial treatment of subcontractors, vendors, suppliers, or commercial customers, nor shall the company retaliate against any person for reporting instances of such discrimination. The company shall

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provide equal opportunity for subcontractors, vendors and suppliers to participate in all of its public sector and private sector subcontracting and supply opportunities, provided that nothing contained in this clause shall prohibit or limit otherwise lawful efforts to remedy the effects of marketplace discrimination that have occurred or are occurring in the County's relevant marketplace in Palm Beach County. The company understands and agrees that a material violation of this clause shall be considered a material breach of this agreement and may result in termination of this agreement, disqualification or debarment of the company from participating in County contracts, or other sanctions. This clause is not enforceable by or for the benefit of, and creates no obligation to, any third party."

#### **All Formal Solicitations issued for County contracts shall require the following certification to be affirmed by the Respondent:**

"The undersigned Respondent hereby certifies and agrees that the following information is correct:

In preparing its response on this Solicitation, the Respondent has considered all proposals submitted from qualified, potential Subcontractors and suppliers, and has not engaged in "discrimination" as defined in the County's Commercial Nondiscrimination Policy as set forth in Part C Section 2-80.24 of the County's Purchasing Code, to wit: discrimination in the solicitation, selection or commercial treatment of any Subcontractor, vendor, supplier or commercial customer on the basis of race, color, national origin, religion, ancestry, sex, age, marital status, familial status, sexual orientation, gender identity or expression, disability, or genetic information, or on the basis of any otherwise unlawful use of characteristics regarding the vendor's, supplier's or commercial customer's employees or owners; provided that nothing in this policy shall be construed to prohibit or limit otherwise lawful efforts to remedy the effects of discrimination that have occurred or are occurring in the County's relevant marketplace of Palm Beach County. Without limiting the foregoing, "discrimination" also includes retaliating against any person or other entity for reporting any incident of "discrimination." Without limiting any other provision of the solicitation for responses on this project, it is understood and agreed that, if this certification is false, such false certification will constitute grounds for the County to reject the response submitted by the Respondent for this Solicitation, and to terminate any contract awarded based on the response. As part of its response, the Respondent shall provide to the County a list of all instances within the immediate past four (4) years where there has been a final adjudicated determination in a legal or administrative proceeding in the State of Florida that the Respondent discriminated against its Subcontractors, vendors, suppliers or commercial customers, and a description of the status or resolution of that complaint, including any remedial action taken. As a condition of submitting a response to the County, the Respondent agrees to comply with the County's Commercial Nondiscrimination Policy as described under Part C, Sec. 2-80.24 of its Purchasing Code.

#### **Sec. 2-80.25. Factual Predicate and Purpose.**

1. This policy is adopted to establish an Equal Business Opportunity Program to remedy the ongoing effects of identified marketplace discrimination that the County has found continue to adversely affect the participation of Small/Minority and/or Women Business Enterprises ("S/M/WBE") in County contracts.
2. In November 2017, the County received and reviewed the Disparity Study Final Report ("the Study") conducted by Mason Tillman Associates, Ltd. ("MTA") on behalf of Palm Beach County ("County"). The MTA Disparity Study used a variety of methodologies and data sources to undertake a comprehensive examination of the relevant marketplace for County purchases for the 5-year Study period from January 1, 2009, through December 31, 2013. This Study identified a number of barriers, including various forms of marketplace discrimination that appear to have undermined the formation, growth, and equitable participation of minority- and women-owned businesses in County purchases and contracts. Among the

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numerous Study findings that form a strong basis in evidence to support adoption of this remedial EBO Program are the following:

- a) Statistically significant disparities in the award of prime contracts and subcontracts to M/WBE firms were found in every one of five industry segments examined (i.e., Construction, Professional Services, CCNA Professional Services, Goods, and Other Services). These disparities were calculated in compliance with the constitutional parameters set forth in *City of Richmond v. J.A. Croson (Croson)*, and its progeny, and established an inference that marketplace discrimination was affecting market outcomes. Disparity analysis undertaken within certain smaller dollar thresholds supported a conclusion that lack of capacity on the part of M/WBE firms did not cause or account for the identified disparities.
  - b) Inferences of marketplace discrimination were buttressed by regression analysis of PUMS data from the relevant geographic market that controlled for a number of variables in the characteristics of business owners, yet yielded significant disparities in business earnings despite comparable education levels, experience, credit worthiness, and age, and also unequal access to capital on the basis of race and gender. Moreover, regression analysis findings of lower business ownership rates for minority persons also supported the conclusion that significant private sector discrimination adversely affected availability of M/WBE firms in the non-remediated commercial markets in the County.
  - c) Qualitative evidence gathered from thirty-five in-depth interviews and two public hearings of M/WBE business owners (and further corroborated by public comments received during three subsequent Policy Deliberation Stakeholder Sessions held in July 2018) identified a number of discriminatory barriers adversely affecting the utilization of ready, willing, and able M/WBE firms. Among these were good old boy networks, a strong bias in favor of incumbent non-minority firms over similarly qualified M/WBE firms on the part of County selection panels, ineffectiveness of a race-neutral SBE program since 2002 in eliminating M/WBE utilization disparities, active and passive participation by County personnel in commercial discrimination, disparate treatment in the award of contracts by the County and by its prime contractors, as well as negative stereotypical attitudes exhibited by some prime contractors and by some County personnel regarding the capabilities of M/WBE firms.
3. January 23, 2018, the County's legal consultant, Franklin Lee, presented to the Board his independent and in-depth review and critique of the legal defensibility of the Study's methodologies, data sources, findings, and recommendations. Based, in part, upon that review and presentation, the Board accepted the Study as establishing a sufficiently strong basis in evidence for undertaking further policy deliberations regarding its SBE Program and proposed amendments to that policy.
  4. During the month of July 2018, the County convened a series of internal stakeholder sessions with County procurement and contracting staff, and a series of external stakeholder sessions with local business stakeholders (large businesses, small businesses, M/WBE, non-M/WBE, and trade association representatives) representing each industry segment examined in the Study, for purposes of corroborating, refuting, and supplementing relevant findings from the study, and for purposes of developing legally defensible policy options to address identified barriers to M/WBE participation to be presented for the Board's consideration. Based upon the internal stakeholder and



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external stakeholder feedback received regarding the Study findings and recommendations, legal consultant Franklin Lee prepared a Policy Option Matrix document to summarize the justifications, pros, and cons for various remedial options that were narrowly tailored to address identified barriers to M/WBE participation in County contracts.

5. August 14, 2018, the County Board convened a workshop session for purposes of reviewing and discussing the merits of the Policy Option Matrix developed by legal consultant Franklin Lee. The Policy Option Matrix reflected a comprehensive menu of legally defensible administrative reforms, race- and gender-neutral, and race- and gender-conscious remedial policies and program options that were tied to specific findings in the Study, as well as to the County's broader factual predicate.
6. In September 2018, a draft of this EBO Ordinance based upon the Policy Option Matrix and stakeholder feedback was presented to County Staff and to stakeholders for review and public comment. The Board's first reading of the Ordinance was then scheduled for October. In October 2018, the Board enacted this Ordinance.

### **Sec. 2-80.26. Administrative Reforms.**

In furtherance of the objectives of this EBO Program, the County Administrator or designee shall be responsible for implementing the following procurement policy reforms and non-industry-specific remedies to address ongoing effects of discrimination that adversely affect M/WBE access to public and private sector contracting opportunities and that will further facilitate the efficient implementation and successful enforcement of the EBO Program:

#### 1. Centralized Bidder Registration System / Data Management Enhancements

Establish and maintain a user-friendly automated web-based centralized bidder registration system capable of tracking availability of all prime and subcontractors interested in performing on County contracts by industry segment and commodity codes that represent the types of goods and services sold by each registrant firm, and tracking utilization of registrant firms by the County dollars spent with each firm at the prime contract and subcontract levels. Registration in this system should be mandatory for every prime contractor and subcontractor that is ready, willing, and qualified to sell some good or service that the County purchases, and that wants to be solicited to bid on County contracts or subcontracts, that wants to participate on County contracts as a prime contractor or subcontractor, and/or that wants to have an invoice processed and paid by the County for goods and services it has provided on behalf of the County. The CBR should be fully integrated with the County's VSS vendor registration system, S/M/WBE certification system, vendor financial systems, and accounting systems. The CBR system should include capabilities that enable the Office of EBO to monitor progress on each County contract (including multi-year contracts and change orders) to determine whether prime contractors are on target to satisfy their S/M/WBE participation commitments, and to enable appropriate intervention by the County to avoid non-compliance by prime contractors in satisfaction of S/M/WBE participation commitments. CBR-generated estimates of relative S/M/WBE availability by commodity code shall be used by the GSC in setting annual and contract-specific SBE and M/WBE participation Goals. Each CBR bidder profile established by a registrant firm shall be password protected and accessible to editing of most fields by the registrant firm. CBR registrations shall be subject to mandatory renewal on a periodic basis. The detailed specifications for the CBR's functionalities and the fields of information that it captures (e.g., CBR ID number, registrant firm ethnicity / gender ownership status and S/M/WBE certification status, prime contractor / subcontractor status, contact info, business and trade

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licenses, tax identification numbers, textual descriptions of goods and services sold, primary commodity codes, and website address) shall be established by the County and posted in the PPM.

#### 2. Solicitation Review

Each Formal Solicitation issued by the County shall be referred to the Office of Equal Business Opportunity ("EBO") Office and the Director of Purchasing sufficiently in advance of publication to determine whether it contains any terms, conditions, contract bundling features, or selection criteria that may unnecessarily restrict competition or adversely impact the ability of S/M/WBE firms to respond or to participate as subcontractors. If such objectionable terms, conditions, contract bundling features, or selection criteria (including brand name specifications or onerous and unreasonable experience requirements) are identified through this review process, the Director of Purchasing, the Director or designee of the Office of EBO, and the Project Manager for the Originating Department shall seek consensus in developing an acceptable modification to the Solicitation. In the event consensus cannot be reached, the County Administrator or designee shall make a final determination regarding the proposed modifications to the Solicitation.

#### 3. De-bundling / Repackaging of Solicitations

Each Formal Solicitation issued by the County shall be referred to the Office of EBO in advance of publication to determine whether it contains any specifications that may unnecessarily restrict competition or adversely impact the ability of S/M/WBE firms to respond or participate as subcontractors. Such review shall also consider whether it is feasible to de-bundle the contract by reducing the size of the procurement or contract to maximize participation opportunities for S/M/WBE prime contractors and subcontractors without imposing undue costs or administrative burdens upon the County. Similarly, such review shall also consider whether smaller contracts should be aggregated into somewhat larger contract opportunities that will render such contracts more feasible and profitable for available S/M/WBE firms to undertake. If such objectionable specifications are identified through this review process, the Director of the Office of EBO, the Director of Purchasing, and the Director or designee for the Originating Department, shall seek consensus in developing an acceptable modification to the specification. In the event consensus cannot be reached, the County Administrator or designee shall make a final determination regarding the proposed modifications to the specification.

#### 4. Subcontract Remedies (Mobilization / Working Capital / Direct Payments)

The County Administrator, in collaboration with the Director of the Office of EBO and the Director of Purchasing, and in consultation with the Banking Consortium, shall establish and convene a work group of County personnel to research, explore, and recommend a variety of options for better addressing the working capital needs of S/M/WBE firms on County prime contracts and subcontracts. Such options shall include, but not be limited to, models for providing initial start-up mobilization fees to prime contractors and subcontractors in advance of first-phase contract performance; revolving working capital funds administered by third parties; direct payment by County of subcontractor invoices in limited circumstances (with approval of prime contractors); and assistance with, or facilitation of, equipment or fleet purchases or leases and acquisition of specialized equipment. The work group should conclude its research and present its findings and recommendations for consideration by the County Administrator within six month of enactment of this Ordinance.

#### 5. Uniform Lead Time for Bid Submittals

In the interest of providing a fair opportunity for smaller firms to compete for County contracts, and for purposes of maximizing competition, absent emergency purchases necessary to protect public health or safety, all routine Requests for Quotations, Requests for Proposals, and other forms of Solicitations shall have

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a closing date that is at least thirty calendar days after the date such SSolicitation is issued publicly.

#### 6. Debriefings for Unsuccessful Bidders

For any contract in which the S/M/WBE has submitted a bid or proposal in response to a Formal Solicitation and subsequent evaluation of responses in accordance with a “Best Value Contracting” method of procurement, the Director of the department issuing the solicitation, or of the department on whose behalf the solicitation was issued, or their designees, shall provide a de-briefing to any non-recommended Respondent, upon request. At a minimum, debriefings shall include disclosures of scoring criteria and scores from the evaluation panel responsible for making the selection for each response that was evaluated. To the extent possible, the de-briefing should also identify for each non-recommended Respondent those areas where its submittal was not as competitive as others, with an explanation as to why. Bid solicitation language and the Office of EBO shall encourage unsuccessful Respondent bidders to avail themselves of such bid-debriefing opportunities.

#### 7. Expedited Payment Program

The County Administrator, in collaboration with the Director of the Office of EBO, the Office of Financial Management and Budget, and the Director of Purchasing, shall establish and convene a work group of County personnel to research, explore, and recommend a variety of options for accelerating payment of invoices in ten days or less. Such options shall include consideration of incentives such as acceptance of percentage discount offers in contractor / vendor invoices that are paid by County within ten or fewer days of receipt. Streamlining of the invoice approval process shall also be part of focus of this work group. Moreover, the work group shall explore the feasibility of inserting clauses into contracts that enable prime contractors to authorize the County to directly pay undisputed invoices from subcontractors that are over thirty days old, and to deduct such amounts from the prime contractor’s invoice when other disputes or issues unrelated to subcontractors’ performance are delaying the County’s payment to the prime. The intent of the Expedited Payment Program is to attract more bidders, enhance competition, and obtain lower prices on behalf of the County and its taxpayers. The work group should conclude its research and present its findings and recommendations for consideration by the County Administrator by no later than six months after enactment of this Ordinance.

#### 8. Disputed Invoices – Ten Day Notice Requirement

Within ten days of the County’s receipt of any payment request or invoice from a contractor or vendor, the County shall notify such contractor or vendor in writing regarding any and all deficiencies in its payment request or invoice that will prevent prompt processing and issuance of payment. To the extent there is an undisputed portion of the invoice that can be paid, the County shall proceed with prompt payment of that portion of the invoice.

