

CITY OF WILMINGTON MINORITY BUSINESS/DISADVANTAGED  
BUSINESS ENTERPRISE PROGRAM

1. MBE/DBE DEFINITION

To qualify for certification, a firm must meet the definition of a minority person, as outlined below in accordance with N.C.G.S. 143-128, and be socially and economically disadvantaged.

Any person having a current 8(a) certification from the Small Business Administration is considered socially and economically disadvantaged.

The City of Wilmington makes a "rebuttable presumption" that individuals in the following groups who are citizens of the United States (or lawfully permanent residents) are socially and economically disadvantaged.

A minority or disadvantaged business enterprise is a small business concern - at least 51 percent owned by one or more socially and economically disadvantaged individuals or, in the case of any publicly owned business, at least 51 percent of the stock is owned by one or more socially and economically disadvantaged individuals; and whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

For the purposes of this program, and in keeping with its determination of affected groups in New Hanover County, a minority or disadvantaged person is one who is a citizen or lawful permanent resident of the United States and who is:

- a. Black - a person having origins in any of the black racial groups in Africa;
- b. Hispanic - a person of Spanish or Portuguese culture with origins in Mexico, South or Central America, or the Caribbean Islands, regardless of race;
- c. Asian America - a person having origins in any of the original peoples of the Far East, Southeast Asia and Asia, the Indian subcontinent, the Pacific Islands;
- d. American Indian - a person having origins in any of the original peoples in North America;  
or
- e. Female.

1.1 Socially and Economically Disadvantaged Individuals

Other individuals may be found to be socially and economically disadvantaged on a case-by-case basis. For example, a disabled Vietnam veteran, an Appalachian white male, or another person may claim to be disadvantaged. If such individual requests that his/her firm be certified as a MBE/DBE, the Board as part of the certification process, will determine whether the individual is socially and economically disadvantaged under the criteria 49 CFR 23 Appendix C of Subpart D. These owners must demonstrate that their disadvantaged status arose from individual circumstances, rather than by virtue of membership in a group.

2. DESIGNATION OF MBE/DBE PERSONNEL

The Purchasing Agent shall be responsible for the following:

- 1.1 Managing and implementing the MBE/DBE program on behalf of the City of Wilmington in conjunction with certification policies set forth by the New Hanover County MBE/DBE Advisory Board.
- 1.2 Carrying out technical assistance activities for the City of Wilmington.
- 1.3 Disseminating information on available City projects so that MBE/DBEs are provided an equitable opportunity to compete for public construction **contracts** of \$50,000 or more, awarded by the City of Wilmington.
- 1.4 Explaining the MBE/DBE participation requirements at pre-bid conferences.
- 1.5 Ensuring that solicitations contain the clauses and goals required by the program.
- 1.6 Ensuring that Requests for Proposals contain clauses which require consultants to specify possible contracting and subcontracting opportunities.

Other personnel who have been assigned MBE/DBE program responsibilities include:

- 2.1 Department heads and/or Project Directors as well as any consultant hired by the City shall be responsible for providing the following:
  - a. Information on possible contracting opportunities as well as a breakdown on possible subcontracting possibilities.
  - b. Consulting with the Purchasing Agent on procurement policies, including bonding, licenses, and other requirements.
  - c. Verification of payments to minority subcontractors during the course of the project.
- 2.2 The City Attorney shall review contract clauses for legal sufficiency.

3. PROCEDURES TO ENSURE THAT MBE/DBE'S HAVE AN EQUITABLE OPPORTUNITY TO COMPETE FOR CONTRACTS AND SUBCONTRACTS

The City of Wilmington will use affirmative action techniques to facilitate MBE/DBE's participation in public construction **contracts** of \$50,000 or more. These techniques will include:

- 1.1 Arranging solicitations or Requests for Proposals, time for presenting bids or proposals, quantities and specifications so as to facilitate MBE/DBE participation.
- 1.2 Providing assistance to MBE/DBEs in overcoming barriers in the procurement process such as the inability to obtain bonding, financing, or technical assistance.

1.3 Conducting information sessions on contracting procedures.

These procedures will be applied to all public construction **contracts**, including those for professional, technical, consultant, or managerial services; construction; and the procurement of materials, supplies, personnel, facilities and equipment associated with such **contracts**. Efforts will be made to facilitate MBE/DBE participation in prime and subcontract opportunities.

