

**Greater Dayton Premier Management  
MBE/WBE UTILIZATION PLAN  
MBE/WBE Participation Proposal**

**ARTICLE 1: POLICY AND TERMS**

- 1.1. It is the policy of the Greater Dayton Premier Management (GDPM) that Minority, and Women Business Enterprises (MBE/WBE) as defined in regulations developed by the Secretary of the Department of Housing and Urban Development (HUD) and promulgated in 24 CFR Part 85, HUD Handbook 7460.8 and 7485.1 REV-3 Section 6(a) and Notice PIH 88-11 (PHA) shall have the maximum opportunity to participate in the performance of contracts financed in whole or in part with federal funds and that bidders, proposers or contractors and their subcontractors or suppliers shall take all necessary and reasonable steps to ensure that MBE/WBEs shall have the maximum opportunity to compete for and perform contracts financed in whole or in part by federal funds.

This policy shall be implemented through GDPM's MBE/WBE Utilization Plan and called the MBE/WBE Participation Proposal. This Amendment to Special Conditions shall be incorporated by reference in its entirety and made a part of each and every Invitation For Bid (IFB), Request for Proposal (RFP), contract or similar procurement document issued or entered into by GDPM.

- 1.2. Pursuant to the MBE/WBE participation requirements as set forth above, GDPM has made its own commitment to MBE/WBE participation. Accordingly, a bidder/proposer or contractor agrees to expend not less than the following percentages of the total contract price inclusive of all modifications and amendments, if awarded, for contract participation by MBE/WBEs:

- 1.2.1 Construction: 25%
- 1.2.2 Professional Services Contracts: 15%
- 1.2.3 Goods, Materials, Supplies & Services 15%

- 1.3. The bidder/proposer's compliance with GDPM's MBE/WBE commitment goals will be evaluated on the basis of a percentage of the total base bid. As indicated in Article 1.2, the MBE/WBE participation goal shall apply to the total dollar value of the contract, inclusive of all amendments, modifications and change orders. The bidder/proposer agrees to comply with the MBE/WBE commitment goal in any contract modification work.

- 1.4. This commitment may be met through direct and/or indirect participation of MBE/WBEs as private managers, developers, subcontractors, suppliers and/or consultants in the performance of GDPM contracts.

- 1.5. Direct participation refers to the utilization of MBE/WBEs in the performance of the contract as follows:

- 1.5.1. The bidder/proposer's status as an MBE/WBE; or
- 1.5.2. A joint venture with one or more MBE/WBEs on the contract(s); or
- 1.5.3. Subcontracting a portion of the work performed on the contract(s) to one or more MBE/WBEs; or

- 1.5.4. The purchase of supplies or materials used in the performance of the contract(s) from one or more MBE/WBEs; or
    - 1.5.5. Any combination of the above.
  - 1.6. Indirect participation refers to the utilization of MBE/WBEs as subcontractors, suppliers or consultants in the normal course of the bidder/proposer's business. This includes public and/or private sector contracts, purchase orders, invoices, etc.
  - 1.7. The bidder/proposer shall, in determining the manner of MBE/WBE participation, first consider the utilization of MBE/WBEs as joint venture partners, private managers, developers, prime contractors, subcontractors and/or suppliers of goods and services directly related to the performance of this contract. In all cases, GDPM requires that the bidder/proposer demonstrate the specific efforts undertaken to utilize MBE/WBEs directly in the performance of this contract.
  - 1.8. After exhausting reasonable good faith efforts and with prior GDPM approval, the bidder/proposer may also meet all or part of GDPM's MBE/WBE commitment goals by contracting with MBE/WBEs for the provision of goods and services not directly related to the performance of the contract.
  - 1.9. Counting MBE/WBE Participation: Guidelines  
Proposed MBE/WBEs must perform a commercially useful function in order to be considered eligible for participation in GDPM's MBE/WBE program. A company is considered to perform a commercially useful function responsible for actually performing, managing, and supervising the work involved. To determine whether an MBE/WBE is performing a commercially useful function, GDPM will review and evaluate the specific: Duties that will be performed by the MBE/WBE. Each MBE/WBE will be expected to perform all of the work contemplated for it by any subcontract or agreement through the use of its own employees and equipment.
    - 1.9.1. GDPM reserves the right to deny or limit MBE/WBE credit to the bidder/proposer where any MBE/WBE is found to be engaged in substantial subcontracting or pass-through activities with others.
    - 1.9.2. Credit for the participation of MBE/WBEs as joint ventures shall be based upon a detailed analysis of the duties, responsibilities and risks undertaken by the MBE/WBE specified by the joint venture's executed agreement. GDPM reserves the right to deny or limit MBE/WBE credit to the bidder/proposer where any MBE/WBE joint venture partner is found to have duties, responsibilities, risks of loss and management control over the joint venture that is not commensurate with or in proportion to its joint venture ownership.
    - 1.9.3. MBE/WBE participation shall be counted toward the MBE/WBE goal set in the contract as follows:
      - 1.9.4.1 Once an MBE/WBE is determined to be eligible in accordance with these rules, the total dollar value of the contract awarded to the MBE/WBE may be counted toward the MBE/WBE goal, except as indicated below.

