

## Part A

### SBO Program

#### Administration and Enforcement

##### Section 1: Program Overview and Scope

This document describes the background and general administration of the City of Charlotte's Small Business Opportunity ("SBO") Program. Capitalized terms used in this document are defined in Appendix 1, which is attached and incorporated by reference. Section references in this document refer to Part A unless otherwise stated.

The SBO Program is divided into 7 Parts, based on the type of contract and whether the situation involves procurement or post contract compliance. For reference purposes, these Parts are:

**Part A:** Administration and Enforcement

**Part B:** Construction Bidding

**Part C:** Services Procurement

**Part D:** Post Contract Award

**Part E:** SBE Certification and Eligibility

**Part F:** Financial Partners

**Part G:** Alternative Construction Agreements

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

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

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

The Stakeholders Committee, assisted by City staff, began its work in February 2002. Through a process that included gathering information from other municipalities, private sector experts and a

public hearing, the Committee examined the challenges facing Charlotte's minority and woman owned business community.

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

In June 2002, after careful consideration, the Stakeholders Committee made a number of recommendations to the Charlotte City Council. These recommendations included the following components aimed at helping small businesses obtain access to capital and access to markets:

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

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

City Council adopted the original version of the SBO Program in January, 2003. The SBO Program went into effect in March, 2003, and was amended by City Council in September 2003 based on a series of public input sessions and feedback. Additional revisions were made in September 2004, March 2007 and August 2009.

**1.2. Program Enabling Legislation.** On August 27, 2002, the North Carolina General Assembly ratified S.B. 1336 which added a new Section 8.88 to the Charlotte City Charter authorizing the City of Charlotte to establish a Small Business Enterprise program to promote the development of small businesses in the Charlotte Metropolitan Statistical Area, and to enhance opportunities for small businesses to participate in City contracts (Session Law 2002-91). The legislation was amended in 2008 to allow the City to extend coverage outside of the Charlotte Metropolitan Statistical Area to include additional counties based on the City's periodic assessment of where

small business development initiatives will promote economic development within the City of Charlotte. The bill authorizes the City to establish bid and proposal specifications that include goals and good faith efforts requirements to enhance participation by small businesses in City contracts. It also permits the City to consider a bidder's compliance with such requirements in awarding contracts, and to refuse to award contracts to bidders that fail to comply. In addition, the City has broad authority to engage in economic development and community development activities pursuant to G.S. 158-7.1 and G.S. 160A-456.

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

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

**1.7. Program Roles and Responsibilities.** The SBO Program establishes the following roles and responsibilities for specific City personnel:

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

- Determine the organization structure and appropriate staffing of the SBO Program Office;
- Establish lines of authority and reporting for successful program implementation;
- Recommend funding for SBO Program staffing, operations, training and outreach;
- Assure the integration of the SBO Program components into the practices and processes of all City Key Business Units (KBU); and
- Make revisions to the SBO Program as needed from time to time to facilitate administration and fulfill Program objectives.

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

- Daily administration of all components of the SBO Program and supervision of the SBO Program staff;
- Developing such rules and guidelines as may be necessary to effectuate the purposes of the SBO Program;
- Advising the City Manager on SBO Program issues;
- Consulting with Key Business Executives and their staffs on SBO Program implementation;
- Being the ombudsman for small business concerns associated with the SBO Program;
- Making revisions to the SBO Program as needed from time to time to facilitate administration and fulfill Program objectives.

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

- Ensuring SBO Program compliance within their Key Business Unit (KBU);
- Developing and implementing strategies to achieve the annual and project participation goals established by the SBO Program;

- Integrating the SBO Program components into their practices and processes;
- Monitoring and reporting minority and women business participation as required by North Carolina law, including N. C. Gen. Stat. §143-128.3 (Minority Business Enterprise Participation Administration);
- Monitoring and reporting DBE participation as required under federal Disadvantaged Business Enterprise programs; and
- Reporting SBE, DBE and/or MBE utilization as required by the SBO Program Manager; and
- Promoting the SBO Program and SBE participation in the contracting and procurement activities of their KBU.

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

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

## **Section 2: Definitions**

Capitalized terms used in the SBO Program shall have the meanings set forth in Appendix 1 to Part A.

## **Section 3: Internal City SBE Goals for Informal Contracts**

**3.1. Annual SBE Goals by KBUs for Informal Contracts:** At the beginning of each City fiscal year, the Program Manager will recommend to the City Manager an annual SBE goal for each KBU measuring the aggregate SBE participation in all Informal Contracts undertaken by that KBU. In determining annual SBE goals and measuring KBU goal achievement, Exempt Contracts shall be excluded, other than those that are exempt solely because they are Informal Contracts.

**3.2. Goal Setting Methodology:** The Program Manager, as a basis for establishing annual SBE Goals for each KBU for Informal Contracts, shall determine the present availability of all SBEs in the City's Vendor Management System (VMS). In addition, the Program Manager shall conduct such inquiries, studies and hearings, and utilize information and assistance from such persons, Contractors, entities or organizations including but not limited to the KBEs, as necessary to establish recommended goals.

**3.3. Accountability.** The City Manager shall take such steps as are appropriate to ensure accountability in meeting such goals by the KBUs.

#### **Section 4: Project Specific SBE Goals**

**4.1. Contracts for which Project-Specific SBE Goals Are Set.** Project specific SBE Goals shall be set for all Contracts, except as provided otherwise in this Program. The type of SBO Program requirements applicable depend on the type of Contract, with the various options being listed below:

Construction Contracts:	Part B
Service Contracts:	Part C
Financial Partner Agreements:	Part F
Developer Agreements:	Part G
Infrastructure Reimbursement Agreements	Part G
Construction Manager At Risk Contracts	Part G

**4.2. Program Manager establishes Goal-Setting Methodology.** The Program Manager shall establish a methodology for setting SBE Goals for Contracts, through rules and guidelines for the implementation of the SBO Program. Such methodology shall take into account the reasonably known availability of subcontracting opportunities that SBEs can perform on each Contract. Such methodology may also take into account the use of an optional Goals Committee or consultation of the Business Advisory Committee.

**4.3. Goals Committees.**

**4.3.1.Appointment.** The City Manager may appoint, as requested in the Program Manager's discretion, one or more Goals Committees to advise and assist the Program Manager in determining SBE Goals for various types of Contracts. Goals Committees, if appointed, shall consist of members with first-hand knowledge of the applicable service or industry.

**4.3.2.Role of Goals Committees.** If appointed, Goals Committees shall consider data about SBE availability to perform the substantive work requirements of a Contract under consideration, and shall provide advice to the Program Manager concerning SBE Goal setting on those projects for which the Program Manager has requested their assistance. SBE availability shall be based on Small Business Enterprises the City has listed in its Vendor Management System (VMS). The Program Manager may use such advice and assistance from the Goals Committees to the extent that the Program Manager deems it appropriate and consistent with the purposes of SBO Program.

**4.3.3.**The Program Manager may also consult the Business Advisory Committee regarding SBE Goals for various Contracts.

## **Section 5: Mandatory Subcontractor Requirements**

**5.1. Mandatory Subcontractor Requirements--Authorization and Intent.** Section 8.82 of the Charlotte City Charter authorizes the Charlotte City Council to establish specifications requiring Contractors to subcontract a certain percentage of the work in Construction Contracts. City Council may from time to time elect to exercise this authority to enhance SBE participation in Construction Contracts when Council determines that doing so is reasonably practicable in light of industry practice and consistent with the City's best interests.

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

## **Section 6: Special Provisions for Exempt Contracts**

**6.1. SBO Program Provisions Applicable To Certain Exempt Contracts.** Bidders for Exempt Contracts must negotiate in good faith with each SBE that responds to the Bidder's solicitations and each SBE that contacts the Bidder on its own accord. Additionally, certain provisions of Part D of the SBO Program (relating to Post Contract Award) shall apply to certain Exempt Contracts. The provisions of Part D that apply and the Exempt Contracts they apply to are listed in Section 1.1 of Part D.

**6.2. Special Provision for Exempt Contracts.** If requested by the Program Manager, Business Enterprises that enter into Exempt Contracts shall be required to notify the City of any subcontracting opportunities that may arise on the Exempt Contract for which there are SBEs listed in the City's database. Failure to comply with this Section shall be deemed a material

breach of the Exempt Contract. In such event, the City shall be entitled to exercise any of the remedies set forth in Part D.

- 6.3. Extension of SBO Program Requirements to Exempt Contracts.** KBEs may in their discretion elect to include in bids and proposals for Exempt Contracts (including but not limited to Informal Contracts) a requirement that bidders comply with any or all SBO Program requirements, including but not limited to the requirement that an SBE Goal be established for the Contract. In such event the Exempt Contract shall be deemed a “Contract” for purposes of this Program.

### **Section 7: SBE Outreach, Assistance and Business Development**

7. The SBOP Office, in cooperation with KBEs or their designees, is authorized to develop programs and activities to provide outreach to Small Business Enterprises, and to assist the business development of such enterprises. These activities may include, but are not limited to:
- 7.1. Communicating information on the SBO Program through newsletters, the Internet, workshops, training activities, and other outreach activities conducted by the City or by other public or private entities in collaboration with the City.
  - 7.2. Development of a resource directory to be provided to the small business community in the Charlotte Regional Area with information as to assistance in bonding, financial management and/or accounting, continuing education, professional organization and other resources that improve small business market access or capacity.
  - 7.3. Such other programs or activities as the Program Manager may from time to time recommend.

### **Section 8: Small Business Opportunity Program Administration**

- 8.1 Quarterly reports.** The Program Manager shall prepare written reports four (4) times each fiscal year, which shall describe the City’s progress in meeting the annual Citywide goal for SBE utilization on Informal Contracts, KBUs progress in meeting KBU goals for Informal Contracts and the extent to which Contractors are meeting per project SBE Goals. Copies of such reports shall be provided to the affected KBUs, the City Manager and City Council. The quarterly report shall
- 8.1.1 Address the City’s progress in implementing the SBO Program, any problems or issues that have arisen in implementing the SBO Program and the City’s plans for addressing such problems.
  - 8.1.2 Provide a summary of Informal Contract activities conducted by KBUs.
  - 8.1.3 Provide a summary of all funds paid to SBEs as prime contractors or subcontractors on City Contracts during the fiscal year.

**8.2 Annual report; explanation of failure to achieve annual goal.** If the annual SBE goal for Informal Contracts is not met for a given year, the Program Manager shall submit to the City Manager and City Council a report that compares SBE utilization achieved to the annual goals, states the reasons why the goals were not met, and recommends further efforts that the City should make to provide opportunity in City contracting and procurement activities and recommend what should be done to meet SBE goals in the future.

**8.3 Rules and guidelines.** The Program Manager shall have the power and authority and may adopt rules and guidelines to effectuate the purpose and operation of the SBO Program, including by way of example but not by way of limitation, rules and guidelines relating to:

8.3.1 Qualification of a Business Enterprise as a Small Business Enterprise;

8.3.2 Composition of the Goals Committees and/or the procedure for inquiries, studies or hearings with respect to establishing annual SBE goals for Informal Contracts or per project SBE Goals;

8.3.3 Determination of Good Faith Negotiation and Good Faith Efforts criteria and the required documentation; and

8.3.4 Determination of whether an SBE Goal has been met and the required documentation;

8.3.5 Definition of Commercially Useful Function and/or Conduit activity;

8.3.6 Clarification of defined terms or correction of inappropriate cross-references to sections within the SBO Program

8.3.7 The procedures, methods and criteria for Certification and decertification of SBEs, including but not limited to the procedures and methods of Certification, questions of ownership, management and control, affiliation, independence, continued eligibility and renewal of Certification, interviews, complaints, investigations and onsite visits, burden of proof, denial or granting of Certification, suspension and/or revocation of Certification, graduation size standards and other criteria.

**8.4 Authority to Amend or Modify Program, Forms and Documentation Requirements.** The City Manager is authorized to amend this Program as he or she deems appropriate from time to time. The Program Manager shall have the power and authority to amend this Program to modify any forms or documentation requirements that are required by this Program, including but not limited to the forms required to document the attainment of SBE Goals, Good Faith Negotiation or Good Faith Efforts. Such modifications may increase, decrease or change the forms and/or documentation requirements established by this Program in such manner as the Program Manager deems appropriate in his or her discretion to promote the purpose and intent of the Program, including but not limited to:

8.4.1 Promoting outreach to SBEs;

8.4.2 Promoting the utilization and development of SBEs; and

8.4.3 Accomplishing (a) and (b) in a manner that minimizes the burden on Bidders and SBEs and minimizes the cost of administering the Program to City taxpayers.

The Program Manager is further authorized to modify Program requirements on a case by case basis when appropriate for specific Contracts, such as by reducing the time requirements for certain Good Faith Efforts when a Bid process is expedited.

**8.5 Minor Non-Compliance Waiver.** In addition to and without limiting the Program Manager's power and authority to grant waivers as provided elsewhere in this Program, the Program Manager shall have the power and authority to waive non-compliance with this Program if:

- a. The non-compliance is minor in nature
- b. Waiving the non-compliance would not put Bidders that complied with the SBO Program at a competitive disadvantage; and
- c. The non compliance does not reflect a lack of diligence on the Bidder's part in complying with the Program. For example, a repeated violation of the same Program provision on two or more bids might be deemed a lack of diligence in complying with the Program.

The conditions set forth in subsections (a) through (c) of this Section shall not apply to waivers granted pursuant to the provisions in Parts B and C of this Program. relating to Waiver of Good Faith Efforts and Good Faith Negotiation.

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

**8.6 Reviews.** Any person or entity who is the subject of and is directly and adversely affected by a determination of the Program Manager on behalf of the City under the SBO Program may appeal such decision by expressing his or her concerns in writing to the SBO Program Manager within **30 Days** after receiving notice of the decision. If the Program Manager fails to satisfactorily resolve the matter within **10 Days**, the aggrieved party may appeal to the Key Business Executive of Neighborhood and Business Services. If the Key Business Executive of Neighborhood and Business Services fails to satisfactorily resolve the matter within **10 Days**, the aggrieved party may appeal by sending written notice to the City Manager. Notices of appeal must be sent within **10 Days** after the aggrieved party receives notice of the decision being appealed from, and must identify the decision being appealed and each reason why the aggrieved party takes issue with the decision. This paragraph shall not be construed to create a right of standing that does not otherwise exist under North Carolina law.

- 8.7 **Delegation.** The SBO Program Manager, the Director of Economic Development, the City Manager and each Key Business Executive may designate other individuals to perform any tasks or functions assigned to them in this Program, including without limitation hearing appeals and making decisions regarding rejection of Bids or granting or bid waivers.

### **Section 9 Severability**

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

## Appendix 1 to Part A

### SBO Program

#### Definitions

Capitalized terms used in the SBO Program shall have the meanings set forth below

1. **Affiliate:** The term "Affiliate" is defined in Part E, Section 2.11.
2. **Bid:** Documents a Business Enterprise submits in response to City Solicitation Documents for the purpose of obtaining a Contract (including without limitation responses to requests for qualification, requests for proposals and invitations to bid).
3. **Bidder:** A Business Enterprise that submits a Bid or Proposal for a Contract.
4. **Bid Opening:** For Contracts that are subject to formal bidding requirements under the North Carolina Bid statutes (G.S. 143-128 and 143-129 et. seq.), the Bid Opening shall be the date that Bids are opened by the City. For other Contracts, the Bid Opening shall mean the date that Bids, Proposals or submittals are due.
5. **Broker:** A Business Enterprise that performs a Commercially Useful Function as an intermediary, for a fee, in the acquisition of materials, supplies or equipment, regardless of whether or not it takes title to such materials, supplies or equipment, but is not a Manufacturer or Regular Dealer. A manufacturer's representative shall be deemed a Broker. Only bona fide commissions earned by a Broker for its activities in performing a Commercially Useful Function on City projects shall be counted toward the SBE Goal.
6. **Business Advisory Committee:** A committee of citizens appointed by the Mayor and City Council for the purpose of providing recommendations and advice to the City on ways the City helps businesses in Charlotte.
7. **Business Days:** Days on which the administrative offices of the City of Charlotte are open for the public to do business.
8. **Business Enterprise:** Any corporation, limited liability company, partnership, individual, sole proprietorship, joint stock company, joint venture, professional association or any other legal entity, whether operated for profit or a non-profit, other than: (a) a Financial Partner; or (b) the City or any other unit of federal, state or local government.

9. **Certification:** Authorization by the Program Manager for a Business Enterprise to participate as an SBE under the SBO Program. Certification shall occur in accordance with Part E of the SBO Program. Certification neither represents nor implies that a Business Enterprise is qualified to perform a particular Contract, or that it performs a Commercially Useful Function on a particular Contract.
  
10. **Charlotte Metropolitan Statistical Area (MSA) and Charlotte Regional Area:** The Charlotte Metropolitan Statistical Area (or "Charlotte MSA") is the Charlotte-Gastonia-Concord, NC-SC Metropolitan Statistical Area, as defined from time to time by the United States Office of Management and Budget (OMB). The Charlotte Regional Area is the Charlotte MSA, plus Lincoln County and Rowan County in North Carolina.
  
11. **City:** The City of Charlotte, North Carolina, a North Carolina municipal corporation.
  
12. **City Solicitation Documents:** The documents issued by the City to solicit Bids or Proposals for a Contract, including but not limited to invitations to bid, requests for qualifications, requests for proposals, plans and specifications and proposed contract provisions. May also be referred to as the "Solicitation Documents."
  
13. **Commercially Useful Function:** A function performed by a Business Enterprise when it is responsible for supplying goods or executing of a distinct element of the work of a contract and carrying out its responsibilities by actually performing, managing and supervising the work involved. To determine whether an SBE is performing a Commercially Useful Function, the amount of work subcontracted, industry practices and other relevant factors will be evaluated. Commercially Useful Function is measured for purposes of determining participation on a Contract, not for determination of Certification eligibility.
  
14. **Committed SBE Goal:** Goal that a Contractor commits to achieve for a Contract at Contract award (which will be the SBE goal stated in the Contractor's Bid or Proposal unless modified by mutual agreement of the City and the Contractor).
  
15. **Conduit:** An SBE that knowingly agrees to pass the scope of work for which it is listed for participation and is scheduled to perform or supply on the contract, to a non-SBE firm. In this type of relationship, the SBE has not performed a Commercially Useful Function and therefore the SBE's participation does not count toward the SBE Goal.
  
16. **Construction Contract:** A Contract under which a Business Enterprise agrees to provide construction or repair services to the City, and for which the City has set an SBE Goal. A Construction Contract may be for horizontal or vertical construction or repair work.

17. **Construction Manager-At-Risk Contract (or CM at Risk Contract):** A construction manager-at-risk agreement as defined in N.C. Gen. Stat. 143-128.1. This includes contracts where a licensed general contractor provides construction management services throughout the construction process, and guarantees the cost of the project.
18. **Contract:** Any agreement through which the City procures services from a Business Enterprise, other than Exempt Contracts. Contracts include agreements and purchase orders for (a) construction, re-construction, alteration and remodeling; (b) architectural work, engineering, testing, construction management and other professional services related to construction; and (c) services of any nature (including but not limited to general consulting and technology-related services). Contracts do not include agreements or purchase orders for the purchase or lease of apparatus, supplies, goods or equipment.

The term "Contract" shall also include Exempt Contracts for which an SBE Goal has been set.