3.1 Other Affirmative Action

The following are other affirmative actions the City may take in order to facilitate MBE/DBE participation:

- 1.1 Provide information to MBE/DBE firms about the City, its contract documents and their functions, as well as information about upcoming contractual needs.
- 1.2 Offer instructions and clarifications on bid specifications, the City's procurement policy, procedures, and general bidding requirements.
- 1.3 Maintain a file of successful bid documents from past procurements and contracts and permit review and evaluation of these documents.
- 1.4 Conduct debriefing sessions to explain why certain bids were unsuccessful.
- 1.5 Provide firms with information on future procurements and contracting schedules.
- 1.6 Provide instructions about job performance requirements.
- 1.7 Provide information on certification procedures, subcontracting, and bonding requirements.
- 1.8 Place bid notices in the Associated General Contractors offices, Dodge Bulletin, local newspapers, as well as periodicals of interest to the disadvantaged community.
- 1.9 Develop mailing lists that include MBE/DBEs and their associations.
- 1.10 Send bid notices to MBE/DBE trade associations, technical assistance agencies, MBE/DBE economic development groups, and to MBE/DBEs with capabilities relevant to the bid notice, as identified by the Advisory Board's MBE/DBE directory.
- 1.11 Make bid specifications available to MBE/DBE contract associations and technical assistance agencies.
- 1.12 Make available to MBE/DBEs and MBE/DBE organizations a list of majority firms bidding as prime contractors.
- 1.13 Use a sufficient lead time for advertisement of all invitations for bid so that all firms have ample time to develop a complete bid package or proposal and secure necessary assistance.

1.14 Hold pre-bid conferences to provide firms with an opportunity to inquire about the MBE/DBE requirements.

4. MBE/DBE DIRECTORY

The City of Wilmington shall utilize the MBE/DBE directory as compiled by New Hanover County. In addition, the City of Wilmington shall appoint a representative from the City to participate on the New Hanover County MBE/DBE Advisory Board for the purpose of participating in the certification of MBE/DBE firms.

New Hanover County maintains and updates a MBE/DBE Directory, which is located in the DBE Liaison Office: Personnel Department, 411 Chestnut Street, Wilmington, N. C., as well as at the Purchasing Office of the City of Wilmington. Other copies will be available at the City Manager's Office, Engineering Department, the Planning Department and the New Hanover County Library.

The State Department of Commerce and Transportation directories will be used to supplement the MBE/DBE Directory. Directories of other agencies may also be used when a project requires a search for MBE/DBEs beyond the normal recruiting areas.

The MBE/DBE Directory lists firms which are capable of performing general contracting and particular solicitations. The Directory is organized by the type of work the contractor desires to perform, i.e., general contracting, lighting, marking, engineering, etc.

The Directory indicates which firms have completed the certification process, those certified by the Small Business Administration (SBA) under the Section 8(a) Program, those certified by the State Department of Commerce and Department of Transportation, and some firms which do not have current certification.

The following information is shown for each firm:

1. Company Name
2. Type of Contractor
3. Address
4. Telephone Number
5. Owned by Woman or Minority
6. Contact Person
7. Certified by County, SBA, DOC, DOT

The Directory is updated annually. The update will include any additional MBE/DBEs certified during that period.

Certification standards are included herein as Appendix 1.

5. PROCEDURES TO ASCERTAIN THE ELIGIBILITY OF MBE/DBES AND JOINT VENTURES INVOLVING MBE/DBES

The New Hanover County MBE/DBE Advisory Board, herein after called "Board", will certify the eligibility of MBE/DBEs and joint ventures involving MBE/DBEs which are named by competitors for **contracts** to be let by the City. The Board may also accept the certifications made by other agencies.

The City requires prime contractors to make good faith efforts to replace a MBE/DBE subcontractor which is unable to perform the contract successfully with another MBE/DBE. Substitutions of MBE/DBE subcontractors after bid opening and during contract performance must be approved by the City. In these instances, the City verifies the eligibility of the substitute firm with the MBE/DBE Directory and Advisory Board.

Any business which desires to participate as a a MBE/DBE will be required to complete and submit a certification application to the Board. Any business which desires to participate as a joint venture MBE/DBE will, in addition, be required to complete a Joint Venture certification application. The applications must be signed and notarized by the authorized representative of the business.

The required application must accompany the MBE/DBE participation information submitted to the City by competitors.

A firm seeking certification as a MBE/DBE will not be required to submit a certification application if:

The potential MBE/DBE contractors states, in writing, that it has submitted the same information to or has been certified by the City, any Department of Transportation agency, or other state or federal agency which uses essentially the same definition of ownership and control criteria as the City. In this case, the potential MBE/DBE must obtain the information and certification from the other agency and submit it to the City.

6. PERCENTAGE GOALS FOR THE DOLLAR VALUE OF THE WORK TO BE AWARDED TO MBE/DBES

Based on State and County goals for MBE/DBE, both of which are 10%, it is recommended that the goal for the City of Wilmington for the period from January 1, 1990 through June 30, 1990 be established at 10%.