- 1.9.4.2 A bidder/proposer may count toward its MBE/WBE goal a portion of the total dollar value of a contract with a joint venture eligible under the standards of the Amendment to Special Conditions equal to the percentage of the ownership and control of the MBE/WBE venture.
- 1.9.4.3 Bidder/proposer may count toward its MBE/WBE goal only expenditures to the MBE/WBEs that perform a commercially useful function in the performance of a contract. An MBE/WBE is considered to perform a commercially useful function when it is responsible for the execution of a distinct element of the contract work and actually performing, managing, and supervising the work involved.
- 1.9.4.4 Consistent with normal industry practices, an MBE/WBE may enter into subcontracts. If an MBE/WBE bidder/proposer subcontracts a significantly greater portion of the work of the contract than would be expected on the basis of normal industry practices, the MBE/WBE shall be presumed not to be performing a commercially useful function. Evidence may be presented by the contractors involved to rebut this presumption.
- 1.9.4.5 A bidder/proposer may count toward its MBE/WBE goal, one hundred percent of its expenditures for materials and supplies required under the contract and obtained **from** an MBE/WBE regular dealer and one hundred percent of such expenditures to an MBE/WBE manufacturer.
- 1.9.4.6 A bidder/proposer may count toward its MBE/WBE goal the following expenditures to MBE/WBEs that are not manufacturers or regular dealers:
- 1.9.4.6.1 The fees or commissions charged for providing bona fide services; such as, professional, technical, bidder/proposer or managerial, and assistance in the procurement of essential personnel, facilities, equipment, materials or supplies required for performance of the contract, provided that the fees or commissions are determined by GDPM to be reasonable and not excessive as compared with fees or commissions customarily allowed for similar services and assistance.
- 1.9.4.6.2 The fees or commissions charged for delivery of materials and supplies required on a job site (but not the cost of materials and supplies themselves) when the hauler, trucker, or delivery service is not also the manufacturer of or a regular dealer in the materials and supplies, provided that such fees are determined by GDPM to be reasonable and not excessive as compared with fees or commissions customarily allowed for similar services.

- 1.9.4.6.3 The fees or commissions charged for providing any bonds or insurance specifically required for the performance of the contract, provided that the fees or commissions are determined by GDPM to be reasonable and not excessive as compared with fees or commissions customarily allowed for similar services.
- 1.10. Bidder/Proposers may also achieve compliance by petition for grant of relief or waiver from GDPM's MBE/WBE commitment goals on the bidder/proposer's letterhead, accompanied by documentation demonstrating that all reasonable "good faith" efforts were made toward fulfilling the goal (see Article 4).
- 1.11. Failure of a bidder/proposer to carry out the commitments and policies with respect to MBE/WBEs shall constitute a material breach of contract and may result in the suspension or termination of a contract, the disqualification of the bidder/proposer for a future award of GDPM contracts, the assessment of liquidated damages or such remedy as GDPM deems appropriate (see Article 9).
- 1.12. GDPM will not accept collusion among the prime bidders, an MBE or any other individual, business or joint venture, or evidence of undue influence on an MBE to alter the committed quantities or its quotation.
- 1.13. Compliance with GDPM's MBE/WBE participation commitment goals will not diminish or supplant Equal Employment Opportunity and Civil Rights provisions as specified elsewhere in this contract and as they relate to prime contractor and subcontractor obligations.