#### 9. Re-evaluation of Evaluation Panel Procedures

The County Administrator shall convene a work group comprised of the Director of the Office of EBO, the Director of Purchasing, and the Directors of each Originating Department for purposes of revisiting the procedures that are followed during evaluation panel interviews and/or scoring of proposals and respondent teams for purposes of vendor selection on best value contracts. Specifically, consideration should be given to limiting comments on prospective respondents to persons serving on the evaluation panels, and also to establishing an opportunity for debriefing and open discussion by evaluation panel members prior to scoring of proposals and/or respondent teams that are under consideration. The intent of this provision is to facilitate more transparency and accountability among evaluation panel members for the scores that each submits.

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### 10. Prior Approval of S/M/WBE Subcontractor Substitutions

Upon submittal of any subcontracting plan or any subcontract agreements from a prime contractor to the County that state the names of proposed S/M/WBE subcontractors and their respective scopes of work, as well as the prime contractor's commitment for dollar payments to (and/or percentage utilization of) S/M/WBE subcontractors for their performance on a specific contract bid, proposal, or contract, the prime contractor may not substitute any other subcontractor (S/M/WBE or otherwise) for performance of such scopes of work without obtaining prior written approval for cause for such substitutions from the Office of Equal Business Opportunity.

### 11. Staff Training re: EBO Program Policies and Procedures

The Office of EBO shall coordinate and provide for annual staff training of key County personnel regarding the EBO Program Ordinance, policy, and procedures, including, but not limited to, instruction on the purpose and objectives of the program, and staff responsibilities in implementing the EBO Program and related procedures.

## **Sec. 2-80.27. Affirmative Procurement Initiatives.**

The Goal Setting Committee shall be established by the County Administrator as defined herein and shall have the responsibility of evaluating Solicitation documents at least fourteen days in advance of scheduled posting an advertisement or release of the Solicitation to the public to determine which of the following industry-specific Affirmative Procurement Initiatives (APIs) shall be applied to a given contract within a particular industry. After the GSC makes a decision regarding the application of an API, the Director of Purchasing, in collaboration with the Director of the Office of EBO, and the County Attorney shall then be responsible for inserting the appropriate language in each Solicitation to effectuate the application of the selected API to that Solicitation in advance of its publication and release. The Affirmative Procurement Initiatives may be considered by the GSC as follows:

1. Construction Industry (Race- and Gender-Neutral Remedies)
  - a. Bond Waiver and Assistance Programs

The County Administrator shall establish a work group of County personnel to research, consider, and recommend a variety of "best practice" models from the State of Florida and across the nation for providing bond waivers and other forms of bonding assistance to S/M/WBE firms. To the extent feasible, bonds should continue to be waived for contracts below \$200,000. In addition, the work group should research and consider other models that shall include, but not be limited to, technical assistance, Owner Controlled Insurance Programs ("OCIP"), bond premium cost reimbursements, incremental bonding requirements for multi-year projects, and bond guarantee programs. The work group shall report its findings and recommendations to the County Administrator no later than six months following enactment of this Ordinance.

- b. Revised Single Trade Contracting Program for Small Contracts

The County's program for direct purchases of single trade services shall be revised and expanded to include informal contracts that are less than \$100,000. Contract renewals for such single trade contracts shall be limited to two years. As feasible, the County may also assign task orders under such single trade contracts on a rotating basis to a panel of five or more prequalified SBE firms. The panel shall be re-ordered in priority periodically from the firm with the least dollars received to firm with the most dollars received. The

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County may negotiate price on a time and materials basis for assignment of tasks under this API.

#### c. Revised Minor Construction Annual Prime Contract Program / SBE Sheltered Market

The County's Minor Construction Annual Prime Contract Program shall be revised and shall be limited to prime construction contracts awarded to SBE firms that are valued at five million dollars (\$5 million) or less, and shall have one-year terms with no more than two one-year options for extensions based upon satisfactory performance. For best value contracts for construction that use alternative delivery methods (e.g., CM at Risk or Design/Build), this program shall provide for evaluation preferences up to 15% of total evaluation points based upon SBE participation. Moreover, the Goal Setting Committee may reserve a subset of small prime contracts valued at or below \$100,000 for sheltered market competition solely among SBEs, or alternatively, the GSC may reserve Decentralized Purchase Order contracts that are valued below \$5,000 for placement in a sheltered market where only certified SBEs are eligible to submit bids or quotes. Size standards for participating SBE construction prime contractors shall be established in accordance with Exhibit Q in the PPM.

#### d. SBE Subcontracting Program

Under this API, the County establishes a minimum mandatory goal of 20% SBE participation for County contracts, provided that the Office of Equal Business Opportunity shall agree to a reasonable reduction or waiver of this goal in instances where it can be factually demonstrated that there is inadequate availability of SBE prime and / or subcontractor firms qualified to perform Commercially Useful Functions that are valued at 20% of the total estimated dollar value of the County contract. Prospective bidders shall be provided an adequate opportunity to formally request such waivers at least seven (7) days prior to bid opening based upon submission of adequate Good Faith Efforts documentation as specified by the Office of EBO and as stated in bid solicitation language.

Factors to be considered by the GSC in making this determination shall include the relative availability of SBE firms to perform Commercially Useful Functions on the specific contract.

A prospective Respondent, to a County Solicitation for which price and scope are defined, shall submit at the time as required in the Solicitation such documentation as required by the Office of EBO that provides:

- i. The name(s) of the SBE Subcontractor(s) it intends to use on the project;
- ii. The percentage of prime contract dollars and the absolute dollar value of subcontracting services to be provided by each SBE;
- iii. A description of the work that each SBE Subcontractor shall perform; and
- iv. Documentation confirming the Subcontractor's commitment to perform the work at the stated price.

A prospective Respondent on a County Solicitation for which Respondents are not initially evaluated based on price, or for which the project scope is not predefined, shall submit as required in the solicitation such documentation as required by the Office of EBO to affirm its intent to meet the subcontracting requirements indicated in the Solicitation. Failure of a Respondent to commit as required in the solicitation to satisfying the SBE subcontracting goal shall render its response non-responsive.

During the price proposal negotiation phase, Respondents shall be required to submit:

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- i. Subcontractor(s) it intends to use on the project;
- ii. The percentage of prime contract dollars and the absolute dollar value of subcontracting services to be provided by each SBE;
- iii. A description of the work that each SBE Subcontractor shall perform; and
- iv. Documentation confirming the Subcontractor's commitment to perform the work at the stated price.

A Respondent may request a full or partial waiver of this mandatory subcontracting requirement for good cause by submitting the appropriate form(s) and documentation at the time as required in the Solicitation. Under no circumstances shall a waiver of a mandatory subcontracting requirement be granted without submission of adequate documentation of Good Faith Efforts by the Respondent and careful review by the Office of EBO. The Office of EBO shall base its determination of a waiver request on criteria such as, but not limited to:

- i. Whether the requestor of the waiver has made Good Faith Efforts to subcontract with qualified and available SBEs;
- ii. Whether subcontracting would be inappropriate and/or not provide a "Commercially Useful Function" under the scope of the contract; and
- iii. Whether there are no certified SBE firms that are qualified and available to provide the goods or services required.

In the absence of a waiver granted by the Office of EBO, failure of a Prime Contractor to commit as required in the Solicitation to satisfying the SBE subcontracting goal shall render its response non-Responsive. Provided, however, that on any prime contract valued under \$10 million, if the Prime Contractor is a certified SBE firm, then the Prime Contractor is allowed to self-perform up to the entire SBE subcontracting goal amount with its own forces. To the extent that the certified SBE Prime Contractor does not self-perform a portion of the SBE subcontracting goal, it shall be responsible for complying with all other requirements of this API for that portion of work that is subcontracted. This self-performance option for certified SBE Prime Contractors may be suspended at the discretion of the Director of the Office of EBO or designee in the event it determines that the adverse cumulative effect of the use of this self-performance option upon subcontractor opportunities is too great.

In the absence of a waiver granted by the Office of EBO or the self-performance of a portion or all of the SBE subcontracting goal by a certified SBE Prime Contractor, the failure of a Prime Contractor to attain a subcontracting goal for SBE participation in the performance of its contract or otherwise comply with the provisions of this API shall be considered a material breach of contract, grounds for termination of that contract with the County, and shall be subject to any penalties and sanctions available under the terms of the EBO Program, its contract terms with the County, or by law.

A Prime Contractor is only permitted to substitute another subcontractor for a designated SBE subcontractor for cause, and is required to notify and obtain prior written approval from the Office of EBO in advance of any such substitution of a designated SBE subcontractor, or reduction in subcontract scope, unless such reduction in scope is the direct and immediate result of a County-mandated change order or contract amendment, or the County has mandated the de-Certification, suspension, debarment, graduation or termination of a designated SBE Subcontractor. However, under such circumstances, the Prime

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Contractor shall undertake Good Faith Efforts to replace the de-certified, suspended, debarred, graduated or terminated SBE with one or more other certified SBE Subcontractors and shall submit a post-contract award waiver request to the Office of EBO in the event such Good Faith Efforts are unsuccessful.

Upon award of the prime contract to a Respondent, the Prime Contractor shall be required to submit accurate progress payment information with each invoice regarding each of its Subcontractors, including SBE Subcontractors. The Originating Department shall audit the reported payments to SBE and non-SBE Subcontractors to ensure that the Prime Contractor's reported subcontract participation is accurate. County contracts with Prime Contractors shall include clauses requiring Prime Contractors to pay Subcontractors in compliance with Florida prompt payment laws, and such clauses shall mandate that in the event of a Prime Contractor's non-compliance regarding such payments, the Prime Contractor shall be subject to any penalties and sanctions available under the terms of the EBO Program Ordinance, its contract terms with the County, or by law.

#### e. SBE Mentor-Protégé Program

The County Administrator shall establish a work group of County personnel and construction industry and surety industry stakeholders to research, consider, and recommend a variety of "best practice" models from the State of Florida and across the nation for mentor-protégé programs to facilitate the successful growth and competitive viability of S/M/WBE firms in the construction industry. Such models for purposes of research and consideration shall include, but not be limited to, programs that team up more established and successful construction firm mentors with less established SBE firms for purposes of providing management guidance and training; programs that provide incentives to mentor firms by reserving certain contracts for competition upon approved mentor-protégé teams; and also programs that provide other incentives to mentor-protégé teams such as accelerated payments, access to working capital funds, and direct purchasing of supplies by County on behalf of mentor-protégé teams. The work group shall report its findings and recommendations to the County Administrator no later than six months after enactment of this Ordinance.

## 2. Construction Industry (Race- and Gender-Conscious Remedies)

The Goal Setting Committee (GSC) shall consider establishment of an overall M/WBE Annual Aspirational Goal in accordance with subsection 'a' below and, in addition, shall review each prospective County Construction Formal Solicitation in advance of its public release and advertisement, and shall make a determination whether to apply any of the other Race-Conscious APIs to those Construction solicitations based upon the following criteria:

- i. Whether the most recent data on M/WBE utilization in the absence of Race-Conscious APIs indicate that Construction contracts of this type have exhibited significant disparities in the utilization of available M/WBE Subcontractors and/or M/WBE Prime Contractors;
- ii. Whether race- and/or gender-neutral remedies alone are likely to fully eliminate any such disparities in the utilization of M/WBE Subcontractors and/or M/WBE Prime Contractors based upon past contract Award and Payment data;
- iii. Whether a particular API is the least burdensome available remedy to non-M/WBE Respondents that is narrowly-tailored and that can effectively eliminate the disparities in the utilization of M/WBEs in

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Construction contracts; and

- iv. Whether the particular API is appropriate for the specific type of Construction contract being procured.

Whenever the GSC uses its discretion to apply any of the following Race-Conscious APIs to Construction solicitations, it shall provide an explanation in the solicitation documents of its reasons for doing so based upon its determinations pursuant to these criteria. In making such determinations, the GSC may also take into consideration the experiences of other jurisdictions within Palm Beach County for Construction services.

#### a. Annual Aspirational Goals

For each fiscal year, the GSC shall establish non-mandatory annual aspirational percentage goals for overall M/WBE prime and subcontract participation on County Construction contracts.

The Annual Aspirational Goals for M/WBE prime contract participation in County Construction contracts have initially been established at 28% MBE and 13% WBE respectively of the total cumulative construction prime contract dollars to be awarded and spent on an annual basis, and at 24% MBE and 14% WBE respectively of the total cumulative construction subcontract dollars to be awarded and spent on an annual basis. These annual aspirational goals are based upon the M/WBE availability estimates by industry set forth in accordance with the County's 2017 Disparity Study findings.

Each Annual Aspirational Goal is to be reviewed on an annual basis for potential adjustment by the GSC based upon the M/WBE availability by industry segment in accordance with the County's 2017 Disparity Study findings, along with relative M/WBE availability data to be collected by the County through its CBR system, and the actual utilization of M/WBEs reflected therein.

Annual Aspirational Goals shall not to be routinely applied to individual solicitations, but are intended to serve as a benchmark against which to measure the overall effectiveness of the EBO Program on an annual basis in addressing identified disparities, and to gauge the need for future adjustments to the mix and aggressiveness of remedies and APIs being applied pursuant to this EBO Program Ordinance.

Annual Aspirational Goals may be stated only in those County bid solicitations that do not contain contract-specific S/M/WBE goals, and when provided, shall be advisory only, and must also be accompanied by the full definition of the term as stated in this EBO Program Ordinance.

#### b. M/WBE Subcontracting Goals

The GSC may, on a contract-by-contract basis, require that a predetermined percentage of a specific Construction contract, up to 40%, be subcontracted to eligible M/WBEs (i.e., certified M/WBE firms owned by African Americans, Hispanic Americans, Asian Americans, Native Americans, and non-minority women). Factors to be considered by the GSC in making this determination shall include the relative availability of M/WBE firms to perform Commercially Useful Functions on the specific contract weighted according to the relative dollar value of the construction sub-specialties available for subcontracting.

A prospective bidder on a County solicitation, for which price and scope are defined, shall submit at the time as required in the solicitation such documentation as required by the County that provides:



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- i. The name(s) of the M/WBE Subcontractor(s) it intends to use on the project;
- ii. The percentage of prime contract dollars and the absolute dollar value of subcontracting services to be provided by each M/WBE;
- iii. A description of the work that each M/WBE Subcontractor shall perform; and
- iv. Documentation confirming the Subcontractor's commitment to perform the work at the stated price.