As part of the budget process for Fiscal Year 1990-91, City staff will develop a process for establishing an annual goal in conjunction with the number and types of projects proposed for the fiscal year.

7. NOTICE PUBLISHING THE OVERALL GOAL

Once established, the overall goal will be submitted to the City Council. The Council will cause publication of a notice announcing that the proposed goal and methodology are available for inspection at its principal offices. Such notice shall be published in general circulation media and in any media of the disadvantaged community.

8. UPDATED GOAL

The overall goal will be reviewed at least annually. The review includes an analysis of projected versus actual MBE/DBE participation.

An updated overall goal and methodology must be established at least 30 days prior to the end of the previous goal period. An update shall be required even when the City does not anticipate awarding any contracts during the following 12-month period.

9. EXPLANATION FOR FAILING TO MEET MBE/DBE GOAL

Upon submission of bid proposals, bidders must submit required documentation, to demonstrate attempts to meet established goals. This documentation will be reviewed and verified by the Purchasing Agent.

Failure to meet established goals alone, upon submission of bid on a City-funded project will not cause the low bidder to be considered nonresponsive. However, failure to meet established goals, upon submission of bid on a federally-funded project may cause the bidder to be considered nonresponsive, even if s/he is the low bidder.

The City of Wilmington reserves the right to reject any and all bids submitted.

After contract award, representatives of the MBE/DBE Program will monitor activities involving MBE/DBE subcontractors to insure that the prime contractor is in compliance with applicable federal, state, and local regulations (wages, equal employment opportunities, etc.) MBE/DBE Program representatives will also monitor goal achievement by the contractors.

10. A MEANS TO ENSURE THAT COMPETITORS MAKE GOOD FAITH EFFORT TO MEET THE MBE/DBE GOAL

Whenever the City of Wilmington issues a solicitation for a **contract** which has subcontracting possibilities, the solicitation will contain the MBE/DBE contract goals. The City will follow this procedure for non-construction as well as construction projects. Thus, the appropriate goal will be included in Invitations to Bid (IFB) for construction work and in Requests for Proposals (RFP) for architectural, engineering, and other professional services.

The solicitation will include a statement that competitors will be required to submit MBE/DBE participation information, as a condition for receiving the contract. Competitors must meet the MBE/DBE goal or demonstrate to the City that it made good faith efforts to do so. The actual clause to be used in the solicitation for City-funded building projects is:

"The bidder/proposer shall make good faith efforts, as defined in the bid specifications, to subcontract \_\_\_\_\_ percent of the dollar value of the prime contract to businesses owned and/or controlled by minority, socially, and/or economically disadvantaged individuals (MBE/DBEs). In the event that the bidder for this solicitation qualifies as a MBE/DBE, the contract goal shall be deemed to have been met. Individuals who are rebuttably presumed to be socially and economically disadvantaged include women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, and Asian-Indian Americans. Bidders are required to submit information concerning MBE/DBEs which will participate in the contract. The information will include (1) name and address of each MBE/DBE; (2) a description of the work to be performed by each named firm; and (3) the dollar value of the work of the contract. If the bidder fails to achieve the contract goal stated herein, it is required to provide documentation demonstrating that it made good faith efforts in attempting to meet established goals. A bid that fails to meet these requirements will be considered non-responsive."

If a contract goal has been established, a bidder may not meet the requirements of the bid specification by stating that it will accomplish all work of the contract using its own employees. It, first, must demonstrate to the City's satisfaction, that it made good faith efforts to meet the goal, and despite these efforts, was unable to subcontract any of the work to MBE/DBEs.

If the contract goal specified in the solicitation is not met, the apparent successful competitor is required to submit documentation of the efforts made. An Interdepartmental Committee appointed by the City Manager shall then determine whether these are "good faith" efforts. The review by the Committee shall include interviews of all appropriate parties involved. As provided by G.S. 143-128(d), nothing in this policy shall be construed to require contractors to award contracts or subcontracts or to make purchases of materials or equipment from MBE/DBE contractors or subcontractors who do not submit the lowest responsible bid or bids. The following criteria will be used:

1. Whether the contractor attended any pre-solicitation or pre-bid meetings that were scheduled by the City to inform MBE/DBEs of contracting and subcontracting opportunities;
2. Whether the contractor advertised in general circulation, trade association, and minority-focus media concerning the subcontracting opportunities;
3. Whether the contractor provided written notice to a reasonable number of specific MBE/DBEs that their interest in the contract was being solicited, in sufficient time to allow the MBE/DBEs to participate effectively;
4. Whether the contractor followed up initial solicitations of interest by contacting MBE/DBEs to determine with certainty whether the MBE/DBEs were interested;
5. Whether the contractor selected portions of the work to be performed by the MBE/DBEs in order to increase the likelihood of meeting the MBE/DBE goals (including, where appropriate, breaking down contracts into economically feasible units to facilitate MBE/DBE participation);