## **ARTICLE 2: DEFINITIONS**

- 2.1. Area of Specialization – description of the MBE/WBEs business which has been determined to be most reflective of the MBE/WBEs claimed specialty or expertise. Each Letter of Certification contains a description of the MBE/WBEs area of specialty. GDPM reserves the right to investigate and determine active MBE/WBE participation specifically identified for this contract prior to award.
- 2.2. Contractor – the individual or business entity selected by GDPM to (1) enter into contract negotiations with GDPM or (2) to receive an award of contract pursuant to an Invitation for Bid or Request for Proposal. Wherever the term Contractor appears, it shall also be construed to pertain to Architects, Engineers, Consultants or other professional service providers as applicable.
- 2.3. Joint Venture – (1) an association of two or more businesses acting as a contractor or as a subcontractor in carrying out all or a definite portion of a contract in which each combine its property, capital efforts, skills, and knowledge, or (2) an enterprise formed after the date of first publication of GDPM's Invitations for Bids or Requests for Proposals to perform work on a contract, which, if the enterprise were continuing, would qualify as an MBE/WBE.
- 2.4. Joint Venture Agreement – a fully executed and notarized copy of the joint venture agreement submitted with the bid by a joint venture. In order to demonstrate the MBE/WBE partner's share

in the ownership, control, management responsibilities, risks in the profits of the joint venture, the proposed Joint Venture Agreement must contain specific details related to:

- Contributions of capital and equipment;
- Work responsibilities or other performance to be undertaken by the MBE/WBE company;
- Commitment of management, supervisory and operative personnel employed by the MBE/WBE to be dedicated to the performance of the contract. The Joint Venture Agreement must also clearly define each partner's authority to contractually obligate the joint venture and each partner's authority to expend joint venture funds (e.g., check signing authority).

2.5 Manufacturer – a company that operates or maintains a factory or establishment that produces, on premises, the materials or supplies obtained by a contractor.

2.6 Minority or Minority Group – may include, but is not limited to, the following racial or ethnic groups:

- Black American; or
- Hispanic American; or
- Asian Pacific American (persons with origins from Japan, China, Philippines, Vietnam, Korea, Samoa, Guam, U.S. Trust Territory of the Pacific Islands, Northern Mariana Islands, Laos, Cambodia, Taiwan); or
- Native American (American Indian, Eskimos, Aleut or Native Hawaiians); or
- Subcontinent Asian Americans; or
- Hasidic Jewish Americans.

2.7 Minority Business Enterprise (MBE) – an independent business which performs a commercially useful function and which is 51% or more owned, controlled and operated on a day-to-day basis by one or more minority persons.

2.8 “Participation Proposal” means an affidavit attesting to the MBE/WBE subcontractors that will be utilized on a given contract, stating the name, address, telephone number of MBE/WBE subcontractor/supplier, dollar amount and percentage of participation and the scope of work to be performed.

2.9 Regular Dealer – a company that owns or maintains a store, warehouse or other establishment in which materials or supplies required for the performance of the contract are bought, kept in stock, and regularly sold to the public in the usual course of business. To be considered a regular dealer, the company must engage in, as its principal business and in its own name, the purchase and sale of the products in question. A regular dealer in such bulk items as steel, cement, gravel, stone, and petroleum products need not keep such products in stock if it owns or operates distribution equipment.

2.10 Women Business Enterprise (WBE) – an independent business which performs a commercially useful function and which is 51% or more owned, controlled and operated on a day-to-day basis by one or more women.

2.11 Utilization Plan – an affidavit attesting to the MBE/WBE subcontractors that will be utilized on a given contract, stating the names, addresses and telephone numbers of the MBE/WBE

subcontractors/suppliers, dollar amount, percentage of participation and the scope of work to be performed.

### **ARTICLE 3: MBE/WBE UTILIZATION PLAN: GUIDELINES GOVERNING SUBMISSION, EVALUATION AND APPROVAL**

#### 3.1. Submission of the MBE/WBE Participation Proposal:

The following schedules and described documents constitute the bidder/proposer's MBE/WBE Utilization Plan and must be submitted as part of the overall proposal/bid on or before the time set for that proposal or bid opening. The MBE/WBE Participation Proposal will be reviewed for completeness; all spaces on the schedules must be filled out or indicated as not applicable. Failure to submit the following described documents in accordance with the guidelines stated may be cause for the rejection of the overall proposal/bid in its entirety.

##### 3.1.1 MBE/WBE PROPOSERS – MBE/WBE REQUIREMENTS

- 3.1.1.1 Letter(s) of Certification – A copy of the MBE/WBE's current Letter(s) of Certification from any certifying authority, such as the City of Dayton Human Relations Council, State of Ohio, South Central Ohio Minority Supplier Development Council, etc.