Financial Partner Agreements, Development Agreements and Construction Manager-at-Risk Agreements shall also be deemed "Contracts," but shall be subject only to the provisions referenced in the respective Parts of the SBO Program listed below:

Financial Partner Agreements:	Part F
Construction Manager at Risk Agreements	Part G
Developer Agreements:	Part G
Infrastructure Improvement Agreements	Part G

19. **Contractor:** A Business Enterprise that enters into a Contract. The term "Contractor" shall include consultants, architects, engineers, suppliers and other providers of goods and services, in addition to construction contractors. For purposes of Part D only, the term "Contractor" shall also include Business Enterprises that are parties to Exempt Contracts (other than Exempt Contracts that fall within Sections 23.3 through 23.9):
20. **Days:** Any reference to "days" in this Program shall mean calendar days, unless it is specifically indicated to be Business Days.
21. **Developer Agreement:** A Contract under which the City agrees to provide funding of \$200,000 or more for a "public-private development project," as defined in Section 7-109 of the City of Charlotte Charter. Section 7-109 defines a public-private development project as a capital project comprising both public and private facilities that are located (i) in the City's central business district, as defined by City Council; (ii) in or along a major transportation corridor; or (iii) in a development zone designated pursuant to G.S. 105-129.3A.

22. **Eligible Owner:** An owner of an SBE who meets the criteria for “Eligible Owner” as set forth in Part E of the SBO Program.

23. **Exempt Contracts:** Contracts that fall within one or more of the following categories shall be “Exempt Contracts” unless the KBU responsible for procuring the Contract decides otherwise:

**23.1. Informal Contracts.** Informal Contracts shall be Exempt Contracts.

**23.2. No Competitive Process Contracts:** Contracts or purchase orders that are entered into without a competitive process, or entered into based on a competitive process administered by an entity other than the City shall be Exempt Contracts, including but not limited to contracts that are entered into by sole sourcing, piggybacking, buying off the North Carolina State contract, buying from a competitive bidding group purchasing program as allowed under G.S. 143-129(e)(3), or using the emergency procurement procedures established by the North Carolina General Statutes.

**23.3. Managed Competition Contracts:** Managed competition contracts pursuant to which a City KBU or division competes with Business Enterprises to perform a City function shall be Exempt Contracts.

**23.4. Real Estate Leasing and Acquisition Contracts:** Contracts for the acquisition or lease of real estate shall be Exempt Contracts.

**23.5. Federal Contracts Subject to DBE Requirements:** Contracts that are subject to the U.S. Department of Transportation Disadvantaged Business Enterprise Program as set forth in 49 CFR Part 26 or any successor legislation shall be Exempt Contracts.

**23.6. State Contracts Subject to MWBE Requirements:** Contracts for which a minority and women business participation goal is set pursuant to G.S. 143-128.2(a) due to a building project receiving funding from the State of North Carolina shall be Exempt Contracts.

**23.7. Financial Partner Agreements with DBE or MWBE Requirements:** Contracts that are subject to a disadvantaged business development program or minority and women business development program maintained by a Financial Partner shall be Exempt Contracts.

**23.8. Interlocal Agreements:** Contracts with other units of federal, state or local government shall be Exempt Contracts.

**23.9. Contracts for Legal Services:** Contracts for legal services shall be Exempt Contracts, unless otherwise indicated by the City Attorney.

**23.10. Contracts with Waivers:** Contracts for which the SBO Program Manager or the City Manager waives the SBO Program requirements shall be Exempt Contracts (such as when there are no SBE subcontracting opportunities on a Contract).

**23.11. Special Exemptions:** Contracts where the KBU and the Program Manager agree that the KBU had no discretion to hire an SBE (e.g., emergency contracts or contracts for banking or insurance services) shall be Exempt Contracts.

Exempt Contracts shall be subject to the SBO Program requirements identified in Section 6 of Part A, but shall not be subject to other SBO Program requirements.

24. **Financial Partner:** A non-profit agency or organization with whom the City of Charlotte contracts to provide specific services for the community. These agencies extend the City's capacity to address strategic priorities and concerns of the community. Partnerships include those due to special legislation, those that support City Council's strategic focus areas, and those that contribute to important community activities.
25. **Financial Partner Agreements:** A Contract under which the City agrees to provide funding to a Financial Partner.
26. **Goals Committees:** Committees of citizens with expertise in construction and other relevant industries, which may be appointed by the City Manager as set out in Part A of this Program to advise the Program Manager as to SBE Goal setting.
27. **Good Faith Efforts (or GFEs):** The requirements that Bidders and Proposers must meet to show that they actively and aggressively sought to achieve the SBE Goal. Good Faith Efforts requirements vary based on the type of Contract, and are defined by Contract type in Parts B, C, F and G of this Program
28. **Good Faith Negotiation:** The obligation of Bidders and Proposers to negotiate in good faith with SBEs.
29. **Informal Contracts:** Contracts and purchase orders through which the City procures services from a Business Enterprise that fall within one of the following 2 categories:
  - 29.1. **Construction Contracts Less Than or Equal To \$200,000:** Contracts for construction or repair work that are estimated to require a total expenditure of City funds less than or equal to \$200,000.
  - 29.2. **Service Contracts That Are Less Than or Equal To \$100,000:** Service Contracts that are estimated to require a total expenditure of City funds less than or equal to \$100,000.
30. **Infrastructure Reimbursement Agreements:** Reimbursement agreements with private developers and property owners that are approved by the City pursuant to Section 2-2 of Charlotte City Code for the design and construction of municipal infrastructure that is included in the City's Capital Improvement Plan and serves the developer or property owner. Infrastructure Reimbursement Agreements may involve, without limitation, water mains, sanitary sewer lines, lift stations, stormwater lines, streets, curb and gutter, sidewalks, traffic control devices and other associated facilities.

31. **Joint Venture:** An association of two (2) or more Business Enterprises to constitute a single Business Enterprise for which purpose they combine their property, capital, efforts, skills and knowledge. Each participant in the Joint Venture must be responsible for a clearly defined portion of work, must perform a Commercially Useful Function, and must share in the ownership, control, management responsibilities, risks and profits of the Joint Venture.
32. **Key Business Executive (KBE) and Key Business Unit (KBU):** A Key Business Executive (or “KBE”) is the manager or director of a City Key Business Unit (or “KBU”). As used in this Program, the term KBE also applies to a person that the KBE may designate to take such actions as are required or permitted under this Program. The term “Key Business Unit” or KBU refers to a department of the City.
33. **Manufacturer:** A Business Enterprise that operates or maintains a factory or establishment that produces, or substantially alters, on the premises the materials, supplies or equipment provided to Contractors, Subcontractors, Regular Dealers or Brokers in connection with a Contract. Expenditures for materials, supplies and equipment obtained from a Manufacturer shall count 100% toward the SBE Goal.
34. **Minority and Women Business Enterprise Goal (MWBE):** Any goals set by the State of North Carolina, the City Council or the City Manager for minority and women business participation in City contracts.
35. **Modified GFEs or Modified Good Faith Efforts:** The requirements a Contractor must meet to solicit SBEs during the term of a Contract or Contract renewal, as set forth in Part D.
36. **NAICS:** North American Industry Classification System (NAICS) codes expressed either in number of employees (size standards) or annual receipts in millions of dollars by industry or service type.
37. **NIGP:** National Institute of Governmental Purchasing (NIGP) codes used to describe commodities purchased by governmental agencies. Services a Business Enterprise provides are categorized by NIGP codes.
38. **Packager:** A Business Enterprise that performs a Commercially Useful Function in the packaging of goods used in or delivered under a Contract, but is not a Regular Dealer or a Manufacturer. A Packager shall be considered as, and treated as, a Broker. This industry comprises establishments primarily engaged in packaging client-owned materials. The services may include labeling and/or imprinting the package. Only the fee paid to the Packager for services that constitute a Commercially Useful Function provided shall count toward the SBE Goal.

39. **Program Manager:** The division manager of the City's SBO Program or a person whom the division manager has designated to exercise the Program Manager's rights or duties in a particular situation.
40. **Proposal:** Documents a Business Enterprise submits in response to City Solicitation Documents for the purpose of obtaining a Services Contract (including without limitation responses to requests for qualification, requests for proposals and invitations to bid).
41. **Proposal Opening:** The date and time that Proposals are due.
42. **Proposer:** A Business Enterprise that submits a Proposal for a Services Contract. In some instances, a Proposer may also be referred to as Bidder.
43. **Qualified SBE:** An SBE that has the financial ability, skill, experience and access to the necessary staff, facilities and equipment to complete a particular Contract or subcontract, and otherwise meets the criteria for being a "responsible bidder" within the meaning of the North Carolina bid statutes. The Program Manager, with advice from the City Attorney, may develop methods and criteria for assessment of whether a particular SBE is Qualified for a particular Contract or subcontract for the purposes of the SBO Program. Nothing contained herein shall in any respect supersede or invalidate rules and regulations that a KBE or City Division Director may promulgate with respect to pre-qualification of City Contractors. The City makes no representations as to the qualification of any SBE or any other Business Enterprise.
44. **Regular Dealer:** This shall mean a Business Enterprise that owns, operates or maintains a store, warehouse or other establishment in which the materials or supplies required for the performance of a Construction Contract are bought, kept in stock and regularly sold to the public in the usual course of business. To be a Regular Dealer, the Business Enterprise must engage in, as a substantial and material portion of its business, and in its own name, the purchase and sale of the products in question. A Regular Dealer in such bulk items as steel, cement, gravel, stone and petroleum products need not keep such products in stock if it owns or operates distribution equipment. Brokers, Conduits, Packagers and manufacturer's representatives shall not be regarded as Regular Dealers within the meaning of this term. Expenditures for materials, supplies and equipment obtained from a Regular Dealer shall count 100% toward the SBE Goal.
45. **Selection Committee:** An individual or committee of City staff and/or consultants formed to evaluate Proposals for a Services Contract.
46. **Services Contract:** A Contract for a Business Enterprise to provide services to the City that is not a Construction Contract. Examples include but are not limited to contracts for architectural, engineering, surveying or construction management services, contracts for janitorial services,

contracts for computer consulting and contracts for language interpretation. Contracts for legal services are not Services Contracts within the meaning of this Section unless the City Attorney decides otherwise in a particular instance.

47. **Small Business Opportunity Program (“SBOP”) Office:** The City’s Small Business Opportunity Program Office, also referred to as the SBOP Office.
48. **Small Business Enterprise (SBE):** A Business Enterprise that is certified by the Program Manager under Part E of the SBO Program as meeting all of the requirements for SBE certification.
49. **Small Business Enterprise Assistance Organizations (“SBE Assistance Organizations”):** An organization, other than the City, that accelerates the successful development of start-up and fledgling companies by providing them with an array of targeted resources and services. These organizations may provide management guidance, technical assistance and consulting tailored to small, minority- or women-owned businesses. The SBO Program Manager shall have sole discretion to determine whether a particular organization constitutes an SBE Assistance Organization for purposes of this Program.
50. **Small Business Enterprise Goal (“SBE Goal”):** A goal established by the City for SBE utilization on a Contract. Calculated as a percentage, the SBE Goal represents the total dollars spent with SBEs as a portion of the total Bid or Proposal amount, including any contingency.
51. **Small Business Enterprise Participation Plan (“SBE Participation Plan”):** A modified version of the SBO Program that private developers and property owners develop as a condition of entering into Development Agreements or Infrastructure Reimbursement Agreements with the City. The SBE Participation Plan establishes the developer or property owner’s SBE Goal and outlines the initiatives the developer or property owner will undertake to achieve the SBE Goal.
52. **Subcontractor:** A Business Enterprise that directly contracts with a Contractor, subcontractor or subconsultant to provide goods or services or perform work in connection with a Contract. The value of the Commercially Useful Function to be performed by an SBE Subcontractor shall count 100% toward the SBE Goal. The term “Subcontractor” also includes Subconsultants” and “Suppliers”.
53. **Supplemental SBE Goal:** SBE goal established for a renewal, amendment or change order to an existing Contract.

**Part B**

**SBO Program**

**Formal Construction Bidding**

**Section 1: Scope**

This document states requirements that Bidders must comply with under the City of Charlotte's Small Business Opportunity ("SBO") Program to obtain Construction Contracts with the City of Charlotte. Capitalized terms used in this document are defined in Appendix 1 to Part A of the SBO Program. Section references in this document refer to Part B unless otherwise stated. Once executed, Construction Contracts are subject to the post contract award requirements set forth in Part D.

The SBO Program is divided into 7 Parts, based on the type of contract and whether the situation involves procurement or post contract compliance. For reference purposes, these Parts are:

**Part A:** Administration and Enforcement

**Part E:** SBE Certification and Eligibility

**Part B:** Construction Bidding

**Part F:** Financial Partners

**Part C:** Services Procurement

**Part G:** Alternative Construction Agreements

**Part D:** Post Contract Award

**Section 2: General Requirements**

- 2.1. When the City Solicitation Documents for a Construction Contract contain an SBE Goal, each Bidder must either: (a) meet the SBE Goal, or (b) comply with the Good Faith Negotiation and Good Faith Efforts requirements set forth in Sections 4 and 5.** Failure to do so constitutes grounds for rejection of the Bid. The City Solicitation Documents will contain certain forms that Bidders must complete to document having met these requirements.
- 2.2. When the City Solicitation Documents for a Construction Contract do not contain an SBE Goal,** each Bidder must negotiate in good faith with each SBE that responds to the Bidder's solicitations and each SBE that contacts the Bidder on its own accord (as defined more specifically in Section 4.4).
- 2.3. Self-Performance.** Self-performance does not exempt Bidders from SBO Program requirements. Bidders that do not meet the SBE Goal for a Construction Contract and desire to self-perform all or part of the Construction Contract must nevertheless demonstrate that they complied with the Good Faith Negotiation and Good Faith Efforts requirements as set forth in Sections 4 and 5.

- 2.4. No SBE Goal When There Are No SBE Subcontracting Opportunities.** The City shall not establish an SBE Goal for Construction Contracts where there are no SBEs certified to perform the scopes of work that the City regards as realistic opportunities for subcontracting.
- 2.5. Mandatory Subcontracting Provision.** Section 8.82 of the Charlotte City Charter authorizes the Charlotte City Council to establish specifications requiring Contractors to subcontract a certain percentage of the work in Construction Contracts. City Council may from time to time elect to exercise this authority to enhance SBE participation in Construction Contracts when it determines that doing so is reasonably practicable in light of industry practice and consistent with the City's best interests. If City Council establishes mandatory subcontracting requirements for a Construction Contract, all Bidders submitting Bids or Proposals on the Contract shall be required to: (a) subcontract the amount of work specified by City Council; and (b) use Good Faith Efforts to subcontract such work to SBEs. In the event a Contractor is unable to subcontract the designated percentage of work to SBEs, the Contractor shall nevertheless be required to subcontract the designated percentage of work to other third party contractors.

### **Section 3: Establishing and Meeting the SBE Goal**

- 3.1.** SBE Goals shall be established in the following manner:
- 3.1.1.** For each Construction Contract, the Program Manager shall establish an SBE Goal that is a percentage of the dollar value of all services and goods the Construction Contract requires (including any contingency), provided that the Program Manager or City Manager may waive the goal requirement for a given Construction Contract if either of them determines it to be in the best interests of the City.
- 3.1.2.** In the event a City Key Business Executive issuing a Construction Contract disagrees with the goal set by the Program Manager, the City Manager or an Assistant City Manager shall resolve the matter.
- 3.2.** The City will only give Bidders credit toward the SBE Goal for those SBEs that:
- 3.2.1. Are certified SBEs as of Bid Opening;** and
- 3.2.2. Will actually perform a Commercially Useful Function** as defined in Part A (which means, among other things, an SBE acting solely as a Conduit will not be counted); and
- 3.2.3. Will perform within the area(s) for which they are certified** by the City unless the Bidder provides documentation satisfactory to the City showing that the SBE has performed similar work in the past. Documentation to satisfy this requirement may

include invoices showing the SBE has previously performed such work. The Bidder must submit this documentation with **Form 4** (the Letter of Intent).

The City will not give credit toward the SBE Goal for subcontracting to SBEs that are found to be Affiliates of the Bidder prior to Bid Opening. If an SBE is decertified between Bid Opening and Contract award, the City will not allow credit toward the SBE Goal for amounts committed to that SBE, but will allow the Bidder to replace the decertified SBE with a certified SBE unless the certification was based on false or fraudulent information of which the Bidder had or should have had knowledge. However, for Contracts that are put out for Bids after April 22, 2011, the City may refuse to allow the substitution and reject the Bid if the SBE is decertified for being an Affiliate, or if the SBE is found to be an Affiliate of the Bidder (even if not decertified), if the City determines in its sole discretion that the Bidder knew or should have known prior to Bid Opening that there was a significant risk that the City would consider the SBE an Affiliate. Bidders shall be deemed to have knowledge of all SBO Program provisions, including those relating to Affiliates.

**3.3. Using SBEs the City Did Not List in City Solicitation Documents.** Bidders shall receive credit for using SBEs that the City did not list in the City Solicitation Documents, as long as the requirements of Section 3.2 are met.

**3.4. Calculating SBE Participation Based on Type of SBE.** The City shall count SBE participation on a Construction Contract as set forth below.

**3.4.1. SBE Subcontractor:** If the Bidder utilizes an SBE as a Subcontractor to perform services, the City shall count 100% of the value of the Commercially Useful Function the SBE performs toward satisfaction of the SBE Goal.

**3.4.2. SBE Manufacturer or Regular Dealer:** The City shall count 100% of all expenditures for materials, supplies and equipment obtained from an SBE Manufacturer or Regular Dealer toward the SBE Goal.

**3.4.3. SBE Broker or Packager:** The City shall count fees or commissions charged by an SBE Broker or Packager for providing a Commercially Useful Function toward the SBE Goal, provided that the Program Manager determines that the fee or commission is reasonable and not excessive as compared with fees customarily charged for similar services. A Commercially Useful Function by an SBE Broker or Packager shall be defined as providing professional, technical, consultant or managerial services and assistance to procure essential personnel, facilities, equipment, materials or supplies required for the performance of the Contract.

**3.4.4. SBE Joint Venture.** In order for the City to count SBE participation in a Joint Venture toward achievement of the SBE Goal, the Bidder shall submit the Joint Venture proposal to the Program Manager at least **10 Business Days** before submitting its Bid. The SBO Program Manager will review the proposal and, assuming that the Bidder does not need to provide more information, the Program Manager will inform the Bidder

at least **5 Business Days** before Bid Opening whether the City will be able to count the SBE's participation toward the SBE Goal.

SBE participation by an SBE Joint Venturer will be calculated as provided above, based on whether the SBE Joint Venturer will be performing a role most similar to that of a Subcontractor, Regular Dealer, Manufacturer, Broker or Packager. For instance, if the SBE Joint Venturer's role is most similar to that of a Subcontractor, 100% of the value of the Commercially Useful Function performed by the SBE will count toward the SBE Goal.

**3.5. Documenting SBE Participation for Purpose of Meeting SBE Goal.** The City may **only** give Bidders credit toward the SBE Goal for SBE participation that is:

- (a) Listed on **Form 3** (the **Subcontractor/Supplier Utilization Commitment Form** as defined in Section 3.6) submitted with the Bid; and
- (b) Documented by **Form 4** (the **SBE Letter of Intent Form** as defined in Section 3.7), that is submitted to the City within the time period set forth in Section 3.7.

Notwithstanding the above, if a Bidder achieves 75% or more of the SBE Goal prior to Bid Opening and documents it as described above, the Bidder shall be deemed to have met the SBE Goal if it provides **Form 4** Letters of Intent for the remaining 25% of the SBE Goal within 3 Business Days after the City requests the Bidder's Good Faith Efforts Compliance Form (**Form 5**).

**3.6. Form 3: Subcontractor/Supplier Utilization Commitment.** City Solicitation Documents for each Construction Contract will include a form labeled "Subcontractor/Supplier Utilization Commitment" ("**Form 3**"), which captures information regarding the SBEs and other subcontractors and suppliers that the Bidder intends to use on the Contract. Failure to properly complete and submit **Form 3** with the Bid constitutes grounds for rejection of the Bid.