6. Whether the contractor provided interested MBE/DBEs with adequate information about the plans, specifications, and requirements of the contract;
7. Whether the contractor negotiated in good faith with interested MBE/DBEs, not rejecting MBE/DBEs as unqualified without sound reasons based on a thorough investigation of their capabilities;
8. Whether the contractor made efforts to assist interested MBE/DBEs in obtaining bonding, lines of credit, or insurance required by the City or contractor;
9. Whether the contractor effectively used the services of available minority community organizations; minority contractors groups; local, state, and Federal minority business assistance offices, and other organizations which provide assistance in the recruitment and placement of MBE/DBEs.

The following points apply to good faith effort determinations:

1. Good faith efforts are those which could reasonably be expected to result in goal attainment by a bidder who aggressively and actively seeks to obtain MBE/DBE participation.
2. The above list of nine efforts are recommended as ones which bidders may make to obtain MBE/DBE participation.
3. The list above is not intended to be exhaustive; other factors or efforts may be relevant in appropriate instances.
4. The City will examine the quantity and intensity of the efforts as well as the type of actions taken. Efforts that are merely pro forma are not sufficient, even though they may be sincerely motivated.

11. A DESCRIPTION OF THE METHODS BY WHICH THE CITY WILL REQUIRE CONTRACTORS AND SUBCONTRACTORS TO COMPLY WITH APPLICABLE MBE/DBE REQUIREMENTS

The City of Wilmington will use the legal instrument of the contract clause to enforce N.C.G.S. 143-128 requirements.

The City requires prime contractors to submit information on the subcontract awards made to MBE/DBEs and MBE/DBEs. The information must be reported along with the bid proposal and includes the firm's name, description of work to be performed, and contract amount.

Records of all progress payments made by prime contractors are required on a monthly basis as part of the prime contractor's "Request for Contract Payment". Prime contractors must contact the City prior to terminating a MBE/DBE for any reason.

Records are verified by obtaining certified statements from MBE/DBE subcontractors. Other appropriate actions may be taken to ensure that prime contractors and subcontractors comply with the MBE/DBE provisions. These actions will include:

1. Desk audits to review all material and information concerning the contractor's compliance.

2. On-site reviews which include interviews, visits to project locations, and inspection of documents and/or information not available at the desk audit which pertains to the contractor's compliance.
3. Any additional investigation which may be called for by a lack of proper record keeping; failure of the prime contractor to cooperate; failure of MBE/DBEs to cooperate; visible evidence of unsatisfactory performance; other evidence as may warrant further investigation.

The City will make prompt compliance determinations regarding its prime contractors. Documentation of noncompliance will include the specific area in which the contractor failed to comply. In these instances, appropriate legal action consistent with the MBE/DBE and other contract provisions will be taken.

## 12. COUNTING MBE/DBE PARTICIPATION TOWARD MEETING THE GOALS

The City of Wilmington will count MBE/DBE participation toward the goals in accordance with the guidelines outlined below.

1. Once a firm is determined to be an eligible MBE/DBE, the total dollar value of the contract awarded to the MBE/DBE is counted toward the MBE/DBE goal.
2. If after contract award, a MBE/DBE is incapable of performing the subcontract for any reason, including ineligibility for certification, or decertification, the prime contractor will be given an opportunity to replace the MBE/DBE with an eligible MBE/DBE firm.
3. The City and its contractors will count toward the MBE/DBE goals a portion of the total dollar value of a contract with a certified joint venture equal to the percentage of ownership and control of the MBE/DBE partner in the joint venture.
4. The City and its contractors will count toward the MBE/DBE goals the total dollar value of a contract with a firm owned and controlled by two socially and economically disadvantaged individuals, each of whom has a 50% interest in the firm.
5. Only expenditures to MBE/DBEs which perform a commercially useful function in the work of a contract will be counted toward the MBE/DBE goals. A MBE/DBE is considered to perform a commercially useful function when it is responsible for execution 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 a MBE/DBE is performing a commercially useful function, the City and its contractors will evaluate the amount of work subcontracted, industry practices, and other relevant factors.
6. Consistent with normal industry practices, a MBE/DBE may enter into subcontracts. If a MBE/DBE contractor subcontracts a significantly greater portion of the work of than would be expected on the basis of normal industry practices, the MBE/DBE shall be presumed not to be performing a commercially useful function. The MBE/DBE may present evidence to the City via the Purchasing Agent to rebut this presumption. The decision by the Purchasing Agent is subject to review by City Manager.

