

## **NOTICE OF PUBLIC HEARING**

- Subject:** Opportunity to comment on proposed amendments to rules concerning participation by and opportunities for minority-owned, women-owned and emerging business enterprises in City procurement.
- Date / Time:** November 13, 2013 / 10 A.M.
- Location:** 110 William Street, 4<sup>th</sup> Floor,  
New York, New York 10038
- Contact:** Anne Rascon  
Deputy Commissioner, Division of Financial and Economic Opportunity  
Department of Small Business Services  
110 William Street, 2nd Floor  
New York, New York 10038

### **Proposed Rule Amendment**

The Commissioner of the New York City Department of Small Business Services (“DSBS”) intends to promulgate amendments to the following sections of Subchapters B, D and E of Chapter 11 of Title 66 of the Rules of the City of New York (the “Rules”) as well as promulgate a new Section 11-27 of the Rules pursuant to §1304 of the New York City Charter:

- §§ 11-21 through 11-26 of Subchapter B of Chapter 11 of Title 66 of the Rules (Minority- and Women-owned Business Enterprise Certification Program)
- § 11-60, §§ 11-62 through 11-70 and §§ 11-72 through 11-74 of Subchapter D of Chapter 11 of Title 66 of the Rules (Participation By Minority-owned and Women-owned Business Enterprises In City Procurement)
- §§ 11-81 through 11-83 of Subchapter E of Chapter 11 of Title 66 of the Rules (Emerging Business Enterprise Certification Program)

The proposed amendments were included in this agency’s regulatory agenda.

### **Instructions**

- Written comments regarding the proposed amendments must be received by close of business on November 12, 2013. Written comments should be sent to:  
Anne Rascon  
Deputy Commissioner, Division of Financial and Economic Opportunity  
Department of Small Business Services  
110 William Street, 2nd Floor  
New York, New York 10038

- If you need a sign language interpreter or other form of reasonable accommodation for disability at the hearing, please notify Anne Rascon by close of business on November 6, 2013.
- Written comments and a summary of the oral comments will be available for public inspection within a reasonable time after receipt between 9:00 a.m. and 4:30 p.m. at the Department of Small Business Services.

### **Statement of Basis and Purpose**

The City's M/WBE Program, originally enacted by Local Law 129 (2005), and codified in section 1304 of the New York City Charter and section 6-129 of the Administrative Code (Ad. Code), establishes goals for participation by minority-owned business enterprises (MBEs), women-owned business enterprises (WBEs), and emerging business enterprises (EBEs) as contractors and subcontractors in the categories of construction, standard services, professional services, and goods valued under \$1 million. Local Law 129 (2005) also requires the Commissioner to establish and operate, on behalf of the City, a centralized program for the certification of MBEs, WBEs and EBEs for the purposes of establishing the eligibility of such businesses for participation in the programs and processes established pursuant to local law to ensure their meaningful participation in City procurement.

Local Law 1 of 2013 amends these provisions by, among other things:

- changing the participation goals for each of the four procurement categories (construction, standard services, professional services, and goods);
- removing the million dollar cap on construction, professional services, and standard services procurements for which a City agency may establish goals;
- lowering the cap from \$1 million dollars to \$100,000 for goods contracts for which a City agency may establish goals;
- modifying defined terms and adding new defined terms;
- changing the definition of "Graduate MBE and/or WBE" and "Graduate EBE" as well as adding new requirements that during the certification and recertification process, SBS determine whether a firm qualifies as a Graduate MBE, Graduate WBE or Graduate EBE and that SBS implement a process for applicable business entities to challenge such a determination as well as a process for having such a designation lifted;
- adding new division requirements regarding oversight of the M/WBE Program, the provision of technical assistance and the promotion of joint ventures;
- adding a new requirement that SBS perform site visits for at least 5% of new MBE and/or WBE as well as EBE certification applications in a given fiscal year; and
- modifying the criteria and procedures for SBS to utilize in determining whether firms certified as MBEs and/or WBEs by other governmental entities can be recognized as certified business enterprises by the City.

The proposed rule amendments to Subchapters B, D and E of Chapter 11 of Title 66 of the Rules implement the above provisions of Local Law 1 of 2013 and conform to the new requirements established by Local Law.

In a separate, simultaneously published proposed rule, DSBS is amending the goals in Section 11-61 of Chapter 11 of Title 66 of the Rules of the City of New York to match the new goals established by Local Law 1. The intent of Local Law 1 was to set goals corresponding to the availability of MBEs or WBEs in categories where a significant disparity between availability and utilization was identified in the Disparity Data Analysis. The goal identified by the Analysis for WBEs in the professional services category was 17 percent; however, due to a legislative drafting error, the goal enacted in Local Law 1 was incorrectly listed as 37 percent. To reflect the correct goal of 17 percent for WBEs in the professional services category, the Commissioner will be exercising the authority provided under Ad. Code § 6-129(d)(4) periodically to review the availability and utilization rates for MBEs and WBEs and, where appropriate, to revise the Citywide participation goals set forth in that section. Section 6-129(d)(4) also provides that DSBS submit the results of the review and any proposed revision to the goals to the Speaker of the City Council at least 60 days prior to publishing a rule that would revise the goals. DSBS has already provided the results of the review to the Council, and, as noted above, the Council has included them in the Local Law 1 Committee Report. DSBS has notified the Speaker of the proposed rulemaking and the 60 day period has since elapsed.

“Shall” and “must” denote mandatory requirements and may be used interchangeably in the rules of this department, unless otherwise specified or unless the context clearly indicates otherwise.

New text is underlined; deleted material is in [brackets].

### **The Amended Rule**

§1. Section 11-21 of Chapter 11 of Title 66 of the Rules of the City of New York is amended to read as follows:

#### **§ 11-21 Definitions.**

As used in [these rules] this subchapter, the following terms [shall] have the following meanings:

Applicant. "Applicant" means a business enterprise which has applied for certification as an MBE and/or WBE.

Audit. "Audit" means an examination of a business enterprise to determine whether the business enterprise is eligible for certification as an MBE and/or WBE, and may include an examination of books, records, physical facilities and interviews of applicants.

Business enterprise. "Business enterprise" means any entity, including a sole proprietorship, partnership or corporation which is authorized to and engages in lawful business transactions in accordance with the laws of New York State.

Certified business. "Certified business" means a business enterprise which has been approved for certification as an MBE and/or WBE in accordance with the procedures set forth in §11-22 of these rules, subsequent to verification that the business enterprise is owned, operated, and controlled by minority group members as defined in §11-21 of these rules, or women.

Certification director. "Certification director" means the director of the minority- and women-owned business enterprise program or his or her designee or his or her successor in function.

Certification letter. "Certification letter" means the letter sent by DSBS to an applicant notifying it of its certification as an MBE and/or WBE.

City. "City" means the City of New York.

Commissioner. "Commissioner" means the Commissioner of the New York City Department of Small Business Services or his or her designee or his or her successor in function.

Day. "Day" means a calendar day unless otherwise specified.

Denial or denied. "Denial" or "denied" means a determination by DSBS that a business enterprise is not eligible for certification as an MBE and/or WBE because it does not meet the criteria for certification.

Division. "Division" means the division of economic and financial opportunity within the department of small business services.

DSBS. "DSBS" means the New York City Department of Small Business Services or its successor in function.

[Director. "Director" means the Director of the Minority- and Women-Owned Business Enterprise Program or his or her designee or his or her successor in function.]

Geographic Market. "Geographic market" of the City means the following counties: Bronx, Kings, New York, Queens, Richmond, Nassau, Putnam, Rockland, Suffolk and Westchester within the State of New York; and Bergen, Hudson, and Passaic within the State of New Jersey.

Graduate MBE and/or graduate WBE. "Graduate MBE" and/or "graduate WBE" [shall] mean an MBE and/or WBE which [must have] has been awarded [prime] contracts by one or more agencies within the past three years where the total city funding from the expense and capital budgets for such contracts was equal to or greater than [fifteen] fifty million dollars and whose size has exceeded the size standards established for its industry by the United States small business administration for three years.

Minority group member. "Minority group member" means a United States citizen or permanent resident alien who is, and can demonstrate membership in, one of the following groups:

- (1) Black persons having origins in any of the Black African racial groups;
- (2) Hispanic persons of Mexican, Puerto Rican, Dominican, Cuban, Central or South American descent of either Indian or Hispanic origin, regardless of race; or
- (3) Asian and Pacific Islander persons having origins in any of the Far East countries, South East Asia, the Indian Subcontinent or the Pacific Islands.

Minority-owned business enterprise or MBE. "Minority-owned business enterprise" or "MBE" means a minority-owned business enterprise that is certified in accordance with §1304 of the charter.

Minority- and women-owned business enterprise certification application or certification application. "Minority- and women-owned business enterprise certification application" or "certification application" means the form that DSBS requires an applicant to submit for purposes of applying for certification as an MBE and/or WBE.

Non-certified firm. "Non-certified firm" means a business enterprise that has not been certified as an MBE and/or WBE in accordance with section 1304 of the charter.

Principal office or place of business. "Principal office or place of business" means where the main office and regular meeting place of the board of directors that manages, conducts, and directs the business is located.

Rejected or rejection. "Rejected" or "rejection" means the refusal by DSBS to certify a business enterprise as an MBE and/or WBE due to an insufficiency in documentation submitted by the applicant.

Women-owned business enterprise or WBE. "Women-owned business enterprise" or "WBE" means a woman-owned business enterprise that is certified pursuant to §1304 of the charter.

§2. Section 11-22 of Chapter 11 of Title 66 of the Rules of the City of New York is amended to read as follows:

**§ 11-22 Eligibility Criteria.**

The following standards [shall] will be used to determine whether a business enterprise is eligible for certification as an MBE and/or WBE.

(a) *Nexus*. In order to be eligible for certification as an MBE and/or WBE, a business enterprise must have a real and substantial business presence in the geographic market for the city of New York. An MBE and/or WBE which meets one of the following conditions [shall] will be deemed to have a real and substantial business presence in the geographic market for the city of New York:

(1) the business enterprise's principal office or place of business or headquarters is located within the City; or

(2) the business enterprise maintains full-time employees in one or more of the business enterprise's offices within the City to conduct or solicit business in the City the majority of their working time; or

(3) the business enterprise's principal office or place of business or headquarters is located within the geographic market of the City, and (i) has transacted business more than once in the City within the last three years, or (ii) has sought to transact business more than once in the City within the last three years; or

(4) twenty-five percent (25%) of the business enterprise's annual gross receipts for the last three years were derived from transacting business in the City; or

(5) the business enterprise's principal office or place of business or headquarters is not located within the geographic market of the City but the business enterprise has demonstrated two or more of the following indicia of a real and substantial presence in the market for the City of New York: (i) the business enterprise has maintained a bank account or engaged in other banking transactions in the City; (ii) the business enterprise, or at least one of its owners, possesses a license issued by an agency of the City to do business in the City; (iii) the business enterprise has transacted or sought to transact business in or with the City more than once in the past three years.

(b) *Ownership.* For the purposes of determining whether an Applicant should be certified as an MBE and/or WBE, or whether such certification should be revoked, the following rules concerning ownership [shall] will be applied:

(1) The equity interest of minority group member(s) and/or women owners must be proportionate to the contribution of the minority group member(s) and/or women owners as demonstrated by, but not limited to, contributions of money, property, equipment or expertise;

(2) A sole proprietorship must be owned by a minority group member and/or woman;

(3) A partnership must demonstrate that minority group members and/or women have a fifty-one (51%) percent or greater share of the partnership; and

(4) A corporation must have issued at least fifty-one (51%) percent of its issued and authorized voting and all other stock to minority group members and/or women shareholders.

(c) *Control.* Determinations as to whether minority group members and/or women control the business enterprise [shall] will be made according to the following criteria:

(1) Decisions pertaining to the operations of the business enterprise [shall] must be made by minority group members and/or women claiming ownership of that business enterprise. The

following [shall] will be considered in determining whether the minority group members and/or women are making such decisions:

(i) whether minority group members and/or women have experience and technical competence in the business enterprise seeking certification;

(ii) whether minority group members and/or women demonstrate the working knowledge and ability needed to operate the business enterprise; and

(iii) whether minority group members and/or women show that they devote time on an ongoing basis to the daily operation of the business enterprise.

(2) Articles of incorporation, corporate by-laws, partnership agreements, business certificates, corporate tax returns, unincorporated business tax returns, partnership tax returns and other agreements, including, but not limited to, loan agreements, lease agreements, supply agreements, credit agreements or other agreements must permit minority group members and/or women who claim ownership of the business enterprise to make those decisions pertaining to operations of the business enterprise without restrictions.

(3) Minority group members and/or women must demonstrate control of negotiations, signature authority for payroll, leases, letters of credit, insurance bonds, banking services and contracts, and other business transactions through production of relevant documents.