NOTICE: GDPM does not make any representations concerning the ability of any MBE/WBEs to perform work within their area of specialty. It is the responsibility of all bidder/proposers to determine the capability and capacity of the MBE/WBEs to satisfactorily perform the work proposed.

If the required documents are not provided, the MBE/WBE may be considered a NON-MBE/WBE and may be required to comply with GDPM's MBE/WBE Utilization Plan requirements for NON MBE/WBEs.

All Letters of Certification must include a statement of the MBE/WBE's area of specialization. The MBE/WBE's scope of work must conform to the area of specialization stated in the proposal/bid.

Any MBE/WBE with a principal place of business located outside of the Dayton Metropolitan Area and/or the State of Ohio may participate in contracts for GDPM. For an out of state MBE/WBE to be considered as a bidder/proposer, a copy of a current Letter of Certification from a recognized local and/or out of state certifying agency must be submitted with the proposal bid.

For a non-certified MBE/WBE to be considered as a bidder/proposer, a time stamped receipt or a letter advising that the certification application is under review from at least one of the recognized certifying agencies must be submitted with the proposal.

- 3.1.1.2 Statement of Bidders' Qualifications – See General Conditions

3.1.1.3 Equal Employment Opportunity Certification – See General Conditions

3.1.2 NON-MBE/WBE BIDDERS/PROPOSERS: MBE/WBE PROPOSAL REQUIREMENTS

3.1.2.1 Schedule A: Affidavit of MBE/WBE utilization – NON- MBE/WBE bidders/proposers must submit, as part of the overall MBE/WBE Participation Proposal on or before the time set for that proposal, a Schedule A which commits them to the utilization of each listed MBE/WBE in the direct or indirect performance of contract work. Through Schedule B, the bidder/proposer shall also commit to the expenditure of a specific dollar amount of participation by each listed MBE/WBE. The total dollar commitment to proposed MBE/WBEs must at least equal the required contract participation goal.

3.1.2.2 Schedule B – Letter of Intent from the MBE/WBE Subcontractors and Suppliers – Schedule B, executed by each MBE/WBE (or MBE/WBE joint venture), included on Schedule A shall be attached and submitted as part of the overall proposal on or before the time set for that proposal. Each Schedule B must accurately detail the work to be performed by the MBE/WBE and the agreed upon prices to be paid.

3.1.2.3 Letter(s) of Certification – A copy of each proposed MBE/WBE’s current Letter(s) of Certification from any certifying authority, such as the City of Dayton Human Relations Council, State of Ohio, South Central Ohio Minority Supplier Development Council, etc. must be attached to the Schedule B Letter of Intent.

All Letters of Certification must include a statement of the area of specialization. The MBE/WBE’s scope of work, as detailed in Schedule A, must conform to their stated area of specialization. Where an MBE/WBE is proposed to perform work not covered by their area of specialization, they must request in writing an expansion of the area of specialization prior to their being proposed to perform such work. The MBE/WBE’s request to expand the scope of the area of specialization, together with all documentation required by recognized certifying agencies, must be received at the time set for that proposal.

Any MBE/WBE with a principal place of business located outside of the Dayton Metropolitan area and/or the State of Ohio may participate in contracts by the GDPM. For an out of state MBE/WBE to be considered as a bidder/proposer, a copy of a current Letter of Certification from a recognized local and/or out of state certifying agency must be submitted with the proposal.

Any non-certified MBE/WBE proposed by the NON- MBE/WBE on Schedule A must have a time stamped receipt or a letter advising that the certification application is under review from at least one of the recognized certifying agencies.

3.1.2.4 Statement of Bidder’s Qualifications – See General Conditions

3.1.2.5 Equal Employment Opportunity Compliance Certification: See General Conditions

3.1.2.6 Waiver Requests – In cases where the bidder/proposer is requesting a waiver or variance of the MBE/WBE participation goals, the request must be submitted at the time of submission of the overall proposal. The waiver request must be completed in accordance with Section 4: Waiver of MBE/WBE Participation Goals.

### 3.2 EVALUATION OF MBE/WBE UTILIZATION PLAN: GUIDELINES

- 3.2.1 During the evaluation period, the bidder/proposer agrees to give upon request, earnest and prompt cooperation to GDPM in submitting to interviews that may be necessary allowing entry to places of business, providing additional documentation, or soliciting the cooperation of proposed MBE/WBEs in providing such assistance.
- 3.2.2 GDPM may deem the bid as non-responsive in its entirety by reason of the determination that:
  - 3.2.2.1 a bidder/proposer's MBE/WBE Participation Proposal contains an insufficient level of MBE/WBE participation;
  - 3.2.2.2 a bidder/proposer is non-responsive or uncooperative to requests for further information relative to the MBE/WBE Participation Proposal; or
  - 3.2.2.3 the MBE/WBE Participation Proposal contains false statements.