7. The City and its contractors may count toward the MBE/DBE goals the following expenditures to MBE/DBE firms which are not manufacturers or regular dealers:
  - a. The fees or commission charged for providing a bona fide service, such as professional, technical, consultant or managerial services and materials or supplies required for performance of the contract, provided that the fee or commission is determined by the City to be reasonable and not excessive as compared with fees customarily allowed for similar services.
  - b. The fees charged for delivery of material and supplies required on a job site (but not the cost of the materials and supplies themselves) when the hauler, trucker, or delivery service is not also the manufacturer of or a regular dealer in the materials and supplies, provided that the fee is determined by the City to be reasonable and not excessive as compared with fees customarily allowed for similar services.
  - c. The fees of commission charged for providing any bonds or insurance specifically required for the performance of the contract, provided that the fee or commission is determined by the City to be reasonable and not excessive as compared with fees customarily allowed for similar services.

13. REQUIRED CLAUSES FOR CONTRACTS

The following clauses should be included in all public construction contracts of \$50,000 or more (but not in leases) between the City and any contractor and in all subcontracts entered as a result thereof.

Policy - It is the policy of the City of Wilmington that Minority Business and Disadvantaged Business Enterprises as defined in N.C.G.S. 143-128(c)(1)(2) shall have maximum opportunity to participate in the performance of contracts financed in whole or in part with City funds under this agreement. Consequently, the MBE/DBE requirements of N.C.G.S. 143-128(c) apply to this contract.

MBE/DBE Obligation - The City and its contractors agree to ensure that minority business and disadvantaged business enterprises have the maximum opportunity to participate in the performance of contract and subcontracts financed in whole or in part with City funds provided under this agreement. In this regard, contractors shall take all necessary and reasonable steps in accordance with the N.C.G.S. 143-128(c) to ensure that minority business and disadvantaged business enterprises have the maximum opportunity to compete for and perform contracts. The City of Wilmington and its contractors shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of contracts.

The City of Wilmington advises each contractor and subcontractor who performs on City building projects that failure to carry out the above requirements shall constitute a breach of contract. The following clause will be used for this purpose:

"All bidders, potential contractors, or subcontractors for this contract are hereby notified that failure to carry out the City of Wilmington policy and the MBE/DBE obligation, as set forth above, shall constitute a breach of contract which

may result in termination of the contract or such other remedy as deemed appropriate by the City."

## APPENDIX 1

### CERTIFICATION STANDARDS

The Board will take the following steps in determining whether a firm may be certified as a MBE/DBE:

1. Perform an on-site visit to the offices of the firm and to any job sites on which the firm is working at the time of the eligibility investigation.
2. Obtain resumes or work histories of the principal owners of the firm and personally interview these individuals.
3. Analyze the ownership of stock in the firm, if it is a corporation.
4. Analyze the bonding and financial capacity of the firm.
5. Determine the work history of the firm, including contracts it has received and work it has completed.
6. Obtain or compile a list of equipment owned or available to the firm and the licenses of the firm and its key personnel to perform the work it seeks to do as a part of the MBE/DBE program.
7. Obtain a statement from the firm of the type of work it prefers to perform as a part of the MBE/DBE program.

#### On-Site Certification Visits

Office and job site visits may be omitted from the investigation in the following situations.

1. When the Board, at its discretion, accepts the certification of another agency, which included such visits.
2. When the Board obtains the report of a site visit completed by another agency, which the Board relies upon. A firm applying for certification may be required to supply such report or cause the other agency to supply it. The Board will then draw its own conclusions regarding eligibility.
3. When the Board recertifies a firm which it previously reviewed on-site, and eligibility issues (i.e., change in ownership) have not arisen which necessitate a second visit. In the absence of such issues, an on-site visit need be conducted only once.

#### Decertification Procedures

Whenever the Board comes to believe that a firm with a current certification is no longer eligible, the firm will be afforded the rudiments of due process prior to revoking its eligibility. The steps to be used are:

1. A letter will be sent to the firm, stating that the Board is contemplating decertification. A brief description of the reasons for the proposed action will be included.
2. The firm will be given an opportunity to respond in person and in writing to present information and arguments. An informal meeting or hearing may be a part of the process, but a formal adversary proceeding will not be used.

While these procedures are not a statutory requirement, the Board will utilize them to make the process fair and to prevent unnecessary procedural litigation.

If the Board denies certification or completes a decertification on a firm which seeks to perform a federally-assisted contract, it may advise the firm that an appeal may be filed within 180 days of the decision with the appropriate federal agency. An appeal must be in writing, dated, and signed, and should be made after all appeal procedures of the sponsor have been exhausted.

The Board may disseminate to interested parties copies of the certification decisions rendered by the Board. Such decisions are generally in response to appeals of certification denials.