(d) *Additional eligibility provisions.* The following provisions apply to all applicants seeking certification as an MBE and/or WBE:

(1) Documentation may be required to substantiate the claim of membership in a minority group. This documentation may include, but is not limited to, birth certificates, foreign passports, naturalization papers, registration on Native American tribal rolls and nonresident visas;

(2) Where the actual management of the business enterprise is contracted out to individuals other than minority group members and/or women, minority group members and/or women must demonstrate that they have the ultimate power to hire and fire these managers, that they exercise this power and make other substantial decisions which reflect control of the business enterprise;

(3) Documentation of one (1) year's business activity [shall] will be required in order to provide sufficient information upon which certification can be reasonably made. The commissioner, in his or her discretion, may permit documentation for a lesser period;

[(4) DSBS may grant eligible status to any business enterprise eligible under §11-22 of these rules, and (A) certified as an MBE or WBE by the New York State Department of Economic Development, Division of Minority and Women's Business Development pursuant to Article 15-A of the New York State Executive Law and any rules or regulations promulgated thereunder, or (B) certified as an MBE or WBE by another governmental or other certifying entity whose minority- and women-owned business enterprise certification criteria are determined by the commissioner to be consistent with the certification criteria set forth in these rules. Unless

otherwise determined by the commissioner, the maximum period for which any certification granted by DSBS pursuant to this subdivision is valid shall be the period during which the business enterprise is certified as an MBE or WBE with the original certifying entity;]

(4)[(5)] Any business enterprise that satisfies the eligibility criteria as set forth in §11-22 of these rules, is presumptively eligible for certification as an MBE and/or WBE under these rules; provided that the commissioner may decline to certify, or revoke the certification of, any business enterprise on the ground that there is not a firm basis for believing that there is a compelling state interest to justify certification of that business enterprise under these rules.

(e) Graduate MBE and/or WBE determinations. The division will, upon reviewing applications for certification and recertification, determine whether a business enterprise qualifies as a graduate MBE and/or WBE. The division will make such determinations in accordance with the following procedures:

(1) In the event that the division determines a business enterprise seeking new certification as an MBE and/or WBE qualifies as a graduate MBE and/or WBE pursuant to §11-21 of these rules, the division will provide a written notice of such determination to the applicant business enterprise stating the reason(s) for such determination and the procedures for challenging the graduate MBE and/or WBE determination.

(2) In the event that the division determines a certified MBE and/or WBE qualifies as a graduate MBE and/or WBE pursuant to §11-21 of these rules, the division will provide a written notice of such determination to the business enterprise seeking recertification setting forth the reason(s) for such determination and the procedures for challenging the graduate MBE and/or WBE determination.

(3) In the event that the division determines a business enterprise seeking new certification or a certified MBE and/or WBE to be a graduate MBE and/or WBE pursuant to §11-21 of these rules, the business enterprise may challenge such a determination pursuant to the procedures set forth in §§ 11-24 and 11-25 of these rules.

(4) In the event that the division has determined a business enterprise to be a graduate MBE and/or WBE, and the business enterprise has not made a timely challenge to that determination, or has made such a challenge and the department has affirmed its determination, the business enterprise may not apply to have the designation lifted for at least two years from the date of the original determination notice. The division will lift the designation if the firm demonstrates that (i) it has not been awarded contracts by one or more agencies within the past three years where the total city funding from the expense and capital budgets for such contracts was equal to or greater than fifty million dollars; and (ii) it has been below the size standards established by the United States small business administration for its industry for a period of two years or more.

(f) Certification as both an MBE and a WBE. In order to be certified as both an MBE and a WBE, a business enterprise must show that the ownership standard described in subdivision b of this section and the control standard described in subdivision c of this section are met by women who are minority group members.

§3. Section 11-23 of Chapter 11 of Title 66 of the Rules of the City of New York is amended to read as follows:

**§11-23 Application Intake and Verification.**

(a) Minority and/or women-owned business enterprise certification applications may be obtained from, and must be returned to DSBS or may be submitted electronically, to the extent an online application process is available. DSBS [shall] will record the date that each application is received.

(b) An applicant [shall] must submit such information or documentation as may be required by DSBS in connection with its certification as an MBE and/or WBE. Failure to submit such information or documentation may result in the rejection or revocation of such certification.

(c) If a certification application is received by DSBS and required documents are missing, questions are unanswered or the certification application is not properly signed, DSBS [shall] will send to the applicant, within 45 days of the date the application was received by DSBS, a notice of status and deficiency (the "Notice"), stating any deficiency arising from missing documents, unfinished questions or deficiencies in signature. An applicant may cure the noticed deficiency by providing DSBS with documents or information requested in the Notice, within 30 days of the date of the Notice.

(d) When the applicant cures a noticed deficiency, pursuant to procedures set forth in §11-23(c) of these rules, DSBS [shall] will have an additional forty-five (45) days to advise the applicant of any further deficiency which may be cured in accordance with §11-23(c) of these rules.

(e) If the applicant does not cure a noticed deficiency, pursuant to procedures set forth in §11-23(c) of these rules, and the certification application remains incomplete for at least forty-two (42) days of the date of the Notice, unless such time is extended by the certification director, the applicant [shall] must be sent a notice stating that its certification application has been rejected and will not be processed, together with its rejected certification application.

(f) An applicant whose certification as an MBE and/or WBE is rejected[,] may not reapply for certification for at least one hundred [and] twenty (120) days of the date of the notice of rejection of its application.

(g) Applicants may be required to consent to inquiries of their bonding companies, banking institutions, credit agencies, contractors, affiliates, clients and other entities to ascertain the applicant's eligibility for certification. Refusal to permit such inquiries [shall] will be grounds for rejection of a certification application.

(h) All applicants and certified businesses [shall] will be subject to an audit at any time. An applicant's or certified business' refusal to facilitate an audit [shall] will be grounds for denial of its certification application or revocation of its certification.

(i) A certification application may be withdrawn by an applicant without prejudice at any time prior to an audit. Following the withdrawal of a certification application, the applicant may not reapply for certification for a period of at least one hundred [and] twenty (120) days from the date of withdrawal of the application.

(j) All applicants and certified businesses may be required to provide documentation to substantiate that the business has the skill and expertise to perform in the particular area of work for which it is requesting listing or is listed on the M/WBE Directory.

(k) The division will conduct site visits for at least 5% of all MBE and/or WBE certification applications received during a fiscal year to verify that such business enterprises are eligible for certification under these rules.

§4. Section 11-24 of Chapter 11 of Title 66 of the Rules of the City of New York is amended to read as follows:

**§11-24 Notice of Determination and Right to Appeal.**

(a) The certification director [shall] will provide the applicant with written notice of a determination approving or denying certification.

(b) In the event certification is approved by the certification director, the applicant must be sent a certification letter and will be certified as an MBE and/or WBE for five years from the date of the certification letter or until notified of the need to reapply at the certification director's request, whichever is earlier, so long as the applicant submits to the division an affidavit of no material change in ownership or control annually.

(c) In the event certification is denied by the certification director, a written notice of such determination [shall] will be provided to the applicant stating the reason(s) for such denial. Such notice [shall] will also state the procedures for filing an appeal.

(d) The applicant may appeal the determination within thirty (30) days after the date of the notice denying the business enterprise's certification. In the event that a request for an appeal is not made within the thirty (30) day period, the certification director's determination will be deemed final and the applicant may not reapply for certification for two (2) years from the date of the written notice denying certification, provided, however, that if the facts and circumstances forming the basis of the denial decision have changed significantly, the applicant, at the discretion of the certification director, may be granted permission to reapply sooner.

(e) The request for an appeal [shall] must state the grounds upon which the denial of certification is being appealed.

§5. Section 11-25 of Chapter 11 of Title 66 of the Rules of the City of New York is amended to read as follows:

## §11-25 Appeals.

A business entity denied certification or re-certification as an MBE and/or WBE [shall] will be given written notice by DSBS of the grounds for such denial and an opportunity to appeal such denial in writing to the commissioner. Such appeal or a request for an extension to file an appeal must be received by the commissioner no later than sixty (60) days after the date of the notice denying the business enterprise's certification or re-certification. The commissioner may extend the period in which to initiate an appeal for good cause shown. Such appeal [shall] must include, at a minimum, a description of the reasons why the decision to deny certification or re-certification is in error and provide evidence to support the appeal. Such business entity [shall] must provide such other documentation or information as is requested by the commissioner, in his or her sole discretion. The commissioner [shall] will render a written determination no later than one hundred twenty (120) days after receipt of the appeal, unless the time to render a determination has been extended upon agreement of the commissioner and the business enterprise. If the commissioner's determination is not made within the prescribed one hundred twenty (120) days after receipt of the appeal or within the agreed upon extended time period, then the appeal is deemed denied. The decision of the commissioner granting or denying such appeal [shall] will constitute the final agency determination.

§6. Section 11-26 of Chapter 11 of Title 66 of the Rules of the City of New York is amended to read as follows:

## §11-26 Revocation of Minority- or Women-Owned Business Enterprise Status.

(a) A certified business must notify DSBS within forty-five (45) days of any material change in the information contained in the certification application. A material change may include, but is not limited to, a change in any of the following: ownership; address; officers; [or] services provided by the certified business[.]; market sector in which the business enterprise operates, bonding capacity of the business enterprise; and the union affiliation(s), if any, of the business enterprise. If a material change occurs, a review may be conducted by DSBS and certification may be revoked. If an MBE's and/or WBE's certification is revoked, such business enterprise may reapply for certification at any time following revocation. If a certified business fails to notify the certification director of such material change, the certification director may in his or her discretion, revoke the certification of an MBE and/or WBE for a period of up to five years.

(b) DSBS, upon having reason to believe or upon receiving allegations indicating that a certified business enterprise is not eligible for certification as an MBE and/or WBE, may meet with minority group members and/or women claiming ownership and control of the certified business and/or conduct an audit of such business enterprise, and [shall] will take the following actions:

- (1) Determine whether the allegation can be substantiated;
- (2) Obtain in writing, if possible, the basis of any allegation from the person or persons making the allegation;

(3) Notify a certified business in writing that its certification as an MBE and/or WBE is under review by the certification director and may be revoked. This notice [shall] will specify the bases for such review and any facts specifically at issue; and

(4) Provide the certified business with an opportunity to respond in writing to any allegations set forth in any notices questioning the certification status of a certified business, within twenty-eight (28) days of the date of such notice, by personal service or certified mail, return receipt requested.

(c) If the minority group members or women claiming ownership of the certified business fail to respond timely in writing to the notice of certification status review, or fail to meet with a DSBS representative or agree to an audit, the certification of the MBE and/or WBE may be revoked by the certification director.

(d) The certification director [shall] will notify, in writing, a certified business of the revocation of its certification as an MBE and/or WBE within fourteen (14) days of revoking such certification. The minority group members and/or women claiming ownership and control of a business enterprise which has had its certification as an MBE and/or WBE revoked, may request an appeal of this decision within thirty (30) days of the date of the notice of revocation. Such appeal [shall] must be conducted in accordance with procedures set forth in §11-25 of these rules. If a request for an appeal is not made within the thirty (30) day period, the certification director's determination [shall] will be final and the business enterprise may not reapply for certification for two (2) years from the date of the notice of revocation provided, however, that if the facts and circumstances forming the basis of the revocation decision have changed significantly, the business enterprise may, at the discretion of the certification director, be granted permission to reapply sooner.

(e) If at any time DSBS has reason to believe that an applicant or certified business has willfully and knowingly provided incorrect information or made false statements, it [shall] will refer the matter to the Department of Investigation for investigation. Falsification of any document by an applicant or a certified business may lead to the imposition of civil and criminal penalties as provided by law and contract, de-certification as an MBE and/or WBE and debarment from City contracts.

§7. Subchapter B of Chapter 11 of Title 66 of the Rules of the City of New York is amended to add a new Section 11-27 to read as follows:

**§11-27 Certification Criteria and Procedures for Firms Certified as Minority- and/or Women-Owned Business Enterprises by Other Governmental Entities.**

(a) DSBS may grant MBE and/or WBE certification status to eligible firms certified as minority owned businesses and/or women owned businesses by other governmental entities in accordance with the criteria and procedures contained in this section.

(b) Eligibility. Firms certified as minority owned businesses and/or women owned businesses by other governmental entities must satisfy the following eligibility requirements to be recognized by the division as certified MBEs and/or WBEs by the city of New York:

(1) The business enterprise must be eligible under §11-22 of these rules; and

(2) The business enterprise must be (i) certified as an MBE and/or WBE by the New York State Department of Economic Development, Division of Minority and Women's Business Development pursuant to Article 15-A of the New York State Executive Law and any rules or regulations promulgated thereunder; or

(ii) The business enterprise must be certified as an MBE and/or WBE by another governmental entity whose minority- and women-owned business enterprise whose certification criteria the commissioner has determined to be consistent with the certification criteria set forth in these rules and must be able to submit documentation evidencing such certification;

(3) The business enterprise must submit the appropriate application(s), form(s) and/or similar document(s) identified by the DSBS for certification pursuant to this section. Failure to submit such information or documentation may result in the rejection of such certification; and

(4) The business enterprise must submit such information or documentation as may be required by DSBS in connection with its certification as an MBE and/or WBE pursuant to this section. Failure to submit such information or documentation may result in the rejection of such certification.