A prospective Respondent to a County solicitation, for which Respondents are not initially evaluated based on price, or for which project scope is not predefined, shall submit at the time as required in the solicitation such documentation as required by the County to affirm its intent to meet the subcontracting requirements indicated in the solicitation. In the absence of a waiver granted by the Office of EBO, failure of a Respondent to commit as required in the solicitation to satisfying the M/WBE subcontracting goal shall render its response non-Responsive.

During the price proposal negotiation phase, Respondents shall be required to submit:

- i. The name(s) of the M/WBE Subcontractor(s) it intends to use on the project;
- ii. The percentage of prime contract dollars and the absolute dollar value of subcontracting services to be provided by each M/WBE; and
- iii. A description of the work that each M/WBE Subcontractor shall perform.

A Respondent may request a full or partial waiver of this mandatory subcontracting requirement for good cause by submitting the appropriate form(s) and documentation at the time as required in the Solicitation. Under no circumstances shall a waiver of a mandatory subcontracting requirement be granted without submission of adequate documentation of Good Faith Efforts by the Respondent and careful review by the Office of EBO. The Office of EBO shall base its determination on a waiver request on criteria such as, but not limited to:

- i. Whether the requestor of the waiver has made Good Faith Efforts to subcontract with qualified and available M/WBEs;
- ii. Whether subcontracting would be inappropriate and/or not provide a "Commercially Useful Function" under the scope of the contract; and
- iii. Whether there are no certified M/WBE firms that are qualified and available to provide the goods or services required.

In the absence of a waiver granted by the Office of EBO, failure of a Prime Contractor to commit as required in the solicitation to satisfying the M/WBE subcontracting goal shall render its response non-Responsive. Provided, however, that on any prime contract valued under \$10 million, if the Prime Contractor is a certified M/WBE firm, then the Prime Contractor is allowed to self-perform up to the entire M/WBE subcontracting goal amount with its own forces. To the extent that the certified M/WBE Prime Contractor does not self-perform a portion of the M/WBE subcontracting goal, it shall be responsible for complying with all other requirements of this API for that portion of work that is subcontracted. This self-performance option for certified M/WBE Prime Contractors may be suspended at the discretion of the Director of the Office of EBO in the event he or she determines that the adverse cumulative effect of the use of this self-performance

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option upon subcontractor opportunities is too great.

In the absence of a waiver granted by the Office of EBO, or the self-performance of a portion or all of the M/WBE subcontracting goal by a certified M/WBE Prime Contractor, the failure of a Prime Contractor to attain a subcontracting goal for M/WBE participation in the performance of its contract or otherwise comply with the provisions of this API shall be considered a material breach of contract, grounds for termination of that contract with the County and shall be subject to any penalties and sanctions available under the terms of the EBO Program, its contract with the County, or by law.

A Prime Contractor is required to notify and obtain prior written approval from the Director of the Office of EBO in advance of any reduction in subcontract scope, unless such reduction in scope is the direct and immediate result of a County-mandated change order or contract amendment, or the County has mandated the de-Certification, suspension, graduation or termination of a designated M/WBE Subcontractor, However, under such circumstances, the Prime Contractor shall undertake Good Faith Efforts to replace the de-certified, suspended, graduated or terminated M/WBE Subcontractor(s) with one or more other certified M/WBE Subcontractor(s) and shall submit a waiver request to the Office of EBO in the event such Good Faith Efforts are unsuccessful.

Upon award of the prime contract to a Respondent, the Prime Contractor shall be required to submit accurate progress payment information with each invoice regarding each of its Subcontractors, including S/M/WBE Subcontractors. The Originating Department shall audit the reported payments to S/M/WBE and non-S/M/WBE Subcontractor to ensure that the Prime Contractors' reported subcontract participation is accurate. Absent a waiver from the Office of EBO, a Prime Contractor's failure to reach the required level of S/M/WBE subcontracting shall be considered a material breach of contract. County contracts with Prime Contractors shall include clauses requiring Prime Contractors to pay Subcontractors in compliance with Florida Prompt Payment Law, and such clauses shall mandate that in the event of Prime Contractor non-compliance regarding such payments, the Prime Contractor shall be subject to any penalties and sanctions available under the terms of the EBO Program, its contract with the County, or by law.

#### c. M/WBE Segmented Subcontracting Goals

Under this API, the GSC may establish M/WBE Segmented Subcontracting Goals on an individual County contract wherein an overall combined M/WBE goal is accompanied by subsets of one or more smaller goals that specifically target the participation of a particular segment of Minority Group Member segments or the WBE segment based upon that segment's relative availability. Such segmented goals shall specifically target the participation of a particular segment of business enterprises owned and controlled by women or certain Minority Group Members (e.g., African-Americans, Hispanic-Americans, Asian-Americans, or Native Americans) based upon relative availability, as well as the existence of consistently and significantly greater patterns of underutilization and disparity within an industry as compared to other gender and Minority Group Member categories of M/WBEs. (For example, if an overall M/WBE subcontracting goal is set at 38% on a given contract, the segmented subcontracting goal may require that at least 23% of that 38% shall be satisfied through the utilization of African American and Hispanic subcontractors.) The application of Segmented M/WBE Subcontracting Goals is intended to ensure that those segments of M/WBEs that have been most significantly and persistently underutilized receive a fair measure of remedial assistance. In all other respects, M/WBE Segmented Subcontracting Goals shall operate in the same manner as the M/WBE Subcontracting Goals set forth in this EBO Program.

#### d. M/WBE Joint Venture / Partnership / Teaming Incentive

Under this API, for contracts valued at greater than \$2.5 million, the GSC may establish incentives to promote joint ventures, partnerships, or teaming arrangements between larger established firms and M/WBE

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firms, or between and among SBE and M/WBE firms. For “best value” contracts wherein low price is not the only criterion for award, the incentive may be for up to twenty percent (20%) of one hundred evaluation points to be reserved for qualifying M/WBE joint ventures wherein the certified M/WBE joint venture partner owns 50% or greater, and performs 50% or greater of the work, of the overall joint venture. Proportionately fewer evaluation preference points would be awarded to the joint venture based upon lesser percentages of ownership by the M/WBE partner. Alternatively, incentives may include bonding assistance, assignment of multiple task orders on job order contracts totaling up to \$2.5 million in value, and accelerated payments or mobilization payments to be afforded to qualifying M/WBE joint ventures. This API should be reserved for those occasions wherein there are sufficient numbers of qualified M/WBE firms available of sufficient size to meaningfully joint venture or partner for purposes of performing larger contracts. Another consideration for application of this API is whether there are larger non-local M/WBE firms, or larger M/WBE firms that may have graduated from eligibility for the program, that are available and willing to joint venture with certified smaller local M/WBEs for purposes of enhancing local capacity at the prime contract level.

A prospective M/WBE joint venture Respondent on such County contracts shall submit in response to the solicitation such documentation as required by the County that includes, but is not limited to:

- i. The names of the M/WBE joint venture, partnership, or team and each of its partners or team members that will participate on the contract;
- ii. The percentage of Prime Contract dollars and the absolute dollar value of the services to be provided by the M/WBE joint venture partner or team member; and
- iii. A description of the work, management responsibilities, and other contributions that each joint venture partner or team member shall perform or provide under the terms of its joint venture, partnership, or teaming agreement.

#### e. M/WBE Mentor-Protégé Program

The County Administrator shall establish a work group of County personnel and construction industry and surety industry stakeholders to research, consider, and recommend a variety of “best practice” models from the State of Florida and across the nation for mentor-protégé programs to facilitate the successful growth and competitive viability of S/M/WBE firms in the construction industry. Such models for purposes of research and consideration shall include, but not be limited to, programs that team up more established and successful construction firm mentors with less established M/WBE firms for purposes of providing management guidance and training; programs that provide incentives to mentor firms by reserving certain contracts for competition upon approved mentor-protégé teams; and also programs that provide other incentives to mentor-protégé teams such as accelerated payments, access to working capital funds, and direct purchasing of supplies by County on behalf of mentor-protégé teams. The work group shall report its findings and recommendations to the County Administrator no later than six months after the effective date of this Ordinance.

#### f. M/WBE Evaluation Preference for “Best Value” RFPs

The GSC may apply this API to Formal Solicitations for County bid solicitations that are issued pursuant to a “Best Value” method of procurement wherein criteria other than price are factored into the selection process. Under the terms of this Evaluation Preference, the GSC shall require that evaluation panels assign point preferences equal to up to 15% of the total points assigned for the evaluation, scoring and ranking of construction-related proposals submitted by those certified M/WBE firms.

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An M/WBE that is awarded a prime contract under this program may not subcontract more than 49% of the contract value to a non-S/M/WBE firm. In determining whether a particular contract is eligible for this Program, the GSC shall consider: (a) the relative availability of S/M/WBEs, with the preference of at least three S/M/WBEs that are likely to bid as a Prime Contractor for the contract; and (b) the degree of underutilization of the S/M/WBEs in the specific Industry Categories.

3. Professional Services (Race- and Gender-Neutral Remedies)
  - a. SBE Vendor Rotation

Under this API, there are two options for the selective use of a prequalified panel of SBE vendors by the County:

#### Option 1

For smaller County non-CCNA professional services contracts valued at less than \$100,000, a prequalified panel of SBE professional services firms may be assigned work tasks on a rotating basis. Periodically, the SBE Vendor Rotation list shall be re-ordered according to the firm with the least amount of dollars received to the most dollars received from the County based upon the cumulative dollars received within the past year.

#### Option 2

When the County requires price competition in its solicitations, and when quotations from several firms are required before award of contracts valued at less than \$100,000, solicitations for price quotations shall be affirmatively and directly sought from the next three firms appearing in the SBE Vendor Rotation list of prequalified firms for that type of professional service prior to contract award. With each successive solicitation of quotations of this type, the list shall be rotated to the next group of three SBE vendors appearing in the rotation.

- b. Evaluation Preference for New SBE Prime Bidders

Under this API, the GSC shall establish point preferences in the evaluation of proposals for those first-time SBE entrants that are competing for County Professional Services contracts for up to one-year after submission of an SBE prime bidder's first successful proposal with the County, or until the firm has received a cumulative total of \$1,000,000 or more in payments for services performed on behalf of the County (whichever period of time is longer). Up to 15 percent (15%) of the total number of evaluation points allocated for selection of a professional services firm by the County shall be reserved for SBE prime bidders that have only received their first contract award with the County within the past year, or have not yet received a cumulative total of \$1,000,000 or more in payments from the County for professional services rendered. One year after a new entrant SBE prime bidder has won its first County contract, assuming it has received a cumulative total of \$1,000,000 or more in payments from the County, it shall no longer be eligible to receive such evaluation preference points for new SBE prime bidders, but may remain eligible to receive other evaluation preference points reserved for SBE prime bidders that are not new. This API is intended to address the natural bias that has been identified on the part of some selection panels against smaller firms that are unknown and that have no significant prior track record with the County.

- c. SBE Reserve for Contracts Up to \$5,000 and Required SBE Quotations on Informal Solicitations for non-CCNA Professional Services

Under this API, the GSC may reserve certain categories of small professional services contracts valued at less than \$5,000 exclusively for competition among SBE professional services firms. For larger

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non-CCNA professional services contracts valued below \$100,000, the GSC shall require at least two to three quotations or proposals be affirmatively solicited directly from SBE professional services firms before the County may make an award. In selecting the use of this API, the GSC shall consider whether the County has had difficulty in obtaining prime contract bids or proposals from available SBE firms for that type of professional services contracts.

#### d. SBE Evaluation Preference for Prime Bidders

Under this API, there are two options available for the GSC to enhance contract opportunities for SBE Prime Bidders on "Best Value" professional services contracts where low bid price is not the only consideration in contract award:

##### Option 1

An SBE evaluation preference of up to 15 percent (15%) of the total number of available evaluation points for scoring of proposals shall be reserved for all SBE prime bidders on County non-CCNA professional services contracts valued at less than \$500,000.

##### Option 2

Evaluation preference points shall be awarded on a sliding scale from zero up to 15 percent (15%) of the total available evaluation points for scoring of proposals to those firms bidding on non-CCNA Professional Services contracts valued at \$500,000 or greater. The sliding scale shall be based upon the relative level of SBE dollar participation that has been committed to on the prime bidder's team (e.g., zero SBE participation on a prime bidder's team shall yield zero evaluation points, whereas the maximum SBE participation among all prime bidders, at the prime contract and subcontract levels combined, shall yield award of fifteen evaluation preference points out of 100; and a prime bidder's team that achieves only half as many dollars in SBE participation as the firm with the greatest SBE dollar participation at the prime contract and subcontract levels combined shall be awarded 7.5 evaluation points out of 100).

#### e. SBE Subcontracting Goals for Professional Services

The Board has established a minimum mandatory goal of 20% SBE participation for County contracts, provided that the Office of Equal Business Opportunity shall agree to a reasonable reduction or waiver of this goal in instances where it can be factually demonstrated that there is inadequate availability of SBE prime and / or subcontractor firms qualified to perform Commercially Useful Functions that are valued at 20% of the total estimated dollar value of the County contract. Prospective bidders shall be provided an adequate opportunity to formally request such waivers prior to bid opening based upon submission of adequate Good Faith Efforts documentation as specified by the Office of EBO and as stated in Solicitation language.

Under this API, the GSC shall, on a contract-specific basis, require that at least twenty percent (20%) of the total value of a prime contract be subcontracted to eligible SBEs. Factors to be considered by the GSC in making this determination shall include the relative availability of SBE firms to perform Commercially Useful Functions on the specific contract.

A prospective Respondent, to a County Solicitation for which price and scope are defined, shall submit at the time as required in the solicitation such documentation as required by the Office of EBO that provides:

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- i. The name(s) of the SBE Subcontractor(s) it intends to use on the project;
- ii. The percentage of prime contract dollars and the absolute dollar value of subcontracting services to be provided by each SBE;
- iii. A description of the work that each SBE Subcontractor shall perform; and
- iv. Documentation confirming the Subcontractor's commitment to perform the work at the stated price.