The decisions apply only to the actions that were contested and do not bind other agencies to make the same judgment concerning a firm's eligibility.

#### Determination of Business Size

The first step in the certification process is to make a determination of business size. If the applicant is not a "small business concern", as defined below, it will be certified by the Board, even though it may be owned and controlled by socially and economically disadvantaged individuals and eligible in all other respects. Even a firm certified by the Small Business Administration (SBA) under the 8(a) program is not eligible if it is not small.

1. The size standards established by the SBA in 13 CFR Part 121, as revised on May 23, 1988, are used for making size determinations. (See Appendix 2)
2. No firm is considered small if, including its affiliates, it averages annual gross receipts in excess of \$14 million over the previous three fiscal years. Thus, a general contractor must "graduate" from the program once its gross receipts exceed the \$14 million ceiling.
3. Contractors are still subject to applicable lower limits established by the SBA. (For example, the SBA size limit for electrical contractors is \$7 million (average of annual gross receipts for three-year period). The \$7 million limit, rather than the \$14 million ceiling, governs in size determinations of these contractors.
4. For subcontractors of \$10,000 or less, a firm is small under the SBA regulations if, including its affiliates, it has no more than 500 employees.
5. For subcontracts over \$10,000 and prime contracts, a firm is small under the SBA regulations if, including its affiliates, it meets the applicable standard in terms of average gross receipts, number of employees, or other measure.

In some instances, the SBA standard, measuring in gross receipts, may not always be applicable. For example, a manufacturer of concrete products (SIC 3272) is small if it

has no more than 500 employees. If one of these businesses earns gross receipts in excess of the \$14 million cap, it would not qualify as small, nor for eligibility as a MBE/DBE, even though it may have less than 500 employees.

6. All affiliates of a firm, as well as the firm itself, are considered when determining gross receipts earned or number of persons employed. Affiliation exists if one firm controls or has the power to control the other, or a third party (or parties) controls or has the power to control both firms.
7. Information on gross receipts earned by an applicant is obtained from its submission of the certification application and supporting documentation.
8. If a firm applies for certification in more than one category (i.e. general contractor and special trade subcontractor), the applicable SBA standard is the one that describes the work the firm will perform under the City contract.
9. Size determinations will be reviewed annually in connection with the recertification process.

#### Challenge Procedures

Any third party may present evidence challenging whether a firm's owners who are presumed to be socially and economically disadvantaged are truly disadvantaged. Individuals certified as 8(a), however, are not subject to these challenges. (Challenges made against owners of 8(a) firms, shall be referred to the SBA for resolution.)

When the Board receives a written challenge to the disadvantaged status of a business owner which is certified or seeking certification, the Board will make a determination of social and economic disadvantage. The Board will initiate an indepth review in order to resolve the challenge, if deemed appropriate.

The guidelines in the Standard Operating Procedures will be used for these actions. Because the procedures are informal, strict rules of evidence do not apply.

While a challenge is in progress, the presumption of social and economic disadvantage continues, and if the firm has been certified, it will continue to be eligible as a MBE/DBE.

#### Eligibility Standards

The Board will use the following standards to determine whether a firm is owned and controlled by one or more socially and economically disadvantaged individuals.

1. Bona fide membership in a group of socially and economically disadvantaged individuals must be established on the basis of the applicant's claim that s/he is a member of such group and is so regarded by that particular disadvantaged community. However, the City is not required to accept the claim if it is determined to be invalid.

Proof of ancestry alone is not conclusive evidence of membership in a group of socially and economically disadvantaged individuals. The fact that a person's grandfather or

other relative belonged to one of these groups does not not necessarily qualify the applicant as a member for purposes of MBE/DBE certification.

If the individual has not held him/herself out to be a member of the community of disadvantaged individuals, has not acted as a member of that community, and would not be identified by persons in the population at large as a member of the group, the individual is not considered as belonging to that disadvantaged group for purposes of MBE/DBE certification.