(c) Certification period. Unless the commissioner determines otherwise, the maximum period for which any certification granted by DSBS pursuant to this subdivision is valid will be the period during which the business enterprise is certified as an MBE and/or WBE with the original certifying entity.

§8. Section 11-60 of Chapter 11 of Title 66 of the Rules of the City of New York is amended to read as follows:

§ 11-60 **Definitions.**

As used in this subchapter, the following terms [shall] have the following meanings:

(1) "Agency" means a city, county, borough, or other office, position, administration, department, division, bureau, board or commission, or a corporation, institution or agency of government, the expenses of which are paid in whole or in part from the city treasury.

(2) "Agency chief contracting officer" means the [person] individual to whom an agency head has delegated authority to organize and supervise the agency's procurement activity.

(3) "Availability rate" means the percentage of business enterprises within an industry

classification that are owned by minorities, women or [persons] individuals who are socially and economically disadvantaged willing and able to perform agency contracts.

(4) "Bidder" means any person submitting a bid or proposal in response to a solicitation for such bid or proposal from an agency.

(5) "Bidders list" or "proposers list" means a list maintained by an agency that includes persons from whom bids or proposals can be solicited.

(6) "City" means the city of New York.

(7) "City chief procurement officer" means the [person] individual to whom the mayor has delegated authority to coordinate and oversee the procurement activity of mayoral agency staff, including the agency chief contracting officers and any offices that have oversight responsibility for procurement.

(8) "Commercially useful function" means a real and actual service that is a distinct and verifiable element of the work called for in a contract. In determining whether an MBE, WBE or EBE is performing a commercially useful function, factors including but not limited to the following [shall] will be considered:

[(i)](a) whether it has the skill and expertise to perform the work for which it is being utilized, and possesses all necessary licenses;

[(ii)](b) whether it is in the business of performing, managing or supervising the work for which it has been certified and is being utilized; and

[(iii)](c) whether it purchases goods and/or services from another business and whether its participation in the contract would have the principal effect of allowing it to act as a middle person or broker in which case it may not be considered to be performing a commercially useful function for purposes of this section.

(9) "Commissioner" [shall] means the commissioner of small business services or his or her designee or his or her successor in function.

(10) "Construction [contract]" means [any agreement with an agency for or in connection with the] construction, reconstruction, demolition, excavation, renovation, alteration, improvement, rehabilitation, or repair of any building, facility, physical structure of any kind. [Construction contracts shall not include contracts for professional services.]

(11) "Contract" means any agreement, purchase order or other instrument whereby the city is committed to expend or does expend funds in return for goods, professional services, standard services, [architectural and engineering services,] or construction.

(12) "Contractor" means a person who has been awarded a contract by a city agency.

(13) “Direct subcontractor” means a person who has entered into an agreement with a contractor to provide services or perform work required pursuant to a contract with a city agency.

(14) “Director” means an individual designated by the mayor to perform the oversight functions of the director described in this title who either reports directly to the mayor or is a commissioner.

[(13)](15) "Directory" means a list prepared by the division of firms certified pursuant to § 1304 of the charter.

[(14)](16) "Division" [shall] means the division of economic and financial opportunity within the department of small business services.

[(15)](17) "EBE" means an emerging business enterprise certified in accordance with § 1304 of the charter.

[(16)](18) "Geographic market of the city" means the following counties: Bronx, Kings, New York, Queens, Richmond, Nassau, Putnam, Rockland, Suffolk and Westchester within the state of New York; and Bergen, Hudson, and Passaic within the state of New Jersey.

[(17)](19) "Goal" means a numerical target.

[(18)](20) "Graduate MBE," "graduate WBE" or "graduate EBE" means an MBE, WBE or EBE which [shall] must have been awarded [prime] contracts by one or more agencies within the past three years where the total city funding from the expense and capital budgets for such contracts was equal to or greater than [fifteen] fifty million dollars and whose size has exceeded the size standards established for its industry by the United States small business administration for three years.

(21) “Human services” means services provided to third parties, including social services such as day care, foster care, home care, homeless assistance, housing and shelter assistance, preventive services, youth services, and senior centers; health or medical services including those provided by health maintenance organizations; legal services; employment assistance services, vocational and education programs; and recreation programs.

(22) “Indirect subcontractor” means a person who has entered into an agreement with a direct subcontractor to provide services or perform work required pursuant to the direct subcontractor’s contract with a contractor.

[(19)](23) "Industry classification" means one of the following classifications:

[(i)](a) construction [services];

[(ii)](b) professional services;

[(iii)](c) standard services; and

[(iv)](d) goods.

[(20)](24) "Joint venture" means an association, of limited scope and duration, between two or more persons who have entered into an agreement to perform and/or provide services required by a contract, in which each such person contributes property, capital, effort, skill and/or knowledge, and in which each such person is entitled to share in the profits and losses of the venture in reasonable proportion to the economic value of its contribution.

[(21)](25) "MBE" means a minority-owned business enterprise certified in accordance with § 1304 of the charter.

[(22)](26) "Minority group" means Black Americans; Asian Americans, and Hispanic Americans, provided that the commissioner [shall be] is authorized to add additional groups to this definition upon a finding that there is statistically significant disparity between the availability of firms owned by [persons] individuals in such a group and the utilization of such firms in city procurement.

(27) "Non-certified firm" means a business enterprise that has not been certified as an MBE, WBE or EBE in accordance with section 1304 of the charter.

[(23)](28) "Person" means any business, individual, partnership, corporation, firm, company, or other form of doing business.

[(24)](29) "Professional services" means services that require specialized skills and the exercise of judgment, including but not limited to accountants, lawyers, doctors, computer programmers and consultants, architectural and engineering services, [design services] and construction management services.

[(25)](30) "Qualified joint venture agreement" means a joint venture between one or more MBEs, WBEs, and/or EBEs and another person, in which the percentage of profit or loss to which the certified firm or firms is entitled or exposed for participation in the contract, as set forth in the joint venture agreement, is at least 25% of the total profit or loss.

[(26)](31) "Scope of work" means specific tasks required in a contract and/or services or goods that must be provided to perform specific tasks required in a contract.

[(27)](32) "Socially and economically disadvantaged" refers to an individual [person] who has experienced social disadvantage in American society as a result of causes not common to individuals [persons] who are not socially disadvantaged, and whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business.

[(28)](33) "Standard services" means services other than professional services and human services or services procured under a construction contract.

[(29) "Subcontractor" means a person who has entered into an agreement with a contractor to provide something that is required pursuant to a contract.]

[(30)](34) "Utilization rate" means the percentage of total contract expenditures expended on contracts or subcontracts with firms that are owned by women, minorities, or individuals who are socially and economically disadvantaged, [persons,] respectively, in one or more industry classifications.

[(31)](35) "WBE" means a women-owned business enterprise certified in accordance with § 1304 of the charter.

[(32) "EBE" means an emerging business enterprise certified in accordance with § 1304 of the charter.]

§9. Section 11-62 of Chapter 11 of Title 66 of the Rules of the City of New York is amended to read as follows:

**§ 11-62 Responsibilities of the Division.**

(1) The division [shall] will create and maintain and periodically update directories by industry classification of MBEs, WBEs and EBEs which it [shall] will supply to all agencies, post on its website and on other relevant city websites and make available for dissemination and/or public inspection at its offices and other locations within each borough. In addition, the division will prepare, periodically update, and post on the division's website a directory of such city certified business enterprises for use by city agencies and contractors, which will include, but is not limited to, the following information for each such business enterprise, as applicable: (i) identification of the market sector in which the business enterprise operates; (ii) the bonding capacity of the business enterprise; (iii) the union affiliation, if any, of the business enterprise; (iv) the contract price and specific tasks performed by the business enterprise for its last three contracts; and (v) the renewal date for the business enterprise's certification.

(2) The division [shall] will make its resources available to assist agencies and contractors in (i) determining the availability of MBEs, WBEs and EBEs to participate in their contracts as prime contractors and/or subcontractors; and (ii) identifying opportunities appropriate for participation by MBEs, WBEs and EBEs in contracts.

(3) The division [shall] will develop and maintain relationships with organizations representing contractors, including MBEs, WBEs and EBEs, and solicit their support and assistance in efforts to increase participation of MBEs, WBEs and EBEs in city procurement.

(4) The division [shall] will coordinate with city and state entities that maintain databases of MBEs, WBEs and EBEs and work to enhance city availability data and directories.

(5) The division [shall] will keep agency M/WBE [and EBE] officers informed of conferences, contractor fairs, and other services that are available to assist them in pursuing the

objectives of this section.

(6) The division [shall] will conduct, coordinate and facilitate technical assistance and educational programs for MBEs, WBEs and EBEs and other contractors designed to enhance participation of MBEs, WBEs and EBEs in city procurement. The division [shall] will further develop a clearinghouse of information on programs and services available to MBEs, WBEs and EBEs. The division will conduct meetings with MBEs, WBEs and EBEs to discuss what agencies look for in evaluating bids and proposals. The division will also educate prime contractors on opportunities to partner or subcontract with certified MBEs, WBEs and EBEs.

(7) The division [shall] will develop standardized forms and reporting documents for agencies and contractors to facilitate the reporting requirements of this section.

(8) The division [shall] will direct and assist agencies in their efforts to increase participation by MBEs, WBEs and EBEs in any city-operated financial, technical, and management assistance program.

(9) The division [shall] will study and recommend to the commissioner methods to streamline the M/WBE and EBE certification process.

(10) Each fiscal year the division, in consultation with the city chief procurement officer, [shall] will audit at least 5% of all open contracts for which contractor utilization plans have been [are] established in accordance with § 11-66 of this subchapter and 5% of all contracts awarded to MBEs, WBEs and EBEs to assess compliance with this subchapter. All solicitations for contracts for which contractor utilization plans are to be established [shall] will include notice of potential audit.

(11) The division [shall] will assist agencies in identifying and seeking ways to reduce or eliminate practices such as bonding requirements or delays in payment by prime contractors that may present barriers to competition by MBEs, WBEs and EBEs.

(12) The division will encourage prime contractors to enter joint venture agreements with MBEs, WBEs and EBEs.

(13) The division will assist appropriate certified business enterprises in becoming prequalified for those categories of procurement for which they may be eligible and for which contracting agencies utilize prequalification in the procurement process;

(14) (a) The division will, upon reviewing applications for certification and recertification, determine whether a firm qualifies as a graduate MBE, WBE, or EBE.

(b) At any time more than two years after the division has determined that a firm qualifies as a graduate MBE, WBE or EBE, the firm may apply to have such designation lifted. The division will lift the designation if the firm demonstrates that it has not been awarded contracts by one or more agencies within the past three years where the total city funding from the expense and capital budgets for such contracts was equal to or greater than fifty million dollars and it has

been below the size standards established by the United States small business administration for its industry for a period of two years or more.

§10. Section 11-63 of Chapter 11 of Title 66 of the Rules of the City of New York is amended to read as follows:

§ 11-63 **Responsibilities of Agency M/WBE Officers.**

Each agency head [shall] will designate a deputy commissioner or other executive officer to act as the agency M/WBE officer who [shall] will be directly accountable to the agency head concerning the activities of the agency in carrying out its responsibilities pursuant to this section, including the responsibilities relating to EBE participation. The duties of the M/WBE officer [shall] will include, but not be limited to:

[(i)](1) creating the agency's utilization plan in accordance with § 11-64 of this subchapter;

[(ii)](2) acting as the agency's liaison with the division;

[(iii)](3) acting as a liaison with organizations and/or associations of MBEs, WBEs and EBEs, informing such organizations and/or associations of the agency's procurement procedures, and advising them of future procurement opportunities;

[(iv)](4) ensuring that agency bid solicitations and requests for proposals are sent to MBEs, WBEs and EBEs in a timely manner, consistent with this section and rules of the procurement policy board;

[(v)](5) referring MBEs, WBEs and EBEs to technical assistance services available from agencies and other organizations;

[(vi)](6) reviewing requests for waivers [of target subcontracting percentages] and/or modifications of participation goals and contractor utilization plans in accordance with § 11-66 of this subchapter;

[(vii)](7) working with the division and city chief procurement officer in creating directories of certified MBEs, WBEs and EBEs pursuant to § 11-68 of this subchapter. In fulfilling this duty, the agency M/WBE officer [shall] will track and record each contractor that is an MBE, WBE or EBE and each subcontractor hired pursuant to such officer's agency contracts that is an MBE, WBE or EBE, and [shall] will share such information with the director, the commissioner, and the city chief procurement officer;

[(viii)](8) for contracts for which contractor utilization [goals] plans have been established pursuant to § 11-66 of this subchapter, monitoring each contractor's compliance with its utilization plan by appropriate means, which [shall] will include, but need not be limited to, job site inspections, contacting MBEs, WBEs and EBEs identified in the plan to confirm their

participation, and auditing the contractor's books and records;

~~[(ix)](9)~~ monitoring the agency's procurement activities to ensure compliance with its agency utilization plan and progress towards the participation goals as established in such plan; [and]

~~[(x)](10)~~ providing to the city chief procurement officer information for the reports required in § 11-69 of this subchapter and providing any other plans and/or reports required pursuant to this subchapter or requested by the director and/or the city chief procurement officer; and[.]