**3.7. Form 4: Letter of Intent.** Within **3 Business Days** after receiving a request from the City (or within such longer time as may be communicated by the City in writing), Bidders must submit a separate Letter of Intent for each SBE listed in **Form 3** and for any additional SBEs for which the Bidder seeks credit under the last sentence of Section 3.5. Bidders may use the Letter of Intent that the City provides with the City Solicitation Documents or may use an alternative form if it contains the same information as Form 4. Regardless of the form, each Letter of Intent must be executed by both the SBE and the Bidder. The KBU shall not count proposed SBE utilization for which it has not received a Letter of Intent by this deadline unless the SBE certifies to the City that it originally agreed to participate in the Contract at the level reported by the Bidder, but subsequently declined to do so.

## **Section 4: Good Faith Negotiation**

- 4.1. Bidders that fail to meet the SBE Goal must comply with the Good Faith Negotiation and Good Faith Efforts requirements set forth in Sections 4 and 5.**
- 4.2. City Outreach.** At least 10 days before Bid Opening on a Construction Contract, the City will send a "Project Notice" to SBEs that are certified in the areas where the City anticipates subcontracting on the project. The Project Notice will describe the project and identify the areas where subcontracting is anticipated. The City will also make available (by email, posting on the City's website or other means) either: (a) a list of Bidders that have submitted **Form 1** (Notification of Subcontracting/Purchasing Opportunities) or other notices of their intent to bid or (b) a list of Bidders that have picked up or requested the City Solicitation Documents for the project.
- 4.3. Good Faith Negotiation.** All Bidders that fail to meet the SBE Goal (including Bidders that desire to self-perform) must negotiate in good faith with each SBE that responds to the Bidder's solicitations and each SBE that contacts the Bidder on its own accord ("Interested SBEs").
- 4.4. Failure to Negotiate In Good Faith.** The City may find that a Bidder did not meet its Good Faith Negotiation obligation if in the City's judgment, the Bidder rejects an Interested SBE's bid for reasons other than: (a) the SBE's bid was higher than what was proposed by the subcontractor or supplier the Bidder decided to use or higher than the Bidder's cost of performing such work on its own; (b) the SBE was not a "Qualified SBE" as defined in Part A; or (c) the Business Enterprise that will be performing in place of the Interested SBE is more qualified than the Interested SBE, to the extent that such difference in qualification would materially impact the Bidder's Bid, or (d) there was a material deficiency with the Interested SBE's bid (such as it being submitted late, containing inaccurate information, etc.). The City Solicitation Documents may contain a form for Bidders to document Good Faith Negotiation. The City may also request on a case-by-case basis documentation sufficient in the City's judgment to prove that the Bidder's reasons for rejecting an Interested SBE are valid. Bidders must provide such forms and information within the time period specified by the City. Failure to comply with the requirements set forth in this Section (the "Good Faith Negotiation Requirements") shall constitute grounds for rejecting a Bid. Notwithstanding the forgoing, Bidders participating in a mentor / protégé program recognized by the SBOP Office may reject an Interested SBE's bid for work that is being performed by the Bidder's SBE mentee or SBE protégé, subject to approval of the SBO Program Manager.

## **Section 5: Good Faith Efforts**

- 5.1. If a Bidder has not fully met the SBE Goal, then it must document that it has made Good Faith Efforts in compliance with this Section 5.** Failure to do so constitutes grounds for rejection of the Bid. “Good Faith Efforts” are referred to in this Section as “GFEs”.
- 5.2. Minimum GFE Points.** For each Construction Contract, the City shall: (a) assign points to the various GFE categories listed in this Section; and (b) establish a minimum total number of points that a Bidder must obtain in order to meet the GFE requirements (the “Minimum GFE Points”). These numbers shall be set forth in the City Solicitation Documents on **Form 5** (the GFE and Statement of GFE Compliance form). The City may exclude or modify certain GFE categories based on the nature and amount of the Contract.
- 5.3. GFE Categories.** For each Construction Contract, the City shall assign GFE points among the following categories:
- 5.3.1. Notification of Subcontracting Opportunities (“Form 1”).** To receive credit for this GFE, a Bidder must provide to the City no later than **14 Days** before Bid Opening a list of the areas in which the Bidder intends to seek subcontractors and suppliers. The Bidder may report this information on **Form 1** or on another document providing the same information as **Form 1**. Bidders may submit **Form 1** by fax, hand delivery, email, overnight courier or regular mail. However, if requested by the City, Bidders must be able to document having sent **Form 1** to the City by the deadline in the same manner as Bidders are required to document having made SBE Contacts in Section 5.3.2.3.
- 5.3.2. SBE Contacts.** The City will specify in the City Solicitation Documents either the minimum number of SBEs the Bidder must contact to receive credit for this GFE or a method for determining which or how many SBEs must be contacted. A Bidder must make the required contacts no less than **7 Days** before Bid Opening to receive credit.
- 5.3.2.1. Solicitation Method:** The Bidder shall make the SBE solicitations by facsimile transmission, e-mail, U.S. Mail, or overnight courier service. Regardless of the method of contact, the solicitation must occur no less than **7 Days** before Bid Opening. If the Bidder contacts SBEs by U.S. Mail, the KBU shall presume that the solicitation reached the SBE by the required deadline if the Bidder: (a) mailed the solicitation at least **10 Days** prior to the Bid Opening; and (b) documented the solicitation as required by Section 5.3.2.3.
- 5.3.2.2. Solicitation Content:** For a Bidder to receive credit for a solicitation, the substance of the solicitation must be sufficient to put the SBE on notice that the Bidder is soliciting a Bid from the SBE to participate in the Contract up for award in one or more of the areas for which the SBE is certified.
- 5.3.2.3. Solicitation Documentation Requirements:** To receive GFE credit for contacting SBEs, a Bidder must submit an SBE Solicitation Form (“**Form 2**”)

within the time specified in the City Solicitation Documents. If no time period is specified in the City Solicitation Documents, a Bidder must submit Form 2 within **3 Business Days** after the City requests it. **Form 2** shall require the Bidder to document in writing for each SBE solicited: (a) the mode of contact, (b) the date of the contact, (c) the business name and contact person for each of the SBE firms contacted, and (d) the NIGP Code or a description identifying the goods or services the Bidder solicited from the SBE. In addition to **Form 2**, the City may require the Bidder to provide a copy of the solicitation sent to SBEs (which must meet the content requirements per Section 5.3.2.2), along with the following documentation depending on the mode of contact:

- (a) **For contacts made by fax:** The Bidder must provide a confirmed fax transmission record showing that: (i) a fax was transmitted to a fax number maintained by the SBE, or (ii) a fax was directed to a fax number maintained by the SBE but did not go through due to reasons outside the Bidder's control. If the Bidder cannot provide the forgoing, the City may refuse to consider such contact in awarding GFE points.
- (b) **For contacts made by e-mail:** The Bidder must provide a copy of an e-mail confirmation notice showing that an e-mail was delivered to an e-mail address maintained by the SBE.
- (c) **For contacts made by U.S. Mail:** The Bidder must provide: (a) a copy of the solicitation that satisfies the content requirements in Section 5.3.2.2; and (b) a Certificate of Mailing from the U.S. Postal Service certifying the date on which the Bidder mailed the solicitation; and (c) an affidavit stating that the Bidder mailed the solicitation to the SBE recipient on the date indicated in the Certificate of Mailing.
- (d) **For contacts made by overnight courier:** The Bidder must provide a copy of the solicitation that meets the content requirements set forth in Section 5.3.2.2, along with a routing slip from the overnight courier showing the SBE's address, the date on which the Bidder sent the solicitation to the SBE recipient.

5.3.2.4. **When Documentation Required** The City may require the documentation listed in Section 5.3.2.3 or any additional documentation relating to SBE solicitations from any Bidder in the City's sole discretion. For example, the City may request the solicitation documentation from one or more Bidders selected randomly by the City when Bidders submit Bids, and/or the City may request solicitation documentation from a select group of Bidders who appear to have submitted the lowest Bids. The City may further elect to request the solicitation documentation from a Bidder who, in the City's

judgment, requires additional monitoring because of previous instances of non-compliance. Bidders must provide the solicitation documentation within **3 Business Days** after the City requests it, unless the City has agreed in writing to a longer time period.

**5.3.3. Making Plans Available.** To receive credit for this GFE, the Bidder must: (a) make “Project Documents” (as defined below) available to Interested SBEs no less than **7 Days** before Bid Opening in one of the 3 ways described below; and (b) notify all SBEs contacted under GFE 5.3.2 of the way in which Project Documents will be made available. As used herein, Project Documents means any project descriptions, construction plans, specifications or requirements that are necessary for SBEs to bid on the project. The 3 ways a Bidder may make Project Documents available to SBEs are:

5.3.3.1. Provide Interested SBEs with a hard copy of the Project Documents via email, fax, regular mail or other means of document transfer; or

5.3.3.2. Provide necessary physical access and adequate time for SBEs to fully review the Project Documents at the Bidder’s place of business within the Charlotte Regional Area or, if the Bidder has no place of business within the Charlotte Regional Area, at an alternate location within the Charlotte Regional Area where the information can be reviewed at no cost to the SBEs; or

5.3.3.3. Post the Project Documents on a website that SBEs can access at no cost.

To receive credit for this GFE, the Bidder’s notice to SBEs must identify: (a) a telephone number or email address for requesting copies of the Project Documents (for 5.3.3.1), (b) the locations (including the address) where Project Documents can be reviewed (for 5.3.3.2) or (c) the website link on which they are posted (for 5.3.3.3). A Bidder may receive credit for GFE 5.3.3 only if it receives credit for GFE 5.3.2 (SBE Contacts). Some plans and designs for City buildings and infrastructure may be restricted from disclosure under federal Homeland Security laws. If the City Solicitation Documents indicate that the Project Documents are restricted from disclosure, the Bidder shall comply with the City’s instructions in making such documents available for review. For example, the City Solicitation Documents may require that SBEs sign a confidentiality agreement in a form approved by the City as a condition to disclosure.

**5.3.4. Breaking Down Work.** To receive credit for this GFE, the Bidder must: (a) notify SBEs as part of a Bidder’s SBE contacts under Section 5.3.2 that the Bidder is willing to divide or combine elements of work into economically feasible units on a case-by-case basis to facilitate SBE participation and (b) negotiate in good faith with any SBEs that request such divisions or combinations. A Bidder may receive credit for GFE 5.3.4 only if it receives credit for GFE 5.3.2 (SBE Contacts).

- 5.3.5. Attendance at Pre-Bid.** To receive credit for this GFE, the Bidder must attend pre-bid meetings scheduled by the City for the Contract in question.
- 5.3.6. Conducting a Pre-Bid for SBEs.** To receive credit for this GFE, the Bidder must conduct a pre-bid meeting for SBEs no less than **3 Business Days** before Bid Opening. The pre-bid meeting must take place within Mecklenburg County, or, if the Proposer has no place of business within Mecklenburg County, at an alternate location within the Charlotte Regional Area. No less than 48 hours before the pre-bid meeting, the Bidder must communicate the time and location of the meeting to the SBEs that the Bidder is required to contact to earn GFE points under Section 5.3.2. A Bidder may receive credit for GFE 5.3.6 only if it receives credit for GFE 5.3.2 (SBE Contacts).
- 5.3.7. Training.** To obtain credit for this GFE, the Bidder must provide training or mentoring to at least 2 SBEs within **12 months** before Bid Opening, and the Bidder must have the training or mentoring certified by the Program Manager. The Program Manager shall have the discretion to deny credit for training or mentoring that in the Program Manager's sole discretion is not significant or not reasonably likely to assist the SBE in developing its capabilities. No credit shall be given for training provided to an Affiliate of the Bidder.
- 5.3.8. SBOP Mentor-Protégé Program.** The Bidder may receive credit for this GFE if the Bidder demonstrates that it is participating in the City's SBO Mentor-Protégé program, and that it is a mentor in good standing. The Program Manager shall have the discretion to deny credit for this GFE if the mentor is not in good standing. Affiliates will not be approved for a mentor-protégé relationship under the City's program.
- 5.3.9. Working With SBE Assistance Organizations.** To receive credit for this GFE, the Bidder must document that it has performed one of the following within the **12 month** period before Bid Opening for an SBE Assistance Organization (as defined below):
- 5.3.9.1. **Provide location for SBE Assistance Organization Event:** providing a meeting location for the SBE Assistance Organization to host a regular meeting or special event at no cost or at a reduced rate.
- 5.3.9.2. **Provide training for SBE Assistance Organization members:** providing training or facilitating workshops aimed at increasing the capacity or skill level of the SBE Assistance Organization members, or participating in training or a workshop sponsored by the SBE Assistance Organization.
- 5.3.9.3. **Contracting with new SBE:** documenting that the SBE Assistance Organization helped to identify an SBE with whom the Bidder subsequently subcontracted work (whether on a City Construction Contract or other contract). The KBU will not give the Bidder credit for this GFE if the Bidder contracts with an SBE that the Bidder has used on previous projects.

As used herein, the term "SBE Assistance Organization" means an organization, other than the City, that: (a) accelerates the successful development of start-up and fledgling

companies by providing them with an array of targeted resources and services; and (b) maintains an office in the Charlotte Regional Area. These organizations may provide management guidance, technical assistance and consulting tailored to small, minority- or women-owned businesses. The SBO Program Manager shall have sole discretion to determine whether a particular organization constitutes an SBE Assistance Organization for purposes of this Program. Bidders seeking credit for this GFE are encouraged to confer with the SBO Program Manager as to whether a particular organization is recognized as an SBE Assistance Organization prior to Bid Opening.

- 5.3.10. Bonding or Insurance Assistance on Construction Contract.** To receive credit for this GFE, the Bidder must assist an SBE in obtaining its own bond or insurance coverage for a City contract or another contract by (a) providing direct assistance within the **6 months** preceding the Bid Opening, and (b) showing that the SBE did not have access to the bond or insurance coverage before the Bidder's assistance. To document satisfaction of this GFE, the Bidder must submit: (a) the name of the SBE; (b) a description of the assistance the Bidder provided; (c) the date the Bidder provided the assistance; (d) the name of a contact person with the SBE who can verify that the Bidder provided the assistance; and (e) any additional information requested by the City. No credit will be given for assistance provided to an Affiliate of the Bidder.
- 5.3.11. Entering Into Joint Venture with SBEs.** To receive credit for this GFE, the Bidder must document the existence of a Joint Venture agreement between the Bidder and an SBE that increases opportunities for SBE business participation, whether on City Contracts or other contracts. To document satisfaction of this GFE, Bidders must document that they have entered into such an agreement within the **12 months** before the Bid Opening, and such documentation must include; (a) the name of the SBE; (b) a description of the Joint Venture; (c) evidence of the date the Bidder and the SBE entered into the agreement; and (d) the name of a contact person with the SBE who can verify the terms of the agreement. If requested by the City, the Bidder must also provide a copy of the Joint Venture agreement. No credit will be given for a joint venture with an Affiliate of the Bidder
- 5.3.12. Financial Assistance.** To receive credit for this GFE, the Bidder must provide one of the following types of assistance to an SBE during the **12 months** before Bid Opening: (a) assistance in obtaining equipment, a loan, capital, lines of credit, (b) joint pay agreements or guaranties to secure loans, the purchase of supplies, or letters of credit, including waiving credit that is ordinarily required; or (c) assistance in obtaining the same unit pricing with the Bidder's suppliers as the Bidder. Such assistance may be in connection with a City Construction Contract or any other contract, but must have a value in excess of \$2,000. To receive credit for this GFE, Bidders must document: (a) the name of the SBE; (b) the description of the assistance the Bidder provided; (c) the date the Bidder provided the assistance; (d) the name of a contact person with the SBE

who can verify that the Bidder provided the assistance was provided; and (e) that the assistance provided had a value in excess of \$2,000. No credit will be given for assistance provided to an Affiliate of the Bidder

- 5.3.13. Quick Pay Agreements on the Construction Contract Up For Award.** For purposes of this Section, the term “Quick Pay Commitment” means a commitment to pay **all SBEs participating** in the Construction Contract within **20 Days** after the Contractor confirms that the SBE has properly performed and the SBE’s work has been properly completed. To receive credit for this GFE, Bidders must: (a) provide the City with a copy of a policy containing the above-referenced Quick Pay Commitment that the Bidder has adopted for the project and document that the Bidder informed each SBE about the Quick Pay Commitment as part of the Bidder’s SBE contacts under Section 5.3.2; or (b) document that prior to Bid Opening the Bidder made a written Quick Pay Commitment to each SBE that will participate in the Construction Contract up for award. Including a statement in a Bid solicitation letter indicating that the Bidder *will consider* entering into quick pay agreements will not suffice. A Bidder may receive credit under subpart (a) of GFE 5.3.13 only if it receives credit for GFE 5.3.2 (SBE Contacts)
- 5.3.14. Attendance at City Workshops or Networking Sessions.** To receive credit for this GFE, the Bidder must document that within **12 months prior to Bid Opening** the Bidder attended a workshop, seminar or networking session held by the City to (a) educate contractors or SBEs about the requirements of the SBO Program and how Bidders can comply with the Program; or (b) increase the capacity or skill level of SBEs; or (c) provide networking opportunities for SBEs.. The City shall not give Bidders credit toward this GFE category for the Bidder’s attendance at a Pre-Bid conference. If the City issued a certificate of attendance for the workshop, seminar or networking session for which credit is sought, the City may require the Bidder to produce such certificate in order to receive GFE credit.
- 5.3.15. Follow-up Contacts.** To receive credit for this GFE, the Bidder must follow-up with each SBE that the Bidder contacted under Section 5.3.2 that did not reply that it was unwilling to participate in the Construction Contract. Additionally, the Bidder must: (a) make each follow-up contact subsequent to the initial contact and at least **48 hours** before Bid Opening; (b) make each follow-up contact by telephone or in person, and (c) document the contact with affidavit stating the name of the SBE representative with whom the Bidder spoke and certifying that the contact met the content requirement of Section 5.3.2.2. The City may further require that the Bidder provide copies of telephone bills showing the date and duration of all follow up solicitation calls that the Bidder made, along with any additional documentation that the City deems appropriate, and the Bidder shall provide such documentation within **3 Business Days** after receipt of the City’s request. Voice mail messages shall be deemed an acceptable mode of

contact within the meaning of this Section if the voicemail meets the solicitation content requirements set forth in Section 5.3.2.2. A Bidder may receive credit for GFE 5.3.15 only if it receives credit for GFE 5.3.2 (SBE Contacts)

- 5.3.16. Achieving 50% of SBE Participation Goal.** To receive credit for this GFE, the Bidder's Committed SBE Goal must be at least 50% of the SBE Goal established by the City for the Contract.
- 5.3.17. Additional SBE Outreach.** To receive credit for this GFE, a Bidder must do the following no less than 7 Days before the Bid Opening: (a) contact the minimum number of "additional outreach" SBEs specified in the City Solicitation Documents (which number will be higher than the minimum contacts required to satisfy GFE 5.3.2); and (b) document compliance with the solicitation requirements outlined in Section 5.3.2.1, Section 5.3.2.2 and Section 5.3.2.3, and (c) supply such additional documentation as the City may require. A Bidder may receive credit for GFE 5.3.17 only if it receives credit for GFE 5.3.2 (SBE Contacts)
- 5.3.18. SBE Participation on Non-City Contracts.** To receive credit for this GFE, the Bidder must document that during the **24 month** period before Bid Opening, the Bidder paid SBEs on non-City contracts more than the Bidder would have to pay SBEs to meet the SBE Goal for the Construction Contract at issue. To receive credit for this item, Bidders must document for each non-City SBE subcontract: (a) the name of the project and the parties to the contract; (b) the name of the SBEs the Bidder paid on the project; (c) the amount the Bidder paid to each SBE during such 24 month period; and (d) any additional documentation requested by the Program Manager for verification purposes. To count a payment to an SBE under this GFE, the SBE must have been certified by the City at the time the payment was made. No credit will be given for amounts paid to an Affiliate of the Bidder.
- 5.3.19. Working With a New SBE.** To receive credit for this GFE, the Bidder must: (a) commit to hire a "New SBE" (as defined below) to provide goods or services totaling at least \$10,000 on the Contract at issue, and (b) calculate and document the New SBE commitment in the manner set forth in Sections 3.2 through 3.7 of this **Part D**. As used herein, "New SBE" means an SBE that was certified as an SBE for the first time during the year prior to Bid Opening.
- 5.3.20. Exceeded GFE Goal by More Than 50% on Past Project.** To receive credit for this GFE, the Bidder must document that during the **2 years** prior to Bid Opening the Bidder exceeded the SBE Goal on a City Contract of equal or greater value by more than 50%. This GFE is measured by actual payments to SBEs as opposed to commitments. A Bidder "exceeds the SBE Goal" for purposes of this GFE when its total payments to SBEs on the Contract exceed the SBE Goal by more than 50% of the SBE Goal (the "50% Payment Threshold"). A Bidder may receive credit for this GFE during the time

period that begins when the 50% Payment Threshold is first reached and extends for 2 years after completion of the applicable project.