A prospective Respondent on a County Solicitation for which Respondents are not initially evaluated based on price, or for which the project scope is not predefined, shall submit as required in the solicitation such documentation as required by the Office of EBO to affirm its intent to meet the subcontracting requirements indicated in the solicitation. Failure of a Respondent to commit as required in the solicitation to satisfying the SBE subcontracting goal shall render its response non-responsive.

During the price proposal negotiation phase, Respondents shall be required to submit:

- i. The name(s) of the SBE Subcontractor(s) it intends to use on the project;
- ii. The percentage of prime contract dollars and the absolute dollar value of subcontracting services to be provided by each SBE;
- iii. A description of the work that each SBE Subcontractor shall perform; and
- iv. Documentation confirming the Subcontractor's commitment to perform the work at the stated price.

A Respondent may request a full or partial waiver of this mandatory subcontracting requirement for good cause by submitting the appropriate form(s) and documentation at the time as required in the Solicitation. Under no circumstances shall a waiver of a mandatory subcontracting requirement be granted without submission of adequate documentation of Good Faith Efforts by the Respondent and careful review by the Office of EBO. The Office of EBO shall base its determination of a waiver request on criteria such as, but not limited to:

- i. Whether the requestor of the waiver has made Good Faith Efforts to subcontract with qualified and available SBEs;
- ii. Whether subcontracting would be inappropriate and/or not provide a "Commercially Useful Function" under the scope of the contract; and
- iii. Whether there are no certified SBE firms that are qualified and available to provide the goods or services required.

In the absence of a waiver granted by the Office of EBO, failure of a Prime Contractor to commit as required in the solicitation to satisfying the SBE subcontracting goal shall render its response non-Responsive. Provided, however, that on any prime contract valued under \$10 million, if the Prime Contractor is a certified SBE firm, then the Prime Contractor is allowed to self-perform up to the entire SBE subcontracting goal amount with its own forces. To the extent that the certified SBE Prime Contractor does not self-perform a portion of the SBE subcontracting goal, it shall be responsible for complying with all other

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requirements of this API for that portion of work that is subcontracted. This self-performance option for certified SBE Prime Contractors may be suspended at the discretion of the Director of the Office of EBO or designee in the event he or she determines that the adverse cumulative effect of the use of this self-performance option upon subcontractor opportunities is too great.

In the absence of a waiver granted by the Office of EBO or the self-performance of a portion or all of the SBE subcontracting goal by a certified SBE Prime Contractor, the failure of a Prime Contractor to attain a subcontracting goal for SBE participation in the performance of its contract or otherwise comply with the provisions of this API shall be considered a material breach of contract, grounds for termination of that contract with the County, and shall be subject to any penalties and sanctions available under the terms of the EBO Program Ordinance, its contract terms with the County, or by law.

A Prime Contractor is only permitted to substitute another subcontractor for a designated SBE subcontractor for cause, and is required to notify and obtain prior written approval from the Office of EBO in advance of any such substitution of a designated SBE subcontractor, or reduction in subcontract scope, unless such reduction in scope is the direct and immediate result of a County-mandated change order or contract amendment, or the County has mandated the de-Certification, suspension, debarment, graduation or termination of a designated SBE Subcontractor. However, under such circumstances, the Prime Contractor shall undertake Good Faith Efforts to replace the de-certified, suspended, debarred, graduated or terminated SBE with one or more other certified SBE Subcontractors and shall submit a waiver request to the Office of EBO in the event such Good Faith Efforts are unsuccessful.

Upon award of the prime contract to a Respondent, the Prime Contractor shall be required to submit accurate progress payment information with each invoice regarding each of its Subcontractors, including SBE Subcontractors. The Originating Department shall audit the reported payments to SBE and non-SBE Subcontractors to ensure that the Prime Contractor's reported subcontract participation is accurate. County contracts with Prime Contractors shall include clauses requiring Prime Contractors to pay Subcontractors in compliance with Florida prompt payment laws, and such clauses shall mandate that in the event of a Prime Contractor's non-compliance regarding such payments, the Prime Contractor shall be subject to any penalties and sanctions available under the terms of the EBO Program Ordinance, its contract terms with the County, or by law.

#### 4. Professional Services (Race- and Gender-Conscious Remedies)

The GSC shall consider establishment of an overall M/WBE Annual Aspirational Goal in accordance with subsection 'a' below and, in addition, shall review each prospective County Professional Services Formal Solicitation in advance of its public release and advertisement, and shall make a determination whether to apply any of the other Race- and Gender-Conscious APIs to those Professional Services solicitations based upon the following criteria:

- i. Whether the most recent data on M/WBE utilization in the absence of Race-Conscious APIs indicate that Professional Services contracts of this type have exhibited significant disparities in the utilization of available M/WBE Subcontractors and/or M/WBE Prime Contractors;
- ii. Whether race- and/or gender-neutral remedies alone are likely to fully eliminate any such disparities in the utilization of M/WBE Subcontractors and/or M/WBE Prime Contractors based upon past contract Award and Payment data;
- iii. Whether a particular API is the least burdensome available remedy to non-M/WBE Respondents that is narrowly-tailored and that can effectively eliminate the disparities in the utilization of M/WBEs in

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Professional Services contracts; and

- iv. Whether the particular API is appropriate for the specific type of Professional Services contract being procured.

Whenever the GSC uses its discretion to apply any of the following Race-Conscious APIs to Professional Services solicitations, it shall provide an explanation in the solicitation documents of its reasons for doing so based upon its determinations pursuant to these criteria. In making such determinations, the GSC may also take into consideration the experiences of other jurisdictions within Palm Beach County for Professional Services.

#### a. Annual Aspirational M/WBE Goals

For each fiscal year, the GSC shall establish non-mandatory annual aspirational percentage goals for overall M/WBE prime and subcontract participation on County Professional Services contracts.

The Annual Aspirational Goals for M/WBE prime contract participation in County Professional Services contracts have initially been established at 23% MBE and 19% WBE respectively of the total cumulative professional services prime contract dollars to be awarded and spent on an annual basis, and at 25% MBE and 21% WBE respectively of the total cumulative professional services subcontract dollars to be awarded and spent on an annual basis. These annual aspirational goals are based upon the M/WBE availability estimates by industry set forth in accordance with the County's 2017 Disparity Study findings.

Each Annual Aspirational Goal is to be reviewed on an annual basis for potential adjustment by the GSC based upon the M/WBE availability by industry segment in accordance with the County's 2017 Disparity Study findings, along with relative M/WBE availability data to be collected by the County through its CBR system, and the actual utilization of M/WBEs reflected therein.

Annual Aspirational Goals shall not be routinely applied to individual Solicitations, but are intended to serve as a benchmark against which to measure the overall effectiveness of the EBO Program on an annual basis in addressing identified disparities, and to gauge the need for future adjustments to the mix and aggressiveness of remedies and APIs being applied pursuant to this EBO Program Ordinance.

Annual Aspirational Goals may be stated only in those County Solicitations that do not contain contract-specific S/M/WBE goals, and when provided, shall be advisory only, and must also be accompanied by the full definition of the term as stated in this EBO Program Ordinance.

#### b. M/WBE Evaluation Preferences for Professional Services

Under this API, the GSC shall award Evaluation preference points shall be awarded on a sliding scale from zero up to 15 percent (15%) of the total available evaluation points for scoring of proposals to those firms bidding on professional services contracts. The sliding scale shall be based upon the relative level of M/WBE dollar participation that has been committed to on the prime bidder's team (e.g., zero M/WBE participation on a prime bidder's team shall yield zero evaluation points, whereas the proposal from the prime bidder that proposes achieving the maximum M/WBE participation among all prime bidders, at the prime contract and subcontract levels combined, shall yield award of fifteen evaluation preference points out of 100 to that bidder; and a prime bidder's team that achieves only half as many dollars in M/WBE participation as the firm with the greatest M/WBE dollar participation at the prime contract and subcontract levels combined shall be awarded 7.5 evaluation points out of 100).

#### c. M/WBE Subcontracting Goals for Professional Services



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The GSC, on a contract-by-contract basis, may require that a predetermined percentage of a specific Professional Services contract, up to 40%, be subcontracted to eligible M/WBEs (i.e., certified M/WBE firms owned by African American, Hispanic American, Asian American, Native American, and non-minority women persons). Factors to be considered by the GSC in making this determination shall include the relative availability of M/WBE firms to perform Commercially Useful Functions on the specific contract weighted according to the relative dollar value of the construction sub-specialties available for subcontracting.

A prospective bidder on a County solicitation, for which price and scope are defined, shall submit at the time as required in the solicitation such documentation as required by the County that provides:

- i. The name(s) of the M/WBE Subcontractor(s) it intends to use on the project;
- ii. The percentage of prime contract dollars and the absolute dollar value of subcontracting services to be provided by each M/WBE;
- iii. A description of the work that each M/WBE Subcontractor shall perform; and
- iv. Documentation confirming the Subcontractor's commitment to perform the work at the stated price.

A prospective Respondent to a County Solicitation, for which Respondents are not initially evaluated based on price, or for which project scope is not predefined, shall submit at the time as required in the Solicitation such documentation as required by the County to affirm its intent to meet the subcontracting requirements indicated in the solicitation. In the absence of a waiver request granted by the Office of EBO, failure of a Respondent to commit as required in the solicitation to satisfying the M/WBE subcontracting goal shall render its response non-Responsive.

During the price proposal negotiation phase, Respondents shall be required to submit:

- i. The name(s) of the M/WBE Subcontractor(s) it intends to use on the project;
- ii. The percentage of prime contract dollars and the absolute dollar value of subcontracting services to be provided by each M/WBE; and
- iii. A description of the work that each M/WBE Subcontractor shall perform.

A Respondent may request a full or partial waiver of this mandatory subcontracting requirement for good cause by submitting the appropriate form(s) and documentation at the time as required in the Solicitation. Under no circumstances shall a waiver of a mandatory subcontracting requirement be granted without submission of adequate documentation of Good Faith Efforts by the Respondent and careful review by the Office of EBO. The Office of EBO shall base its determination on a waiver request on criteria such as, but not limited to:

- i. Whether the requestor of the waiver has made Good Faith Efforts to subcontract with qualified and available M/WBEs;
- ii. Whether subcontracting would be inappropriate and/or not provide a "Commercially Useful Function" under the scope of the contract; and
- iii. Whether there are no certified M/WBE firms that are qualified and available to

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provide the goods or services required.

In the absence of a waiver granted by the Office of EBO, failure of a Prime Contractor to commit as required in the Solicitation to satisfying the M/WBE subcontracting goal shall render its response non-Responsive. Provided, however, that on any prime contract valued under \$1 million, if the Prime Contractor is a certified M/WBE firm, then the Prime Contractor is allowed to self-perform up to the entire M/WBE subcontracting goal amount with its own forces. To the extent that the certified M/WBE Prime Contractor does not self-perform a portion of the M/WBE subcontracting goal, it shall be responsible for complying with all other requirements of this API for that portion of work that is subcontracted. This self-performance option for certified M/WBE Prime Contractors may be suspended at the discretion of the Director of the Office of EBO in the event he or she determines that the adverse cumulative effect of the use of this self-performance option upon subcontractor opportunities is too great.

In the absence of a waiver granted by the Office of EBO, or the self-performance of a portion or all of the M/WBE subcontracting goal by a certified M/WBE Prime Contractor, the failure of a Prime Contractor to attain a subcontracting goal for M/WBE participation in the performance of its contract or otherwise comply with the provisions of this API shall be considered a material breach of contract, grounds for termination of that contract with the County and shall be subject to any penalties and sanctions available under the terms of the EBO Program Ordinance, its contract with the County, or by law.

A Prime Contractor is required to notify and obtain prior written approval from the Director of the Office of EBO in advance of any reduction in subcontract scope, unless such reduction in scope is the direct and immediate result of a County-mandated change order or contract amendment, or the County has mandated the de-Certification, suspension, graduation or termination of a designated M/WBE Subcontractor. However, under such circumstances, the Prime Contractor shall undertake Good Faith Efforts to replace the de-certified, suspended, graduated or terminated M/WBE Subcontractor(s) with one or more other certified M/WBE Subcontractor(s) and shall submit a waiver request to the Office of EBO in the event such Good Faith Efforts are unsuccessful.

Upon award of the prime contract to a Respondent, the Prime Contractor shall be required to submit accurate progress payment information with each invoice regarding each of its Subcontractors, including S/M/WBE Subcontractors. The Originating Department shall audit the reported payments to S/M/WBE and non-S/M/WBE Subcontractors to ensure that the Prime Contractors' reported subcontract participation is accurate. Absent a waiver from the Office of EBO, a Prime Contractor's failure to reach the required level of S/M/WBE subcontracting shall be considered a material breach of contract. County contracts with Prime Contractors shall include clauses requiring Prime Contractors to pay Subcontractors in compliance with Florida Prompt Payment Law, and such clauses shall mandate that in the event of Prime Contractor non-compliance regarding such payments, the Prime Contractor shall be subject to any penalties and sanctions available under the terms of the EBO Program, its contract with the County, or by law.

d. M/WBE Segmented Subcontracting Goals for Professional Services

Under this API, the GSC may establish M/WBE Segmented Subcontracting Goals on an individual County contract wherein an overall combined M/WBE goal is accompanied by subsets of one or more smaller goals that specifically target the participation of a particular segment of Minority Group Member segments or the WBE segment based upon that segment's relative availability. Such segmented goals shall specifically target the participation of a particular segment of business enterprises owned and controlled by women or certain Minority Group Members (e.g., African-Americans) based upon relative availability, as well as the existence of consistently and significantly greater patterns of underutilization and disparity within an industry as compared to other gender and Minority Group Member categories of M/WBEs. (For example, if an overall M/WBE subcontracting goal is set at 46% on a given contract, the segmented subcontracting goal may require

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that at least 10% of that 46% shall be satisfied through the utilization of African American subcontractors.) The application of Segmented M/WBE Subcontracting Goals is intended to ensure that those segments of M/WBEs that have been most significantly and persistently underutilized receive a fair measure of remedial assistance. In all other respects, M/WBE Segmented Subcontracting Goals shall operate in the same manner as the M/WBE Subcontracting Goals set forth in this EBO Program Ordinance.

e. M/WBE Vendor Rotation

Under this API, there are two options for the selective use of a prequalified panel of M/WBE vendors by the County:

Option 1

For smaller non-CCNA County professional services contracts valued at less than \$100,000, a prequalified panel of M/WBE professional services firms may be assigned work tasks on a rotating basis. Periodically, the M/WBE Vendor Rotation list shall be re-ordered according to the firm with the least amount of dollars received to the most dollars received from the County based upon the cumulative dollars received within the past year.