### 3.3 APPROVAL OF MBE/WBE PARTICIPATION PROPOSAL – GUIDELINES

- 3.3.1 The Procurement Department will review and evaluate the MBE/WBE Participation Proposal as follows:
  - 3.3.1.1 Verify the certification of MBE/WBEs identified on Schedules A, B, and the Letter of Certification.
  - 3.3.1.2 Verify that the scope of work proposed by each MBE/WBE is within the area of specialization of such business.
  - 3.3.1.3 Evaluate Schedules A and B for the proposed awardee(s) in accordance with the MBE/WBE goal established for the contract.
  - 3.3.1.4 Calculate the total MBE/WBE dollar participation for the proposed contract.
  - 3.3.1.5 Review the waiver request, if included, and determine if the bidder/proposer is in compliance with GDPM's waiver requirements. This includes preparation of the recommendation memo for the Executive Director's approval.
- 3.4 GDPM, at its sole discretion, may modify the MBE/WBE Participation Proposal approval time frames on a contract specific basis in order to have sufficient time to obtain, evaluate and make a determination on the best information available from the proposed awardee(s), while giving due consideration to having the award completed to meet the GDPM's needs on a timely basis.
- 3.5 Upon approval of the MBE/WBE Participation Proposal, the contract shall be routed for award and execution in accordance with GDPM's Procurement Policies and Procedures.

## **ARTICLE 4:WAIVER OF MBE/WBE PARTICIPATION GOALS**

4.1 If a bidder/proposer is unable to meet the MBE/WBE participation commitment goals in its proposal for a GDPM contract, a written request for waiver of MBE/WBE participation commitment goals must be submitted as part of its submissions in response to an IFB or RFP.

4.1.1 GDPM's Executive Director has the authority to waive MBE/WBE participation goals on contracts with a recommendation from the Procurement Department. This may occur whenever the Executive Director determines that for the reasons of time, need, or standards not previously known, that such a waiver would be in GDPM's best interest.

### **WAIVER OF MBE/WBE PARTICIPATION GOALS; PREAWARD**

4.1.2 Bidder/Proposers requesting a waiver of GDPM's MBE/WBE participation commitment goals must submit a request for waiver on the bidder/proposer's letterhead. The bidder/proposer must demonstrate that all required good faith efforts were taken to secure eligible MBE/WBEs for the performance of contract work. The following are examples of good faith efforts:

4.1.2.1 Attendance at a pre-bid meeting, if any, scheduled by GDPM to inform MBE/WBEs of subcontracting opportunities under a given solicitation or;

4.1.2.2 Advertising and soliciting for bids through all reasonable and available means including, but not limited to, trade association publications, minority-focused media, attendance at pre-bid meetings, advertising and/or written notices, the interest of all certified MBEs who have the capability to perform the work of the contract concerning subcontracting opportunities. The bidder must solicit this interest within sufficient time to allow the MBEs to respond to the solicitation. The bidder must determine with certainty if the MBEs are interested by taking appropriate steps to follow up initial solicitations

4.1.2.3 Providing written notice to a reasonable number of specific MBEs that their interest in the contract is being solicited. The notice shall be provided in sufficient time to allow the firms to participate effectively.

4.1.2.4 Following up the initial solicitations of interest by contacting MBEs to determine with certainty whether they are interested in the contract.

4.1.2.5 Providing interested MBEs with adequate information about the plans, specifications and requirements of the contract in a timely manner to assist them in responding to a solicitation.

4.1.2.6 Negotiating in good faith with interested MBEs and not rejecting any such firms as unqualified without sound reasons based on a thorough investigation of the firm's capabilities. It is the bidder's responsibility to make a portion of the work available to MBE subcontractors and suppliers and to select those portions of the work or material needs consistent with

the available MBE subcontractors and suppliers, so as to facilitate participation.

4.1.2.7 Selecting portions of the work of the contract to be performed by MBEs to increase the likelihood of meeting participation goals including, where appropriate, breaking down contracts into economically feasible units to facilitate participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces.