**5.4. GFE and GFE Statement of Compliance Form (Form 5) and Additional Documentation.** To demonstrate GFE compliance, a Bidder shall complete a Good Faith Efforts Compliance Form ("**Form 5**"), which shall list each of the GFE categories outlined in Section 5.3 and any additional criteria that the Program Manager may establish from time to time.

**5.4.1.** The Bidder must submit **Form 5** within the time specified in the City Solicitation Documents. If the City does not specify a time, the Bidder must submit **Form 5** within **3 Business Days** after the City requests it. The City may request **Form 5** from all Bidders, or may limit such request to one Bidder or a group of Bidders (including the lowest Bidders, a group of randomly selected Bidders, Bidders that have had compliance issues in the past or such other categories as the City may deem appropriate).

**5.4.2.** In addition to **Form 5**, the City shall be entitled to request any further documentation or information that the City deems reasonably necessary to verify a Bidder's compliance with the Good Faith Efforts requirements. The Bidder shall provide such information within **3 Business Days** after receiving a request from the City, unless otherwise agreed in writing by the City.

**5.4.3.** If **Form 5** is not due with the Bid, the Bidder shall: (a) certify in its Bid that it has either met the GFE Goal or complied with the GFE requirements; and (b) agree in writing that failure by the Bidder to provide documentation evidencing such compliance within the time period required by the City shall constitute a forfeiture of the Bidder's bid bond, and shall entitle the City to recover under the bid bond as though the Bidder had refused to execute a contract with the City to perform the Bid.

Regardless of when Form 5 is due, **all actions necessary to earn the GFE points must be undertaken prior to Bid Opening.**

**5.5. Documenting Good Faith Efforts for Self-Performed Work.** Bidders that elect to self-perform all or part of a Construction Contract where the KBU has identified subcontracting opportunities must comply with each of the following GFE provisions. Failure to do so shall constitute grounds for rejection of the Bid:

**5.5.1.** The Bidder must certify in its Bid that: (i) it is licensed, qualified and able to perform all aspects of the Contract without subcontracting; and (ii) it has a valid business reason for self-performing all work on the Contract as opposed to subcontracting with an SBE. The Bid must describe the valid business reason for self performing, and the Bidder must submit **with its Bid** documentation sufficient to demonstrate to the City's reasonable satisfaction the validity of such assertions. Valid business reasons include: (a) special skill-based qualifications that the SBE does not possess or (b) a significant increase in the cost for the SBE to perform the scope of work instead of the Bidder, or

(c) such other factors as the SBO Program Manager may deem valid in a particular instance. Bidders that intend to self perform are encouraged to gather their documentation and approach the SBO Program Manager at least **14 days** prior to the Bid Opening to obtain clearance for self performance.

**5.5.2.** SBEs may approach the Bidder about possible subcontracting or subconsulting opportunities on the project by virtue of having received notice of the project from the City or through other means. In such event, the Bidder must comply with the Good Faith Negotiation requirements of Section 4 in evaluating and responding to any SBE quotes or inquiries the Bidder receives in connection with the project.

**5.5.3.** The Bidder must submit copies of any quotes the Bidder receives from Interested SBEs with the Bidder's Bid, along with a comparison of the SBEs quote with the Bidder's costs and expenses for doing such work.

## **Section 6: Waivers**

**6.1.** Failure to comply with Part B of the SBO Program may be waived only in accordance with this Section. Notwithstanding anything contained herein to the contrary, the waivers referenced in this Section may be granted by the Program Manager or the Program Manager's designee, by the City Manager or the City Manager's designee, or by City Council.

**6.2. Waiver of Good Faith Efforts and Good Faith Negotiation.** The Program Manager shall be entitled (but not required) to waive the Good Faith Efforts and the Good Faith Negotiation requirement in a situation where the lowest Bidder failed to comply with the Good Faith Efforts and Good Faith Negotiation requirements ("Non-Compliant Bidder") but has proposed SBE utilization that is greater than that proposed by the next lowest Bidder that complied with the Good Faith Efforts and the Good Faith Negotiation requirements and would otherwise be awarded the Construction Contract ("Compliant Bidder"). In determining whether to grant such waiver, the Program Manager will take into account:

- (a) The cost difference to the City between the two Bids;
- (b) The difference in the level of SBE utilization proposed by the Compliant and Non-Compliant Bidders;
- (c) The level of effort the Compliant and Non-Compliant Bidders undertook to meet the Good Faith Efforts requirement;
- (d) The consistency in subcontractors the Non-Compliant Bidder has proposed on City projects (i.e. whether or not the Bidder consistently uses the same subcontractors on every Bid);

- (e) The consistency in SBE Goals the Non-Compliant Bidder has proposed on City projects (i.e., whether or not the Bidder consistently proposes the same SBE Goal) and
- (f) Instances of past non-compliance with the Good Faith Efforts requirements on the part of the Non-Compliant Bidder and any other factors deemed relevant by the Program Manager.

**6.3. Minor Non-Compliance Waiver.** In addition to and without limiting the Program Manager's power and authority to grant waivers under **Section 6.2**, the Program Manager shall have the power and authority to waive non-compliance with this Program:

**6.3.1.** The non-compliance is minor in nature

**6.3.2.** Waiving the non-compliance would not put Bidders that complied with the SBO Program at a competitive disadvantage; and

**6.3.3.** The non compliance does not reflect a lack of diligence on the Bidder's part in complying with the Program. For example, a repeated violation of the same Program provision on two or more bids might be deemed a lack of diligence in complying with the Program.

**6.4. General Information About Waivers.** The waivers referenced in Section 6 may be granted without notice to City Council. Nothing in Section 6 shall require the Program Manager to grant a waiver in any situation, or give rise to a suggestion that the Program Manager might be inclined to grant a waiver in a certain situation. Likewise, the City shall not be bound by any oral representation made by any City employee, official, agent or representative that a waiver will be granted for a particular instance or for a category of instances.

## **Section 7: False Statements or Certifications**

**7.1.** It shall be a violation of the SBO Program, and grounds for rejection of a Bid and other sanctions for any Bidder to make a false or materially misleading statement, or certification regarding any matter relevant to the SBO Program.

**Part C**  
**SBO Program**  
**Services Procurement**

**Section 1: Program Overview and Scope**

This document states requirements that Proposers must comply with under the City of Charlotte's Small Business Opportunity ("SBO") Program to obtain Service Contracts with the City of Charlotte. Capitalized terms used in this document are defined in Appendix 1 to Part A of the SBO Program. Section references in this document refer to Part A unless otherwise stated. Once executed, Service Contracts are subject to the post contract award requirements set forth in Part D.

The SBO Program is divided into 7 Parts, based on the type of contract and whether the situation involves procurement or post contract compliance. For reference purposes, these Parts are:

**Part A:** Administration and Enforcement

**Part B:** Construction Bidding

**Part C:** Services Procurement

**Part D:** Post Contract Award

**Part E:** SBE Certification and Eligibility

**Part F:** Financial Partners

**Part G:** Alternative Construction Agreements

**Section 2: General Requirements**

- 2.1. When the City Solicitation Documents for a Service Contract contain an SBE Goal, each Proposer must either: (a) meet the SBE Goal, or (b) comply with the Good Faith Negotiation and Good Faith Efforts requirements set forth in Sections 4 and 5.** Failure to do so will be considered as a factor in the evaluation process and may result in the City excluding a Proposal from further consideration. The City Solicitation Documents will contain certain forms that Proposers must complete to document having met these requirements.
  
- 2.2. When the City Solicitation Documents for a Service Contract do not contain an SBE Goal,** each Proposer must negotiate in good faith with each SBE that responds to the Proposer's solicitations and each SBE that contacts the Proposer on its own accord (as defined more specifically in Section 4.4). Additionally, the City may negotiate a Committed SBE Goal with the successful Proposer after the Proposal Opening.
  
- 2.3. Self-Performance.** Self-Performance does not exempt Proposers from meeting the Good Faith Efforts requirements. Proposers that do not meet the SBE Goal and desire to self-perform all or part of the Contract must nevertheless demonstrate that they complied with the Good Faith Negotiation and Good Faith Efforts requirements as provided Sections 4 and 5.

- 2.4. **No SBE Goal When There Are No SBE Subcontracting Opportunities.** The City shall not establish an SBE Goal for Service Contracts where there are no SBEs certified to perform the scopes of work that the City regards as realistic opportunities for subcontracting.

### Section 3: Establishing and Meeting the SBE Goal

- 3.1. SBE Goals shall be established in the following manner:

- 3.1.1. For each Service Contract, the Program Manager shall establish an SBE Goal that is a percentage of the dollar value of all services and goods the Contract requires (including any contingency), provided that, if the Program Manager or City Manager determines it to be in the best interests of the City, the Program Manager may waive the goal requirement for a given Service Contract, or may negotiate a Committed SBE Goal with the successful Proposer as part of the Contract negotiation process.
- 3.1.2. In the event a City Key Business Executive issuing an Other Service Contract disagrees with the goal set by the Program Manager, the City Manager or an Assistant City Manager shall resolve the matter.

- 3.2. The City will only give Proposers credit toward the SBE Goal for those SBEs that:

- 3.2.1. **Are certified as SBEs as of the Proposal due date;** and
- 3.2.2. **Will actually perform a Commercially Useful Function** as defined in Part A (which means, among other things, an SBE acting solely as a Conduit will not be counted); and
- 3.2.3. **Will perform within the area(s) for which they are certified** by the City unless the Proposer provides documentation satisfactory to the City showing that the SBE has performed similar work in the past. Documentation to satisfy this requirement may include invoices showing the SBE has previously performed such work. The Proposer must submit this documentation with **Form 4** (the Letter of Intent).

The City will not give credit toward the SBE Goal for subcontracting to SBEs that are found to be Affiliates of the Proposer prior to the Proposal due date. If an SBE is decertified between the Proposal due date and Contract award, the City will not allow credit toward the SBE Goal for amounts committed to that SBE, but will allow the Proposer to replace the decertified SBE with a certified SBE unless the certification was based on false or fraudulent information of which the Proposer had or should have had knowledge. However, for Contracts that are put out for Proposals after April 22, 2011, the City may refuse to allow the substitution and reject the Proposal if the SBE is decertified for being an Affiliate, or if the SBE is found to be an Affiliate of

the Proposer (even if not decertified), if the City determines in its sole discretion that the Proposer knew or should have known prior to the Proposal due date that there was a significant risk that the City would consider the SBE an Affiliate. Proposers shall be deemed to have knowledge of all SBO Program provisions, including those relating to Affiliates.

**3.3. Using SBEs the City Did Not List in City Solicitation Documents.** Proposers shall receive credit for using SBEs that the City did not list in the City Solicitation Documents, as long as the requirements of Section 3.2 are met.

**3.4. Calculating SBE Participation Based on Type of SBE.** The City shall count SBE participation on a Service Contract as set forth below.

**3.4.1. SBE Subconsultant or Subcontractor:** If the Proposer utilizes an SBE as a **subconsultant** or **subcontractor** to perform services, the City shall count 100% of the value of the Commercially Useful Function the SBE performs toward satisfaction of the SBE Goal.

**3.4.2. SBE Manufacturer or Regular Dealer:** The City shall count 100% of all expenditures for materials, supplies and equipment obtained from an SBE Manufacturer or SBE Regular Dealer toward the SBE Goal.

**3.4.3. SBE Broker or Packager;** The City shall count fees or commissions charged by an SBE Broker or Packager for providing a Commercially Useful Function toward the SBE Goal, provided that the Program Manager determines that the fee or commission is reasonable and not excessive as compared with fees customarily charged for similar services. A Commercially Useful Function by an SBE Broker or Packager shall be defined as providing professional, technical, consultant or managerial services and assistance to procure essential personnel, facilities, equipment, materials or supplies required for the performance of the Contract.

**3.4.4. SBE Joint Venture:** In order for the KBU to count SBE participation in a Joint Venture toward achievement of the SBE Goal, the Proposer shall submit the Joint Venture proposal to the Program Manager at least **10 Business Days** before submitting its Proposal. The SBO Program Manager will review the proposal and, assuming that the Proposer does not need to provide more information, the Program Manager will inform the Proposer at least **5 Business Days** before the Proposal due date whether the City will be able to count the SBE's participation toward the SBE Goal.

SBE participation by the SBE Joint Venturer will be calculated as provided above, based on whether the SBE Joint Venturer will be performing a role most similar to that of a Subcontractor, Regular Dealer, Manufacturer, Broker or Packager. For instance, if

the SBE Joint Venturer's role is most similar to that of a Subcontractor, 100% of the value of the Commercially Useful Function performed by the SBE will count toward the SBE Goal.

**3.5. Documenting SBE Participation for Purpose of Meeting SBE Goal.** The City will evaluate Proposals for compliance with the SBO Program before selecting the successful Proposer, and may do so before forwarding Proposals to the Selection Committee.

**3.5.1. When the City Solicitation Documents contain an SBE Goal,** the City may only give Proposers credit toward the SBE Goal for SBE participation that is:

- (a) Listed on **Form 3** (the Subcontract/Supplier Utilization Commitment Form defined in Section 3.6) submitted with the Proposal; and
- (b) Documented by **Form 4** (the Letter of Intent form as defined in Section 3.7), that is submitted to the City within **3 Business Days** after the City requests it (or within such longer time as may be agreed by the City in writing); and

Notwithstanding the above, if a Proposer achieves 75% or more of the SBE Goal prior to Proposal Opening and documents it as described above, the Proposer shall be deemed to have met the SBE Goal if it provides **Form 4** Letters of Intent for the remaining 25% of the SBE Goal within 3 Business Days after the City requests the Proposer's Good Faith Efforts Compliance Form (**Form 5**).

**3.5.2. When the City Solicitation Documents do not contain an SBE Goal,** the City may negotiate a Committed SBE Goal with the successful Proposer. In such event the City will give credit toward the SBE Goal for SBE participation that complies with Section 3.2.

**3.6. Form 3: Subcontractor/Supplier Utilization Commitment.** When the City sets an SBE Goal prior to Proposal opening, the City Solicitation Documents will include a form labeled "Subcontractor/Supplier Utilization Commitment" ("**Form 3**"), which captures information regarding the SBEs and other subcontractors and suppliers that the Proposer intends to use on the Contract.

**3.7. Form 4: Letter of Intent.** Within **3 Business Days** after receiving a request from the City (or within such longer time as may be communicated by the City in writing), Proposers must submit a separate Letter of Intent for each SBE listed on Form 3 and for any additional SBEs for which the Proposer seeks credit under the last sentence of Section 3.5. Proposers may use the Letter of Intent that the City provides with the City Solicitation Documents or may use an alternative form if it contains the same information as **Form 4**. Regardless of the form, each Letter of Intent must be executed by both the SBE and the Proposer. The City shall not count proposed SBE utilization for which it has not received a Letter of Intent within such time period unless the SBE

certifies to the City that it originally agreed to participate in the Contract at the level reported by the Proposer, but subsequently declined to do so.

#### **Section 4: Good Faith Negotiation**

- 4.1. Proposers that fail to meet the SBE Goal must comply with the Good Faith Negotiation and Good Faith Efforts requirements set forth in Sections 4 and 5.** Failure to do so shall be considered as a factor in the evaluation process and may result in a Proposal being excluded from further consideration.
- 4.2. City Outreach.** At least **10 Days** prior to the Proposal due date for a Service Contract, the City will send a "Project Notice" to SBEs that are certified in the areas where subcontracting is anticipated on the project. The Project Notice will describe the project and identify where subcontracting is anticipated. The City will also make available (by email, posting on the City's website or other means) either: (a) a list of Proposers that have submitted **Form 1** (Notification of Subcontracting/Purchasing Opportunities), or provided other notices of their intent to propose, or (b) a list of Proposers that have picked up or requested the City Solicitation Documents for the Contract.
- 4.3. Good Faith Negotiation.** Proposers that fail to meet the SBE Goal must negotiate in good faith with each SBE that responds to the Proposer's solicitations and each SBE that contacts the Proposer on its own accord ("Interested SBEs").

**Failure to Negotiate In Good Faith.** The City may find that a Proposer did not meet its Good Faith Negotiation obligation if in the City's judgment, the Proposer rejects an Interested SBE's proposal for reasons other than: (a) the SBE was not a "Qualified SBE" within the meaning of Part A; (b) the Business Enterprise that will be performing in place of the Interested SBE is more qualified than the Interested SBE, to the extent that such difference in qualification would materially impact the Proposer's Proposal; (c) the SBE's price proposal was higher than what was proposed by the subcontractor or subconsultant the Proposer decided to use or higher than the Proposer's cost of performing such work on its own; or (d) there was a material deficiency with the Interested SBE's proposal (such as it being submitted late, containing inaccurate information, etc.). The City Solicitation Documents may contain a form for Proposers to document Good Faith Negotiation. In addition, the City may request on a case-by-case basis documentation sufficient in the City's judgment to prove that the Proposer's reasons for rejecting an Interested SBE's proposal are valid. Proposers must provide such forms and information within the time period specified by the City. Failure to comply with the requirements set forth in this Section (the "Good Faith Negotiation Requirements") shall constitute grounds for rejecting a Proposal.

Notwithstanding the forgoing, Proposers participating in a mentor / protégé program recognized by the SBOP Office may reject an Interested SBE's bid for work that is being performed by the Proposer's SBE mentee or SBE protégé, subject to approval of the SBO Program Manager.