(11) participating in meetings required pursuant to § 11-70 of this subchapter.

**§11.** Section 11-64 of Chapter 11 of Title 66 of the Rules of the City of New York is amended to read as follows:

**§ 11-64 Agency Utilization Plans.**

(1) Beginning May 15, 2006, and on April 1 of each year thereafter, each agency which, during the fiscal year which ended on June 30 of the preceding year, has made procurements in excess of five million dollars [during the fiscal year which ended on June 30 of the preceding calendar year], without counting procurements exempt pursuant to paragraph two of § 11-74 of this subchapter, [shall] must submit an agency utilization plan for the fiscal year commencing in July of the year when such plan is to be submitted to the commissioner. Upon approval by the commissioner such plan [shall] will be submitted to the speaker of the council. Each such plan [shall] will, at a minimum, include the following:

~~[(i)](a)~~ the agency's participation goals for MBEs, WBEs and EBEs for the year, provided however, that when setting its goals, each agency must consider the citywide goals, the size and nature of its own procurement portfolio (excluding contracts described in paragraph two of § 11-74 of this subchapter), and the availability of MBEs, WBEs and EBEs with the capacity to perform the specific types and scale of work for which the agency anticipates it will solicit procurements during the year;

~~[(ii)](b)~~ an explanation for any agency goal that is different than the participation goal for the relevant group and industry classification as determined pursuant to § 11-61 of this subchapter;

~~[(iii)](c)~~ a list of the names and titles of agency personnel responsible for implementation of the agency utilization plan;

~~[(iv)](d)~~ methods and relevant activities [proposed] for achieving the agency's participation goals; and

~~[(v)](e)~~ any other information which the agency or the commissioner deems relevant or necessary.

(2) An agency utilization plan must set forth specific participation goals for MBEs, WBEs and/or EBEs for purchases of professional services, standard services, construction and goods valued at or below twenty thousand dollars, and for purchases of professional services, standard services, construction and goods valued at or below one hundred thousand dollars. When setting its goals for such purchases, in addition to the factors set forth in paragraph (1) of this section, each agency must specifically consider the potential for such purchases to provide opportunities for MBEs, WBEs and EBEs to develop greater capacity, thereby increasing competition for city procurements.

~~[(2)](3)~~ An agency utilization plan may be amended from time to time[, in consultation with the division] to reflect changes in the agency's projected expenditures or other relevant circumstances and resulting changes in such agency's participation goals. Such amendments [shall] must be submitted to the commissioner, the city chief procurement officer and the speaker of the council at least thirty days prior to implementation.

~~[(3)](4)~~ In planning its procurement activities over the course of the fiscal year, each agency subject to this section must consider how it will achieve the goals set forth in its approved agency utilization plan. This determination should be guided by the agency's knowledge of the market involved in the procurement, and the level of progress it has made during the fiscal year toward meeting its goal for the relevant category of procurement.

(5) Prior to approving individual agency utilization plans, the commissioner, in consultation with the city chief procurement officer, will consider whether such plans viewed in the aggregate establish any goals exceeding the corresponding citywide goals set forth in § 11-61 of this subchapter. If the commissioner, in consultation with the city chief procurement officer, finds any aggregated goals exceed the corresponding citywide goal, the commissioner will require agencies to adjust their goals so that plans, viewed in the aggregate, do not establish goals exceeding the citywide goals. Nothing in this paragraph will be construed to limit the award of contracts and subcontracts that may be made to MBEs, WBEs and EBEs without using goals.

(6) The commissioner, in consultation with the city chief procurement officer, will, no later than July 31 of each year, publish on the division's website a plan and schedule for each agency detailing the anticipated contracting actions for the upcoming fiscal year that form the basis for the agency utilization plan of each such agency. The plan and schedule will include information specific to each prospective invitation for bids, request for proposal, or other solicitation, including, but not limited to, the specific type and scale of the services and/or goods to be procured, the term of the proposed contract, the method of solicitation the agency intends to utilize, and the anticipated fiscal year quarter of the planned solicitation.

**§12.** Section 11-65 of Chapter 11 of Title 66 of the Rules of the City of New York is amended to read as follows:

## § 11-65 Achieving Agency Participation Goals.

(1) Each agency head [shall] must be directly accountable for the goals set forth in his or her agency's utilization plan.

(2) Each agency [shall] must make all reasonable efforts to meet the participation goals established in its agency utilization plan. Agencies will, at a minimum, use the following methods to achieve participation goals:

[(i)](a) Agencies [shall] must engage in outreach activities to encourage MBEs, WBEs and EBEs to compete for all facets of their procurement activities, including contracts awarded by negotiated acquisition, emergency and sole source contracts, and each agency will seek to utilize MBEs, WBEs and/or EBEs for all types of goods, services and construction they procure.

[(ii)](b) Agencies [shall] must encourage eligible businesses to apply for certification as MBEs, WBEs and EBEs and inclusion in the directories of MBEs, WBEs and EBEs. Agencies [shall] must also encourage MBEs, WBEs and EBEs to have their names included on their bidders lists, seek pre-qualification where applicable, and compete for city business as contractors and subcontractors. Agencies are encouraged to advertise procurement opportunities in general circulation media, trade and professional association publications and small business media, and publications of minority and women's business organizations, and send written notice of specific procurement opportunities to minority and women's business organizations.

[(iii)](c) All agency solicitations for bids or proposals [shall] must include information referring potential bidders or proposers to the directories of MBEs, WBEs and EBEs prepared by the division.

[(iv)](d) In planning procurements, agencies [shall] must consider the effect of the scope, specifications and size of a contract on opportunities for participation by MBEs, WBEs and EBEs.

[(v)] For construction contracts, agencies shall consider whether to enter into separate prime contracts for construction support services including, but not limited to, trucking, landscaping, demolition, site clearing, surveying and site security.]

[(vi)](e) Prior to soliciting bids or proposals for contracts valued at over ten million dollars, other than contracts for capital projects valued at over twenty-five million dollars and contracts that are exempt pursuant to paragraph two of § 11-74 of this subchapter, an agency [shall] must submit the bid or proposal to the city chief procurement officer for a determination whether it is practicable to divide the proposed contract into smaller contracts and whether doing so will enhance competition for such contracts among MBEs, WBEs and EBEs and other potential bidders or proposers. The agency [shall] must follow the instructions of the city chief procurement officer in cases where he or she determines that it is both practicable and advantageous in light of cost and other relevant factors to divide such contracts into smaller contracts.

[(vii)](f) Agencies [shall] must examine their internal procurement policies, procedures and practices and, where practicable, address those elements, if any, that may negatively affect participation of MBEs, WBEs and EBEs in city procurement.

[(viii) Agency M/WBE officers shall, in accordance with guidelines established by the city chief procurement officer, establish a process for quarterly meetings with MBEs, WBEs and EBEs to discuss what the agency looks for in evaluating bids and proposals.

(ix) Agencies shall encourage prime contractors to enter joint venture agreements with MBEs, WBEs and EBEs.]

§13. Section 11-66 of Chapter 11 of Title 66 of the Rules of the City of New York is amended to read as follows:

**§ 11-66 Participation Goals for [Construction and Professional Services] Contracts for Construction and Professional and Standard Services.**

(1) Prior to issuing the solicitation of bids or proposals for individual [construction and professional services] contracts, agencies [shall] must establish [a target subcontracting percentage for the contract and] participation goals for MBEs, WBEs and/or EBEs. [The "target subcontracting percentage" for the contract shall represent the percentage of the total contract which the agency anticipates a typical prime contractor in the relevant industry would in the normal course of business award to one or more subcontractors for amounts under one million dollars. The participation goals established for a contract shall represent a percentage of the total dollar value of all subcontracts for amounts under one million dollars pursuant to the award.] Such goals may be greater than, less than or the same as the relevant citywide goal or goals established pursuant to § 11-61 of this subchapter. Taking into account the factors listed in this subdivision, an agency may establish a goal for a procurement that may be achieved by a combination of prime contract and subcontract dollars, a combination of construction and services performed pursuant to the contract, and/or a combination of MBEs, WBEs and/or EBEs. Alternatively, an agency may establish specific goals for particular types of services, and/or goals for particular types of certified firms. In determining the participation goals for a particular contract, an agency [shall] must consider the following factors:

[(i)](a) the scope of work;

[(ii)](b) the availability of MBEs, WBEs and EBEs able to perform the particular tasks required in the contract;

[(iii)](c) the extent to which the type and scale of work involved in the contract [presents] present prime contracting and subcontracting opportunities for amounts [under one million dollars] within the capacity of MBEs, WBEs and EBEs;

(iv)(d) the agency's progress to date toward meeting its annual participation goals through

race-neutral, gender-neutral and other means, and the agency's expectations as to the effect such methods will have on participation of MBEs, WBEs and EBEs in the agency's future contracts; and

[(v)](e) any other factors the contracting agency deems relevant.

(2) A contracting agency shall not be required to establish participation goals

(i) for procurements described in § 11-74 of this subchapter; or

(ii) when the agency has already attained the relevant goal in its annual utilization plan, or expects that it will attain such goal without the use of such participation goals.

(3) For each contract in which a contracting agency has established participation goals, such agency shall state in the solicitation for such contract that bidders and/or proposers shall be required to agree as a material term of the contract that[, with respect to the total amount of the contract to be awarded to one or more subcontractors pursuant to subcontracts for amounts under one million dollars,] the contractor [shall] must [be subject to] meet the participation goals unless such goals are waived or modified by the agency in accordance with this section. An agency must permit a contractor that is an MBE, WBE or EBE to count its own participation toward fulfillment of the relevant participation goal, provided that the agency has determined the value of such a contractor's participation by subtracting from the total value of the contract any amounts that the contractor pays to direct subcontractors. An agency must permit a contractor that is a qualified joint venture to count a percentage of its own participation toward fulfillment of the relevant participation goal. The agency must determine the value of such a contractor's participation by subtracting from the total value of the contract any amounts that the contractor pays to direct subcontractors, and then multiplying the remainder by the percentage to be applied to total profit to determine the amount to which an MBE, WBE or EBE is entitled pursuant to the joint venture agreement. Notwithstanding any provision of this paragraph to the contrary, a contractor's achievement of participation goals must be determined as described in paragraph two of § 11-67 of this subchapter.

(4) For each contract in which participation goals are established, the agency [shall] must include in its solicitation and/or bidding materials, a referral to the directories prepared by the division pursuant to § 11-62 of this subchapter.

(5) For each contract for which participation goals are established the contractor [shall be required to] must submit with its bid or proposal[, ] a utilization plan indicating:

(a) whether the contractor is an MBE, WBE, EBE, or a qualified joint venture; [the percentage of the work it intends to subcontract, and]

(b) the percentage of work it intends to award to direct subcontractors; [for amounts under one million dollars, and,] and

(c) in cases where the contractor intends to award direct subcontracts, [for amounts under one million dollars,] a description of the type and dollar value of work designated for participation by MBEs, WBEs and/or EBEs, and the time frames in which such work is scheduled to begin and end.

When the contractor utilization plan indicates that the bidder or proposer does not intend to [award the target subcontracting percentage] meet the participation goals, the bid or proposal [shall] will not be deemed responsive unless the agency has granted a pre-award [waiver] request for change pursuant to subdivision [12]11 of this section.

[(6) For each contract for which a utilization plan has been submitted, a material term of the contract shall be that, with respect to the total amount of the contract to be awarded to one or more subcontractors pursuant to subcontracts for amounts under one million dollars, the contractor shall be subject to participation goals unless such goals are modified by the agency in accordance with this section.]

[(7)](6)(a) For each contract for which a contractor utilization plan has been submitted, the contracting agency [shall] must require that within thirty days of the issuance of notice to proceed, and at least once per year thereafter, the contractor submit a list of persons to which it intends to award subcontracts within the next twelve months, and a written confirmation that the contractor has notified each MBE, WBE or EBE included in such list. For multi-year contracts, the contractor [shall] must submit such a list of persons and written confirmation of notification to the agency annually. In the event that a contracting agency disapproves a contractor's selection of a subcontractor or subcontractors, the contracting agency [shall] must allow such contractor a reasonable time to propose alternate subcontractors.

(b) The contracting agency may also require the contractor to report periodically about the contracts awarded by its direct subcontractors to indirect subcontractors.