2. An eligible MBE/DBE must be an independent business. The ownership and control by disadvantaged persons must be real, substantial, and continuing and must go beyond the pro forma ownership of the firm, as reflected in its ownership documents. The disadvantaged owners must enjoy the customary incidents of ownership and must share in the risks and profits commensurate with their ownership interests, as demonstrated by an examination of the substance rather than form of arrangements. Recognition of the business as a separate entity for tax or corporate purposes is not necessarily sufficient for recognition as a MBE/DBE. In determining whether a potential MBE/DBE is an independent business, the City considers all relevant factors, including the date the business was established, the adequacy of its resources for the work of the contract, and the degree to which financial, equipment leasing, and other relationships with non-MBE/DBE firms vary from industry practices.
3. The disadvantaged owners must also possess the power to direct or cause the direction of the management and day-to-day, as well as major decisions on matters of management, policy, and operations. The firm must not be subject to any forms or informal restrictions which limit the customary discretion of the disadvantaged owners. There must not be restrictions through, for example, bylaw provisions, partnership agreements, or charter requirements for cumulative voting rights or otherwise that prevent the disadvantaged owners, without the cooperation or vote of any owner who is not socially and economically disadvantaged, from making a business decision of the firm.
4. If the owners of the firm who are not socially and economically disadvantaged individuals, are disproportionately responsible for the operation of the firm, then the firm is not controlled by socially and economically disadvantaged individuals and is not eligible. Where the actual management of the firm is contracted out to individuals other than the owner, the persons having the ultimate power to hire and fire the managers are considered as controlling the business.
5. All securities which constitute ownership and/or control of a corporation for purposes of establishing it as a MBE/DBE must be held directly by socially and economically disadvantaged individuals. No securities held in trust, or by any guardian for a minor shall be considered as held by socially and economically disadvantaged individuals in determining the ownership or control of a corporation.
6. The contributions of capital or expertise by the socially and economically disadvantaged individuals to acquire their interests in the firm shall be real and substantial. Examples of insufficient contributions include a promise to contribute capital, a note payable to the firm or its owners who are not socially and economically disadvantaged, or the mere participation as an employee, rather than as a manager.

7. In addition to the above standards, special consideration is given to the following circumstances:
  - a. Newly formed firms and firms whose ownership and/or control has changed since the date of the advertisement of the contract are closely scrutinized to determine the reasons for the timing of the formation or change in the firm.
  - b. A previous and/or continuing employer-employee relationship between or among present owners is carefully reviewed to ensure that the employee-owner has management responsibilities and capabilities, as referenced above.
  - c. Any relationship between a MBE/DBE and a non-MBE/DBE which has an interest in the MBE/DBE is carefully reviewed to determine if the interest of the non-MBE/DBE conflicts with the requirements for ownership and control.
8. A joint venture will be certified if the MBE/DBE partner of the joint meets the eligibility standards, is responsible for a clearly defined portion of the work to be performed, and shares in the ownership, control, management responsibilities, risks, and profits of the joint venture.
9. A joint venture is eligible to compete in a MBE/DBE program if the MBE/DBE partner of the joint venture meets the eligibility standards; the MBE/DBE partner's share in the ownership, control, management responsibility, risks, and profits of the joint venture is at least 51 percent; and the MBE/DBE partner is responsible for a clearly defined portion of the work to be performed.
10. A business applying for certification as a MBE/DBE or as a joint venture MBE/DBE must cooperate with the City in supplying any additional information which may be requested in order to make a determination.
11. The City safeguards from disclosure to unauthorized persons information that reasonably may be regarded as confidential business information, consistent with federal, state, and local law.
12. Once certified, a MBE/DBE will be required to update its submission annually by submitting a new certification application or certifying that the one on file is still accurate. Firms are notified upon certification that a new certification application must be submitted whenever there is a change in the firm's ownership or control.
13. The denial of certification by the Board is final for the particular contract and any other contracts being let at the time of the denial (except when the Board reverses the denial, following an appeal). Firms denied certification may correct deficiencies in their ownership and control and re-apply for certification only for future contracts.

## APPENDIX 2

### BID CONDITIONS - MINORITY BUSINESS ENTERPRISE/DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

The following bid conditions apply to this contract. Submission of a bid/proposal by a prospective contractor shall constitute full acceptance of these bid conditions.

1. Definition - Minority Business Enterprise (MBE)/Disadvantaged Business Enterprise (DBE) is a business which is at least 51% owned and controlled by a minority or woman.
2. Policy - It is the policy of the City of Wilmington that minority businesses or disadvantaged businesses, as defined by N.C.G.S. 143-128(c)(1)(2) have maximum opportunity to participate in the performance of contracts and subcontracts funded in whole or in part with public funds. Consequently, the MBE/DBE requirements of N.C.G.S. 143-128(c) apply to this contract.
3. MBE/DBE Obligation - The contractor agrees to ensure that MBE/DBEs have maximum opportunity to participate in the performance of contracts or subcontracts financed in whole or in part with City funds. In this regard, all contractors shall take all necessary and reasonable steps in accordance with N.C.G.S. 143-128(c) to ensure that MBE/DBEs have maximum opportunity to compete for and perform contracts. Contractors shall not discriminate on the basis of race, color, national origin, or sex, in the award and performance of City contracts.
4. Compliance - All bidders, potential contractors, or subcontractors for this contract are hereby notified that failure to carry out the City policy and the MBE/DBE obligation, as set forth above, shall constitute a breach of contract which may result in termination of the contract or such other remedy as deemed appropriate by the owner.
5. Subcontract Clauses - All bidders and potential contractors hereby assure that they will include the above clauses in all subcontracts which offer further subcontracting opportunities.
6. Contract Award - Bidders are hereby advised that meeting the MBE/DBE subcontract goals or making an acceptable good faith effort to meet such goals are conditions of being awarded this contract. The owner proposes to award the contract to the lowest responsive and responsible bidder submitting a reasonable bid, provided s/he has made an acceptable good faith effort to meet the goals for MBE/DBE participation.