4.1.2.8 A bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including MBE subcontractors, and would take a firm's price and capabilities as well as contract goals into consideration. However, the fact that there may be some additional costs involved in finding and using MBEs is not in itself sufficient reason for a bidder's failure to meet the participation goal, as long as such costs are reasonable. Also, the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make good faith efforts. Prime contractors are not, however, required to accept higher quotes from MBEs if the price difference is excessive or unreasonable.

4.1.2.9 Making efforts to assist interested MBEs in obtaining bonding, lines of credit, or insurance required by the prime bidder.

4.1.2.10 Effectively using the services of available minority community organizations, minority contractor groups and other organizations that provide assistance for and placement of MBEs.

4.1.2.11 Bidder/Proposers must produce evidence of efforts to negotiate with MBE/WBEs for specific sub-bids including at a minimum:

- The names, addresses, and telephone numbers of MBE/WBEs that were solicited or;
- A description of the information provided to MBE/WBEs regarding the plans and specifications for portions of the work to be performed or;
- A statement of why additional agreements with MBE/WBEs were not reached or;
- Listing of at least three assist agencies (including GDPM) contacted to identify qualified MBE/WBEs or;
- Explanation of unsuccessful solicitation attempts.

4.1.3 Failure to submit documentation sufficient to support the waiver request will cause the proposal to be found non-responsive by GDPM and the proposal will be rejected. In such cases, GDPM's remedies may include but not limited to, negotiating with another bidder/proposer or re-advertising the IFB/RFP proposal.

4.1.4 To expedite the contract, bidder/proposer must submit all necessary documents as part of its overall proposal on or before the time set for that proposal.

- 4.1.5 GDPM's Procurement Department will review all waiver requests to determine whether there is sufficient evidence that the bidder/proposer has exercised good faith efforts but was, despite such efforts, unable to meet the applicable goals. The designee, upon the Executive Director's review and compliance determination, will notify the bidder/proposer of GDPM's decision.

#### WAIVER OF MBE/WBE PARTICIPATION GOALS: POST AWARD

- 4.1.6 After award of the contract, no relief of the MBE/WBE requirements will be granted by GDPM except in exceptional circumstances. Requests for complete or partial waiver of the contract's MBE/WBE participation goals must be made in writing, stating all details of the request, the circumstances, and all relevant information. The request must be accompanied by a record of all efforts taken by the bidder/proposer to locate MBE/WBEs, solicit MBE/WBEs, and to seek assistance from technical assistance agencies.
- 4.1.7 In a case where a business under contract was previously considered to be an MBE/WBE but is later found to be, or whose work is found not to be creditable toward the MBE/WBE goal fully as planned, the GDPM will consider the following special criteria in evaluating a waiver request:
- 4.1.7.1 Whether the bidder/proposer was reasonable in believing the business was an MBE/WBE or that certification standards were not being violated;
- 4.1.7.2 The adequacy of unsuccessful efforts taken to obtain a substitute MBE/WBE as outlined in Article 5, MBE/WBE Substitutions.

#### WAIVER OF MBE/WBE PARTICIPATION GOALS: APPEALS

- 4.1.8 The bidder/proposer shall have the right to appeal a denial of a waiver request. A notice to appeal a waiver request must be received by the Procurement Department within five days of the bidder/proposer's receipt of the waiver denial. The letter of appeal must be accompanied by supporting documents evidencing the grounds for its request.
- 4.1.9 A decision on an appeal by GDPM will be forwarded to the bidder/proposer within 10 days of receipt of the appeal.
- 4.1.10 The final determination by GDPM may be appealed to the Board of Commissioners of GDPM. Any party which believes that it has been wrongly denied a waiver may file an appeal in writing, signed and dated with the Secretary, United States Department of Housing and Urban Development, no later than two days after the date of GDPM's final determination.