## **Section 5: Good Faith Efforts**

- 5.1. If a Proposer has not fully met the SBE Goal, then it must document that it has made Good Faith Efforts in compliance with this Section 5.** Failure to do so shall be considered as a factor in the evaluation process and may result in a Proposal being excluded from further consideration. "Good Faith Efforts" are referred to in this Section as "GFEs".
- 5.2. Minimum GFE Points.** For each Service Contract for which an SBE Goal has been set by the City, the City shall (a) assign points to the various GFE categories listed in this Section and (b) establish a minimum total number of points that a Proposer must obtain in order to meet the GFE requirements (the "Minimum GFE Points"). These numbers shall be set forth in the City Solicitation Documents. The City may exclude or modify certain GFE categories based on the nature and amount of the Contract.
- 5.3. GFE Categories.** For each Service Contract for which an SBE Goal has been set in the City Solicitation Documents, the City shall assign GFE points among the following categories:
- 5.3.1. Notification of Subconsulting or Subcontracting Opportunities (Form 1).** To receive credit for this GFE, a Proposer must provide a list of the areas in which the Proposer intends to seek subconsultants, subcontractors and suppliers to the City no later than **14 Days** before the Proposal due date. The Proposer may report this information on **Form 1** or on another document providing the same information as Form 1. Proposers may submit Form 1 by fax, hand delivery, email, overnight courier or regular mail. However, if requested by the City, Proposers must be able to document having sent **Form 1** to the City by the deadline in the same manner as Proposers are required to document having made SBE Contacts per Section 5.3.2.3.
- 5.3.2. SBE Contacts.** The City will specify in the City Solicitation Documents either the minimum number of SBEs the Proposer must contact to receive credit for this GFE or a method for determining which or how many SBEs must be contacted. A Proposer must make the required contacts no less than **14 Days** before the Proposal due date to receive credit.
- 5.3.2.1. Solicitation Method:** The Proposer shall make the SBE solicitations by facsimile transmission, e-mail, U.S. Mail, or overnight courier service. Regardless of the method of contact, the solicitation must reach the recipient at least **14 Days** before the Proposal due date. If the Proposer contacts SBEs by U.S. Mail, the City shall presume that the solicitation reached the

SBE by the required deadline provided that the Proposer: (a) mailed the solicitation at least **17 days** prior to the Proposal due date; and (b) documented as required by Section 5.3.2.3.

5.3.2.2. **Solicitation Content:** For a Proposer to receive credit for a solicitation, the substance of the solicitation must be sufficient to put the SBE on notice that the Proposer is soliciting a proposal from the SBE to participate in the Contract up for award in one or more of the areas for which the SBE is certified.

5.3.2.3. **Solicitation Documentation Requirements (Form 2):** To receive GFE credit for contacting SBEs, Proposers must submit an SBE Solicitation Form (**Form 2**) within the time specified in the City Solicitation Documents. If no time period is specified in the City Solicitation Documents, a Proposer must submit **Form 2** within 3 Business Days after the City requests it. **Form 2** shall require the Proposer to document in writing for each SBE solicited: (a) the mode of contact, (b) the date of the contact, (c) the business name and contact person for each of the SBE firms contacted, and (d) the NIGP Code or a description identifying the goods or services the Proposer solicited from the SBE. In addition to **Form 2**, the City may require the Proposer to provide a copy of the solicitation sent to SBEs (which must meet the content requirements per Section 5.3.2.2), along with the following documentation based on the mode of contact:

(a) **For contacts made by fax:** The Proposer must provide a confirmed fax transmission record showing that: (i) a fax was transmitted to a fax number maintained by the SBE, or (ii) a fax was directed to a fax number maintained by the SBE but did not go through due to reasons outside the Proposer's control. If the Proposer cannot provide the forgoing, the City may refuse to consider such contact in awarding GFE points.

(b) **For contacts made by e-mail:** The Proposer must provide a copy of an e-mail confirmation notice showing that an e-mail was delivered to an e-mail address maintained by the SBE.

(c) **For contacts made by U.S. Mail:** The Proposer must provide: (a) a copy of the solicitation that meets the content requirements set forth in Section 5.3.2.2; (b) a Certificate of Mailing from the U.S. Postal Service certifying the date on which the Proposer mailed the solicitation and (c) an affidavit stating that the Proposer mailed the solicitation to the SBE recipient on the date indicated on the Certificate of Mailing.

(d) **For contacts made by overnight courier:** The Proposer must provide a copy of the solicitation that meets the content requirements set forth in Section 5.3.2.2 and a routing slip from the overnight courier showing the

SBE recipient address and the date on which the Proposer sent the solicitation to the SBE recipient.

5.3.2.4. **When Documentation Is Required:** The City may require the documentation listed in Section 5.3.2.3 or any additional documentation relating to SBE solicitations from any Proposer in the City's sole discretion. For example, the City may request the solicitation documentation from one or more Proposers selected randomly by the City, and/or the City may request solicitation documentation from a select group of Proposers who appear to be the most qualified. The City may further elect to request the solicitation documentation from a Proposer who, in the City's judgment, requires additional monitoring because of previous instances of non-compliance. Proposers must provide the solicitation documentation within **3 Business Days** after the City requests it, unless the City has agreed in writing to a longer time period.

**5.3.3. Making Plans Available.** To receive credit for this GFE, the Proposer must: (a) make "Project Documents" (as defined below) available to Interested SBEs not less than **7 Days** before Proposal Opening in one of the 3 ways described below; and (b) notify all SBEs contacted under GFE 5.3.2 of the way in which Project Documents will be made available. As used herein, Project Documents means any project descriptions, construction plans, specifications or requirements that are necessary for SBEs to bid on the project. The 3 ways a Proposer may make Project Documents available to SBEs are:

5.3.3.1. Provide Interested SBEs with a hard copy of the Project Documents via email, fax, regular mail or other means of document transfer; or

5.3.3.2. Provide necessary physical access and adequate time for SBEs to fully review the Project Documents at the Proposer's place of business within Charlotte Regional Area or, if the Proposer has no place of business within Charlotte Regional Area, at an alternate location within the Charlotte Regional Area where the information can be reviewed at no cost to the SBEs; or

5.3.3.3. Post the Project Documents on a website that SBEs can access at no cost.

To receive credit for this GFE, the Proposer's notice to SBEs must identify a telephone number or email address for requesting copies of the Project Documents (for 5.3.3.1), the locations (including the address) where Project Documents can be reviewed (for 5.3.3.2) or the website link on which they are posted (for 5.3.3.3). A Proposer may receive credit for GFE 5.3.3 only if it receives credit for GFE 5.3.2 (SBE Contacts). Some plans and designs for City buildings and infrastructure may be restricted from disclosure under federal Homeland Security laws. If the City Solicitation Documents indicate that the Project Documents are restricted from disclosure, the Proposer shall

comply with the City's instructions in making such documents available for review. For example, the City Solicitation Documents may require that SBEs sign a confidentiality agreement in a form approved by the City as a condition to disclosure.

- 5.3.4. Attending a City pre-submittal meeting.** To receive credit for this GFE, the Proposer must attend a pre-submittal meeting scheduled by the City for the Contract in question.
- 5.3.5. Conducting a Pre-Proposal for SBEs.** To receive credit for this GFE, the Proposer must conduct a pre-bid meeting for SBEs no less than **3 Business Days** before Proposal Opening. The pre-bid meeting must take place within Mecklenburg County, or, if the Proposer has no place of business within Mecklenburg County, at an alternate location within the Charlotte Regional Area. Not less than 48 hours before the pre-bid meeting, the Proposer must communicate the time and location of the meeting to the SBEs that the Proposer is required to contact to earn GFE points under Section 5.3.2. A Proposer may receive credit for this GFE only if it receives credit for GFE 5.3.2 (SBE Contacts).
- 5.3.21. Training.** To obtain credit for this GFE, the Proposer must provide training or mentoring to at least 2 SBEs within **12 months** before Proposal Opening, and the Proposer must have the training or mentoring certified by the Program Manager. The Program Manager shall have the discretion to deny credit for training or mentoring that in the Program Manager's sole discretion is not significant or not reasonably likely to assist the SBE in developing its capabilities. No credit shall be given for training provided to an Affiliate of the Proposer.
- 5.3.6. SBOP Mentor-Protégé Program.** The Proposer may receive credit for this GFE if the Proposer demonstrates that it is participating in the City's SBO Mentor-Protégé program, and that it is a mentor in good standing. The Program Manager shall have the discretion to deny credit for this GFE if the mentor is not in good standing. Affiliates will not be approved for a mentor-protégé relationship under the City's program.
- 5.3.7. Working With SBE Assistance Organizations.** To receive credit for this GFE, the Proposer must document that it has performed one of the following within the **12 month** period before Proposal Opening for an SBE Assistance Organization (as defined below):
  - 5.3.7.1. Provide location for SBE Assistance Organization Event:** providing a meeting location for the SBE Assistance Organization to host a regular meeting or special event at no cost or at a reduced rate.
  - 5.3.7.2. Provide training for SBE Assistance Organization members:** providing training or facilitating workshops aimed at increasing the capacity or skill level of the SBE Assistance Organization members, or participating in training or a workshop sponsored by the SBE Assistance Organization.
  - 5.3.7.3. Contracting with new SBE:** documenting that the SBE Assistance Organization helped to identify an SBE with whom the Proposer

subsequently subcontracted work within the past year (whether on a City Construction Contract or other contract). The KBU will not give the Proposer credit for this GFE if the Proposer contracts with an SBE that the Proposer has used on previous projects.

As used herein, the term "SBE Assistance Organization" means an organization, other than the City, that: (a) accelerates the successful development of start-up and fledgling companies by providing them with an array of targeted resources and services; and (b) maintains an office in the Charlotte Regional Area. These organizations may provide management guidance, technical assistance and consulting tailored to small, minority- or women-owned businesses. The SBO Program Manager shall have sole discretion to determine whether a particular organization constitutes an SBE Assistance Organization for purposes of this Program. Proposers seeking credit for this GFE are encouraged to confer with the SBO Program Manager as to whether a particular organization is recognized as an SBE Assistance Organization prior to Proposal Opening.

**5.3.9. Entering Into Joint Ventures With SBEs.** To receive credit for this GFE, the Proposer must document the existence of a Joint Venture agreement between the Proposer and the SBE that increases opportunities for SBE business participation. To document satisfaction of this GFE, Proposers must show that they have entered into such an arrangement within **12 months** before the Proposal due date, and such documentation must include: (a) include the name of the SBE; (b) a description of the Joint Venture; (c) evidence of the date the arrangement was entered into; and (d) the name of a contact person with the SBE who can verify the terms of the agreement. No credit will be given for assistance a joint venture with an Affiliate.

**5.3.10. Financial Assistance.** To receive credit for this GFE, the Proposer must provide one of the following types of assistance to an SBE during the **12 months** period preceding the Proposal due date: (a) assistance in obtaining equipment, a loan, capital, lines of credit, (b) joint pay agreements or guaranties to secure loans, the purchase of supplies, or letters of credit, including waiving credit that is ordinarily required; or (c) assistance in obtaining the same unit pricing with the Proposer's suppliers as the Proposer. Such assistance may be in connection with a Service Contract or any other contract, but must have a value in excess of \$2,000. To receive credit for this item, Proposers must document: (a) the name of the SBE; (b) the description of the assistance the Proposer provided; (c) the date the Proposer provided the assistance; (d) the name of a contact person with the SBE who can verify that the Proposer provided the assistance was provided; and (e) that the assistance provided had a value in excess of \$2,000. No credit will be given for assistance provided to an Affiliate of the Proposer.

**5.3.11. Quick Pay Agreements.** For purposes of this Section, the term "Quick Pay Commitment" means a commitment to pay **all SBEs participating** in the Service

Contract within **20 Days** after the Proposer confirms that the SBE has properly performed and the SBE's work has been properly completed. To receive credit for this GFE, Proposers must: (a) provide the City with a copy of a policy containing the above-referenced Quick Pay Commitment that the Proposer has adopted for the project and document that the Proposer informed each SBE about the Quick Pay Commitment as part of the Proposer's SBE contacts under Section 5.3.2; or (b) document that prior to Proposal Opening the Proposer made a written Quick Pay Commitment to each SBE that will participate in the Construction Contract up for award. Including a statement in a Proposal solicitation letter indicating that the Proposer *will consider* entering into quick pay agreements will not suffice. A Proposer may receive credit under subpart (a) of GFE 5.3.11 only if it receives credit for GFE 5.3.2 (SBE Contacts).

**5.3.12. Attendance at City SBO Workshops or Networking Sessions.** To receive credit for this GFE, the Proposer must document that within **12 months prior to Proposal Opening** the Proposer attended a workshop, seminar or networking session held by the City to (a) educate contractors or SBEs about the requirements of the SBO Program and how Proposers can comply with the Program; or (b) increase the capacity or skill level of SBEs; or (c) provide networking opportunities for SBEs.. The City shall not give Proposers credit toward this GFE category for the Proposer's attendance at a Pre-Proposal conference. If the City issued a certificate of attendance for the workshop, seminar or networking session for which credit is sought, the City may require the Proposer to produce such certificate in order to receive GFE credit.

**5.3.13. Follow-up Contacts.** To receive credit for this GFE, the Proposer must follow-up with each SBE that the Proposer contacted under Section 5.3.2 that did not reply that it was unwilling to participate in the Construction Contract. Additionally, the Proposer must: (a) make each follow-up contact subsequent to the initial contact and at least **48 hours** before Proposal Opening; (b) make each follow-up contact by telephone or in person, and (c) document the contact with affidavit stating the name of the SBE representative with whom the Proposer spoke and certifying that the contact met the content requirement of Section 5.3.2.2. The City may further require that the Proposer provide copies of telephone bills showing the date and duration of all follow up solicitation calls that the Proposer made, along with any additional documentation that the City deems appropriate, and the Proposer shall provide such documentation within **3 Business Days** after receipt of the City's request. Voice mail messages shall be deemed an acceptable mode of contact within the meaning of this Section if the voicemail meets the solicitation content requirements set forth in Section 5.3.2.2. A Proposer may receive credit for this GFE only if it receives credit for GFE 5.3.2 (SBE Contacts)

**5.3.14. Achieving 50% of SBE Participation Goal.** To receive credit for this GFE, the Proposer's Committed SBE Goal must be at least 50% of the SBE Goal established by the City for the Contract.

- 5.3.15. Additional SBE Outreach.** To receive credit for this GFE, a Proposer must do the following no less than 7 Days before the Proposal Opening: (a) contact the minimum number of “additional outreach” SBEs specified in the City Solicitation Documents (which number will be higher than the minimum contacts required to satisfy GFE 5.3.2); and (b) document compliance with the solicitation requirements outlined in Section 5.3.2.1, Section 5.3.2.2 and Section 5.3.2.3, and (c) supply such additional documentation as the City may require. A Proposer may receive credit for GFE 5.3.17 only if it receives credit for GFE 5.3.2 (SBE Contacts).
- 5.3.16. SBE Participation on Non-City Contracts.** To receive credit for this GFE, the Proposer must document that during the **24 month** period before Proposal Opening, the Proposer paid SBEs on non-City contracts more than the Proposer would have to pay SBEs to meet the SBE Goal for the Construction Contract at issue. To receive credit for this item, Proposers must document for each non-City SBE subcontract: (a) the name of the project and the parties to the contract; (b) the name of the SBEs the Proposer paid on the project; (c) the amount the Proposer paid to each SBE during such 24 month period; and (d) any additional documentation requested by the Program Manager for verification purposes. To count a payment to an SBE under this GFE, the SBE must have been certified by the City at the time the payment was made. No credit will be given for amounts paid to an Affiliate of the Proposer.
- 5.3.17. Working With a New SBE.** To receive credit for this GFE, the Proposer must: (a) commit to hire a “New SBE” (as defined below) to provide goods or services totaling at least \$10,000 on the Contract at issue, and (b) calculate and document the New SBE commitment in the manner set forth in Sections 3.2 through 3.7 of this **Part D**. As used herein, “New SBE” means an SBE that was certified as an SBE for the first time during the year prior to Proposal Opening. No credit will be given for working with Affiliate of the Proposer.
- 5.3.18. Exceeded SBE Goal by More Than 50% on Past Project.** To receive credit for this GFE, the Proposer must document that during the **2 years** prior to Proposal Opening the Proposer exceeded the SBE Goal on a City Contract of equal or greater value by more than 50%. This GFE is measured by actual payments to SBEs as opposed to commitments. A Proposer “exceeds the SBE Goal” for purposes of this GFE when its total payments to SBEs on the Contract exceed the SBE Goal by more than 50% of the SBE Goal (the “50% Payment Threshold”). A Proposer may receive credit for this GFE during the time period that begins when the 50% Payment Threshold is first reached and extends for 2 years after completion of the applicable project.

- 5.4. GFE and GFE Statement of Compliance Form (Form 5) and Additional Documentation.** To demonstrate GFE compliance, a Proposer shall complete a Good Faith Efforts Compliance Form

(“**Form 5**”), which shall list each of the GFE categories outlined in Section 5.3 and any additional criteria that the Program Manager may establish from time to time.

- 5.4.1.** The Proposer must submit **Form 5** within the time specified in the City Solicitation Documents. If the City does not specify a time, the Proposer must submit **Form 5** within 3 Business Days after the City requests it. The City may request **Form 5** from all Proposers, or may limit such request to one Proposer or a group of Proposers (including the lowest cost Proposers, a group of randomly selected Proposers, Proposers that have had compliance issues in the past or such other categories as the City may deem appropriate).
- 5.4.2.** In addition to **Form 5**, the City shall be entitled to request any further documentation or information that the City deems reasonably necessary to verify a Proposer's compliance with the Good Faith Efforts requirements. The Proposer shall provide such information within 3 Business Days after receiving a request from the City, unless otherwise specified in writing by the City.
- 5.4.3.** If **Form 5** is not due with the Proposal, the Proposer shall: (a) certify in its Proposal that it has either met the GFE Goal or complied with the GFE requirements; and (b) agree in writing that failure by the Proposer to provide documentation evidencing such compliance within the time period required by the City shall constitute a forfeiture of the Proposer's bid bond, if any, and shall entitle the City to recover under the bid bond as though the Proposer had refused to execute a contract with the City to perform the Proposal.

Regardless of when Form 5 is due, **all actions necessary to earn the GFE points must be undertaken prior to Proposal Opening.**

**5.5. Documenting Good Faith Efforts for Self-Performed Work.** Proposers that elect to self-perform all of a Service Contract where the KBU has identified subcontracting or subconsulting opportunities must comply with each of the following provisions. Failure to do so will be considered as a factor in the Proposal evaluation process and may result in a Proposal being excluded from consideration:

- 5.6.1.** The Proposer must certify in its Proposal that: (i) it is licensed, qualified and able to perform all aspects of the Contract without subcontracting; and (ii) it has a valid business reason for self-performing all work on the Contract as opposed to subcontracting with an SBE. The Proposal must describe the valid business reason for self performing, and the Proposer must submit **with its Proposal** documentation sufficient to demonstrate to the City's reasonable satisfaction the validity of such assertions. Valid business reasons include: (a) special skill-based qualifications that the SBE does not possess or (b) a significant increase in the cost for the SBE to perform the scope of work instead of the Proposer, or (c) such other factors as the SBO Program Manager may deem valid in a particular instance. Proposers that intend to

self perform are encouraged to gather their documentation and approach the SBO Program Manager at least **14 days** prior to the Proposal due date to obtain clearance for self performance.

- 5.6.2.** SBEs may approach the Proposer about possible subcontracting or subconsulting opportunities on the project by virtue of having received notice of the project from the City or through other means. In such event, the Proposer must comply with the Good Faith Negotiation requirements of Section 4 in evaluating and responding to any SBE quotes or inquiries the Proposer receives in connection with the project.
- 5.6.3.** The Proposer must submit copies of any quotes the Proposer receives from Interested SBEs with the Proposer's Proposal, along with a comparison of the SBEs quote with the Proposer's costs and expenses for doing such work.

## **Section 6: Waivers**

- 6.1.** Failure to comply with Part B of the SBO Program may be waived only in accordance with this Section. Notwithstanding anything contained herein to the contrary, the waivers referenced in this Section may be granted by the Program Manager or the Program Manager's designee, by the City Manager or the City Manager's designee, or by City Council.
  