[(8)](7) For each contract for which a contractor utilization plan has been submitted, the contractor [shall] must, with each voucher for payment, and/or periodically as the agency may require, submit statements, certified under penalty of perjury, which [shall] must include, but not be limited to, the total amount the contractor paid to its direct subcontractors, and, where applicable pursuant to subparagraph (l) of paragraph (1) of § 11-67 of this subchapter, the total amount direct subcontractors paid to indirect subcontractors, [(including subcontractors that are not MBEs, WBEs or EBEs)]; the names, addresses and contact numbers of each MBE, WBE or EBE hired as a subcontractor [pursuant to such plan] by the contractor or any of the contractor's direct subcontractors, as well as the dates and amounts paid to each MBE, WBEs or EBEs. The contractor [shall] must also submit, along with its voucher for final payment, the total amount it paid to subcontractors, and, where applicable pursuant to subparagraph (l) of paragraph (1) of § 11-67 of this subchapter, the total amount its direct subcontractors paid directly to their indirect subcontractors [(including subcontractors that are not MBEs, WBEs or EBEs)]; and a final list, certified under penalty of perjury, which [shall] must include the name, address and contact information of each subcontractor that is an MBE, WBE or EBE [hired pursuant to such plan], the work performed by, and the dates and amounts paid to each.

[(9)](8) If payments made to, or work performed by, MBEs, WBEs or EBEs are less than the amount specified in the contractor's utilization plan, the agency [shall] must take appropriate action in accordance with § 11-72 of this subchapter, unless the contractor has obtained a modification of its utilization plan pursuant to paragraph 12 of this section.

[(10)](9) When advertising a solicitation for bids or proposals for a contract for which a participation goal has been established, the agenc[ies]y [shall] must[,] include in the advertisement a general statement that the contract will be subject to participation goals for MBEs, WBEs and/or EBEs.

[(11)](10) In the event that a contractor with a contract that includes a contractor utilization plan submits a request for a change order the value of which exceeds the greater of ten percent of such contract or \$500,000, the agency [shall] must [establish participation goals as if for a new contract for the work to be performed pursuant to such change order] review the scope of work for the contract, and the scale and types of work involved in the change order, and determine whether the participation goals should be modified.

[(12)](11) [Pre-award waiver] Requests from bidders or proposers for changes in participation goals.

(a) A bidder or proposer may request that an agency change the participation goal or goals established for the procurement on the grounds that goals are unreasonable in light of the availability of certified firms to perform the services required, or by demonstrating that it has legitimate business reasons for proposing a lower level of subcontracting in its utilization plan.

(b) If the contracting agency determines that the participation goals established for the procurement are unreasonable in light of the availability of certified firms to perform the services required, it must revise the solicitation and extend the deadline for bids and proposals.

[If the level of subcontracting set forth in a utilization plan is less than the target subcontracting percentage, the bidder or proposer shall submit a request to the contracting agency, prior to the deadline for such requests established by the contracting agency as indicated in the invitation to bid or propose, for a full or partial waiver of the targeted subcontracting percentage. Such request shall include documentation to support the bidder's or proposer's capacity to perform the contract without any subcontracting, or to perform the contract without awarding the amount of subcontracts for under one million dollars represented by the targeted subcontracting percentage.]

[(i)](c) Subject to paragraph [(ii)](d) of this section, the contracting agency may grant a full or partial waiver of the [target subcontracting percentage] participation goals to a bidder or proposer who demonstrates that it has legitimate business reasons for proposing the level of subcontracting in its utilization plan. The contracting agency [shall] will make its determination in light of factors [which] that [shall] must include, but not be limited to, whether the bidder or proposer has the capacity and the bona fide intention to perform the contract without any subcontracting, or to perform the contract without awarding the amount of subcontracts [for under one million dollars] represented by the [target subcontracting percentage] participation goals. In making such determination, the agency may consider whether the utilization plan is

consistent with past subcontracting practices of the bidder or proposer, whether the bidder or proposer has made efforts to form a joint venture with a certified firm, and whether the bidder or proposer has made good faith efforts to identify portions of the contract that it intends to subcontract. [The administrative code provides that within thirty days of the registration of a contract, the]The city chief contracting officer [shall] will notify the council of any such waiver granted with respect to [the] a registered contract in the quarterly report required pursuant to § 11-69 of this subchapter.

[(ii)](d) [The administrative code provides that the]The agency M/WBE officer shall provide written notice of requests for a full or partial waiver of the [target subcontracting percentage] participation goals to the division and the city chief procurement officer and [shall] will not approve any such request without the approval of the city chief procurement officer, provided that the city chief procurement officer, upon adequate assurances of an agency's ability to administer its utilization plan in accordance with the provisions of this section, may determine that further approval from the city chief procurement officer is not required with respect to such requests for an agency's contracts or particular categories of an agency's contracts. [The administrative code provides that the]The city chief procurement officer [shall] will notify the speaker of the council and the division in writing [within thirty days of] in the quarterly report required pursuant to § 11-69 of this subchapter following the registration of the contract for which the agency granted a request for a full or partial waiver of a [target subcontracting percentage] participation goal, provided that where an agency has been authorized to grant waivers without approval of the chief procurement officer, such notice [shall] will be provided to the speaker of the council and the division by the agency. Such notification [shall] will include, but not be limited to, the name of the contractor, the original [target subcontracting percentage] participation goal, the waiver request, including all documentation, and an explanation for the approval of such request.

[(13)](12) Modification of utilization plans at contractor's request or agency's initiative.  
[(i)] A contractor may request modification of its utilization plan after the award of a contract. Subject to paragraph [(ii)](b) of this section, an agency may grant such request if it determines that such contractor has established, with appropriate documentary and other evidence, that it made all reasonable, good faith efforts to meet the goals set by the agency for the contract. [Prior to granting such request, an agency shall consult with the division.] In making such determination, the agency [shall] will consider evidence of the following efforts, as applicable, along with any other relevant factors:

[(A)](i) The contractor advertised opportunities to participate in the contract, where appropriate, in general circulation media, trade and professional association publications and small business media, and publications of minority and women's business organizations;

[(B)](ii) The contractor provided notice of specific opportunities to participate in the contract, in a timely manner, to minority and women's business organizations;

[(C)](iii) The contractor sent written notices, by certified mail or facsimile, in a timely manner, to advise MBEs, WBEs and EBEs that their interest in the contract was solicited;

[(D)](iv) The contractor made efforts to identify portions of the work that could be substituted for portions originally designated for participation by MBEs, WBEs and/or EBEs in the contractor utilization plan, and for which the contractor claims an inability to retain MBEs or WBEs or EBEs;

[(E)](v) The contractor held meetings with MBEs, WBEs and/or EBEs prior to the date their bids or proposals were due, for the purpose of explaining in detail the scope and requirements of the work for which their bids or proposals were solicited. Documentation of such meetings [shall] must include the dates, times, and locations of such meetings, meeting announcements and invitations, meeting agendas, documents distributed at such meetings, and attendance lists;

[(F)](vi) The contractor made efforts to negotiate with MBEs, WBEs and/or EBEs as relevant to perform specific subcontracts, or act as suppliers or service providers. Documentation of such negotiation [shall] must include the names, addresses, and telephone numbers of MBEs, WBEs and/or EBEs that were solicited; the date of each such solicitation; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to the reasons that agreements could not be reached with MBEs, WBEs and/or EBEs to perform the work.

[(G)](vii) Timely written requests for assistance made by the contractor to the agency M/WBE officer and to the division[;] and as well as documented requests for assistance made by the contractor to organizations that provide assistance in the recruitment and placement of MBEs, WBEs and/or EBEs, including but not limited to, minority and/or women community organizations, minority and/or women contractors' groups; local, state and federal business assistance offices;

[(H)](viii) Description of how recommendations made by the division[,] and the contracting agency, and other organizations described in subparagraph (G) of this paragraph were acted upon and an explanation of why action upon such recommendations did not lead to the desired level of participation of MBEs, WBEs and/or EBEs.

[(I)](ix) The contractor rejected bids by MBEs, WBEs and/or EBEs for sound reasons based upon a thorough investigation of their capabilities. The MBE's, WBE's and/or EBE's political or social affiliations or lack thereof [shall] will not be a legitimate reason for rejecting or not soliciting bids to meet the goals.

[(J)](x) The contractor designated portions of the work to be performed by MBEs, WBEs and/or EBEs in order to increase the likelihood that the goals will be met, including but not limited to, breaking out the work under the contract into feasible units to facilitate MBE, WBE and/or EBE participation.

[(K)](xi) The contractor made efforts to assist interested MBEs, WBEs and/or EBEs in obtaining bonding, lines of credit, or insurance as required by the City or the contractor.

[(L)](xii) The contractor made efforts to assist interested MBEs, WBEs and/or EBEs in

obtaining necessary equipment, supplies, materials, or related assistance or services.

[(ii)](b) The [administrative code provides that the] agency M/WBE officer [shall] must provide written notice of requests for such modifications to the division and the city chief procurement officer and [shall] will not approve any such request for modification without the approval of the city chief procurement officer, provided that the city chief procurement officer, upon adequate assurances of an agency's ability to administer its utilization plan in accordance with the provisions of this section, may determine that further approval from the city chief procurement officer is not required with respect to such requests for an agency's contracts or particular categories of an agency's contracts. The [administrative code provides that the] city chief procurement officer, [shall] will notify the speaker of the council and the division in writing within seven days of the approval of a request for modification of a utilization plan, provided that where an agency has been authorized to grant modifications without approval of the chief procurement officer, such notice [shall] will be provided to the speaker of the council and the division by the agency. Such notification [shall] must include, but not be limited to, the name of the contractor, the original utilization plan, the modification request, including all documentation, and an explanation for the approval of such request.

[(iii)](c) An agency may modify the participation goals established for a procurement when the agency has changed the scope of the work in a manner that affects the scale and types of work that the contractor indicated in its contractor utilization plan would be awarded to subcontractors.

(d) The agency M/WBE officer [shall] will provide written notice to the contractor of its determination that [shall] must include the reasons for such determination.

[(14)] (13) Substitution of the MBE, WBE and/or EBE subcontractor whose participation was necessary to achieve a participation goal [shall] will be permitted only with approval of the contracting agency, and only in the following circumstances:

- (A) Unavailability after receipt of reasonable notice to proceed;
- (B) Poor performance;
- (C) Financial incapacity;
- (D) Refusal by the subcontractor to honor the bid or proposal price or scope;
- (E) Mistake of fact or law about the elements of the scope of work of a solicitation where a reasonable price cannot be agreed;
- (F) Failure of the subcontractor to meet insurance, licensing, or bonding requirements;
- (G) The subcontractor's withdrawal of its bid or proposal;
- (H) Decertification of the subcontractor as an MBE, WBE or EBE;

(I) The contractor becomes aware of information negatively reflecting on the subcontractor's business integrity;

(J) Other circumstances allowed by the agency after consultation with the division.

Where the contractor has established the basis for substitution to the satisfaction of the contract compliance officer, it [shall] must make good faith efforts to substitute with a subcontractor which can be counted toward achievement of the relevant goal. If the contractor plans to hire a subcontractor on any scope of work that was not previously disclosed in the compliance plan, the contractor must obtain approval of the agency M/WBE officer and [shall] must make good faith efforts to ensure that MBEs, WBEs and/or EBEs have a reasonable opportunity to bid on the new scope of work.

[(15)](14) For each contract in which a contracting agency has established participation goals, the agency [shall] will evaluate and assess the contractor's performance in meeting each such goal. Such evaluation and assessment [shall] must be a part of the contractor's overall contract performance evaluation required pursuant to § 333 of the charter.

**§14.** Section 11-67 of Chapter 11 of Title 66 of the Rules of the City of New York is amended to read as follows:

**§ 11-67 Determining Credit for MBE, WBE and EBE Participation.**

(1) An agency's achievement of its annual goals [shall] will be calculated as follows:

[(i)](a) The [total] dollar amount that an agency has paid or is obligated to pay to a prime contractor which is an MBE, WBE or EBE, reduced by the dollar amount the contractor has paid or is obligated to pay its direct subcontractors upon their completion of work, [may] will be credited toward the relevant goal. Where an agency has paid or is obligated to pay a prime contractor that is both an MBE and a WBE, such amount will be credited toward the relevant goal for MBEs or the goal for WBEs.

[(ii)](b) [The] Except as provided in subparagraph (c) of this paragraph, the total dollar amount that a prime contractor of any agency has paid or is obligated to pay to a direct subcontractor [which] that is an MBE, WBE or EBE [may] will be credited toward the relevant goal. Where such a contractor has paid or is obligated to pay a direct subcontractor that is both an MBE and a WBE, such amount will be credited toward the relevant goal for MBEs or the goal for WBEs.