## **ARTICLE 5: CHALLENGES TO MBE/WBE'S ELIGIBILITY**

- 5.1. Any third party may challenge the MBE/WBE status of any individual presumed to be an MBE/WBE provided that the challenged party is an owner of an MBE/WBE company seeking recognition of certification from GDPM. An individual who has a current 8(a) Certification from the Small Business Administration (SBA) may not be challenged through this procedure.
- 5.2. The challenge shall be in writing and shall include all information available to the challenging party relevant to the determination of whether the challenged individual is, in fact, an MBE/WBE. The written challenge shall be filed with GDPM's Purchasing Manager.
- 5.3. GDPM shall determine, on the basis of the information provided, whether there is reason to believe that the challenged party is, in fact, not an MBE/WBE. If GDPM determines that there is no reason to believe that the challenged party is not an MBE/WBE, GDPM shall so inform the challenging party in writing. The decision is final and terminates the proceedings as provided. If GDPM determines that there is reason to believe that the challenged party is not an MBE/WBE, GDPM shall begin a proceeding as follows:
  - 5.3.1. GDPM shall notify the challenged party that its status as an MBE/WBE company has been challenged. The notice shall identify the challenging party and summarize the grounds for the challenge. The notice shall also require the challenged party to provide GDPM, within 10 business days, information sufficient to evaluate the party's MBE/WBE status. Failure to provide the requested information will result in sanctions up to and including debarment.
  - 5.3.2. GDPM shall evaluate the information available to it, conduct such investigation as deemed necessary and make a proposed determination of the MBE/WBE status of the challenged party. GDPM shall also provide an opportunity to the parties for an informal hearing at which time each party shall have the opportunity to respond to this proposed determination in writing and in person. The rules of evidence shall not apply and there shall be no presentation of witnesses or cross-examination.
  - 5.3.3. Following the informal hearing, GDPM shall make a final determination as to the challenged party's MBE/WBE status. GDPM shall inform the party, in writing, of the final determination, setting forth the reasons for its decision. In making its determination, GDPM shall be guided by the federal guidelines governing MBE/WBE status.
- 5.4. During the pendency of the challenge under this Article, the presumption that the challenged party is an MBE/WBE shall remain in effect.
- 5.5. Once GDPM has made a final decision on a challenged matter that determination goes into effect immediately.
- 5.6. The final determination by GDPM may be appealed by the adversely affected party to the Board of Commissioners of GDPM. Any party which believes that it has been wrongly denied recognition of certification as an MBE/WBE or joint venture may file an appeal in writing, signed and dated with the Board of Commissioners no later than two days after the date of

GDPM's final determination. Third parties who have reason to believe that another party has been wrongly denied or granted recognition of certification may advise the Secretary of the United States Department of Housing and Urban Development.

## **ARTICLE 6: MBE/WBE UTILIZATION PLAN: REPORTING REQUIREMENTS DURING THE TERM OF THE CONTRACT**

- 6.1. Post-Award monitoring shall be conducted by the Procurement Department and includes the following:
  - 6.1.1. Reviewing MBE/WBE participation compliance;
  - 6.1.2. Conducting on-site visits to monitor compliance of contractors with GDPM's MBE/WBE Participation Proposal;
  - 6.1.3. Tracking and monitoring payments to MBE/WBEs;
  - 6.1.4. Conducting MBE/WBE: "Front" investigations; and
  - 6.1.5. Reviewing and acting upon waivers, substitutions and modifications proposed by contractors after the contract has been awarded and executed.
- 6.2. The bidder/proposer shall, within five business days of receiving the awarded contract or prior to any work being performed, execute formal contracts or purchase orders with the MBE/WBEs included in their various MBE/WBE related schedules. These written agreements shall be forwarded to the GDPM Procurement Department, 400 Wayne Ave. PO Box 8750 Dayton, Ohio 45401-8750.
- 6.3. Specialty areas: In cases where the bidder/proposers have not identified their MBE/WBEs prior to award, they will be required to submit the completed affidavit within 30 days and prior to Notice-To-Proceed. Specialty areas are to be determined by the Procurement Department.
- 6.4. Schedule C: Status Reports of MBE/WBE Subcontract Payments
  - 6.4.1. During the term of contracts, the bidder/proposer shall submit regular "Status Reports of MBE/WBE Subcontract payments" (see Appendix , Schedule C). The reports are to be submitted with each request for payment from GDPM during the term of the contract. Failure to submit the Schedule C may result in payment delay and/or denial. The Schedule C must be submitted to the Procurement Department 400 Wayne Ave. PO Box 8750 Dayton, Ohio 45401-8750 .
  - 6.4.2. In the case of one time procurement with either single or multiple deliveries, a Schedule C, indicating final MBE/WBE payments shall be submitted directly to the Procurement Department so as to assure receipt of, either at the same time or before the user department receives the contractor's final invoice.