- 6.2. Waiver of Good Faith Efforts and Good Faith Negotiation** The Program Manager shall be entitled (but not required) to waive the Good Faith Efforts and the Good Faith Negotiation Requirements in a situation where the most qualified Proposer failed to comply with the Good Faith Efforts and Good Faith Negotiation requirements (the "Non-Compliant Proposer"), but has proposed SBE utilization that is greater than that proposed by the next most qualified Proposer that complied with Good Faith Efforts and Good Faith Negotiation requirements and would otherwise be awarded the Service Contract (the "Compliant Proposer"). In determining whether to grant such waiver, the Program Manager will take into account:
  - (a) The cost difference to the City between the two proposals;
  - (b) The difference in the qualification level of the Compliant and Non-Compliant Proposers;
  - (c) The level of SBE utilization proposed by the Compliant and Non-Compliant Proposers;
  - (d) The level of effort the Compliant and Non-Compliant Proposers undertook to meet the Good Faith Efforts requirement;
  - (e) The consistency in subcontractors the Non-Compliant Proposer has proposed on City projects (i.e. whether or not the Proposer consistently uses the same subcontractors on every Proposal);
  - (f) The consistency in SBE Utilization Commitment the Non-Compliant Proposer has proposed on City projects (i.e., whether or not the Proposer consistently proposes the same SBE Utilization Percentage) and

- (g) Instances of past non-compliance with the Good Faith Efforts requirements on the part of the Non-Compliant Proposer and any other factors deemed relevant by the Program Manager.

**6.3. Minor Non-Compliance Waiver.** In addition to and without limiting the Program Manager's power and authority to grant waivers under Section 6, the Program Manager shall have the power and authority to waive non-compliance with this Program if:

**6.3.1.** The non-compliance is minor in nature; and

**6.3.2.** The non compliance does not reflect a lack of diligence on the Proposer's part in complying with the Program. For example, a repeated violation of the same Program provision on two or more proposals might be deemed a lack of diligence in complying with the Program.

**6.4. General Information About Waivers.** The waivers referenced in Section 6 may be granted without notice to City Council. Nothing in Section 6 shall require the Program Manager to grant a waiver in any situation, or give rise to a suggestion that the Program Manager might be inclined to grant a waiver in a certain situation. Likewise, the City shall not be bound by any oral representation made by any City employee, official, agent or representative that a waiver will be granted for a particular instance or for a category of instances.

## **Section 7: False Statements or Certifications**

**7.1.** It shall be a violation of the SBO Program, and grounds for disqualification from the Proposal evaluation process for any Proposer to make a false or materially misleading statement or certification regarding any matter relevant to the SBO Program.

## Part D

### SBO Program

#### Post Contract Award Requirements

##### Section 1: Scope

- 1.1. The purpose of this document is to establish requirements for Contractor compliance with the SBO Program after Contract award. **Part D applies to and is incorporated into all City Contracts** for which an SBE Goal has been established or negotiated (which includes all Construction Contracts over \$200,000, and all Service Contracts over \$100,000, unless otherwise exempt). **The following Sections of Part D also apply to: (a) Informal Contracts, (b) service and construction and repair contracts entered into without a competitive process or for which the City waived the SBE Goal requirement and (c) other Exempt Contracts**, excluding those that fall within Sections 23.3 through 23.9 of Appendix 1 to Part A:
- Section 6: New Subcontractor Opportunities/Additions to Scope, Contract Amendments
  - Section 8: Utilization Reports
  - Section 9: Compliance Documentation
  - Section 10: False Statements or Misrepresentations
  - Section 11: Special Provision for Exempt Contracts
  - Section 12: Violations and Investigations
  - Section 13: Remedies
  - Section 14: Contract Provisions
  - Section 15: Determining Compliance and Exercising Remedies
- 1.2. Capitalized terms used in Part D shall have the meanings set forth in Part A, Appendix 1 of the SBO Program. Section references in this document refer to Part D unless otherwise stated.

##### Section 2: Committed SBE Goal Applies Through Contract Completion

- 2.1. **Contractors shall have an affirmative, ongoing obligation to meet or exceed the Committed SBE Goal for the duration of the Contract.** Unless exempted by another Section of this Part D, the City may deem a Contractor to be in violation of the SBO Program and in breach of its Contract if at any time the City determines that: (a) the Contractor will not meet the Committed SBE Goal; and (b) the reasons for the Contractor's failure are in the City's judgment within the Contractor's control. For example, if a Contractor does not meet the SBE Goal because the Contractor terminated an SBE without cause or if the Contractor caused an SBE to

withdraw from the project without justification, then the City could find the Contractor to be in violation.

**2.2. Exceptions.** A Contractor shall not be deemed in violation of this Program for failure to meet the Committed SBE Goal to the extent such failure is directly attributable to:

**2.2.1. The City reducing the scope of a Contract** so as to eliminate or reduce work that was going to be performed by SBEs (whether through a change order, Contract amendment, force account or otherwise);

**2.2.2. An SBE's voluntary withdrawal** from the project if the Contractor demonstrates that such withdrawal was beyond the Contractor's reasonable control, so long as the Contractor complied with the Modified Good Faith Efforts to replace the SBE with another SBE; or

**2.2.3. Termination or reduction in the work of an SBE,** if the Contractor demonstrates that such termination was consistent with the terms of this Program, and that the Contractor complied with the Modified Good Faith Efforts to replace the SBE with another SBE.

### **Section 3: Performance of a Commercially Useful Function and Affiliate Status**

**3.1. Contractors have an ongoing, affirmative obligation to ensure that SBEs performing on the Contract are performing a Commercially Useful Function.** A Contractor shall be in violation of the SBO Program and in breach of its Contract if it lists an SBE to receive credit toward a Committed SBE Goal with knowledge that the SBE will be acting as a Conduit or will otherwise not be performing a Commercially Useful Function reasonably commensurate with the payment amount for which the Contractor will be seeking credit.

**3.2. For purposes of meeting the Committed SBE Goal, Contractors shall only receive credit for the amount of SBE participation that constitutes a Commercially Useful Function.** Payments exceeding the value of the Commercially Useful Function performed by an SBE shall not count toward meeting the Committed SBE Goal.

**3.3. If an SBE is found to be an Affiliate of the Contractor** prior to starting work on the Contract, the Contractor will not earn credit toward the SBE Goal for amounts paid to that SBE. If the City determines that an SBE is an Affiliate of the Contractor after the SBE starts work on the Contract, or if the SBE is decertified for being an Affiliate after starting work on the Contract, the City may deny SBE credit for amounts paid to the Affiliate and find the Contractor and the SBE to be in violation of the SBO Program if: (a) the Contract was put out for Bids or Proposals after April 22, 2011, and (b) the City determines in its sole discretion that the Contractor knew or should have known there was a significant risk that the City would consider the SBE an Affiliate. Contractors

shall be deemed to have knowledge of all SBO Program provisions, including those relating to Affiliates.

#### **Section 4: Change in SBE Status**

**4.1** Changes in an SBE's Certification status after submission of the Contractor's Bid shall be handled as follows:

**4.1.1.** If an SBE's Certification terminates due to expiration or graduation, the dollars paid to the SBE on the Contract shall still count toward the Committed SBE Goal.

**4.1.2.** If an SBE's Certification terminates because the City determines that the SBE is an Affiliate, or if an SBE is found to be an Affiliate of the Contractor (even if not decertified), then the Section 3.3 shall determine whether there is a Program violation and whether the Contractor receives credit toward the SBE Goal for amounts paid to the Affiliate.

**4.1.3.** If an SBE's Certification terminates due to the SBE having done any of the following, then the dollars paid to the SBE on the Contract shall NOT count toward the Committed SBE Goal and the Contractor shall be deemed in violation of the SBO Program and in breach of the Contract if it had knowledge of such conduct:

- The SBE has obtained SBE Certification by false or fraudulent means;
  - The SBE acts as a Conduit on any City Contract with the Contractor;
  - The SBE fails to perform a Commercially Useful Function reasonably commensurate to the compensation the Contractor agreed to pay such SBE, or
- Notwithstanding the above, if an SBE's Certification terminates due to the SBE obtaining it by false or fraudulent means, then the Contractor shall be able to count toward the SBE Goal all amounts paid to the SBE prior to the date the Contractor became aware of such deception (and such time thereafter as is in the City's judgment reasonably necessary for the Contractor to replace the SBE).

#### **Section 5: Terminating or Replacing an SBE**

**5.1.** Contractors shall not terminate, replace or reduce the work of an SBE that the Contractor has counted toward meeting the Committed SBE Goal unless:

**5.1.1.** The SBE refuses to enter into a contract consistent with the SBE's Letter of Intent;

**5.1.2.** The SBE's Certification terminates for any of the reasons set forth in Section 4.1.2;

**5.1.3.** The SBE materially breaches its contract with the Contractor;

**5.1.4.** The City reduces the Contract scope of work so as to eliminate or reduce the work that the SBE was to perform; or

**5.1.5.** The SBE voluntarily withdraws from the Contract for reasons not within the Contractor's reasonable control.

**5.2. Contractors shall provide the KBU and the SBO Program Manager written notice prior to replacing or terminating an SBE on a Contract.** The notice shall identify the SBE and the Contract, state the reason for the termination or replacement and state the proposed date on which such termination or replacement will occur. Unless the circumstances necessitate immediate termination or replacement, the Contractor shall provide such notice to the KBU and the SBO Program Manager at least **5 Business Days** before the Contractor terminates the SBE. The Contractor shall further provide written notice to the SBE stating the reasons for the termination. Unless circumstances dictate otherwise, the Contractor shall provide such notice before termination is to occur.

**5.3. Modified GFEs to Replace an SBE to a Contract.** When an SBE withdraws or is terminated from a Contract for any reason, the Contractor shall comply with the Modified Good Faith Efforts Requirements described below to replace the departing SBE with another SBE. Likewise, when new opportunities for subcontracting arise on a Contract and the City sets a Supplemental SBE Goal, the Contractor shall comply with the Modified GFEs set forth below in an effort to meet the Supplemental SBE Goal,

**5.3.1. Modified SBE Contacts.** The Contractor must solicit at least 3 SBEs unless the City agrees in writing to a lower number (the "Modified SBE Contacts"). The Contractor shall comply with the Good Faith Efforts requirements set forth in Section 5.3.2 of Parts B and C of the Program for making and documenting such SBE contacts (excluding the contact deadlines). Contractors shall be required to provide a **Form 4** Letter of Intent for each SBE they add to a Contract subsequent to Contract award.

**5.3.2. Additional Efforts.** In addition to making the Modified SBE Contacts, the Contractor shall undertake at least 2 of the other Good Faith Efforts applicable to that type of Contract, excluding Notification of Subcontracting Opportunities, Attendance at the City's Pre-Bid or Pre-Submittal Meeting, Follow-up Contacts and Achieving 50% of SBE Participation.

## **Section 6: New Subcontractor Opportunities/Additions to Scope, Contract Amendments**

**6.1. Notice of New Subcontracting Opportunities.** If a Contractor elects to subcontract any portion of a Contract that the Contractor did not previously identify to the City as a subcontracting opportunity, or if the scope of work on a Contract increases for any reason in a manner that creates a new SBE subcontracting opportunity (whether through a change order, Contract amendment, inaccurate initial estimate by the Contractor or otherwise), the Contractor shall: (a) promptly notify the City of the new subcontracting opportunity and, (b) inform the City whether the Contractor, existing SBEs or other subcontractors can perform the new opportunity.

- 6.2. SBE Goal for New/Additional Subcontracting Opportunities.** Upon receipt of a notice of new subcontracting opportunities under Section 6.1, the Program Manager or designee shall either: (a) notify the Contractor that there will be no Supplemental SBE Goal for the new work or (b) establish and notify the Contractor of a Supplemental SBE Goal for the new work (assuming there are SBEs listed in the City's database for that particular type of work).
- 6.3. Modified Good Faith Efforts.** If the City sets a Supplemental SBE Goal for new work on a Contract, the Contractor shall comply with the Modified Good Faith Efforts set forth in Section 5.3 in attempting to meet the Supplemental SBE Goal.
- 6.4. Notwithstanding the forgoing, a Contractor shall have no obligation to comply with Sections 6.1 and 6.3 if the Contractor's Committed SBE Goal for the Contract is higher than the SBE Goal the City established in the City Solicitation Document, provided that the City has determined that the Contractor is on track to meet the higher Committed SBE Goal. If in the City's judgment the Contractor is not on track to meet the Committed SBE Goal, the Contractor shall comply with Section 6.1 even if the Committed SBE Goal is higher than the SBE Goal established by the City.**

#### **Section 7: Special Provisions for Renewal of Contracts**

- 7.1.** In the event the City renews a Contract without a competitive process, the City shall establish a Supplemental SBE Goal for the renewal period (which will be the Committed SBE Goal unless there is just cause to change it), and the Contractor shall use Modified Good Faith Efforts to meet it.
- 7.2.** The Supplemental SBE Goal and Modified Good Faith Efforts and Good Faith Negotiation requirements shall be deemed incorporated into each Contract renewal document. The Contractor entering into the renewal shall be required to either meet the Supplemental SBE Goal or document that it has satisfied the Modified Good Faith Efforts and Good Faith Negotiation requirements referenced herein. Failure to do so shall: (a) subject the Contractor to any of the remedies set forth in this Part D; and / or (b) result in the City soliciting new Bids or Proposals for the Contract rather than renewing with the existing Contractor.

#### **Section 8: Payment to SBEs**

- 8.1. Payment to SBEs.** Contractors shall abide by N.C. General Statute 143-134.1 (b), which states:
- Within seven days of receipt by the prime contractor of each periodic or final payment, the prime contractor shall pay the subcontractor based on work completed or service provided under the subcontract. If any periodic or final payment to the subcontractor is delayed by more than seven days after receipt of the periodic or final payment by the prime contractor, the prime contractor shall pay the subcontractor interest, beginning on

the eighth day, at the rate of one percent (1%) per month or fraction thereof on such unpaid balance as may be due.

**8.2. Quick Payment Policy.** If a Contractor has made a Quick Pay Commitment under Parts B or C of this Program, the Contractor shall comply with any provisions of the Quick Pay Commitment that are more stringent than Section 143-134.1 (b), but shall also remain bound by Section 143-134.1(b). For instance, if a prime contractor entered into a Quick Pay Commitment to pay its subcontractors within 20 days after work is completed, but yet has still not paid its subcontractors two months after the prime contractor has been paid by the City, the prime contractor will be in violation of Sections 8.1 and 8.2 of this Part and subject to any remedies the City may impose as a result, and will also be liable under state law for violating Section 143-134.1 (b) and for paying any interest that may be due as a result.

### **Section 9: Utilization Reports and Documentation of Payments**

**9.1.** Contractors shall report to the City the total dollars paid to each SBE on each Contract, and shall provide such payment affidavits, certifications or other documentation regarding payment to subcontractors as may be requested by the City from time to time. Such affidavits, certifications or documents shall be in the format specified by the SBOP Office, and shall be submitted at such times as required by the City. Failure to provide such reports within the time period specified by the City shall entitle the City to exercise any of the remedies set forth in Section 14, including but not limited to withholding payment from the Contractor and/or collecting liquidated damages.

### **Section 10: Compliance Documentation**

**10.1. Responding To City Requests for Information.** The City may request information, documents or other materials from a Contractor at any time for the purpose of determining whether the Contractor is in compliance with the SBO Program. The Contractor shall comply with all such requests within **3 Business Days**, unless otherwise agreed by the City in writing.

**10.2. Contractor Compliance with City Consultant Requests for Information.** Contractors shall further cooperate with the City and any consultants hired by the City: (a) in any investigation initiated by the City to determine whether the Contractor is in compliance with the SBO Program, or (b) in connection with any disparity study conducted by the City to determine whether there is discrimination among contractors or subcontractors on City contracts.

**10.3.** Failure to comply with this Section 10 by a Contractor shall entitle the City to exercise any of the remedies set forth in Section 14, including but not limited to withholding payment from the Contractor and/or collecting liquidated damages.

### **Section 11: False Statements or Misrepresentations.**

Contractors shall not make any false statements, material misrepresentations or material, misleading omissions regarding any matter relevant to the SBO Program (including but not limited to information relating to Good Faith Efforts, SBE utilization, SBE certification or payments to SBEs). Failure to comply with this Section shall entitle the City to exercise any of the remedies set forth in Section 14, including but not limited to withholding payment from the Contractor and/or collecting liquidated damages.

### **Section 12: Special Provision for Exempt Contracts.**

If requested by the Program Manager, Business Enterprises that enter into Exempt Contracts shall be required to notify the City of any subcontracting opportunities that may arise on the Exempt Contract for which there are SBEs listed in the City's database. Failure to comply with this provision shall be deemed a material breach of the Exempt Contract, and shall entitle the City to exercise any of the remedies set forth in Section 14.

### **Section 13: Violations and Investigations**

**13.1. Reporting of Violations and Unfair Practices.** Contractors and SBEs shall report any alleged SBO Program violations or unfair practices involving the SBO Program to the SBO Program Manager within **5 Business Days** after the Contractor or SBE first became aware of the act or omission in question. The Program Manager may reject as untimely any report submitted after such time. The SBO Program office shall not accept reports of violations or unfair practices that are submitted more than **30 Calendar Days** after the SBE first became aware of the act or omission in question.

**13.2. Investigations and Burden of Proof.** The SBOP Office is empowered to receive and investigate complaints and allegations by SBEs, third parties and/or City personnel, and/or to initiate its own investigations regarding compliance with the SBO Program and the rules and guidelines promulgated thereunder. In the event the SBOP Office determines in its sole discretion that an investigation is warranted, the Program Manager shall notify the party being investigated. Upon written notice of such investigation, the affected party shall be obligated to cooperate fully with the investigation and shall have a continuing duty to provide complete, truthful information to the Program Manager. The party under investigation shall have the burden of proof in showing that it complied with the Program

### **Section 14: Remedies**

**14.1.** A violation of the SBO Program by a Contractor shall constitute a material breach of the Contract, and shall entitle the City or private owner to:

- 14.1.1. Exercise all rights and remedies that it may have at law or at equity for violation of the Contract;
- 14.1.2. Terminate the Contract for default;
- 14.1.3. Suspend the Contract for default;
- 14.1.4. Withhold all payments due to the Contractor under the Contract until such violation has been fully cured or the City and the Contractor have reached a mutually agreeable resolution;
- 14.1.5. Assess liquidated damages as provided in Section 14.2; and/or.
- 14.1.6. Offset any liquidated damages and/or any amounts necessary to cure any violation of the SBO Program from any retainage being held by the City on the Contract, or from any other amounts due to the Contractor under the Contract.