(c) In the case of contracts of the types identified pursuant to subparagraph (1) of this paragraph, the total dollar amount that a prime contractor of an agency has paid or is obligated to pay a direct subcontractor that is an MBE, WBE, or EBE, reduced by the dollar amount the direct subcontractor has paid or is obligated to pay its indirect subcontractors upon completion of

work, will be credited toward the relevant goal. Where such a contractor has paid or is obligated to pay a direct contractor that is both an MBE and a WBE, such amount will be credited toward the relevant goal for MBEs or the goal for WBEs.

(d) In the case of contracts of the types identified pursuant to subparagraph (l) of this paragraph, the total dollar amount that a direct subcontractor of the prime contractor has paid or is obligated to pay to an indirect subcontractor that is an MBE, WBE or EBE will be credited toward the relevant goal. Where such a contractor has paid or is obligated to pay an indirect contractor that is both an MBE and a WBE, such amount will be credited toward the relevant goal for MBEs or the goal for WBEs.

[(iii)](e) For requirements contracts, credit [may] will be given for the actual dollar amount paid under the contract.

[(iv)](f) Where one or more MBEs, WBEs or EBEs is participating in a qualified joint venture, the amounts that the joint venture is required to pay its direct subcontractors will be subtracted as provided in subparagraph (a) of this paragraph, and then a percentage of the remaining dollar amount of the contract equal to the percentage of total profit to which MBEs, WBEs or EBEs are entitled pursuant to the joint venture agreement [shall] will be credited toward the relevant goal. Where such a participant in a joint venture is both an MBE and a WBE, such amount will be credited toward the relevant goal for MBEs or the goal for WBEs.

[(v)](g) No credit [shall] will be given for participation in a contract by an MBE, WBE or EBE that does not perform a commercially useful function.

[(vi)](h) No credit [shall] will be given for the participation in a contract by any company that has not been certified as an MBE, WBE or EBE in accordance with § 1304 of the charter.

[(vii)](i) In the case of a contract for which the contractor is paid on a commission basis, the dollar amount of the contract may be determined on the basis of the commission earned or reasonably anticipated to be earned under the contract.

[(viii)](j) No credit [shall] will be given to a contractor for participation in a contract by a graduate MBE, WBE or EBE.

[(ix)](k) The participation of a certified company [shall] will not be credited toward more than one participation goal.

(1) The city chief procurement officer may identify types of contracts where payments to indirect subcontractors will be credited toward the relevant participation goals.

(2) A contractor's achievement of [each goal] its participation goals established in its utilization plan [shall] will be calculated [in the same manner as described for calculating the achievement of agency utilization goals as described in subdivision (1) of this section; provided that no] as follows:

(a) A contractor's use of direct subcontractors and their indirect subcontractors toward achievement of each goal established in its utilization plan will be calculated in the same manner as described for calculating the achievement of agency utilization goals as described in paragraph (1) of this subdivision, except that a contractor's use of a subcontractor that is both an MBE and a WBE will not be credited toward the contractor's achievement of more than one goal;

(b) An agency must permit a contractor that is an MBE, WBE or EBE to count its own participation toward fulfillment of the relevant participation goal, provided that the value of such a contractor's participation be determined by subtracting from the total value of the contract any amounts that the contractor pays to direct subcontractors, and provided further that a contractor that is both an MBE and a WBE will not be credited for its participation toward more than one goal;

(c) No credit will be given to the contractor for the participation of a company that is not certified in accordance with § 1304 of the charter before the date that [the agency approves] the subcontractor completes the work under the subcontract.

(d) An agency will permit a contractor that is a qualified joint venture to count a percentage of its own participation toward fulfillment of the relevant participation goal. The value of such a contractor's participation will be determined by subtracting from the total value of the contract any amounts that the contractor pays to direct subcontractors, and then multiplying the remainder by the percentage to be applied to total profit to determine the amount to which an MBE, WBE or EBE is entitled pursuant to the joint venture agreement; provided that where such a participant in a joint venture is both an MBE and a WBE, such amount will not be credited toward more than one goal.

§15. Section 11-68 of Chapter 11 of Title 66 of the Rules of the City of New York is amended to read as follows:

**§ 11-68 Small Purchases.**

[(1) Each agency shall, consistent with the participation goals established in § 11-61 of this subchapter and such agency's utilization plan, establish goals for purchases valued at or below five thousand dollars which shall be made from MBEs, WBEs and/or EBEs.

(2)] Whenever an agency solicits bids or proposals for small purchases pursuant to section three hundred fourteen of the charter, the agency [shall] must maintain records identifying the MBEs, WBEs and EBEs it solicited, which [shall] will become part of the contract file.

§16. Section 11-69 of Chapter 11 of Title 66 of the Rules of the City of New York is amended to read as follows:

**§ 11-69 Compliance Reporting.**

(1) The [administrative code provides that the] city chief procurement officer, in consultation with the division, [shall] will prepare and submit [semiannual]quarterly reports to the speaker of the council as described in this section. [A preliminary] Preliminary reports containing information for the fiscal year in progress [shall] will be submitted to the speaker of the council by January first, April first, and July first of each year [April 1, 2007, and annually thereafter], and a final report containing information for the preceding fiscal year [shall] will be submitted to the speaker of the council by October first of each year [1, 2007 and annually thereafter]. The reports, which [shall] will also be posted on the division's website, [shall] must contain the following information, disaggregated by agency:

[(i)](a) the number and total dollar value of contracts awarded, disaggregated by industry classification and size of contract, including but not limited to, contracts valued at or below twenty thousand dollars, contracts valued above twenty thousand dollars and at or below one hundred thousand dollars, contracts valued above one hundred thousand dollars and at or below one million dollars, contracts valued above one million dollars and at or below five million dollars, contracts valued above five million dollars and at or below twenty five million dollars, and contracts valued above twenty five million dollars; [, provided that contracts for amounts under five thousand dollars need not be disaggregated by industry;

(ii) the number and total dollar value of contracts awarded to MBEs, WBEs and EBEs, disaggregated by minority and gender group and industry classification, provided that contracts for amounts under five thousand dollars need not be disaggregated by industry;

(iii) the total number and total dollar value of contracts awarded valued at less than five thousand dollars and the total number and total dollar value of such contracts awarded to MBEs, WBEs and EBEs, disaggregated by minority and gender group;

(iv) the total number and total dollar value of contracts awarded valued at between five thousand and one hundred thousand dollars and the total number and total dollar value of such contracts awarded to MBEs, WBEs and EBEs, disaggregated by minority and gender group and industry classification;

(v) the total number and total dollar value of contracts awarded valued at between one hundred thousand dollars and one million dollars and the total number and total dollar value of such contracts awarded to MBEs, WBEs and EBEs, disaggregated by minority and gender group and industry classification;

(vi) the total number and total dollar value of contracts awarded valued at over one million dollars and the total number and total dollar value of such contracts awarded to MBEs, WBEs and EBEs, disaggregated by minority and gender group and industry classification;

(vii)] (b) for those contracts for which an agency set participation goals in accordance with § 11-66 of this subchapter:

[A.](i) the number and total dollar amount of such contracts disaggregated by industry classification, size of contract and status as MBE, WBE, EBE, or non-certified firm, and further

disaggregated by minority and gender group, and the number and dollar value of such contracts that were awarded to firms that are certified both as MBEs and WBEs;

[B.](ii) the number and total dollar value of such contracts that were awarded to qualified joint ventures and the total dollar amount attributed to the MBE, WBE or EBE joint venture partners, disaggregated by minority and gender group, size of contract and industry classification, and the number the dollar value of such contracts that were awarded to firms that are certified both as MBEs and WBEs;

[C.](iii) the number and total dollar value of subcontracts approved during the reporting period that were entered into pursuant to [such] contracts for which the agency has established participation requirements under this section (including both contracts awarded during the current reporting period and those awarded in earlier reporting periods that remain open during the current reporting period), and the number and total dollar amount of such subcontracts awarded to MBEs, WBEs and EBEs, disaggregated by minority and gender group, size of subcontract and industry classification, and the number and dollar value of such subcontracts that were awarded to firms that are certified both as MBEs and WBEs;

[D.](iv) a list of the requests for full or partial waivers of [target subcontracting percentages granted] participation requirements for such contracts made pursuant to paragraph 11 [12] of § 11-66 of this subchapter and the determination made with respect to such requests, and the number and dollar amount of those contracts for which such waivers were granted, disaggregated by industry classifications; and

[E.](v) a list of the requests for modification of participation requirements for such contracts made pursuant to subdivision 12 [13] of § 11-66 of this subchapter and the determinations made with respect to such requests, and the number and dollar amount of those contracts for which such modifications were granted, disaggregated by industry classification;

[(viii)](c) a detailed list of each complaint received pursuant to subdivision 1 of § 11-72 of this subchapter which [shall] will, at a minimum, include the nature of each complaint and the action taken in investigating and addressing such complaint including whether and in what manner the enforcement provisions of § 11-72 of this subchapter were invoked and the remedies applied;

[(ix)](d) a detailed list of all non-compliance findings made pursuant to subdivision 4 of § 11-72 of this subchapter and actions taken in response to such findings;

[(x)](e) the number of firms certified or recertified in accordance with § 1304 of the charter during the six months immediately preceding such report;

[(xi)](f) the number and percentage of contracts audited pursuant to subdivision 10 of § 11-62 of this subchapter and a summary of the results of each audit;

[(xii)](g) a summary of efforts to reduce or eliminate barriers to competition as required pursuant to paragraph 11 of § 11-62 of this subchapter;

[(xiii)](h) a list of all solicitations submitted to the city chief procurement officer pursuant to paragraph [vi]e of subdivision 2 of § 11-65 of this subchapter and a summary of the determination made regarding each such submission; and

[(xiv)](i) any other information as may be required by the director and/or the commissioner.

(2) The annual reports submitted in October [shall] will, in addition, contain a determination made by the director and the commissioner, as to whether each agency has made substantial progress toward achieving its utilization goals and whether the city has made substantial progress toward achieving the citywide goals established pursuant to § 11-61 of this subchapter. [The first three annual reports shall also include detailed information about steps that agencies have taken to initiate and ramp up their efforts to comply with the requirements of this section, including but not limited to, demonstrating specific efforts made to comply with § 11-63 of this subchapter.]

(3) If an agency that has submitted an agency utilization plan pursuant to § 11-64 of this subchapter fails to achieve its utilization goal, the agency head must prepare and submit to the director, the commissioner, the city chief procurement officer, and the speaker of the council by October first a performance improvement plan which must describe in detail the efforts such agency intends to undertake to increase M/WBE participation.

[(3)](4) The data that provide the basis for the reports required by this section [shall] must be made available electronically to the council at the time the reports are submitted.

§17. Section 11-70 of Chapter 11 of Title 66 of the Rules of the City of New York is amended to read as follows:

#### § 11-70 **Agency Compliance.**

(1) [The]Each agency [shall] must submit to the commissioner and the city chief procurement officer such information as is necessary for the city chief procurement officer to complete his or her reports as required in § 11-69 of this subchapter. The [administrative code provides that the] director, the commissioner, and the city chief procurement officer [shall] will review each agency's submissions. The director will convene the agency M/WBE officers for those agencies that have submitted utilization plans pursuant to § 11-64 of this subchapter as often as the director deems necessary, but no less frequently than once per quarter, in order to have agency M/WBE officers (i) discuss the results of the reports required in § 11-69 of this subchapter; (ii) offer detailed information concerning their effectuation of their performance improvement plans and any additional efforts undertaken to meet goals established in agency utilization plans; (iii) share the practices that have yielded successes in increasing M/WBE participation; and (iv) devise strategic plans to improve the performance of those failing to meet goals established in agency utilization plans. No less frequently than twice per year, agency heads for those agencies that have submitted utilization plans pursuant to § 11-64 of this

subchapter must join such quarterly meetings. [and whenever]Whenever it has been determined that an agency is not making adequate progress toward the goals established in its agency utilization plan, the director, the commissioner, and the city chief procurement officer [shall] will act to improve such agency's performance, and may take any of the following actions:

[(i)](a) require the agency to submit more frequent reports about its procurement activity;

[(ii)](b) require the agency to notify the director, the commissioner and the city chief procurement officer, prior to solicitation of bids or proposals for, and/or prior to award of, contracts in any category where the agency has not made adequate progress toward achieving its utilization goals;

[(iii)](c) reduce or rescind contract processing authority delegated by the mayor pursuant to §§ 317 and 318 of the charter; and

[(iv)](d) any other action the director, the commissioner, and the city chief procurement officer [or the commissioner] deem appropriate.

(2) Noncompliance. [The administrative code provides that whenever]Whenever the director, the city chief procurement officer, or the commissioner finds that an agency has failed to comply with its duties under this section, he or she [shall] will attempt to resolve such noncompliance informally with the agency head. [It further provides that in] In the event that the agency fails to remedy its noncompliance after such informal efforts, the director and the city chief procurement officer [shall] will submit such findings in writing to the mayor and the speaker of the council, and the mayor [shall] will take appropriate measures to ensure compliance.

(3) Failure by an agency to submit information required by the director, the division, or the city chief procurement officer, in accordance with this section, including but not limited to the utilization plan required pursuant to § 11-64 of this subchapter, [shall] will be deemed noncompliance.