Option 2

When the County requires price competition in its Solicitations, and when quotations from several firms are required before award of contracts valued at less than \$100,000, Solicitations for price quotations shall be affirmatively and directly sought from the next three firms appearing in the M/WBE Vendor Rotation list of prequalified firms for that type of professional service prior to contract award. With each successive solicitation of quotations of this type, the list shall be rotated to the next group of three M/WBE vendors appearing in the rotation. In selecting this API, the GSC shall consider the extent to which the County has been unsuccessful in obtaining bids from available M/WBE professional services firms.

f. M/WBE Required Quotations for Contracts Up to \$5,000 and Required M/WBE Solicitations for non-CCNA Professional Services Contracts Valued Under \$100,000

Under this API, the GSC may require direct affirmative Solicitation of quotations from up to three M/WBE firms for certain categories of small DPO professional services contracts valued at less than \$5,000. For larger non-CCNA professional services contracts valued below \$100,000, the GSC shall require the County to directly and affirmatively solicit at least two to three quotations or proposals from M/WBE professional services firms before the County may make an award. In selecting the use of this API, the GSC shall consider whether the County has had difficulty in obtaining prime contract bids or proposals from available M/WBE firms for that type of non-CCNA professional services contracts.

5. Goods and Other Services (Race- and Gender-Neutral Remedies)

b. SBE Vendor Rotation

Under this API, there are two options for the selective use of a prequalified panel of SBE vendors by the County:

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### Option 1

For smaller County Goods and Other Services contracts valued at less than \$100,000, a prequalified panel of SBE Goods and Other Services firms may be assigned work tasks on a rotating basis. Periodically, the SBE Vendor Rotation list shall be re-ordered according to the firm with the least amount of dollars received to the most dollars received from the County based upon the cumulative dollars received within the past year.

### Option 2

When the County requires price competition in its Solicitations, and when quotations from several firms are required before award of contracts valued at less than \$100,000, Solicitations for price quotations shall be affirmatively and directly sought from the next three firms appearing in the SBE Vendor Rotation list of prequalified firms for that type of professional service prior to contract award. With each successive solicitation of quotations of this type, the list shall be rotated to the next group of three SBE vendors appearing in the rotation.

- c. SBE Reserve for Contracts Below \$5,000 and Required SBE Quotations on Informal Solicitations Below \$100,000

Under this API, the GSC may reserve certain categories of small Goods and Other Services contracts valued at less than \$5,000 exclusively for competition among SBE Goods and Other firms. For larger Goods and Other Services contracts valued below \$100,000, the GSC shall require at least two to three quotations or proposals be affirmatively solicited directly from SBE Goods and Other Services firms before the County may make an award. In selecting the use of this API, the GSC shall consider whether the County has had difficulty in obtaining prime contract bids or proposals from available SBE firms for that type of Good or Other Service contract.

- d. SBE Evaluation Preference for Prime Bidders

Under this API, there are two options available for the GSC to enhance contract opportunities for SBE Prime Bidders on "best value" Other Services contracts where low bid price is not the only consideration in contract award:

### Option 1

An SBE evaluation preference of up to 15 percent (15%) of the total number of available evaluation points for scoring of proposals shall be reserved for all SBE prime bidders on County Other Services contracts valued at less than \$500,000.

### Option 2

Evaluation preference points shall be awarded on a sliding scale from zero up to 15 percent (15%) of the total available evaluation points for scoring of proposals to those firms bidding on Other Services contracts valued at \$500,000 or greater. The sliding scale shall be based upon the relative level of SBE dollar participation that has been committed to on the prime bidder's team (e.g., zero SBE participation on a prime bidder's team shall yield zero evaluation points, whereas the maximum SBE participation among all prime bidders, at the prime contract and subcontract levels combined, shall yield award of fifteen evaluation preference points out of 100; and a prime bidder's team that achieves only half as many dollars in SBE participation as the firm with the greatest SBE dollar participation at the prime contract and subcontract levels combined shall be awarded 7.5 evaluation points out of 100).

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### e. SBE Joint Venture Incentive for Other Services Contracts

Under this API, the GSC may establish joint venture incentives for joint ventures between larger established firms and local SBE firms on Other Services contracts valued at greater than \$5 million. Such joint venture incentives may include: (1) additional option years for contracts; and/or (2) access to mobilization funds; and/or (3) evaluation preferences of up to 15 percent of all evaluation points to be assigned for joint ventures between two or more certified SBE firms, or between SBE and non-SBE joint venture partners that have an overall minimum percentage (e.g., 20%) SBE participation in ownership and management of the joint venture. The GSC should consider use of this API in circumstance when the County has a priority for promoting the growth of S/M/WBE capacity in a given industry segment.

### f. SBE Subcontracting Goals for Other Services Contracts Valued at Greater Than \$5 Million

For larger Other Services contracts valued at greater than \$5 million wherein there are adequate numbers of commercially useful functions available for subcontracting purposes, the GSC may consider applying a mandatory subcontracting goal for the participation of SBE subcontractors. The Board has established a minimum mandatory goal of 20% SBE participation for County contracts, provided that the Office of Equal Business Opportunity shall agree to a reasonable reduction or waiver of this goal in instances where it can be factually demonstrated that there is inadequate availability of SBE prime and / or subcontractor firms qualified to perform Commercially Useful Functions that are valued at 20% of the total estimated dollar value of the County contract. Prospective bidders shall be provided an adequate opportunity to formally request such waivers prior to bid opening based upon submission of adequate Good Faith Efforts documentation as specified by the Office of EBO and as stated in Solicitation language.

Under this API, a prospective Respondent to a County Solicitation shall submit at the time as required in the solicitation such documentation as required by the Office of EBO that provides:

- i. The name(s) of the SBE Subcontractor(s) it intends to use on the project;
- ii. The percentage of prime contract dollars and the absolute dollar value of subcontracting services to be provided by each SBE;
- iii. A description of the work that each SBE Subcontractor shall perform; and
- iv. Documentation confirming the Subcontractor's commitment to perform the work at the stated price.

A Respondent may request a full or partial waiver of this mandatory subcontracting requirement for good cause by submitting the appropriate form(s) and documentation at the time as required in the Solicitation. Under no circumstances shall a waiver of a mandatory subcontracting requirement be granted without submission of adequate documentation of Good Faith Efforts by the Respondent and careful review by the Office of EBO. The Office of EBO shall base its determination of a waiver request on criteria such as, but not limited to:

- i. Whether the requestor of the waiver has made Good Faith Efforts to subcontract with qualified and available SBEs;
- ii. Whether subcontracting would be inappropriate and/or not provide a "Commercially

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Useful Function” under the scope of the contract; and

- iii. Whether there are no certified SBE firms that are qualified and available to provide the goods or services required.

In the absence of a waiver granted by the Office of EBO, failure of a Prime Contractor to commit as required in the solicitation to satisfying the SBE subcontracting goal shall render its response non-Responsive. Provided, however, that on any prime contract valued under \$10 million, if the Prime Contractor is a certified SBE firm, then the Prime Contractor is allowed to self-perform up to the entire SBE subcontracting goal amount with its own forces. To the extent that the certified SBE Prime Contractor does not self-perform a portion of the SBE subcontracting goal, it shall be responsible for complying with all other requirements of this API for that portion of work that is subcontracted. This self-performance option for certified SBE Prime Contractors may be suspended at the discretion of the Director of the Office of EBO or designee in the event he or she determines that the adverse cumulative effect of the use of this self-performance option upon subcontractor opportunities is too great.

In the absence of a waiver granted by the Office of EBO or the self-performance of a portion or all of the SBE subcontracting goal by a certified SBE Prime Contractor, the failure of a Prime Contractor to attain a subcontracting goal for SBE participation in the performance of its contract or otherwise comply with the provisions of this API shall be considered a material breach of contract, grounds for termination of that contract with the County, and shall be subject to any penalties and sanctions available under the terms of the EBO Program, its contract terms with the County, or by law.

A Prime Contractor is only permitted to substitute another subcontractor for a designated SBE subcontractor for cause, and is required to notify and obtain prior written approval from the Office of EBO in advance of any such substitution of a designated SBE subcontractor, or reduction in subcontract scope, unless such reduction in scope is the direct and immediate result of a County-mandated change order or contract amendment, or the County has mandated the de-Certification, suspension, debarment, graduation or termination of a designated SBE Subcontractor. However, under such circumstances, the Prime Contractor shall undertake Good Faith Efforts to replace the de-certified, suspended, debarred, graduated or terminated SBE with one or more other certified SBE Subcontractors and shall submit a waiver request to the Office of EBO in the event such Good Faith Efforts are unsuccessful.

Upon award of the prime contract to a Respondent, the Prime Contractor shall be required to submit accurate progress payment information with each invoice regarding each of its Subcontractors, including SBE Subcontractors. The Originating Department shall audit the reported payments to SBE and non-SBE Subcontractors to ensure that the Prime Contractor’s reported subcontract participation is accurate. County contracts with Prime Contractors shall include clauses requiring Prime Contractors to pay Subcontractors in compliance with Florida prompt payment laws, and such clauses shall mandate that in the event of a Prime Contractor’s non-compliance regarding such payments, the Prime Contractor shall be subject to any penalties and sanctions available under the terms of the EBO Program Ordinance, its contract terms with the County, or by law.

g. SBE Price Preference

Under this API, the GSC may apply certain purchasing procedures to increase SBE participation, including, but not limited to, purchases valued below the mandatory Formal Solicitation threshold amount set forth in the Purchasing Code, and purchases made by decentralized purchase orders (DPOs) for Goods and Other Services valued under five thousand dollars (\$5,000.00). The purchasing procedures shall include a provision that every effort will be made by buyers to contact all registered certified SBEs that are available within a particular commodity area for such purchases, The purchasing procedures shall also include a

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process so as to allow as many vendors as possible to compete in providing goods and services to Palm Beach County. The purchasing procedures shall also include a provision requiring awards of purchases to be made to the lowest responsive, responsible bidder unless a certified SBE's bid is within ten (10) percent of the lowest non-small business bid, in which case the award shall be made to the certified small business bidder submitting the lowest responsive, responsible bid at the price that it bid. This section shall not apply to procurement of Construction Services.

#### 6. Goods and Other Services (Race- and Gender-Conscious Remedies)

The GSC shall consider establishment of an overall M/WBE Annual Aspirational Goal in accordance with subsection 'a' below and, in addition, shall review each prospective County Goods and Other Services Formal Solicitation in advance of its public release and advertisement, and shall make a determination whether to apply any of the other Race- and Gender-Conscious APIs to those Good and Other Services Solicitations based upon the following criteria:

- i. Whether the most recent data on M/WBE utilization in the absence of Race-Conscious APIs indicate that Goods and Other Services contracts of this type have exhibited significant disparities in the utilization of available M/WBE Subcontractors and/or M/WBE Prime Contractors;
- ii. Whether race- and/or gender-neutral remedies alone are likely to fully eliminate any such disparities in the utilization of M/WBE Subcontractors and/or M/WBE Prime Contractors based upon past contract Award and Payment data;
- iii. Whether a particular API is the least burdensome available remedy to non-M/WBE Respondents that is narrowly-tailored and that can effectively eliminate the disparities in the utilization of M/WBEs in Professional Services contracts; and
- iv. Whether the particular API is appropriate for the specific type of Goods and Other Services contract being procured.

Whenever the GSC uses its discretion to apply any of the following Race-Conscious APIs to Goods and Other Services Solicitations, it shall provide an explanation in the Solicitation documents of its reasons for doing so based upon its determinations pursuant to these criteria. In making such determinations, the GSC may also take into consideration the experiences of other jurisdictions within Palm Beach County for Goods and Other Services.

##### a. Annual Aspirational M/WBE Goals

For each fiscal year, the GSC shall establish non-mandatory annual aspirational percentage goals for overall M/WBE prime and subcontract participation on County Goods and Other Services contracts.

The Annual Aspirational Goals for M/WBE prime contract participation in County Goods and Other Services contracts have initially been established at 16% MBE and 17% WBE respectively of the total cumulative Goods and Other Services contract dollars to be awarded and spent on an annual basis. These annual aspirational goals are based upon the M/WBE availability estimates by industry set forth in accordance with the County's 2017 Disparity Study findings.

Each Annual Aspirational Goal is to be reviewed on an annual basis for potential adjustment by the

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GSC based upon the M/WBE availability by industry segment in accordance with the County's 2017 Disparity Study findings, along with relative M/WBE availability data to be collected by the County through its CBR system, and the actual utilization of M/WBEs reflected therein.

Annual Aspirational Goals shall not be routinely applied to individual solicitations, but are intended to serve as a benchmark against which to measure the overall effectiveness of the EBO Program on an annual basis in addressing identified disparities, and to gauge the need for future adjustments to the mix and aggressiveness of remedies and APIs being applied pursuant to this EBO Program Ordinance.

Annual Aspirational Goals may be stated only in those County Solicitations that do not contain contract-specific S/M/WBE goals, and when provided, shall be advisory only, and must also be accompanied by the full definition of the term as stated in this EBO Program Ordinance.

#### b. M/WBE Vendor Rotation

Under this API, there are two options for the selective use of a prequalified panel of M/WBE vendors by the County:

##### Option 1

For smaller Goods and Other Services contracts valued at less than \$100,000, a prequalified panel of M/WBE Goods or Other Services firms may be assigned work tasks or supply orders on a rotating basis. Periodically, the M/WBE Vendor Rotation list shall be re-ordered according to the firm with the least amount of dollars received to the most dollars received from the County based upon the cumulative dollars received within the past year.

##### Option 2

When the County requires price competition in its Solicitations, and when quotations from several firms are required before award of contracts valued at less than \$100,000, solicitations for price quotations shall be affirmatively and directly sought from the next three firms appearing in the M/WBE Vendor Rotation list of prequalified firms for that type of Good or Other Service prior to contract award. With each successive solicitation of quotations of this type, the list shall be rotated to the next group of three M/WBE vendors appearing in the rotation. In selecting this API, the GSC shall consider the extent to which the County has been unsuccessful in obtaining bids from available M/WBE Goods and Other Services firms.