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

- 14.2. **Liquidated Damages.** In entering into a Contract that is subject to the SBO Program, the Contractor agrees to the following:

The City and the Contractor acknowledge and agree that the City will incur damages if the Contractor violates the SBO Program in one or more of the ways set forth below, including but not limited to loss of goodwill, detrimental impact on economic development and diversion of internal staff resources. The parties further acknowledge and agree that the damages the City might reasonably be anticipated to accrue as a result of such failures are difficult to ascertain due to their indefiniteness and uncertainty. Accordingly, the Contractor agrees to pay the liquidated damages assessed by the City at the rates set forth below for each specified violation of the SBO Program. The Contractor further agrees that for each specified violation the agreed upon liquidated damages are reasonably proximate to the loss the City will incur as a result of such violation:

- 14.2.1. **Failure to Meet SBE Goal.** If the City determines upon completion or termination of a Contract that the Contractor did not meet the Committed SBE Goal and that such failure is not otherwise excused under Part D, the City may assess the lesser of: (a) \$30,000 or (b) the dollar difference between the Committed SBE Goal and the Contractor's actual SBE utilization;
- 14.2.2. **Using SBE as a Conduit.** If the Contractor lists an SBE to receive credit toward a Committed SBE Goal with knowledge that the SBE will be acting as a Conduit or will not be performing a Commercially Useful Function reasonably commensurate with the payment amount for which the Contractor will be seeking credit, the City may assess the lesser of: (a) \$20,000 or (b) the dollar amount the Contractor indicated that it would

pay such SBE in the SBEs contract (or if no contract has been signed, the SBE's Letter of Intent);

**14.2.3. Wrongful Termination or Replacement of SBE Services.** If the Contractor terminates or replaces an SBE in violation of the SBO Program, the City may assess the lesser of: (a) \$20,000 or (b) the dollar amount of the work remaining to be performed by the terminated SBE at the time it was terminated (or if the SBE was not terminated because it was never retained, then, the dollar amount that the Contractor indicated it would pay the SBE in the SBE's letter of intent);

**14.2.4. Failure to Comply with SBO Program Following Termination or Withdrawal by SBE.** If the Contractor fails to comply with the Modified Good Faith Efforts requirements in replacing an SBE that is terminated or withdraws from work on a Contract, the City may assess the lesser of: (a) \$20,000 or (b) the dollar amount of the work remaining to be performed by the SBE that withdrew or was terminated at the time of the termination or withdrawal;

**14.2.5. Failure to Comply with SBO Program to Add New Subcontractors.** If the Contractor fails to comply with Modified Good Faith Efforts when required in adding new subcontractors to a Contract, or when the scope of work of a Contract changes so as to create a new SBE subcontracting opportunity, or on a Contract renewal, the City may assess the lesser of: (a) \$20,000; or (b) the dollar amount of the new or additional work;

**14.2.6. False Statements and Misrepresentations.** If the Contractor makes a false statement, material misrepresentation or material misleading omission regarding any matter relevant to the SBO Program (including but not limited to information relating to good faith efforts, SBE utilization, SBE certification or payments to SBEs), the City may assess the lesser of: (a) \$25,000; or (b) if the misrepresentation relates to payment, the dollar difference between what the Contractor represented and the truth;

**14.2.7. Failure to Respond to Request for Information.** If the Contractor fails to provide any report, documentation, affidavit, certification or written submission required under the SBO Program within the time period set forth therein, the City may assess \$25 per day for each day that such report, documentation or written submission is overdue.

**14.2.8. Seeking Credit for Use of An Affiliate to Meet the Committed SBE Goal.** If the City finds a violation of Section 3.3 of this Part due to a Contractor seeking credit for utilizing an SBE that the City determines to be an Affiliate, the City may assess the lesser of: (a) \$20,000 or (b) the dollar amount the Contractor counted towards its Committed SBE Goal for that SBE.

**14.3. Remedies for Violations in the Procurement Process.** A violation of the SBO Program in the bid phase of a Contract shall be grounds for rejection of the applicable Bid or Proposal. If the violation involves bad faith or dishonesty or may otherwise be indicative of the violator's

qualification to perform certain future Contracts, the City may consider such violation in awarding such future Contracts.

## **Section 15: Contract Provisions**

**15.1. Mandatory Contract Provisions.** Each Contract and Exempt Contract Subject to Post Award Compliance shall include the provisions set forth below, subject to such minor revisions as may be necessary to achieve consistent terminology:

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

- (a) The terms of the City's Small Business Program, as revised from time to time, together with all rules and guidelines established under such program (collectively, the "SBO Program") are incorporated into this Agreement by reference; and
- (b) A violation of the SBO Program shall constitute a material breach of this Agreement, and shall entitle the City to exercise any of the remedies set forth in Part D of the SBO Program, including but not limited to liquidated damages; and
- (c) Without limiting any of the other remedies the City has under the SBO Program, the City shall be entitled to withhold periodic payments and final payment due to the Contractor under this Agreement until the City has received in a form satisfactory to the City all claim releases and other documentation required by the City's SBO Program, and in the event payments are withheld under this provision, the Contractor waives any right to interest that might otherwise be warranted on such withheld amount under G.S. 143-134.1; and
- (d) The remedies set forth in Part D of the SBO Program shall be deemed cumulative and not exclusive and may be exercised successively or concurrently, in addition to any other available remedy; and.
- (e) The City will incur costs if the Contractor violates the SBO Program, and such costs are difficult to ascertain due to their indefiniteness and uncertainty. Accordingly, the Contractor agrees to pay the City liquidated damages at the rates set forth in Part D of the SBO Program.
- (f) The Contractor agrees to participate in any dispute resolution process specified by the City from time to time for the resolution of disputes arising from the SBO Program.

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

**Section 16: Determining Compliance and Exercising Remedies.**

- 16.1.** The SBOP Office shall review all Contracts for compliance with the SBO Program. This review shall include, but not be limited to, whether the Committed SBE Goal (in both dollar amounts and percentages) is maintained over the duration of the Contract, whether the Contractor improperly terminated, replaced or reduced the work of an SBE, whether the Contractor complied with Section 6 regarding any Contract amendments, renewals or additions to scope, whether SBEs on the Contract performed a Commercially Useful Function, etc. The SBOP Office may conduct such review on its own, or may hire consultants to assist in such process.
  
- 16.2.** When the SBOP Office determines that a Contractor has violated the SBO Program, the Program Manager shall make a recommendation to the KBE regarding appropriate remedies for the City to exercise in that situation and the KBE responsible for the affected procurement process or Contract shall make the decision as to what remedies will be exercised.

**Part E**  
**SBO Program**  
**SBE Certification and Eligibility**

**Section 1: Program Overview and Scope**

This document states requirements for becoming and remaining certified as a Small Business Enterprise under the City of Charlotte's Small Business Opportunity ("SBO") Program. Capitalized terms used in this document are defined in Appendix 1 to Part A of the SBO Program. Section references in this document refer to Part E unless otherwise stated.

The SBO Program is divided into 7 Parts, based on the type of contract and whether the situation involves procurement or post contract compliance. For reference purposes, these Parts are:

**Part A:** Administration and Enforcement

**Part B:** Construction Bidding

**Part C:** Services Procurement

**Part D:** Post Contract Award

**Part E:** SBE Certification and Eligibility

**Part F:** Financial Partners

**Part G:** Alternative Construction Agreements

**Section 2: SBE Certification and Eligibility**

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

**2.1. Licensed and For Profit.** Only for profit enterprises shall be eligible for SBE Certification. Non-profit organizations cannot become certified as SBEs. Additionally, to be eligible for SBE Certification, a Business Enterprise must: (a) be authorized to do business in the State of North Carolina; (b) unless exempt, have a valid Mecklenburg County privilege license; and (c) demonstrate that the Business Enterprise, its employees or Eligible Owners holds each business or professional license required for the operation of each type of business for which the Business Enterprise seeks SBE Certification.

**2.2. Ownership.** "Eligible Owners" must own at least fifty-one percent (51%) of the legal and equitable interest in the Business Enterprise. A person shall be deemed an "Eligible Owner" if such person:

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

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

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

- 2.2.4. Has a personal net worth under \$750,000, excluding: (i) \$500,000 of the equity in his or her primary residence\*; and (ii) his or her ownership interest in the applicant Business Enterprise; and (iii) the value of his or her retirement savings account as defined by the United States Tax Code and the Internal Revenue Service, and
- 2.2.5. Is not currently an official, officer or employee of the City.

\*For a married couple, the \$500,000 limit applies to the total equity in the residence.

In the case of a transfer in ownership, the owner to which the business has been transferred must be the Eligible Owner for a minimum of one year subsequent to the date of transfer, and must meet requirements described herein.

- 2.3. **Management and Control.** The daily business operations of the Business Enterprise shall be managed and controlled by one or more Eligible Owners. Such Eligible Owner(s) shall be deemed to manage and control the daily business operations only if:
  - 2.3.1. Their management and control is specifically demonstrated to be real, substantial and continuing and goes beyond the pro-forma ownership of the Business Enterprise as reflected in its ownership documents;
  - 2.3.2. They possess the power to and actually direct the management and policies of the Business Enterprise;
  - 2.3.3. They make both routine and major decisions on matters of management, policy and operations; and
  - 2.3.4. They are not subject to formal or informal restrictions that are inconsistent with the customary discretion of majority owners.
- 2.4. **Experience and Involvement of Eligible Owners.** One or more Eligible Owners must:
  - 2.4.1. Have substantial experience in the trade or industry or other experience, which would be necessary to make routine and major decisions for the Business Enterprise; and
  - 2.4.2. Regularly hold themselves out to the public and sign important documents and financial instruments in a manner that is indicative of primary management and control of daily business operations and responsibility for routine and major decisions.
- 2.5. **Actively in business for twelve months.** The Business Enterprise may not be certified until twelve (12) months after all of the following:
  - 2.5.1. Formation of the Business Enterprise;
  - 2.5.2. Commencement of sustained business activity in each trade or profession described on the Certification application; and
  - 2.5.3. Commencement of ownership, management and control of daily business operations by the Eligible Owners(s).

- 2.6. Exemption of Twelve Months Business Activity Requirement for Former Eligible Owner Certified with Existing SBE.** If a person who was an Eligible Owner of a Certified SBE that was a partnership or corporation creates a sole proprietorship to engage in the same type of business, the sole proprietorship SBE will not have to demonstrate sustained business activity for 12 months subsequent to the date of creating the sole proprietorship. If a person who was an Eligible Owner of a Certified SBE that was a partnership or corporation creates another corporation or other Business Enterprise with multiple owners, the Eligible Owner may need to demonstrate majority ownership and management control of the new corporation before the City grants an exemption for the twelve-month in business requirement. Additionally, see Section 2.11 regarding Affiliate status. Granting an exemption is not intended to mean that the SBOP office will not request other information to verify eligibility for SBE Certification.
- 2.7. SBE Certification Based on NIGP Codes.** SBE Certification areas shall correspond to the major groups set forth in the National Institute of Government Purchasing (NIGP) Commodity Codes or such other classification codes or standards as the Program Manager may designate from time to time. SBEs shall be certified only for the NIGP Codes for which they apply and in which they have had sustained business activity for a minimum of twelve (12) months. As part of the SBE Certification, annual update and renewal process, each SBE shall identify the NIGP Code that best describes where the SBE derives the majority of its income (the SBEs "Primary Business").
- 2.7.1. Adding or altering NIGP Codes for which SBE status was initially granted.** If at any time subsequent to Certification an SBE can demonstrate sustained business activity in one or more additional areas, or if the SBEs Primary Business changes, the SBE can request that the City review, add or alter the NIGP codes upon which its initial Certification was based or change its listing for Primary Business. Adding or altering NIGP Codes or changing an SBEs Primary Business shall be subject to approval by the SBO Program Manager or designee.
- 2.7.2. Performing services outside of the NIGP Codes for which SBE status was initially granted.** If an SBE responds to a solicitation to subcontract services in areas for which it was not initially or subsequently certified, the Contractor shall be able to count the utilization toward the SBE Utilization Goal as long as the SBE can demonstrate to the City's reasonable satisfaction that it will actually be performing the work in question.
- 2.8. Perform a Commercially Useful Function.** The Business Enterprise must perform a Commercially Useful Function. A Business Enterprise does not perform a Commercially Useful Function if it merely acts as a Conduit by passing the scope of work for which it is scheduled to perform or supply on the contract to an SBE or non-SBE firm.

**2.9. Geographic Restriction.** The Business Enterprise must have its principal place of business within the Charlotte Regional Area throughout the period the Business Enterprise is certified as an SBE. If after a Business Enterprise becomes certified as an SBE and the Charlotte Regional Area changes so as to exclude the area where the SBE's principal place of business is located, the SBE shall be entitled to retain its Certification until the date on which its certification expires in accordance with this Program.

As used in this Program, the term "Charlotte Regional Area" means: (a) the Charlotte Metropolitan Statistical Area; plus (b) Lincoln County and Rowan County in North Carolina.

**2.10. Threshold Size and Graduation Standards.** The annual sales receipts and the number of employees of the Business Enterprise, combined with all Affiliates, cannot exceed the size standards set forth below.

**2.10.1. SBE Size Eligibility.** No applicant Business Enterprise shall be certified as an SBE, and following Certification of an SBE, no Certification shall be renewed if on the effective date of the application or renewal the applicant Business Enterprise or SBE (combined with all Affiliates) has achieved a size standard that exceeds twenty-five (25%) of the applicable size standards established by the Small Business Administration at 13 CFR § 121.201 *et. seq.* for the SBEs Primary Business, as amended, or successor regulation or classification system by either:

- (a) Annual receipts averaged over the three (3) preceding fiscal years;
- (b) Size standard based on number of employees;
- (c) Or other criteria, which the Program Manager may establish from time to time.

**2.10.2. Certification Based on NAICS Size Standards ("SBA Size Regulations").** The annual receipts and number of employees of an applicant Business Enterprise shall be determined in accordance with the definitions and methodology established by the Small Business Administration at 13 CFR 121.201 *et. seq.* as amended, or successor regulation or classification system, all of which are incorporated into this Program by reference.

**2.10.3. SBE Graduation from NAICS Size Standard.** If an SBE, together with its Affiliate(s) has exceeded the graduation criteria in the NAICS major group that matches the SBE's Primary Business, the SBE shall be deemed to be graduated from SBE Certification. In such event, the SBE and its Affiliate(s) shall no longer be considered eligible to remain certified as SBEs. Graduation, or other conditions of ineligibility of an SBE, shall not affect the contribution made by the SBE toward satisfaction of a SBE Utilization Goal if the work was bid or proposed to be performed by the SBE before the date of ineligibility or achievement of the graduation criterion, except as provided in Part D.

**2.10.4. Graduation Criteria Applies to Affiliates.** The graduation criteria set forth above shall apply to all Affiliates of the graduating SBE as well as the SBE itself. When an SBE

graduates from Certification, so do all Affiliates of the SBE. When an SBE has become ineligible for Certification, its Affiliates shall be ineligible for certification as well.

**2.11. Affiliate Relationships.** In determining whether an applicant Business Enterprise is within the size thresholds set forth in this Part, the City will consider the combined sales volume and employees of all “Affiliates” of the applicant. Two entities are “Affiliates” of one another when: (a) one controls or has the power to control the other, (b) a third party or group of parties controls or has the power to control both; or (c) there is a significant relationship between the two entities as described in Section 2.11.2.

**2.11.1. Control.** Examples of the power to control include but are not limited to:

- Ownership of a majority equity interest (stock, partnership shares, etc.),
- Voting control of the board of directors
- Officer with decision making authority
- Approval rights over key decisions (through charter, by-laws, shareholder’s agreement or otherwise)
- Power to prevent a quorum, or to otherwise block action by the board of directors or shareholders.

Control may be direct or indirect, and need not be actually exercised to create an Affiliate relationship.

**2.11.2. Significant Relationship.** There is a significant relationship between two entities when one entity is significantly dependent on the other, when one entity (through shared officers, employees, etc.) has the ability to play a key role in the management or direction of the other, or when the two entities have share facilities, assets or employees to a significant degree or have an identity of interest (through family relationships or otherwise). The factors the City will consider include but are not limited to:

- Common ownership, management or employees,
- Shared equipment, assets or facilities,
- Family relationships,
- Physical proximity,
- Percentage of revenue derived from the other entity,
- Loans, leases and contributions, and
- Contractual or other significant relationships

**2.11.3. Totality of the Circumstances Test.** The City will apply a totality of the circumstances test in deciding whether an Affiliate relationship exists. No single factor is essential to such a finding.

For instance, if two entities operate from the same property, are in the same general industry, share employees and equipment and have key management officials in common, the City will find an Affiliate relationship even if one entity derives only a small percentage of its income from the other. Likewise, if one entity receives 90% of its income from another entity, the City may find an Affiliate relationship even if none of the other factors are present.

**2.11.4. Presumption of Affiliate Status.** The City will presume that two or more entities are Affiliates of one another when both of the following conditions are met:

- 50% or more of one entity's annual gross revenue over the prior 3 years derived from contracts with the other entity or group of entities, and
- The entities have common ownership, common management, shared facilities, shared assets, family relationships or other significant connections.

This presumption is rebuttable in the City's discretion if the applicant business shows that the connection between the two entities is minimal, and that the applicant business is no longer at any risk of being financially dependent on the other business.

The above presumption does not in any way limit the City's ability to find an Affiliate relationship when the two conditions set forth above are not met.

**2.12. Appeal Process.** If a Business Enterprise feels that it has been unfairly denied SBE status or that its SBE status has been wrongfully terminated, the Business Enterprise shall submit its concerns in writing to the SBO Program Manager within **30 Days** after the aggrieved incident. If the Program Manager fails to satisfactorily resolve the matter within **10 Days**, the aggrieved party may appeal by to the Key Business Executive of Neighborhood and Business Services. If the Key Business Executive of Neighborhood and Business Services fails to satisfactorily resolve the matter within **10 Days**, the aggrieved party may appeal by sending written notice to City Manager or a person designated by the City Manager to hear the appeal. Notices of appeal must be sent within **10 Days** after the aggrieved party receives notice of the decision being appealed from, and must identify the decision being appealed and each reason why the aggrieved party takes issue with the decision. This paragraph shall not be construed to create a right of standing that does not otherwise exist under North Carolina law.

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

- 2.14. Interviews, investigation and onsite visits.** The SBO Program office may interview all persons upon whom eligibility for Certification is based, and is empowered to interview such other persons and conduct such onsite visits and investigations as may be appropriate in its sole discretion to verify eligibility for Certification. A Business Enterprise wishing to become or remain certified as an SBE shall cooperate with the SBO Program office in supplying additional information that may be requested in order to make a determination. If an SBE fails to respond to the SBO Program office's request for information within (a) either the time period specified in the notice requesting information or (b) if no time is specified in the notice within 15 Days subsequent to the date of the notice, the City may immediately suspend eligibility and/or terminate SBE Certification.
- 2.15. Attendance at Orientation Meetings.** The City shall conduct periodic meetings to educate SBEs about SBO Program requirements and about general matters relating to participating in City contracts or contracting in general. The Program Manager may by rule or regulation require SBEs to attend follow-up meetings on a periodic basis, but no more than once every two years.
- 2.16. Continued eligibility and renewal of Certification.** An SBE Certification shall be valid for a 3-year period, provided that the SBE submits a Status Affidavit for each year after the first year. The Status Affidavit shall contain such information as may be required by the SBOP Office from time to time regarding the current status of the SBEs business, and shall be submitted no later than **30 days** prior to each annual anniversary of the Certification. An SBE may apply to renew its SBE Certification by submitting a renewal application no later than **30 days** before its third year anniversary of Certification. An SBE Certification shall terminate automatically and without notice upon the failure of the Business Enterprise to satisfy any requirement set forth in this Section.
- 2.17. Suspension, Revocation or Modification of SBE Certification.** The SBOP Office shall have the power to suspend or revoke any Certification issued under the SBO Program and may suspend an SBE's participation from counting toward an SBE Goal if:
- 2.15.1.** The SBE has by false or fraudulent representations obtained SBE Certification;
  - 2.15.2.** The SBOP Office at any time determines that the SBE is not eligible for Certification due to Affiliate status, exceeding the size thresholds or other reasons;
  - 2.15.3.** The SBE firm is found to have committed any act which constitutes improper, fraudulent or dishonest dealing;
  - 2.15.4.** The SBE acts as a Conduit or fails to perform a Commercially Useful Function on a City project;
  - 2.15.5.** The SBE fails to comply with the provisions of SBO Program, fails to submit information requested by the City, or fails to cooperate in investigations.

- 2.18.** The SBOP may further modify the list of areas for which an SBE is certified, if the SBE regularly fails to submit bids or proposals for work in particular area, or if it becomes apparent that the SBE is not qualified to perform work in a particular area. However, nothing in this SBO Program or in any action or inaction by the SBOP Office or the Program Manager shall be deemed a representation or certification that a particular SBE is qualified to perform work in a particular area.
- 2.19.** The Program Manager shall make all decisions regarding the suspension or revocation of an SBE's Certification, and the duration of such suspension or revocation. The SBO Program Manager may consider an SBEs history of performance on City projects when determining whether to suspend or revoke SBE Certification status.