**§18.** Section 11-72 of Chapter 11 of Title 66 of the Rules of the City of New York is amended to read as follows:

**§ 11-72 Enforcement.**

(1) Any person who believes that a violation of the requirements of § 6-129 of the administrative code of the city of New York or these rules, or any provision of a contract that implements § 6-129 of the administrative code of the city of New York or these rules, including, but not limited to, any contractor utilization plan, has occurred may submit a complaint in writing to the division, the city chief procurement officer and the comptroller. [Such complaint shall be signed and dated.] The division [shall] will promptly investigate such complaint and determine whether there has been a violation.

(2) Any complaint alleging fraud, corruption or other criminal behavior on the part of a

bidder, proposer, contractor, subcontractor or supplier [shall] will be referred to the commissioner of the department of investigation.

(3) Contract award. [(i)](a) When an agency receives a protest from a bidder or proposer regarding a contracting action that is related to § 6-129 of the administrative code of the city of New York or these rules, the agency [shall] must send copies of the protest and any appeal thereof, and any decisions made on the protest or such appeal, to the division and the comptroller.

[(ii)](b) Whenever a contracting agency has determined that a bidder or proposer has violated § 6-129 of the administrative code of the city of New York, or these rules, the agency may disqualify such bidder or proposer from competing for such contract and the agency may revoke such bidder's or proposer's prequalification status.

(4) Contract administration. (a) For each contract for which an agency has established participation requirements under this section, at least once annually during the term of such contract, the agency must review the contractor's progress toward attainment of its utilization plan, including but not limited to, reviewing the percentage of work the contractor has actually awarded to MBE, WBE and/or EBE subcontractors and the payments the contractor has made to such subcontractors.

[(i)](b) Whenever an agency believes that a contractor or a subcontractor is not in compliance with § 6-129 of the administrative code of the city of New York, these rules, or any provision of a contract that implements § 6-129 of the administrative code of the city of New York or these rules, including, but not limited to any contractor utilization plan, the agency [shall] must send a written notice to the city chief procurement officer, the division and the contractor describing the alleged noncompliance and offering the contractor an opportunity to be heard. The agency [shall] must then conduct an investigation to determine whether such contractor or subcontractor is in compliance.

[(ii)](c) In the event that a contractor has been found to have violated § 6-129 of the administrative code of the city of New York, these rules, or any provision of a contract that implements § 6-129 of the administrative code of the city of New York or these rules, including, but not limited to any contractor utilization plan, the contracting agency [shall] must, after consulting with the city chief procurement officer and the division, determine whether any of the following actions should be taken:

[(A)](i) enter an agreement with the contractor allowing the contractor to cure the violation;

[(B)](ii) revoke the contractor's pre-qualification to bid or make proposals for future contracts;

[(C)](iii) make a finding that the contractor is in default of the contract;

[(D)](iv) terminate the contract;

[(E)](v) declare the contractor to be in breach of contract;

[(F)](vi) withhold payment or reimbursement;

[(G)](vii) determine not to renew the contract;

[(H)](viii) assess actual and consequential damages;

[(I)](ix) assess liquidated damages or reduction of fees, provided that liquidated damages may be based on amounts representing costs of delays in carrying out the purposes of the program established by this section, or in meeting the purposes of the contract, the costs of meeting utilization goals through additional procurements, the administrative costs of investigation and enforcement, or other factors set forth in the contract;

[(J)](x) exercise rights under the contract to procure goods, services or construction from another contractor and charge the cost of such contract to the contractor that has been found to be in noncompliance; or

[(K)](xi) take any other appropriate remedy.

(5) To the extent available pursuant to rules of the procurement policy board, a contractor may seek resolution of a dispute regarding a contract related to § 6-129 of the administrative code of the city of New York or these rules. The contracting agency [shall] must submit a copy of such submission to the division.

(6) Whenever an agency has reason to believe that an MBE, WBE or EBE is not qualified for certification, or is participating in a contract in a manner that does not serve a commercially useful function, or has violated any provision of § 6-129 of the administrative code of the city of New York or these rules, the agency [shall] must notify the commissioner who [shall] will determine whether the certification of such business enterprise should be revoked.

(7) Statements made in any instrument submitted to an [contracting] agency pursuant to these rules [shall] will be submitted under penalty of perjury and any false or misleading statement or omission [shall] will be grounds for the application of any applicable criminal and/or civil penalties for perjury. The making of a false or fraudulent statement by an MBE, WBE or EBE in any instrument submitted pursuant to these rules [shall] will, in addition, be grounds for revocation of its certification.

(8) A contractor's record in implementing its contractor utilization plan [shall] will be a factor in the evaluation of its performance. Whenever a contracting agency determines that a contractor's compliance with a contractor utilization plan has been unsatisfactory, the agency [shall] must, after consultation with the city chief procurement officer, file an advice of caution form for inclusion in VENDEX as caution data.

(9) Any complaint alleging fraud, corruption or other criminal behavior on the part of a

bidder, proposer, contractor, subcontractor or supplier [shall] must in addition be referred to the department of investigation.

§19. Section 11-73 of Chapter 11 of Title 66 of the Rules of the City of New York is amended to read as follows:

**§ 11-73 Procurements by Elected Officials and the Council.**

(1) In the case of procurements by independently elected city officials other than the mayor, where these rules provide for any action to be taken by the director or the city chief procurement officer, such action [shall] will instead be taken by such elected officials.

(2) In the case of procurements by the council, where these rules provide for any action to be taken by the director or the city chief procurement officer, such action [shall] will instead be taken by the speaker of the council.

§20. Section 11-74 of Chapter 11 of Title 66 of the Rules of the City of New York is amended to read as follows:

**§ 11-74 Applicability.**

Agencies [shall] will not be required to apply participation requirements to the following types of contracts:

[(i)](1) those subject to federal or state funding requirements which preclude the city from imposing the requirements of this subchapter;

[(ii)](2) those subject to federal or state law participation requirements for MBEs, WBEs, disadvantaged business enterprises, and/or EBEs;

[(iii)](3) contracts between agencies;

[(iv)](4) procurements made through the United States general services administration or another federal agency, or through the New York state office of general services or another state agency, or any other governmental agency.

[(v)](5) emergency procurements pursuant to section three hundred fifteen of the charter;

[(vi)](6) sole source procurements pursuant to section three hundred twenty-one of the charter;

[(vii)](7) [small purchases as defined pursuant to section three hundred fourteen of the charter;] contracts for human services; and

[(viii)](8) contracts awarded to not-for-profit organizations.

§21. Section 11-81 of Chapter 11 of Title 66 of the Rules of the City of New York is amended to read as follows:

**§11-81 Definitions.**

As used in [these rules] this subchapter, the following terms [shall] have the following meanings:

Applicant. "Applicant" means a business enterprise which has applied for certification as an EBE.

Audit. "Audit" means an examination of a business enterprise to determine whether the business enterprise is eligible for certification as an EBE, and may include an examination of books, records, physical facilities and interviews of applicants.

Business enterprise. "Business enterprise" means any entity, including a sole proprietorship, partnership or corporation, which is authorized to and engages in lawful business transactions in accordance with the laws of New York State.

Certified business. "Certified business" means a business enterprise which has been approved for certification as an EBE in accordance with the procedures set forth in §11-82 of these rules, subsequent to verification that the business enterprise is owned, operated, and controlled by socially and economically disadvantaged persons as defined in §11-82 of these rules.

Certification director. "Certification director" means the director of the emerging business enterprise certification program or his or her designee or his or her successor in function.

Certification letter. "Certification letter" means the letter sent by DSBS to an applicant notifying it of its certification as an EBE.

City. "City" means the City of New York.

Commissioner. "Commissioner" means the commissioner of the New York City Department of Small Business Services or his or her designee or his or her successor in function.

Day. "Day" means a calendar day unless otherwise specified.

Denial or denied. "Denial" or "denied" means a determination by DSBS that a business enterprise is not eligible for certification as an EBE because it does not meet the criteria for certification.

Division. "Division" means the division of economic and financial opportunity within the department of small business services.

DSBS. "DSBS" means the New York City Department of Small Business Services or its successor in function.

[Director of Certification. "Director of Certification" means the director of the emerging business enterprise certification program or his or her designee or his or her successor in function.]

Economically disadvantaged. "Economically disadvantaged" refers to a socially disadvantaged person whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.

Non-certified firm. "Non-certified firm" means a business enterprise that has not been certified as an EBE in accordance with section 1304 of the charter.

Emerging business enterprise or EBE. "Emerging business enterprise" or "EBE" means a business enterprise that is certified in accordance with §1304 of the charter, [ , in which:

- (i) at least fifty-one (51%) percent of the ownership interest is held by United States citizens or permanent resident aliens;
- (ii) the ownership interest of such persons is real, substantial and continuing;
- (iii) such persons have and exercise the authority to control independently, the day-to-day business decisions of the enterprise; and
- (iv) such persons have demonstrated, in accordance with regulations promulgated by the commissioner, that they are socially and economically disadvantaged.]

Emerging business enterprise certification application. "Emerging business enterprise certification application" means the form that DSBS requires an applicant to submit for purposes of applying for certification as an EBE.

Geographic Market. "Geographic market" of the city means the following counties: Bronx, Kings, New York, Queens, Richmond, Nassau, Putnam, Rockland, Suffolk and Westchester within the State of New York; and Bergen, Hudson, and Passaic within the state of New Jersey.

Graduate EBE. "Graduate EBE" [shall] means an EBE which has been awarded [prime] contracts by one or more agencies within the past three years where the total city funding from the expense and capital budgets for such contracts was equal to or greater than [fifteen] fifty million dollars[.] and whose size has exceeded the size standards established for its industry by the United States small business administration for three years.

Immediate family. "Immediate family" means a spouse, domestic partner, unemancipated child (including children of a domestic partner), and if they live with the individual claiming disadvantage, parent or sibling.

Principal office or place of business. "Principal office" or "place of business" [shall] means where the main office and regular meeting place of the board of directors that manages, conducts, and directs the business is located.

Rejected or rejection. "Rejected" or "rejection" means the refusal by DSBS to certify a business enterprise as an EBE due to an insufficiency in documentation submitted by the applicant.

Socially and economically disadvantaged. "Socially and economically disadvantaged" refers to an [person] individual who has experienced social disadvantage in American society as a result of causes not common to [persons] individuals who are not socially disadvantaged, and whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. An [person's] individual's race, national origin, or gender, by itself, does not qualify the [person] individual as "socially disadvantaged" and the net worth of [persons] individuals to be "economically disadvantaged" must be less than one million dollars. In determining such net worth, the [department] division [shall] will exclude the ownership interest in the business enterprise and the equity in the primary personal residence.

§22. Section 11-82 of Chapter 11 of Title 66 of the Rules of the City of New York is amended to read as follows:

**§11-82 Eligibility Criteria.**

The following standards [shall] will be used to determine whether a business enterprise is eligible for certification as an EBE.

(a) *Nexus*. In order to be eligible for certification as an EBE, a business enterprise will have a real and substantial business presence in the geographic market for the city of New York. An EBE which meets one of the following conditions [shall] will be deemed to have a real and substantial business presence in the geographic market for the city of New York:

(1) the business enterprise's principal office or place of business or headquarters is located within the City; or

(2) the business enterprise maintains full-time employees in one or more of the business enterprise's offices within the City to conduct or solicit business in the City the majority of their working time; or

(3) the business enterprise's principal office or place of business or headquarters is located within the geographic market of the City, and

(i) has transacted business more than once in the City within the last three (3) years, or

(ii) has sought to transact business more than once in the City within the last three (3) years;  
or

(4) twenty-five percent (25%) of the business enterprise's annual gross receipts for the last three (3) years were derived from transacting business in the City; or

(5) the business enterprise's principal office or place of business or headquarters is not located within the geographic market of the City but the business enterprise has demonstrated two or more of the following indicia of a real and substantial presence in the market for the City of New York:

(i) the business enterprise has maintained a bank account or engaged in other banking transactions in the City;

(ii) the business enterprise, or at least one of its owners, possesses a license issued by an agency of the City to do business in the City;

(iii) the business enterprise has transacted or sought to transact business in or with the City more than once in the past three years.

(b) *Ownership.* For the purposes of determining whether an applicant should be certified as an EBE, or whether such certification should be revoked, the following rules concerning ownership [shall] will be applied:

(1) The equity interest of socially and economically disadvantaged [persons] individuals must be proportionate to the contribution of the socially and economically disadvantaged [persons] individuals as demonstrated by, but not limited to, contributions of money, property, equipment or expertise;

(2) A sole proprietorship must be owned by a socially and economically disadvantaged [person] individual;

(3) A partnership must demonstrate that socially and economically disadvantaged [persons] individuals a fifty-one (51%) percent or greater share of the partnership; and

(4) A corporation must have issued at least fifty-one (51%) percent of its issued and authorized voting and all other stock to socially and economically disadvantaged [persons] individuals.