#### c. Voluntary M/WBE Distributorship Development Program

The GSC may apply this API to any solicitation and subsequent award for Goods contracts that have a base term with contract extensions for the County's purchase of Goods and related services when each of the following conditions has been met:

- i. Manufacturers often sell such goods or supplies to the County indirectly through



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authorized distributorships or authorized dealers;

- ii. One or more such manufacturers indirectly competing for such County supply requirements contracts have no such authorized distributorships or authorized dealers that are also certified as M/WBE firms, that are headquartered or have a Significant Business Presence within Palm Beach County, and are available to sell such goods and supplies to the County;
- iii. At least one manufacturer of such goods and supplies has established, or has agreed to establish, an authorized distributorship or authorized dealer that is certified as an M/WBE, is headquartered or has a Significant Business Presence in Palm Beach County through which the manufacturer has agreed to sell the goods or supplies to the County for the duration of the contract, including all of the contract's option years;
- iv. The Office of EBO has examined the terms of the authorized distributorship or authorized dealer agreement entered into between the manufacturer and its certified M/WBE authorized distributorship or authorized dealer and determined that the M/WBE distributor or dealer is headquartered or has a Significant Business Presence in Palm Beach County, and determined that such terms are non-discriminatory in that the certified M/WBE's agreement is no different from that of non-M/WBE authorized distributorships and authorized dealers for the manufacturer regarding such matters as scope of geographical territory allocation, scope of potential public and private sector customers, scope of product line, price lists for goods and supplies, volume discounts in pricing, rebates, credit terms, delivery terms, marketing and technical support from manufacturer, and any other material terms that may affect the competitive viability of the authorized distributorship or authorized dealer.

Provided the manufacturer and its certified M/WBE authorized distributorship or authorized dealer meets conditions iii. and iv. above, and provided further that the certified M/WBE authorized distributorship or authorized dealer has won a bid for the supply of such Goods and/or related services to the County, under this API, notwithstanding any provision in this EBO Program Ordinance to the contrary, the Director of the Office of EBO may extend the length of the supply contract by additional option years without rebidding the contract, and/or the County may accelerate payment of invoices. The Office of EBO and Originating Department shall carefully monitor the contract to ensure that the certified M/WBE authorized distributorship or authorized dealer is performing a Commercially Useful Function under the contract, and that it is being treated in accordance with the terms of its agreement with the manufacturer. This assessment shall be made by the Office of EBO prior to the County's exercise of any option year on the supply contract. In the event the Office of EBO determines that these conditions have not been met, the County shall decline to exercise the next option year on the supply contract and shall instead re-bid the contract.

d. Mandatory M/WBE Distributorship Development Program

In instances wherein manufacturers have violated the County's Commercial Nondiscrimination Policy set forth in Section 2-80.24 by excluding or discriminating against M/WBE suppliers that seek to become authorized dealers / distributors, this API requires the manufacturer to establish such an authorized dealership with an M/WBE supplier under the terms of API Sec. 2-80.27 (6) (c) as a condition for being eligible to sell commodities to the County.

e. M/WBE Evaluation Preferences

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Under this API, evaluation preference points shall be awarded on a sliding scale from zero up to 15 percent (15%) of the total available evaluation points for scoring of proposals to those firms bidding on “best value” Other Services contracts valued at less than \$500,000. The sliding scale shall be based upon the relative level of M/WBE dollar participation that has been committed to on the prime bidder’s team (e.g., zero M/WBE participation on a prime bidder’s team shall yield zero M/WBE evaluation preference points, whereas the proposal from the prime bidder that proposes achieving the maximum M/WBE participation among all prime bidders, at the prime contract and subcontract levels combined, shall yield award of all fifteen M/WBE evaluation preference points to that bidder out of the total overall 100 available evaluation points; and a prime bidder’s team that achieves only half as many dollars in M/WBE participation as the firm with the greatest M/WBE dollar participation at the prime contract and subcontract levels combined shall be awarded 7.5 evaluation points out of the fifteen M/WBE evaluation preference points). Alternatively, the GSC may restrict award of the 15 percent (15%) evaluation preference to those M/WBE Other Services firms that have not previously been awarded a contract by the County. In such instances, the M/WBE firms shall remain eligible for such 15% evaluation preferences for up to one year from date of their first contract award, or until cumulative total payments on County contracts (prime contract and subcontract dollars) to that new entrant firm have reached \$1 million, whichever period of time is longer.

#### f. M/WBE Joint Venture Incentives

Under this API, for contracts valued at greater than \$5 million, the GSC may establish incentives to promote joint ventures between larger established firms and M/WBE firms, or between and among SBE and M/WBE firms. For “best value” contracts wherein low price is not the only criterion for award, the incentive may be for up to fifteen percent (15%) of one hundred evaluation points to be reserved for qualifying S/M/WBE joint ventures wherein the certified M/WBE joint venture partner owns 50% or greater, and performs 50% or greater of the work, of the overall joint venture. Proportionately fewer evaluation preference points would be awarded to the joint venture based upon lesser percentages of ownership by the M/WBE partner. Alternatively, incentives may include bonding waivers, assignment of multiple task orders on job order contracts totaling up to \$1,000,000 in value, and accelerated payments or mobilization payments to be afforded to qualifying S/M/WBE joint ventures. This API should be reserved for those occasions wherein there are sufficient numbers of qualified M/WBE firms available of sufficient size to meaningfully joint venture for purposes of performing larger contracts. Another consideration for application of this API is whether there are larger non-local S/M/WBE firms, or larger S/M/WBE firms that may have graduated from eligibility for the program, that are available and willing to joint venture with certified smaller local M/WBEs for purposes of enhancing local capacity at the prime contract level.

#### g. M/WBE Subcontracting Goals of Other Services Contracts Valued at Greater Than \$5 Million

The GSC may, on a contract-by-contract basis, require that a predetermined percentage up to 40% of a specific Other Services contract that is valued at greater than \$5 million shall be subcontracted to eligible M/WBEs (i.e., certified M/WBE firms owned by African American, Hispanic, and Caucasian women persons). Factors to be considered by the GSC in making this determination shall include the relative availability of M/WBE firms to perform Commercially Useful Functions on the specific contract weighted according to the relative dollar value of the construction sub-specialties available for subcontracting.

A prospective bidder on a County solicitation, for which price and scope are defined, shall submit at the time as required in the solicitation such documentation as required by the County that provides:

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- i. The name(s) of the M/WBE Subcontractor(s) it intends to use on the project;
- ii. The percentage of prime contract dollars and the absolute dollar value of subcontracting services to be provided by each M/WBE;
- iii. A description of the work that each M/WBE Subcontractor shall perform; and
- iv. Documentation confirming the Subcontractor's commitment to perform the work at the stated price.

A prospective Respondent to a County solicitation, for which Respondents are not initially evaluated based on price, or for which project scope is not predefined, shall submit at the time as required in the solicitation such documentation as required by the County to affirm its intent to meet the subcontracting requirements indicated in the solicitation. In the absence of a waiver request granted by the Office of EBO, failure of a Respondent to commit as required in the solicitation to satisfying the M/WBE subcontracting goal shall render its response non-Responsive.

During the price proposal negotiation phase, Respondents shall be required to submit:

- i. The name(s) of the M/WBE Subcontractor(s) it intends to use on the project;
- ii. The percentage of prime contract dollars and the absolute dollar value of subcontracting services to be provided by each M/WBE; and
- iii. A description of the work that each M/WBE Subcontractor shall perform.

A Respondent may request a full or partial waiver of this mandatory subcontracting requirement for good cause by submitting the appropriate form(s) and documentation at the time as required in the solicitation. Under no circumstances shall a waiver of a mandatory subcontracting requirement be granted without submission of adequate documentation of Good Faith Efforts by the Respondent and careful review by the Office of EBO. The Office of EBO shall base its determination on a waiver request on criteria such as, but not limited to:

- i. Whether the requestor of the waiver has made Good Faith Efforts to subcontract with qualified and available M/WBEs;
- ii. Whether subcontracting would be inappropriate and/or not provide a "Commercially Useful Function" under the scope of the contract; and
- iii. Whether there are no certified M/WBE firms that are qualified and available to provide the goods or services required.

In the absence of a waiver granted by the Office of EBO, failure of a Prime Contractor to commit as required in the Solicitation to satisfying the M/WBE subcontracting goal shall render its response non-Responsive. Provided, however, that on any prime contract valued under \$5 Million, if the Prime Contractor is a certified M/WBE firm, then the Prime Contractor is allowed to self-perform up to the entire M/WBE subcontracting goal amount with its own forces. To the extent that the certified M/WBE Prime Contractor does not self-perform a portion of the M/WBE subcontracting goal, it shall be responsible for complying with all other requirements of this API for that portion of work that is subcontracted. This self-performance option for certified M/WBE Prime Contractors may be suspended at the discretion of the Director of the Office of EBO in the event he or she determines that the adverse cumulative effect of the use of this self-performance

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option upon subcontractor opportunities is too great.

In the absence of a waiver granted by the Office of EBO, or the self-performance of a portion or all of the M/WBE subcontracting goal by a certified M/WBE Prime Contractor, the failure of a Prime Contractor to attain a subcontracting goal for M/WBE participation in the performance of its contract or otherwise comply with the provisions of this API shall be considered a material breach of contract, grounds for termination of that contract with the County and shall be subject to any penalties and sanctions available under the terms of the EBO Program Ordinance, its contract with the County, or by law.

A Prime Contractor is required to notify and obtain prior written approval from the Director of the Office of EBO in advance of any reduction in subcontract scope, unless such reduction in scope is the direct and immediate result of a County-mandated change order or contract amendment, or the County has mandated the de-Certification, suspension, graduation or termination of a designated M/WBE Subcontractor, However, under such circumstances, the Prime Contractor shall undertake Good Faith Efforts to replace the de-certified, suspended, graduated or terminated M/WBE Subcontractor(s) with one or more other certified M/WBE Subcontractor(s) and shall submit a waiver request to the Office of EBO in the event such Good Faith Efforts are unsuccessful.

Upon award of the prime contract to a Respondent, the Prime Contractor shall be required to submit accurate progress payment information with each invoice regarding each of its Subcontractors, including S/M/WBE Subcontractors. The Originating Department shall audit the reported payments to S/M/WBE and non-S/M/WBE Subcontractor to ensure that the Prime Contractors' reported subcontract participation is accurate. Absent a waiver from the Office of EBO, a Prime Contractor's failure to reach the required level of S/M/WBE subcontracting shall be considered a material breach of contract. County contracts with Prime Contractors shall include clauses requiring Prime Contractors to pay Subcontractors in compliance with Florida Prompt Payment Law, and such clauses shall mandate that in the event of Prime Contractor non-compliance regarding such payments, the Prime Contractor shall be subject to any penalties and sanctions available under the terms of the EBO Program Ordinance, its contract with the County, or by law.

### **Sec. 2-80.28. Program Administration.**

#### **a. Originating Departments – Duties and Responsibilities**

It shall be the responsibility of the Purchasing Department to ensure that solicitations emanating from the department adhere to the procedures and provisions set forth in this EBO Program. The Originating Department Director or Manager or designee shall assume joint responsibility with Purchasing for assuring vendor and contractor compliance with the policy objectives of this EBO Program (as stated within material Bid Solicitation contract specifications, and deliverable requirements). The Originating Department shall review, on a continuing basis, all aspects of the Program's operations that it is involved in to any degree, and make adjustments to its efforts, as necessary, to assure that the EBO Program Ordinance's purpose is being achieved. The Originating Department, in collaboration with Purchasing and the Office of EBO, shall ensure the following actions are taken to ensure that S/M/WBEs have the maximum practicable opportunity to participate on County contracts:

- i. Post all Formal Solicitations on the County's website, for the solicitation period

### Part C. Equal Business Opportunity Program

required by state law for the type of procurement, and then direct targeted e-mail alerts containing links to the webpage where such County solicitations are posted at least thirty days in advance of bid or proposal due dates. Such e-mail alerts should be directed to all Respondents that have registered with the appropriate commodity/industry codes on the County's CBR system;

- ii. Encourage all prospective Prime Contractor Respondents for County solicitations to post their subcontract opportunities on the County webpage where the solicitation specifications have been posted by the County.
- iii. Ensure that the Commercial Nondiscrimination Policy statement, compliance language, and any other materials and specifications required by the EBO Program Code are included in all Bid Solicitation and contract documents;
- iv. Preview and evaluate all contracting opportunities in an effort to de-bundle the total requirements of a contract into smaller units to promote maximum and reasonable opportunities for S/M/WBE participation, without making separate, sequential or component purchases in violation of state purchasing laws;
- v. Establish procedures to ensure that all contractors submitting correct and undisputed invoices are paid within thirty (30) days and that Subcontractors are paid within ten (10) days after the County pays the Prime Contractor. Insert a requirement in all contracts that Prime Contractors must inform subcontractors of written notice of disputed invoices within five (5) days of receipt, and clearly state in such notices the reasons for the disputed invoice;
- vi. Ensure that a County contract is not executed and that a Notice to Proceed is not issued until binding agreements between the Prime and subcontracting S/M/WBEs have been executed by all parties and submitted to the Originating Department;
- vii. Ensure that all required statistics and documentation regarding bid, contract, invoice, and payment information are submitted to the Office of EBO as requested;
- viii. If circumstances prevent the Originating Department from meeting notification requirements contained herein, the Originating Department shall engage in direct and extensive outreach to S/M/WBE associations or other relevant organizations to inform them of the contracting opportunity, unless the circumstances are exigent and an emergency exists that requires immediate action to protect the public health, safety or welfare; and
- ix. Notify the Director of the Office of EBO or designee of all change orders and amendments to contracts that are subject to this EBO Program Ordinance and take necessary steps to ensure that APIs applied to the contract by the GSC are also extended and enforced, to the maximum practical extent, with regard to any modified scope of work under the terms of such change orders and contract amendments.