**Part F  
SBO Program**

**Financial Partners**

**Section 1: Program Overview and Scope**

This document states requirements that Financial Partners must comply with under the City of Charlotte's Small Business Opportunity ("SBO") Program as a condition of receiving funding from the City of Charlotte. Capitalized terms used in this document are defined in Appendix 1 to Part A of the SBO Program. Section references in this document refer to Part F unless otherwise stated.

The SBO Program is divided into 7 Parts, based on the type of contract and whether the situation involves procurement or post contract compliance. For reference purposes, these Parts are:

**Part A:** Administration and Enforcement

**Part B:** Construction Bidding

**Part C:** Services Procurement

**Part D:** Post Contract Award

**Part E:** SBE Certification and Eligibility

**Part F:** Financial Partners

**Part G:** Alternative Construction Agreements

1. **Financial Partners Defined.** Financial Partners are non-profit agencies or organizations with whom the City of Charlotte contracts to provide specific services. These agencies extend the City's capacity to address strategic priorities and concerns of the community. Partnerships include those due to special legislation, those that support City Council's five strategic focus areas; and partnerships that contribute to important community activities. The contract under which the City agrees to provide funding to a Financial Partner.
2. **SBO Program Exemption.** If the Financial Partner currently administers an MWBE program or DBE program, the Financial Partner may seek an exemption from the SBO Program by communicating to the KBU administering the Financial Partner contract and the SBOP Office the Financial Partner's intention to use its existing contractor program in lieu of adhering to the SBO Program. Financial Partners exempted from the SBO Program shall, if requested in writing by the SBOP Office, adhere to outreach and reporting requirements outlined in Sections 4 and 5 for MWBE and DBE firms.
3. **SBOP Establishes Annual SBE Utilization Goal.** The SBOP Office shall set an SBE Goal for each Financial Partner, and the City shall take such steps as are appropriate to ensure accountability in meeting such goals by Financial Partners. The SBO Program Manager may, in his or her sole discretion, alter or adjust a Financial Partner's SBE Goal, as warranted.
4. **Outreach Requirements.** Financial Partners shall undertake the following efforts to meet the SBE Goals established by the City:

- 4.1.1. Notify SBEs of any contracting or procurement opportunities that may exist in the Financial Partner's business for which there are SBEs listed in the City's database; and
- 4.1.2. Request advice and assistance from the SBDP Office as to what additional measures might be helpful if and when it becomes apparent that outreach alone will be insufficient to meet the Financial Partner's SBE Goal; and
- 4.1.3. Follow such additional measures as the SBDP Office reasonably recommends.

**5. Reporting Requirements.** Financial Partners shall report to the City on a periodic basis (either quarterly or according to the schedule established by the SBOP Office) the total amount of dollars paid by the Financial Partner to SBEs. Periodic reporting shall occur no less than once a year. Reports shall be in such format and shall contain such information as may be specified by the SBDP Office from time to time.

**6. Material breach of contract.** Failure to comply with Part F of the SBO Program shall be deemed a material breach of the Financial Partner's Agreement with the City. In the event a Financial Partner fails to comply with Part F, the City shall be entitled to terminate or suspend the Financial Partner Agreement, withhold payment under the Financial Partner Agreement, impose any liquidated damages that may be included in the Financial Partner Agreement or impose any other remedy allowed under the Financial Partner Agreement, or at law or in equity, for material breach of contract. Notwithstanding the forgoing, failure to meet an SBE Goal shall not be deemed a material breach if the Financial Partner complies with Section 4 and demonstrates to the City's reasonable satisfaction that it used diligent efforts to meet the SBE Goal.

**Part G**  
**SBO Program**

**Alternative Construction Agreements**

**Section 1: Program Overview and Scope.**

This document states requirements under the City of Charlotte's Small Business Opportunity ("SBO") Program for Infrastructure Reimbursement Agreements, Public-Private Development Agreements and Construction Manager at Risk Agreements. Capitalized terms used in this document are defined in Appendix 1 to Part A of the SBO Program. Section references in this document refer to Part G unless otherwise stated.

The SBO Program is divided into 7 Parts, based on the type of contract and whether the situation involves procurement or post contract compliance. For reference purposes, these Parts are:

**Part A:** Administration and Enforcement

**Part B:** Construction Bidding

**Part C:** Services Procurement

**Part D:** Post Contract Award

**Part E:** SBE Certification and Eligibility

**Part F:** Financial Partners

**Part G:** Alternative Construction Agreements

**Section 2: SBE Requirements for Infrastructure Reimbursement Agreements and Public-Private Development Agreements ("Reimbursement Agreements")**

**2.1 Definition of "Reimbursement Agreements":** "Reimbursement Agreement" means an Infrastructure Reimbursement Agreement or a Public Private Development Agreement, each of which is defined below.

**2.1.1** An **Infrastructure Reimbursement Agreement** is an agreement with a private developer or property owner approved by the City under Section 2-2 of Charlotte City Code for the design and construction of municipal infrastructure that is included in the City's capital improvement plan and serves the developer or property owner. Infrastructure Reimbursement Agreements may involve, without limitation, water mains, sanitary sewer lines, lift stations, stormwater lines, streets, curb and gutter, sidewalks, traffic control devices and other associated facilities.

**2.1.2** A **Developer Agreement** is a contract under which the City agrees to provide funding of more than \$200,000 for a "public-private development project" as defined in Section 7-109 of the City of Charlotte Charter. A public-private development project must be a capital project comprising both public and private facilities that are located (i) in the City's central business district, as defined by City Council; (ii) in or along a major

transportation corridor; or (iii) in a development zone designated pursuant to G.S. 105-129.3A.

**2.2 Reimbursement Agreements Are Exempt From Part B of the SBO Program Except to the Extent Program Provisions Are Incorporated Into an SBE Participation Plan for a Specific Project.** Reimbursement Agreements are exempt from Part B of the SBO Program. However, as a condition of entering into a Reimbursement Agreement, the City shall require the owner or developer to comply with Section 2.3 regarding the establishment of an SBE Goal and compliance with an SBE Participation Plan for the project, unless the SBO Program Manager exempts the Reimbursement Agreement from these requirements. The SBO Program manager may exempt a Reimbursement Agreement from the requirements of Section 2.3 if the SBO Program Manager determines that the opportunities for SBE utilization do not warrant an SBE Goal or SBE Participation Plan.

**2.3 SBO Requirements Applicable to Reimbursement Agreements.** Unless exempted by the SBO Program Manager, Private developers and property owners that enter into Reimbursement Agreements (collectively referred to as the “Company”) shall comply with the following:

**2.3.1** Prior to City Council’s vote to award the Reimbursement Agreement, the Company shall submit the following to the SBO Program Manager for review and approval:

**2.3.1.1** A proposed SBE Goal for the design and construction work for which the City will provide reimbursement to the Company (“Reimbursement Work”); and

**2.3.1.2** A proposed SBE participation plan that describes what outreach and other efforts the Company will be required to undertake to meet the SBE Goal (the “SBE Participation Plan”).

**2.3.2** City staff may reject the proposed SBE Participation Plan if in the City’s judgment it is not reasonably calculated to meet the SBE Goal. In such case the City shall make suggestions to the Company about how to improve the proposed SBE Participation Plan, and the Company shall continue submitting revised versions until one is approved by the City.

**2.3.3** Notwithstanding the forgoing, the City and the developer or property owner may in some instances agree to have the proposed SBE Goal apply to more than the design and construction work for which the City will provide reimbursement. In such instances the term “Reimbursement Work” shall apply to all work subject to the SBE Goal.

**2.3.4** The SBE Goal shall be presented to City Council for approval as part of the Reimbursement Agreement.

**2.3.5** Throughout the duration of the Reimbursement Work, the Company shall submit to the City written reports that detail contract award amounts and the actual dollars spent with SBE firms on the project, broken down by industry, trade and race/gender/ethnic

ownership. Such reports shall be in a format approved by the SBO Program Manager and shall contain such information as may be specified by the SBO Program Manager from time to time. The SBO Program Manager may, in his or her sole discretion, authorize the Company to submit such reports on a quarterly rather than monthly basis, provided that such authorization shall be in writing.

**2.3.6** The Company shall comply with the SBE Participation Plan throughout the duration of the Reimbursement Work. A violation of the SBE Participation Plan shall be deemed a violation of the SBO Program.

**2.3.7** A violation of the SBO Program or the SBE Participation Plan shall constitute a material breach of the Reimbursement Agreement, and shall entitle the City to exercise any of the remedies set forth in Part D of the SBO Program for breach by a Contractor, including but not limited to liquidated damages; and

**2.4 Mandatory Reference to SBO Program in Agreement.** Each Reimbursement Agreement (other than those exempted by the SBO Program Manager) shall contain the following provisions, subject to such minor revisions as may be necessary to achieve consistent terminology with the Reimbursement Agreement:

**Small Business Opportunity Program.** The City has adopted a Small Business Opportunity Program, which is posted on the City's website and available in hard copy form upon request to the City. The Company has adopted a Small Business Enterprise ("SBE") Goal for the project covered by this Agreement, and has agreed to comply with an SBE participation plan that was developed by the Company and approved by the City (the "SBE Participation Plan"). The parties agree that:

- (h) The terms of the City's Small Business Program, as revised from time to time, together with all rules and guidelines established under such program (collectively, the "SBO Program") and the SBE Participation Plan are incorporated into this Agreement by reference; and
- (i) The Company shall be subject to and comply with all provisions referenced in Section 3 of Part G of the SBO Program (which pertains to Reimbursement Agreements); and
- (j) The Company shall be deemed a "Contractor" and this Agreement shall be deemed a "Contract" for purposes of Part D of the SBO Program; and
- (k) A violation of the SBO Program or the SBE Participation Plan shall constitute a material breach of this Agreement, and shall entitle the City to

exercise any of the remedies set forth in Part D of the SBO Program for breach by a Contractor, including but not limited to liquidated damages; and

- (l) Without limiting any of the other remedies the City has under the SBO Program, the City shall be entitled to withhold periodic payments and final payment due to the Company under this Agreement until the City has received in a form satisfactory to the City all claim releases and other documentation required by the City's SBO Program or the SBE Participation Plan, and in the event payments are withheld under this provision, the Company waives any right to interest that might otherwise be warranted on such withheld amount under G.S. 143-134.1; and
- (m) The remedies set forth in Part D of the SBO Program shall be deemed cumulative and not exclusive and may be exercised successively or concurrently, in addition to any other available remedy; and.
- (n) The City will incur costs if the Company violates the SBO Program or the SBE Participation Plan, and such costs are difficult to ascertain due to their indefiniteness and uncertainty. Accordingly, the Company agrees to pay the City liquidated damages at the rates set forth in Part D of the SBO Program if the Company violates the SBE Participation Plan or the SBO Program.
- (o) The SBE Goal for this Agreement is \_\_. The Company agrees that it is accountable for meeting the SBE Goal, and that failure to do so constitutes a breach of this Agreement unless such failure is due to circumstances beyond the Contractor's control. The Company further agrees that in the event of such unexcused failure, the upper limit on the Company's liquidated damages under Section 14.2.1 of Part D shall be \$75,000 instead of \$30,000.
- (p) The Company agrees to participate in any dispute resolution process specified by the City from time to time for the resolution of disputes arising from the SBO Program.
- (q) Nothing in this Section shall be construed to relieve a Company from any obligation it may have under N.C. Gen. Stat. 143-134.1 regarding the payment of subcontractors.

In lieu of the forgoing provision, the City may incorporate the applicable provisions of the SBE Program into the stand alone SBE Plan, and incorporate the SBE Plan by reference into the Reimbursement Agreement.

### **Section 3: SBE Requirements for Construction Manager-At-Risk.**

**3.1. Definition of CM at Risk.** A “CM at Risk” is a licensed general contractor that has signed a construction manager at risk agreement as defined in N.C. Gen. Stat. 143-128.1 to manage a construction project for the City (referred to for purposes of Section 3 as the “Project”). A CM at Risk both manages and guarantees the cost of the Project. A CM at Risk Contract is the agreement between the CM at Risk and the City, under which the CM at Risk agrees to manage and guarantee the cost of the Project.

**3.2. Construction Manager-At-Risk Projects.** A CM at Risk shall comply with the following requirements:

3.2.1. Prior to City approval of the CM at Risk Contract, the CM at Risk shall submit a proposed SBE Goal for the Project to the City for review and approval by the SBO Program Manager and such other City staff as the City Manager may deem appropriate. If the CM at Risk Contract is one which must be approved by City Council, the SBE Goal shall be subject to City Council approval as well.

3.2.2. The CM at Risk shall enforce and comply with the SBO Program throughout the duration of the Project as follows:

- a. The CM at Risk shall administer and enforce Parts B, C and D of the SBO Program with respect to contractors working on the Project as though the CM at Risk were assuming the role of the City, and shall be subject to oversight by the City as set forth in this Section 3.
- b. The CM at Risk shall establish SBE Goals for its contracts on the Project that are sufficient to enable the CM at Risk to meet its overall SBE Goal.
- c. The CM at Risk shall designate a program manager to be responsible for ensuring that the CM at Risk and all contractors working on the Project comply with the SBO Program (the “CM at Risk Program Manager”).
- d. The SBO Program provisions contained in the solicitation documents and contracts used by the CM at Risk on the Project shall be: (a) subject to approval by the City’s SBO Program Manager; and (b) substantially similar to the SBO provisions used in the City’s solicitation documents, except that the term “City” where appropriate shall be changed to identify the CM at Risk.
- e. For purposes of Parts B, C and D of the SBO Program, the term “Contract” shall include all contracts that the CM at Risk enters into with contractors and subcontractors in connection with the Project (other than contracts that would fall

within the definition of Exempt Contracts if entered into by the City). For purposes of Part D, the term "Contract" shall also include the CM at Risk Contract between the CM at Risk and the City.

- f. For purposes of Part D, both the CM at Risk and each contractor working for the CM at Risk on the Project shall be considered "Contractors." For example, the CM at Risk shall be required to comply with Section 5 of Part D when terminating or replacing an SBE contractor on the Project, and a contractor on the Project shall be required to comply with Section 5 of Part D when replacing an SBE subcontractor on the Project. The CM at Risk shall be responsible to the City for any failure to comply with Section 5 either on its own part or on the part of on its contractors. For purposes of triggering the City's remedies against the CM at Risk, a violation of the SBO Program may be either a violation by the CM at Risk or a violation by a contractor working under the CM at Risk, but need not be both.
  
- g. In administering and enforcing Parts B, C and D of the SBO Program as to contractors working on the Project, the CM at Risk shall take the place of the City or the KBU or KBE in all applicable definitions and provisions. For example, the term "City Solicitation Documents" shall mean the documents issues by the CM at Risk to solicit Bids or Proposals on the Project. Likewise, the CM at Risk shall conduct the outreach to SBEs that the City would otherwise be required to conduct under Part B of the SBO Program. Notwithstanding the forgoing:
  - (1) The term "SBE" shall refer only to SBEs certified by the City, and the City shall maintain the SBE database and make all decisions regarding SBE certification and continued eligibility;
  - (2) The SBO Program Manager shall retain sole discretion to determine whether a particular organization constitutes an SBE Assistance Organization for purposes of Parts B and C;
  - (3) The term "non-City contracts" in Parts B and C, Section 5.3.17 shall continue to mean contracts not with the City, as opposed to contracts not with the CM at Risk;
  - (4) The CM at Risk's Program Manager shall not establish additional criteria for Good Faith Efforts compliance under Sections 5.3, 5.4 or 5.5 of Part B without the City SBO Program Manager's prior written consent; and
  - (5) The CM at Risk shall not grant waivers of non-compliance with the SBO Program without the City's SBO Program Manager's prior written consent.

- h. The CM at Risk shall notify the City of each situation where the CM at Risk learns of a potential SBO Program violation on the Project. The City shall have final authority in determining whether a particular situation constitutes a violation of the SBO Program.
- i. Notwithstanding anything contained herein to the contrary, the CM at Risk shall be subject to the remedies set forth in Part D of the SBO Program not only for a failure by the CM at Risk to comply with the SBO Program, but also for a failure to comply by a contractor working on the Project. A violation of the SBO Program by a contractor on the Project shall constitute a violation of the SBO Program by the CM at Risk. For example, if a contractor on the Project uses an SBE as a Conduit, the City may (as one of several possible remedies) require the CM at Risk to pay liquidated damages equal to the lesser of: (a) \$20,000 or (b) the dollar amount the contractor indicated that it would pay such SBE in the SBEs contract (or if no contract has been signed, the SBE's Letter of Intent). It shall then be up to the CM at Risk to recover such liquidated damages from its contractor. Likewise, if a contractor on the Project wrongfully refuses to use an SBE that it counted toward meeting the Committed SBE Goal in violation of Section 5 of Part D, the City may refuse to make payment under the CM At Risk Contract until the matter has been resolved to the City's satisfaction (or may assess liquidated damages against the CM at Risk or exercise any of the other remedies permitted in Part D).
- j. In addition to and without limiting the CM at Risk's liability under the preceding paragraph, it shall be a violation of the SBO Program and a material breach of the CM at Risk Contract if the CM at Risk fails to comply with one of the CM at Risk's obligations under this Part G. For example (and without limitation), it shall be a violation of the SBO Program and a material breach of the CM At Risk Contract if the CM at Risk: (a) fails to include the SBO Provisions approved by the City in its solicitation documents for a contractor or subcontractor on the Project; (b) fails to inform the City of an SBO Program violation by a contractor on the Project; or (c) fails to provide to the City the reports required by this Part G.

3.2.3. Throughout the duration of the project, the CM at Risk shall submit monthly or quarterly reports (as directed by the Program Manager) detailing the actual dollars spent with SBE firms on the project, broken down by industry, trade and race/gender/ethnic ownership. Such reports shall be in a format approved by the SBO Program Manager and shall contain such information as may be specified by the SBO Program Manager from time to time.

**3.3. Mandatory Reference to SBO Program in CM at Risk Contracts.** Each CM at Risk Contract shall contain the following provisions (subject to such minor revisions as may be necessary to achieve consistent terminology with the remainder of the CM at Risk Contract):

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

- a. The terms of the City's Small Business Program, as revised from time to time, together with all rules and guidelines established under such program (collectively, the "SBO Program") and the SBE Participation Plan are incorporated into this Agreement by reference; and
- b. The CM at Risk shall be subject to and comply with all provisions referenced in Section 3 of Part G of the SBO Program (which pertains to construction managers at risk); and
- c. A violation of the SBO Program by the CM at Risk or by a contractor working on the Project shall constitute a material breach of this Agreement, and shall entitle the City to exercise any of the remedies set forth in Part D of the SBO Program for breach by a Contractor, **including but not limited to liquidated damages**; and
- d. Without limiting any of the other remedies the City has under the SBO Program, the City shall be entitled to withhold periodic payments and final payment due to the CM at Risk under this Agreement until the City has received in a form satisfactory to the City all claim releases and other documentation required by the City's SBO Program, and in the event payments are withheld under this provision, the Company waives any right to interest that might otherwise be warranted on such withheld amount under G.S. 143-134.1; and
- e. The remedies set forth in Part D of the SBO Program shall be deemed cumulative and not exclusive and may be exercised successively or concurrently, in addition to any other available remedy; and.
- f. The City will incur costs if the Company or one of the contractors working on the project contemplated by this Agreement violates the SBO Program, and such costs are difficult to ascertain due to their indefiniteness and

uncertainty. Accordingly, the Company agrees to pay the City liquidated damages at the rates set forth in Part D of the SBO Program if the Company or a contractor working on the project violates the SBO Program.

- g. The Company agrees to participate in any dispute resolution process specified by the City from time to time for the resolution of disputes arising from the SBO Program, and to require contractors working on the project to do so as well.
- h. Nothing in this Section shall be construed to relieve a Company from any obligation it may have under N.C. Gen. Stat. 143-134.1 regarding the payment of subcontractors.