## ARTICLE 7. MBE/WBE SUBSTITUTIONS

- 7.1. Arbitrary changes by the bidder/proposer of its commitment goals earlier certified in the Schedule A are prohibited. Further, once entering into each approved MBE/WBE subagreement, the bidder/proposer shall, thereafter, neither terminate the sub-agreement, nor reduce the scope of the work to be performed by the MBE/WBE, nor decrease the price to the MBE/WBE without, in each instance, receiving prior written approval of GDPM.
- 7.2. In some cases however, it may become necessary to substitute a new MBE/WBE in order to actually fulfill the MBE/WBE requirements. In such cases, GDPM must be given reasons justifying the release by GDPM of prior specific MBE/WBE commitments established in the bidder/proposer's proposal. The substitution procedure will be as follows:
- 7.2.1 The bidder/proposer must notify the Procurement Department immediately in writing of an apparent necessity to reduce or terminate an MBE/WBE subcontract and to propose a substitute company for some phase of work, in order to sustain the fulfillment of the MBE/WBE participation goals.
- 7.2.2 The bidder/proposer's notification to GDPM should include the specific reasons for the proposed substitution. Stated reasons that would be acceptable include any of the following examples:
- A previously committed MBE/WBE was found not to be able to perform, or not to be able to perform on time;
  - A committed MBE/WBE was found not to be able to produce acceptable work;
  - A committed MBE/WBE was later determined not to be bona fide;
  - An MBE/WBE previously committed to a given price later demands an unreasonable escalation of price.
- 7.2.3 The bidder/proposer's position in these cases must be fully explained and supported with adequate documentation. Stated reasons which will not be acceptable include:
- A replacement company has been recruited to perform the same work under terms more advantageous to the bidder/proposer;
  - Issues about performance by the committed MBE/WBE are disputed (unless every reasonable effort has already been taken to have the issues resolved or mediated satisfactorily);
  - An MBE/WBE has requested reasonable price escalation, which may be justified due to unforeseen circumstances (i.e., a change in scope of MBE/WBE's work).
- 7.2.4 The bidder/proposer's notification should include the name, address, and principal official of any proposed substitute MBE/WBE, the dollar value and scope of work of the newly proposed subcontract. The same MBE/WBE Schedules, which are required of bidder/proposers, as enumerated above in Article 3, Submission, Evaluation and Approval of MBE/WBE Participation Proposal, shall be attached.
- 7.2.5 GDPM will evaluate the submitted documentation and respond within 15 working days after the request for a compliance determination for the proposed MBE/WBE substitution. The response may be in the form of requesting more information, or

requesting an interview to clarify, or to mediate the problem. The response may also be in the form of a rejection of the proposed MBE/WBE substitution with the reasons therefore included in GDPM's response. In the case of an expressed emergency need to receive the necessary decision for the sake of job progress, GDPM will instead respond as soon as practicable.

7.2.6 Actual substitution of an MBE/WBE to fulfill commitment goals should not be made prior to GDPM's approval, in writing. Once notified of GDPM's approval, the substitute MBE/WBE subcontract must be executed within five working days and a copy of the MBE/WBE subcontract with signatures of both parties to the agreement should be submitted to GDPM.

7.2.7 GDPM will not approve extra payment for escalated costs incurred by the bidder/proposer when a substitution of subcontractors become necessary in order to comply with MBE/WBE contract requirements.

## **ARTICLE 8: NON-COMPLIANCE SANCTIONS AND LIQUIDATED DAMAGES**

- 8.1. GDPM shall have the discretion to apply suitable sanctions to the bidder/proposer if the bidder/proposer is found to be in non-compliance with the MBE/WBE requirements. Failure to comply with the MBE/WBE terms of commitment goals as applicable to and in the contract or failure to use MBE/WBEs as stated in the bidder/proposer's submitted schedules, constitutes a material breach of the contract and may lead to the suspension and/or termination of this contract in whole or in part; furthermore, continued eligibility to enter into future contracting arrangements with GDPM may be jeopardized as a result of non-compliance. In some cases, payments may be withheld until corrective action is taken.
- 8.2. When work is completed, in the event that GDPM has determined that the bidder/proposer was not compliant in the fulfillment of the required MBE/WBE commitment goal and a waiver was not obtained GDPM will thereby be damaged in the failure to provide the benefit of participation to the MBE/WBE to the degree set forth in this MBE/WBE Utilization Plan.
- 8.3. Therefore, in the event of such non-compliance, the bidder/proposer and contractor agrees that GDPM will deduct as liquidated damages cumulative amounts computed as follows:
  - For each one percent (or fraction thereof) of shortfall toward the MBE/WBE goal, one percent of the base bid for this contract shall be surrendered by the bidder/proposer to GDPM in payment as liquidated damages, if such damages are assessed or may be deducted from pay requests.