#### b. Office of EBO – Duties and Responsibilities

The following duties and responsibilities of the Office of EBO are in addition to those set forth in Section 2-80.23:

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### General Duties

The EBO Program Ordinance will be administered and managed by the Director of the Office of EBO or designee. The Director of the Office of EBO shall attend all Board agenda meetings to address any S/M/WBE or EBO Program issues. The Office of EBO shall be responsible for the overall administration of the County's EBO Program. At a minimum, the Office of EBO shall:

- 1) Report to the County and the public, based on available data, on at least an annual basis as to the County's progress toward satisfying the EBO Program Code purposes and objectives.
- 2) Formulate, establish, distribute and implement additional forms, rules and procedures for EBO Program waivers, improvements and adjustments to the goal-setting methodologies and other EBO Program features;
- 3) Have advance substantive input in a contract specification review process consistent with this EBO Program Ordinance to ensure that contract solicitation specifications are not unnecessarily restrictive and unduly burdensome to S/M/WBE firms;
- 4) Receive and analyze external and internal information, including statistical data and anecdotal testimony regarding the barriers encountered by S/M/WBE firms in attempting to obtain contract opportunities at the County, and the relative effectiveness of various APIs in addressing those barriers;
- 5) Monitor and support the implementation of the EBO Program policies and procedures and propose modifications to appropriate County officials as necessary to fully achieve the purpose and objectives of the EBO Program policies and procedures;
- 6) Provide public education and advocacy internally and externally regarding the purposes and objectives of the EBO Program Ordinance;
- 7) Develop, maintain and distribute directories of certified SBEs and M/WBEs;
- 8) Assess technical assistance needs of S/M/WBE firms and provide seminars and technical assistance referrals to S/M/WBE firms to enhance their ability to effectively compete for County contracts;
- 9) Investigate alleged violations of this EBO Program Ordinance and provide written recommendations to appropriate authorities for remedial action and imposition of sanctions and penalties when necessary;
- 10) Determine Prime Contractor compliance with EBO Program Ordinance requirements prior to contract award presentation to the County and prior to Originating Department release of final retainage;
- 11) Oversee the maintenance of an accurate contract performance and compliance reporting system;
- 12) Provide staff support for the GSC and the EBOAC; and
- 13) Collaborate with Information Technology, Facilities Development & Operations, and the Purchasing Department to streamline the invoice and payment procedures at the County so as to accelerate payments for undisputed invoices within twenty (20) days of receipt to prime contractors and vendors, and to require such primes and vendors to then pay undisputed subcontractor invoices within ten (10) days of receipt of invoice.

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### Certification

Certification of all S/M/WBE firms shall be the ultimate responsibility of the Office of EBO. The Office of EBO shall be responsible for reviewing all S/M/WBE Certification and re-Certification forms used by its selected certifying agent or organization to ensure that they are sufficient for purposes of gathering information consistent with the standards, definitions and intent established by this EBO Program Ordinance. The Office of EBO shall also maintain an automated and up-to-date web-based registry of all certified S/M/WBE firms that is readily available to the general public, as well as to County personnel.

- 1) In executing its responsibility in connection with these Certifications, the Office of EBO may, at the Director's discretion, contract with a regional governmental or certification agency/organization for the purpose of issuing Certifications in a manner that is consistent with the eligibility standards established under this EBO Program Ordinance.
- 2) A firm eligible for Certification(s) under this EBO Program Ordinance shall be an Independently Owned and Operated business. The ownership and Control by Minority Group Members or Women shall be real and substantial, and shall be indicated by customary incidents of ownership as demonstrated by an examination of the substance, rather than the form, of ownership and operating arrangements. In determining whether a potential firm is an Independently Owned and Operated business, the certifying agency considers all relevant factors including, but not limited to:
  - i) The date the business was established;
  - ii) The adequacy of its resources for the work of the contract; and
  - iii) The degree to which financial, equipment leasing, supplier and other relationships with non-minority businesses vary from industry practice.
- 3) The Minority Group Member or women owners must possess and exercise the power to direct the management and policies of the firm and to make day-to-day decisions, as well as any decisions on matters of management policy, and operations. The firm shall not be subject to any formal or informal restrictions which limit the customary discretion of the Minority Group Member or women owners. There shall be no restrictions by partnership agreements, charter requirements, operating agreements or other arrangements which prevent the Minority Group Member or women owners from making business decisions for the firm without the cooperation or vote of any owner that is not minority or female.
- 4) Recognition of the business as a separate entity for tax or corporate purposes is not necessarily sufficient for recognition as an S/M/WBE. Certification as S/M/WBE firms will be in accordance with the definitions established in this EBO Program Ordinance and the PPM.
- 5) A claim of minority status as a Minority Group Member must be directly related to the applicant's parents' status. Neither birthplace nor marriage has any bearing on minority status of the Certification applicant. All Minority Group and women owners of certified firms must be Individuals that are lawfully residing in, or are citizens of, the United States or its territories.
- 6) A firm seeking Certification or re-Certification status under this EBO Program Ordinance shall cooperate fully with the County (or its designated certification agent) in supplying additional information and in facilitating a site visit of the enterprise which may be requested in order to make a determination. Failure or refusal to cooperate shall result in denial or repeal of Certification.
- 7) Proof of Certification by another certifying entity may be accepted by the County in lieu of the County's

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own Certification process if the certifying entity adheres to the same or similar policies and standards as those established by the County. To the extent the County's factual predicate for its EBO Program Ordinance requires, under applicable law, a narrower definition of S/M/WBE firm categories (e.g., due to ethnicity / gender of ownership or relevant geographic market considerations), the County shall limit the categories of S/M/WBE firms certified by other jurisdictions that shall be eligible for participation in the County's Equal Business Opportunity Program as necessary to ensure that the Race-Conscious remedial relief provided by the County's Program remains appropriately narrowly-tailored.

- 8) Before accepting another jurisdiction's S/M/WBE Certification program, the Office of EBO shall examine the definitions, standards and Certification practices of the program to ensure that it adheres to established County Certification guidelines.
- 9) If the owners of the business who are not Minority Group Members or women are disproportionately responsible for the operation of the firm, the firm is not Controlled by minorities and/or women and may not be considered to be an M/WBE within the meaning of this EBO Program Ordinance. Where the actual management of the business is contracted out to Individuals other than the owner, those persons who have the ultimate power to hire and fire the managers may, for the purposes of this EBO Program Ordinance, be considered as Controlling the business.
- 10) All securities that constitute ownership or Control of a corporation for purposes of establishing it as an M/WBE under this EBO Program Ordinance shall be held directly by Minority Group Members or women. Securities held in trust, or by any guardian for a minor, may not be considered as being held by Minority Group Members or women in determining the ownership or Control of a corporation.
- 11) The contributions of capital or expertise by the Minority Group Member or women owners to acquire their interests in the business shall be real and substantial. Examples of insufficient capital contributions include:
  - i) A promise to contribute capital;
  - ii) A note payable to the business or its owners who are not socially and economically disadvantaged, Minority Group Members or Women; and
  - iii) Contributions in labor or expertise that result solely in employee compensation, without participation in business profits as an owner.
- 12) Special consideration of the following additional circumstances in determining eligibility:
  - i) Newly-formed businesses and businesses whose ownership or Control has changed since the date of the advertisement of the contract shall be closely scrutinized to determine the reasons for the timing of the formation of, or change in, the businesses;
  - ii) A previous or continuing employer–employee relationship between or among present owners shall be carefully reviewed to ensure that the employee–owner has management responsibilities and capabilities discussed in this EBO Program Ordinance; and
  - iii) Any relationship between an M/WBE and a business that is not an M/WBE, but that has an interest in the M/WBE, shall be carefully reviewed to determine if the interest of the non-minority business conflicts with the ownership and Control requirements of this EBO Program Ordinance.



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- iv) Once certified, an S/M/WBE firm shall update its status biennially by submitting a Certification affidavit. If ownership or Control of the firm has changed, the S/M/WBE firm shall submit a new Certification affidavit to the Office of EBO (or its contracted Certification agency) within thirty (30) days of the change.
  - v) The certifying entity will notify applicants of staff's determinations on Certification and re-Certification status.
- 13) Once denied Certification, a firm may not re-apply for Certification until one year has lapsed since the date of final determination regarding certification denial.
- 14) A firm shall be de-certified when it no longer meets the eligibility requirements for Certification, and such de-certified firms shall not be eligible to re-apply for one year from the date of the final adverse decision.
- 15) Certification, once granted, remains in effect for three (3) years, except in accordance with the graduation and suspension provisions of this EBO Program Ordinance.
- 16) Within 30 days of the issuance of letter stating the basis for denial of certification status, the applicant may seek reconsideration of the decision by submitting a request for reconsideration in writing to the Director of the Office of the EBO. The request for reconsideration shall state the basis for appeal. The requestor may also seek a conference with the Director for purposes of being heard on the appeal. Upon completion of conference and review of the request for reconsideration, the Director of the EBO Office shall issue a final written determination within 30 days of conclusion of the conference. Director's decision shall be the final administrative decision of the County.

### Compliance Responsibilities

The Office of EBO, along with contracting staff of each County department, shall monitor compliance with these EBO Program requirements during the term of the contract. If it is determined that there is cause to believe that a Prime Contractor or Subcontractor has failed (or will likely fail) to comply with any of the requirements of this EBO Program Ordinance, or with the contract provisions pertaining to S/M/WBE utilization, the Director of the Office of EBO or designee shall so notify the Originating Department and the contractor. The Director of the Office of EBO or designee may require such reports, information, and documentation from contractors, Respondents and the head of any County department, division, or office as are reasonably necessary to determine compliance with the EBO Program Ordinance requirements, within fifteen (15) calendar days after the notice of noncompliance is issued. If the requested materials are not received within fifteen (15) calendar days, then a finding of noncompliance is determined and appropriate penalties and sanctions will apply as stated in this EBO Program Ordinance and the PPM.

Joint responsibility is shared by the Director of the Office of EBO or designee and the Originating Department or designee to attempt to resolve a contractor's, subcontractor's, or vendor's noncompliance with the requirements of this EBO Program Ordinance, including any non-compliance with contract provisions pertaining to S/M/WBE utilization, within fifteen (15) calendar days after the apparent noncompliance is discovered. A written notice of the noncompliance should immediately be sent by the Office of EBO or designee to those contractors, subcontractors, or vendors that are in noncompliance, and to the Director or Manager of the Originating Department or designee. If noncompliance cannot be resolved within fifteen (15) calendar days after notice is sent, the Director of the Office of EBO or designee and the Director or Manager of the Originating Department or designee shall submit written recommendations to the County Administrator or designee, and if the County Administrator or designee concurs with the finding, such sanctions as stated

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in this EBO Program Ordinance and Procedures and the PPM shall be imposed.

Whenever the Director of the Office of EBO or designee finds, after investigation, that an Originating Department has failed to comply with the provisions of this EBO Program Ordinance or the contract provisions pertaining to S/M/WBE utilization, a written finding specifying the nature of the noncompliance shall be transmitted to the Originating Department, and the Director of the Office of EBO or designee shall attempt to resolve any noncompliance through conference and conciliation. Should such attempt fail to resolve the noncompliance, the Director of the Office of EBO or designee shall transmit a copy of the finding of noncompliance, with a statement that conciliation was attempted and failed, to the County Administrator or designee who shall take appropriate action under this EBO Program Ordinance to secure compliance.

The Director of the Office of EBO, or designee, shall submit a written annual report to the County Administrator and the Board on the progress of the County toward the utilization goals and objectives established by this EBO Program Ordinance together with the identification of any problems and specific recommendations for improving the County's performance.

The Director of the Office of EBO or designee and Originating Departments shall work closely with the Office of the County Attorney to include language in all County contracts that ensures compliance with the EBO Program. This language should also include a time period for the contractor to correct any and all deficiencies no later than fifteen (15) calendar days after notification of non-compliance.

The Director of the Office of EBO shall also establish certification, re-certification, and graduation procedures for S/M/WBE firms to be certified by an independent third-party entity as being at least 51% owned, controlled, and managed in accordance with eligibility standards and definitions established by this EBO Program Ordinance, and the size standards set forth in Exhibit Q of the PPM. Processing of certification applications shall be at no cost to the applicants. Director of the Office of EBO shall diligently review the practices and standards of prospective certifying entities to ensure that they are consistent with best practices for maintaining economic inclusion program integrity.

#### Reporting Requirements – Office of EBO

The Director of the Office of EBO or designee shall monitor the implementation of this EBO Program and periodically issue written reports (preferably quarterly) on the progress of the EBO Program and the various EBO Program elements. Also, on no less than an annual basis, the Director of the Office of EBO or designee shall report to the County Board and the County Administrator on the implementation of the Program and, as data becomes available, progress on achieving the goals and objectives of the EBO Program Ordinance and the effectiveness of the EBO Program. Such reports shall include the achievement of contract participation goals for S/M/WBEs by ethnicity and gender of ownership, by industry segment, by location, and by API. The Director of the Office of EBO or designee shall also issue a written report on an annual basis to the County Administrator and the Board that summarizes contract payments to Prime Contractors and all Subcontractors for each of these categories. This written report should also address stated EBO Program objectives including, but not limited to, enhancement of competition as reflected in solicitation response activity, growth in availability and business capacity for S/M/WBE firms, removal of barriers to S/M/WBE contract participation, reduction or elimination of disparities in contract awards and contract payments to M/WBE firms in County contracts. Other specific performance measures by which the success of the EBO Program Ordinance might be evaluated (depending upon the availability of data) include: (a) growth in the numbers of SBE and M/WBE firms winning their first contract awards from the County; (b) growth in the County's overall SBE and M/WBE Prime Contracting dollar volume; (c) growth in the numbers of SBE and M/WBE firms that are bondable and in the collective bonding capacity of SBE and M/WBE firms; (d) growth in the numbers of SBE and M/WBE firms that successfully graduate from the programs and remain as viable competitors after the passage of two (2) years; (e) growth in the numbers of graduated SBE and M/WBE firms

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that successfully compete for County contracts; (f) growth in the size of the largest County contracts won and successfully performed by SBE and M/WBE firms respectively; (g) comparability in the annual growth rates and median sales of SBE firms and M/WBE firms as compared to other firms; and (h) growth in the percentage of contract dollar participation of M/WBE firms in the private sector of the Relevant Marketplace. The written report should also contain any recommendations for modifications, suspension, or termination of any portion of this EBO Program, with justifications for each such recommendation.

#### Support to Goal Setting Committee and EBO Advisory Committee

The Office of EBO shall provide staff support and logistical support for the Goal Setting Committee and the Equal Business Opportunity Advisory Committee as necessary. Such support shall include, but not be limited to, scheduling, facilitating data requests, analysis, communications, and meeting logistics.