(c) *Control.* Determinations as to whether socially and economically disadvantaged [persons] individuals control the business enterprise will be made according to the following criteria:

(1) Decisions pertaining to the operations of the business enterprise must be made by socially and economically disadvantaged [persons] individuals claiming ownership of that business enterprise. The following will be considered in determining whether the socially and economically disadvantaged persons are making such decisions:

(i) whether socially and economically disadvantaged [persons] individuals have experience and technical competence in the business enterprise seeking certification;

(ii) whether socially and economically disadvantaged [persons] individuals demonstrate the working knowledge and ability needed to operate the business enterprise; and

(iii) whether socially and economically disadvantaged [persons] individuals show that they devote time on an ongoing basis to the daily operation of the business enterprise.

(2) Articles of incorporation, corporate by-laws, partnership agreements, business certificates, corporate tax returns, unincorporated business tax returns, partnership tax returns and other agreements, including, but not limited to, loan agreements, lease agreements, supply agreements, credit agreements or other agreements must permit socially and economically disadvantaged [persons] individuals who claim ownership of the business enterprise to make those decisions pertaining to operations of the business enterprise without restrictions.

(3) Socially and economically disadvantaged [persons] individuals must demonstrate control of negotiations, signature authority for payroll, leases, letters of credit, insurance bonds, banking services and contracts, and other business transactions through production of relevant documents.

(d) *Additional eligibility provisions.* The following provisions apply to all applicants seeking certification as an EBE:

(1) Where the actual management of the business enterprise is contracted out to individuals other than socially and disadvantaged [persons] individuals, socially and economically disadvantaged [persons] individuals must demonstrate that they have the ultimate power to hire and fire these managers, that they exercise this power and make other substantial decisions which reflect control of the business enterprise;

(2) Documentation of one (1) year's business activity [shall] will be required in order to provide sufficient information upon which certification can be reasonably made. The commissioner, in his or her discretion, may permit documentation for a lesser period;

(3) DSBS may grant eligible status to any business enterprise eligible under §11-82 of these rules, and certified as an EBE or disadvantaged business enterprise by another governmental or other certifying entity whose emerging business enterprise or disadvantaged business enterprise certification criteria are determined by the commissioner to be consistent with the certification criteria set forth in these rules. Unless otherwise determined by the commissioner, the maximum period for which any certification granted by DSBS pursuant to this subdivision is valid [shall] will be the period during which the business enterprise is certified as an EBE or disadvantaged business enterprise with the original certifying entity;

(4) Any business enterprise that satisfies the eligibility criteria as set forth in §11-82 of these rules is presumptively eligible for certification under these rules; provided that the commissioner may decline to certify, or revoke the certification of, any business enterprise on the ground that there is not a firm basis for believing that there is a compelling state interest to justify certification of that business enterprise under these rules.

(e) *Evidence of social and economic disadvantage.* (1)(A) Evidence of individual social disadvantage must include the following elements: (i) At least one objective distinguishing feature that has contributed to social disadvantage, such as physical or mental disability, long-term residence in an environment isolated from the mainstream of United States society, or other similar causes not common to individuals who are not socially disadvantaged;

(ii) Personal experiences of substantial and chronic social disadvantage in United States society, not in other countries; and

(iii) Negative impact on entry into or advancement in the business world because of the social disadvantage. DSBS will consider any relevant evidence in assessing this element. In every case, however, DSBS will consider education, employment and business history, where applicable, to see if the totality of circumstances shows disadvantage in entering into or advancing in the business world.

(B) *Education.* DSBS will consider such factors as denial of equal access to institutions of higher education, exclusion from social and professional association with students or teachers, denial of educational honors rightfully earned, and social patterns or pressures which discouraged the individual from pursuing a professional or business education.

(C) *Employment.* DSBS will consider such factors as unequal treatment in hiring, promotions and other aspects of professional advancement, pay and fringe benefits, and other terms and conditions of employment; retaliatory or discriminatory behavior by an employer; and social patterns or pressures which have channeled the individual into nonprofessional or non-business fields.

(D) *Business history.* DSBS will consider such factors as unequal access to credit or capital, acquisition of credit or capital under commercially unfavorable circumstances, unequal treatment in opportunities for government contracts or other work, unequal treatment by potential customers and business associates, and exclusion from business or professional organizations.

(2) Evidence of individual economic disadvantage must include the following elements: (A) Submission of narrative and financial information. (i) Each individual claiming economic disadvantage must describe it in a narrative statement, and must submit personal financial information supporting the assertions contained in the narrative statement.

(ii) An individual claiming economic disadvantage who is married or a member of a domestic partnership [shall] must submit separate financial information for his or her spouse or domestic partner, provided that such financial information will not be required where the individual and the spouse are legally separated.

(B) *DSBS evaluation of diminished capital and credit opportunities.* DSBS will examine factors relating to the personal financial condition of any individual claiming disadvantaged status, including personal income for the past two years (including bonuses and the value of company stock given in lieu of cash), personal net worth, and the fair market value of all assets, whether encumbered or not. DSBS will also consider the financial condition of the applicant compared to the financial profiles of small businesses in the same primary industry classification, or, if not available, in similar lines of business, which are not owned and controlled by socially and economically disadvantaged individuals in evaluating the individual's access to credit and capital. The financial profiles that DSBS compares will include total assets, net sales, pre-tax profit, sales/working capital ratio, and net worth.

(C) *Transfers within two years.* (1) Except as set forth in §11-82(e)(2)(C)(2), DSBS will attribute to an individual claiming disadvantaged status any assets which that individual has transferred to an immediate family member, or to a trust a beneficiary of which is an immediate family member, for less than fair market value, within two years prior to a business enterprise's application for participation in the EBE program or within two years of a participant's annual renewal, unless the individual claiming disadvantaged status can demonstrate that the transfer is to or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support.

(2) DSBS will not attribute to an individual claiming disadvantaged status any assets transferred by that individual to an immediate family member that are consistent with the customary recognition of special occasions, such as birthdays, graduations, anniversaries, and retirements.

(3) In determining an individual's access to capital and credit, DSBS may consider any assets that the individual transferred within such two-year period described by §11-82(e)(2)(C)(1), that DSBS does not consider in evaluating the individual's assets and net worth (e.g., transfers to charities).

(b) *Net worth.* For EBE eligibility, the net worth of an individual claiming disadvantage must be less than one million dollars. In determining such net worth, DSBS will exclude the ownership interest in the applicant and the applicant's equity in the primary personal residence (except any portion of such equity which is attributable to excessive withdrawals from the applicant). Exclusions for purposes of determining net worth are not exclusions for asset valuation or access to capital and credit purposes. A contingent liability does not reduce an individual's net worth.

(f) *Graduate EBE determinations.* The division will, upon reviewing applications for certification and recertification, determine whether a business enterprise qualifies as a graduate EBE. The division will make such determinations in accordance with the following procedures:

(1) In the event that the division determines a business enterprise seeking new certification as an EBE qualifies as a graduate EBE pursuant to §11-81 of these rules, the division will provide a written notice of such determination to the applicant business enterprise stating the reason(s) for such determination and the procedures for challenging the graduate EBE determination.

(2) In the event that the division determines a certified EBE qualifies as a graduate EBE pursuant to §11-81 of these rules, the division will provide a written notice of such determination to the business enterprise seeking recertification setting forth the reason(s) for such determination and the procedures for challenging the graduate EBE determination.

(3) In the event that the division determines a business enterprise seeking new certification or a certified EBE to be a graduate EBE pursuant to §11-81 of these rules, the business enterprise may challenge such a determination pursuant to the procedures set forth in §§ 11-84 and 11-85 of these rules.

(4) In the event that the division has determined a business enterprise to be a graduate EBE, and the business enterprise has not made a timely challenge to that determination, or has made such a challenge and the department has affirmed its determination, the business enterprise may not apply to have the designation lifted for at least two years from the date of the original determination notice. The division will lift the designation if the firm demonstrates that: (i) it has not been awarded contracts by one or more agencies within the past three years where the total city funding from the expense and capital budgets for such contracts was equal to or greater than fifty million dollars; and (ii) it has been below the size standards established by the United States small business administration for its industry for a period of two years or more.

§23. Section 11-83 of Chapter 11 of Title 66 of the Rules of the City of New York is amended to read as follows:

**§11-83 Application Intake and Verification.**

(a) Emerging business enterprise certification applications may be obtained from, and must be returned to DSBS. DSBS [shall] will date stamp the date of receipt of a certification application upon receiving it.

(b) An applicant [shall] must submit such information or documentation as may be required by DSBS in connection with its certification as an EBE. Failure to submit such information or documentation may result in the rejection or revocation of such certification.

(c) If a certification application is received by DSBS and required documents are missing, questions are unanswered or the certification application is not properly notarized, DSBS must send to the applicant, within forty-five (45) days of the initial date stamped on the certification application, a notice of status and deficiency (the "Notice"), stating any deficiency arising from missing documents, unfinished questions or deficiencies in notarization. An applicant may cure the noticed deficiency by providing DSBS with documents or information requested in the Notice, within thirty (30) days of the date of the Notice.

(d) When the applicant cures a noticed deficiency, pursuant to procedures set forth in §11-83(c) of these rules, DSBS has an additional forty-five (45) days to advise the applicant of any further deficiency which may be cured in accordance with §11-83(c) of these rules.

(e) If the applicant does not cure a noticed deficiency, pursuant to procedures set forth in §11-83(c) of these rules, and the certification application remains incomplete for at least forty-five (45) days of the date of the Notice, unless such time is extended by the certification director [of EBEs], the applicant [shall] must be sent a notice stating that its certification application has been rejected and will not be processed, together with its rejected certification application.

(f) An applicant whose certification as an EBE is rejected may not reapply for certification for at least one hundred [and] twenty (120) days of the date of the notice of rejection of its application.

(g) Applicants may be required to consent to inquiries of their bonding companies, banking institutions, credit agencies, contractors, affiliates, clients and other entities to ascertain the applicant's eligibility for certification. Refusal to permit such inquiries [shall] will be grounds for rejection of a certification application.

(h) All applicants and certified businesses [shall] will be subject to an audit at any time. An applicant's or certified business' refusal to facilitate an audit [shall] will be grounds for denial of its certification application or revocation of its certification.

(i) A certification application may be withdrawn by an applicant without prejudice at any time prior to an audit. Following the withdrawal of a certification application, the applicant may not reapply for certification for a period of at least one hundred [and] twenty (120) days from the date of withdrawal of the application.

(j) All applicants and certified businesses may be required to provide documentation to substantiate that the business has the skill and expertise to perform in the particular area of work for which it is requesting listing or is listed on the EBE Directory.

(k) The division will conduct site visits for at least 5% of all EBE certification applications received during a fiscal year to verify that such business enterprises are eligible for certification under these rules.

**NEW YORK CITY LAW DEPARTMENT  
100 CHURCH STREET  
NEW YORK, NY 10007  
212-788-1087**

**CERTIFICATION PURSUANT TO  
CHARTER §1043(d)**

**RULE TITLE: Participation by and opportunities for minority-owned, women-owned and emerging business enterprises in City procurement**

**REFERENCE NUMBER: 2013 RG 084**

**RULEMAKING AGENCY: Department of Small Business Services**

I certify that this office has reviewed the above-referenced proposed rule as required by section 1043(d) of the New York City Charter, and that the above-referenced proposed rule:

- (i) is drafted so as to accomplish the purpose of the authorizing provisions of law;
- (ii) is not in conflict with other applicable rules;
- (iii) to the extent practicable and appropriate, is narrowly drawn to achieve its stated purpose; and
- (iv) to the extent practicable and appropriate, contains a statement of basis and purpose that provides a clear explanation of the rule and the requirements imposed by the rule.

/s/ STEVEN GOULDEN  
Acting Corporation Counsel

Date: September 25, 2013

**NEW YORK CITY MAYOR'S OFFICE OF OPERATIONS  
253 BROADWAY, 10<sup>th</sup> FLOOR  
NEW YORK, NY 10007  
212-788-1400**

**CERTIFICATION / ANALYSIS  
PURSUANT TO CHARTER SECTION 1043(d)**

**RULE TITLE: Participation by and opportunities for minority-owned, women-owned and emerging business enterprises in City procurement**

**REFERENCE NUMBER: SBS-3**

**RULEMAKING AGENCY: Department of Small Business Services**

I certify that this office has analyzed the proposed rule referenced above as required by Section 1043(d) of the New York City Charter, and that the proposed rule referenced above:

- (i) Is understandable and written in plain language for the discrete regulated community or communities;
- (ii) Minimizes compliance costs for the discrete regulated community or communities consistent with achieving the stated purpose of the rule; and
- (iii) Does not provide a cure period because it does not establish a violation, modification of a violation, or modification of the penalties associated with a violation.

/s/ Andrea M. Bender  
Mayor's Office of Operations

September 26, 2013  
Date