Bidders are advised that the owner has sole authority to determine if the bidders have made sufficient effort toward meeting MBE/DBE goals to qualify for contract award. The owner reserves the right to reject any or all bids submitted.

7. Subcontract Goals - The attainment of goals established for this contract are to be measured as a percentage of the total dollar value of the contract. The goals established for this contract are as follows:

% MBE/DBE\*

\* MBE/DBE goals are accomplished via subcontracts performed by certified businesses.

8. Available MBE/DBEs - The owner has on file a MBE/DBE program which has been approved by City Council. This program contains a listing of MBE/DBEs. Bidders are encouraged to inspect this list to assist in locating MBE/DBEs for the work to be done. Other MBE/DBEs may be added to the list in accordance with the owner's approved MBE/DBE program. Credit toward meeting the MBE/DBE goals will not be counted unless the MBE/DBE to be used can be certified by the owner.
9. Contractor's Required Submission - The following information concerning MBE/DBE participation in the contract must be submitted along with the bid proposal.

Disadvantaged/Minority Subcontracts

<u>Minority Subcontractors Names and Addresses</u>	<u>Subcontract Work Item</u>	<u>Dollar Value of Subcontract Work</u>
_____	_____	_____
_____	_____	_____
_____	_____	_____
Total Dollar Value of Subcontract Work		_____
Total Dollar Value of Basic Bid		_____
Percent of Total		_____

Women Subcontracts

<u>Women Subcontractors Names and Addresses</u>	<u>Subcontract Work Item</u>	<u>Dollar Value of Subcontract Work</u>
_____	_____	_____
_____	_____	_____
_____	_____	_____
Total Dollar Value of Subcontract Work		_____
Total Dollar Value of Basic Bid		_____
Percent of Total		_____

If the contractor fails to meet the contract goals established in Paragraph 7 above, s/he must submit information, along with the bid proposal, which will assist the owner in determining whether or not the contractor made acceptable good faith efforts to meet the contract goals. Failure to meet the goals by lack of good faith efforts will disqualify the bidder's proposal.

Suggested guidance for use in determining if good faith efforts were made by a contractor are included in the MBE/DBE Program Guidelines.

A list of the efforts that a contractor may make and the owner may use in making a determination as to the acceptability of a contractor's efforts to meet the goals, are as follows:

1. Whether the contractor attended any pre-solicitation or pre-bid meetings that were scheduled by the recipient to inform the MBE/DBEs of contracting and subcontracting opportunities;
  2. Whether the contractor advertised in general circulation, trade association, and minority-focus media concerning the subcontracting opportunities;
  3. Whether the contractor provided written notice to a reasonable number of specific MBE/DBEs that their interest in the contract was being solicited, in sufficient time to allow the MBE/DBEs to participate effectively;
  4. Whether the contractor followed up initial solicitations of interest by contacting MBE/DBEs to determine with certainty whether the MBE/DBEs were interested;
  5. Whether the contractor selected portions of work to be performed by MBE/DBEs in order to increase the likelihood of meeting the MBE/DBEs goals (including, where appropriate, breaking down contracts into economically feasible units, to facilitate MBE/DBE participation);
  6. Whether the contractor provided interested MBE/DBEs with adequate information about the plans, specifications, and requirements of the contract;
  7. Whether the contractor negotiated in good faith with interested MBE/DBEs, not rejecting MBE/DBEs as unqualified without sound reasons, based on a thorough investigation of their capabilities.
10. Contractor Assurances - The bidder hereby assures that s/he will make a good faith effort to meet the following:
- a. The MBE/DBE participation goals as established in Paragraph 7 above, which is included.
  - b. The MBE/DBE participation percentage shown in Paragraph 9, which has been submitted as a condition of contract award.

Agreements between bidder/proposer and a MBE/DBE in which the MBE/DBE promises not to provide subcontracting quotations to other bidders/proposers are prohibited. The bidder shall make a good faith effort to replace a MBE/DBE subcontractor which is unable to perform successfully, with another MBE/DBE subcontractor. Substitution must be coordinated and approved by the owner.

The bidder shall establish and maintain records and submit regular reports, as required, which will identify and assess progress in achieving MBE/DBE subcontract goals and other MBE/DBE affirmative action efforts.