#### c. Contractor / Vendor Responsibilities

To facilitate the Office of EBO completing its responsibilities in administering EBO Program elements, a contractor / vendor shall:

- 1) Permit the Office of EBO to inspect any relevant matter, including records and the jobsite, and to interview Subcontractors and workers (field compliance).
- 2) If performing a County Construction contract, ensure that all Subcontractors are paid any undisputed amount to which the Subcontractor is entitled within 10 calendar days of receiving a progress or final payment from the County and otherwise comply with the County's contract terms and conditions which set forth the obligations of the Prime Contractor and Subcontractors and the remedies for delinquency or nonpayment of undisputed amounts.
- 3) Notify the County in writing of any changes to their S/M/WBE utilization and/or subcontracting plan. All changes (substitutions and/or terminations) must be approved in advance and in writing by the Office of EBO.
- 4) Amendment for unforeseen circumstances: If at any time after submission of a solicitation response and before execution of a contract, the apparent successful Respondent determines that a certified S/M/WBE listed on the participation schedule has become or will become unavailable, then the apparent successful Respondent shall immediately notify the Office of EBO. Any desired change in the S/M/WBE participation schedule shall be approved in advance by the Office of EBO and shall indicate the Prime Contractor's Good Faith Efforts to substitute another certified S/M/WBE Subcontractor (as appropriate) to perform the work. Any desired changes (including substitutions or termination and self-performance) must be approved in writing in advance by the Office of EBO.
- 5) Notify the Originating Department and Office of EBO regarding any transfer or assignment of a contract with the County.
- 6) Retain records of all Subcontractor payments for a minimum of four years following project termination date.

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### d. Exceptions and Waivers

- (a) If a Respondent is unable to comply with the API requirements imposed by GSC under the terms of this EBO Program Ordinance, such Respondent shall submit, as required in the Solicitation, a request for a waiver or partial waiver at the time as required in the solicitation. The waiver request shall include specified documentation which demonstrates a Good Faith Effort to comply with the requirements as described under the selected APIs.
- (b) If, after recommended award of a contract, a contractor is unable, through no fault of its own, to meet the participation requirements for S/M/WBEs specified at response submittal, the contractor must immediately seek substitute S/M/WBEs to fulfill the requirements; the requested substitution must be approved by the Director of the Office of EBO or designee and the Originating Department Director or designee. If, after reasonable Good Faith Efforts, the contractor is unable to find an acceptable substitute S/M/WBE, a post-award waiver may be requested. The request shall document the reasons for the contractor's inability to meet the goal requirement. In the event the contractor is found not to have performed Good Faith Efforts in its attempt to find a suitable substitute for the initial S/M/WBE proposed utilization, the contract may, in the County's sole discretion, be terminated for material breach. If the County terminates the contract, the County may then award the contract to the next lowest Responsible and Responsive Respondent or, in the alternative, re-solicit the contract with the terminated vendor being disqualified from participation in the re-solicitation.
- (c) Upon submission of a prospective draft Solicitation to the Office of EBO, and prior to the public release of solicitations, an Originating Department or Department of Purchasing may request the Director of the Office of EBO or designee to waive or modify the application of API requirements for S/M/WBE participation by submitting its reasons in writing. In the event consensus cannot be reached regarding the request, the request for exception of the solicitation from the EBO program shall be resolved by the County Administrator. The County Administrator or designee may grant such an exception or modification of application of an API upon a determination that:
  - i) The extraordinary and necessary requirements of the contract render application of the APIs infeasible or impractical;
  - ii) The nature of the goods or services being procured are excluded from the scope of this EBO Program Ordinance; or
  - iii) Sufficient qualified S/M/WBEs providing the goods or services required by the contract are unavailable in Palm Beach County despite every reasonable attempt to locate them.

Otherwise, such Solicitations shall be forwarded to the Director of the Office of EBO for review and also to the GSC for possible application of APIs. Any further requests from an Originating Department or Purchasing Department for modification of Goal amounts or other APIs as established by the GSC shall be presented to the County Administrator or designee, whose decisions on such requests shall be final.

- (d) The Director of the Office of the EBO may waive the application of APIs to enhance S/M/WBE utilization for a specific contract under the following circumstances:
  - i) Whenever the needed goods or services are available only from a sole source and the prospective contractor is not currently disqualified from doing business with the County, or the procurement is necessary to preserve or protect the health and safety

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of the County's residents; and

- ii) The Originating Department or Purchasing certifies to the Director of the Office of EBO and County Administrator or designee:
  - a) That an emergency exists which requires goods or supplies to be provided with such immediacy that it is unable to comply with the requirements of this Ordinance;
  - b) That the prospective contractor is an S/M/WBE or, if not, that the prospective contractor will make a Good Faith Effort to utilize S/M/WBEs; and
  - c) That the conditions imposed by law, or the external source of funding for the contract or grant effectively prohibits the application of the EBO Program Ordinance.

Final approval of all such exceptions and waivers shall be made by the County Administrator or designee.

e. Penalties and Sanctions

Upon recommendation of sanctions by the County Administrator regarding the failure of a contractor, vendor, Respondent or other business representative to comply with any portion of this EBO Program Ordinance, the County Board may impose upon the non-complying party any or all of the following penalties:

- i) Suspension of contract;
- ii) Withholding of funds;
- iii) Rescission of contract based upon a material breach of contract pertaining to EBO Program compliance;
- iv) Refusal to accept a response or proposal;
- v) Debarment of a Respondent, contractor or other business entity from eligibility for providing goods or services to the County for a period not to exceed three (3) years (upon Board approval); and
- vi) Liquidated damages equal to the difference in dollar value of S/M/WBE participation as committed to in the contract, and the dollar value of S/M/WBE participation as actually achieved.

It is a violation of this EBO Program Ordinance to:

- i) Fraudulently obtain, retain or attempt to obtain, retain or aid another in fraudulently obtaining, retaining or attempting to obtain or retain Certification status as an S/M/WBE for purposes of this EBO Program Ordinance.

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- ii) Willfully falsify, conceal or cover up by a trick, scheme or device, a material fact or make any false, fictitious or fraudulent statements or representations, or make use of any false writing or document, knowing the same to contain any false, fictitious or fraudulent statement or entry pursuant to the terms of this EBO Program Ordinance.
- iii) Willfully obstruct, impede or attempt to obstruct or impede any authorized official or employee who is investigating the qualifications of a business entity which has requested Certification as an S/M/WBE.
- iv) Fraudulently obtain, attempt to obtain or aid another person fraudulently obtaining or attempting to obtain public monies to which the person is not entitled under the terms of this EBO Program Ordinance.
- v) Make false statements to any entity that any other entity is or is not certified as an S/M/WBE for purposes of this EBO Program Ordinance.

Any person who violates these provisions shall be subject to penalties and sanctions established by this EBO Program Ordinance and related policies and procedures posted in the PPM, and also to the maximum penalty provided by law.

### f. Equal Business Opportunity Advisory Committee (EBOAC)

The Director of the Office of EBO in collaboration with the County Administrator shall nominate a fifteen-member citizens committee made up of representatives of trade groups and members of the general business community (as specified below), and subject to formal appointment by the Board, this advisory group shall serve as the Equal Business Opportunity Advisory Committee to: (a) assist the Director of the EBO Program or designee, the County Administrator or designee, and the Board in reviewing the administration of various programs and policies that promote S/M/WBE participation in County prime contract and subcontract opportunities;; and (b) make recommendations to the Director of the Office of EBO, the County Administrator or designee, and Board concerning modifications of such programs, policies, and procedures established pursuant to this EBO Code. As vacancies become available, they shall be filled as soon as practicable through the same nomination and appointment process.

(1) *Membership:* The EBOAC shall consist of the following members:

- a. One (1) black business owner certified as a small business by the county;
- b. One (1) Hispanic business owner certified as a small business by the county;
- c. One (1) women business owner certified as a small business by the county;
- d. One (1) white male business owner certified as a small business by the county;
- e. One (1) business owner domiciled in the county;
- f. One (1) representative of a business incubator program;
- g. One (1) representative of a Hispanic business organization;
- h. One (1) representative of the National Association of Women in Construction;
- i. One (1) representative of a women's business organization;

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- j. One (1) certified minority contractor;
- k. One (1) representative of the Associated General Contractors Association;
- l. One (1) representative of the Small Business Development Center;
- m. One (1) representative of a financial institution that assists small businesses;
- n. One (1) representative of a Black Chamber of Commerce of Palm Beach County;
- o. One (1) representative of a professional services organization.

#### (2) *Appointment Process / Terms / Vacancies / Reimbursements*

Members shall be appointed at large by the board of county commissioners and shall serve for staggered terms of three (3) years. Members may only serve for (3) three consecutive three- year terms. Vacancies shall be filled in the same manner as the original appointments for the remainder of the vacant term. Each member shall serve without compensation and may be removed without cause by the board of county commissioners at any time. Travel reimbursement is limited to expenses incurred only for travel outside the county necessary to fulfill board member responsibilities when sufficient funds are budgeted and available, and upon approval of the county administrator or deputy county administrator.

#### (3) *Additional Duties and functions.* The committee shall have the following duties and functions:

- a. Review and evaluate the effectiveness of small business programs within county government;
- b. Monitor and evaluate the effectiveness of the county's small business policies and procedures, resolutions and ordinances, including their implementation by the various county departments;
- c. Study and evaluate the necessity for further county regulations and procedures regarding small business participation;
- d. Receive and where necessary, analyze information concerning the presence of discrimination in the bidding and contracting process and recommend to the board of county commissioners further steps to alleviate such discrimination;
- e. Prepare, adopt and present an annual report to the board of county commissioners;
- f. Research and review other jurisdictions' small business programs;
- g. Act as a conduit between the county and the community, industry; organizations, trade associations, chambers of commerce and small and minority/women businesses;
- h. Plan and participate in education and training for small businesses; and
- i. Research and recommend to the board of county commissioners race- and gender-neutral mechanisms which will assist small businesses.
- j. Monitor and report on level of minority/women business enterprise participation.
- k. Monitor legislative initiatives and other issues and activities which impact small and M/WBE businesses and advise the board of county commissioners concerning same.

(3) *Meetings and organizations.* The committee shall meet on a regular basis (but no less than four times per year). A majority of members appointed shall constitute a quorum. In the presence of a quorum, committee business shall be conducted by a vote of a majority present. The meetings shall

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be governed by the Robert's Rules of Order. Reasonable public notice of all committee meetings shall be provided, and all such meetings shall be open to the public at all times.



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- (4) *Assistance to the committee.* The committee may request information from any department or agency of the county, local, regional, state, or federal government for information or advice in the performance of its work. The Office of EBO shall be responsible for providing staffing and data needs for the GSC.
- (5) *Chair and vice-chair.* A chair and vice-chair shall be initially appointed by the County Administrator and subsequently elected by a majority of the committee and shall serve for a term of one (1) year. The duties of the chair shall be to:
- a. Call committee meetings and set the agenda for the same;
  - b. Preside at committee meetings;
  - c. Establish subcommittees, appoint subcommittee chairs, and charge subcommittees with specific tasks;
  - d. Perform other functions as the committee may assign by rule or order.

The vice-chair shall perform the duties of the chair in the chair's absence, and such other duties as the chair may assign.

If a vacancy occurs in the office of the chair, the vice-chair shall become the chair for the unexpired term. If a vacancy occurs in the office of the vice-chair, the committee will elect another member to fill the unexpired term of the vice-chair.

- (6) *Attendance.* Members shall be automatically removed for lack of attendance. Lack of attendance is defined as failure to attend three (3) consecutive meetings or failure to attend more than two-thirds (2/3) of the meetings scheduled during a calendar year. Participation for less than three-fourths (¾) of a meeting shall constitute lack of attendance. Members removed under this section shall not continue to serve until a new appointment is made and removal shall create a vacancy.
- (7) *Conflict of interest.* Committee members shall be governed by the applicable provisions of the Palm Beach County Ethics Resolution R-94-693, as may be amended.

g. Goal Setting Committee

The Goal Setting Committee (GSC) is to be appointed and chaired by the County Administrator or designee. The GSC shall include, at a minimum, the Director of the Office of EBO or designee, the Director of the Purchasing Department or designee, the Director of Facilities Development and Operations (FDO) or designee, the Director or designee of the Originating Department whose contract(s) are under consideration by the GSC (if the Originating Department is neither FDO nor Purchasing) all without duplication of designees. The County Administrator or designee may also appoint two ex-officio members of the EBOAC to serve on any GSC purely in an advisory and non-voting capacity. Said ex-officio members shall be required to adhere to all confidentiality and conflict of interest disclosure requirements imposed on voting members. At the County Administrator's discretion, one or more GSCs may be appointed to serve in this capacity. The GSC establishes S/M/WBE goals for the EBO Program (e.g., Annual Aspirational Goals and contract-by-contract subcontracting goals, and determining which M/WBE segments are eligible for Segmented Subcontracting Goals annually) based upon Industry Categories, vendor availability, project-specific characteristics, and

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M/WBE utilization. The GSC also makes determinations about which APIs are to be applied to specific contracts based upon various criteria.

At a minimum, the GSC shall:

- a. Meet as often as it deems necessary to accomplish its duties as outlined in this Ordinance, but not less than once monthly;
- b. Formulate, recommend to the County Administrator or designee and implement additional rules and procedures for EBO Program goal-setting and other aspects of its duties in selecting and applying specific APIs to County solicitations and contracts in an efficient and effective manner; and
- c. Monitor and support the implementation of the EBO Program.

**Sec. 2-80.29. Severability Clause.**

If any section, paragraph, sentence, clause, phrase or word of this EBO Program Code, Policies, Procedures, or the application thereof, to any person or circumstance is for any reason held by a Court of competent jurisdiction to be unconstitutional, inoperative, invalid or void, such holding shall not affect the remainder of this EBO Program Ordinance or the application of any other provisions of this Ordinance which can be given effect without the invalid provision or application, and to this end, all the provisions of this Ordinance are hereby declared to be severable.

**Sec. 2-80.30. Effective Date and Sunset.**

This Ordinance shall become effective January 1, 2019, and various features of the EBO Program may be phased in as soon as practicable over the course of the subsequent six months at the discretion of the County Administrator. Absent amendment and / or reauthorization by the Board, this EBO Program Code, policies and procedures shall sunset on December 31, 2023.

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