WSSC Code of Regulations

Title 6. Procurement
Subtitle II. Supplied Diversity
Chapter 6.30 Minority Business Enterprise (MBE) Program

Article I. General Provisions

6.30.010 Purpose.

In accordance with the Public Utilities Article, §§ 20-203 and 20-204, Annotated Code of Maryland, this chapter establishes:

(a) A minority business enterprise utilization program to **[**facilitate**] TO REMEDY DISCRIMINATION BY FACILITATING** participation of responsible certified minority business enterprises (MBE) in design/build and construction contracts awarded by the Washington Suburban Sanitary Commission ("Commission" or "WSSC"); and

(b) A minority business enterprise utilization program to **[**facilitate**] TO REMEDY DISCRIMINATION BY FACILITATING** participation of responsible certified minority business enterprises in goods and services contracts awarded by the Commission other than those covered by the program for design/build and construction contracts.

(c) Specialized terms used in this chapter are defined in WSSC 6.30.030.

6.30.020 Statement of policies and objectives.

(a) *Policies.*

(1) WSSC is committed to avoid being an active or passive participant in public or private sector discrimination or in any system of exclusion based on race, gender or ethnicity.

(2) WSSC will carry out the requirements of the Public Utilities Article, §§ 20-203 and 20-204, Annotated Code of Maryland, in a manner consistent with the United States Constitution, the Maryland Constitution, and applicable federal and state statutes and regulations, as construed by applicable judicial precedent.

(3) **[**WSSC has a compelling interest to remedy any ongoing effects of marketplace **]** **WSSC'S MOST RECENT DISPARITY STUDY DEMONSTRATES A STRONG BASIS IN EVIDENCE OF** discrimination against minority- and women-owned business enterprises **[**that are ready, willing, and able to provide services for any of the four contracting areas to the Commission**] IN THE COMMISSION'S GEOGRAPHIC AND PRODUCT MARKETS**.

(4) **[** In accordance with constitutional requirements relating to proper justification for a minority business program, WSSC must determine whether there is a strong basis in evidence of ongoing effects of past or present discrimination, and must also determine that remedial action is necessary to alleviate any identified discrimination. WSSC's factual predicate for this chapter includes a study demonstrating a statistically significant disparity between availability and utilization of ready, willing and able prime contractors and subcontractors that are minority- and women-owned business enterprises.

(5)**]** The remedies in this chapter are intended to further WSSC's **[**compelling interest in ensuring**] OBLIGATION TO ENSURE** that the Commission is neither an active nor passive participant in private or public sector marketplace discrimination, and to actively promote equal opportunity for all segments of the contracting and business community to participate in WSSC contracts.

[(6)**] (5)(I)** This chapter's remedies are narrowly tailored and **[**are intended to promote greater availability, capacity development, and contract participation by**] VERY CAREFULLY DESIGNED AND TIGHTLY TARGETED TO BE EFFECTIVE AND TO REMEDY DISCRIMINATION AGAINST** minority- and women-owned business enterprises in WSSC contracts.

(II) The Commission shall use race- and gender-conscious means for addressing **[**statistically significant disparities within its contract participation**] DISCRIMINATION** as a last resort only after considering use of race- and gender-neutral means and finding that they alone will **[**likely**]** be insufficient to remedy the effects of identified discrimination.

[(7)**](6)** The General Manager/CEO, in consultation with the OSDI Director, the Chief Procurement Officer and the General Counsel, on an ongoing basis, will recommend to the Commission amendments to this chapter necessary to comply with changes in applicable law and to fully effectuate the policies and objectives set forth herein.

[(8)**](7)** The Commission shall take all necessary, reasonable, and legal action to prevent discrimination, and to ensure that all businesses (including minority- and women-owned business enterprises) are afforded **[**the maximum practicable**] A FULL AND FAIR** opportunity to participate in the Commission's contracting process.

[(9)**](8)** Consistent with Title 19 of the State Finance and Procurement Article, Annotated Code of Maryland, the Commission will not enter into a contract with any business entity that has discriminated in the solicitation, selection, or treatment of subcontractors, suppliers, vendors, or commercial customers or any otherwise unlawful use of characteristics regarding the vendor's, supplier's, or commercial customer's employees or owners as provided for in state law.

[(10)**](9)** The Office of Supplier Diversity and Inclusion (OSDI) **DIRECTOR** along with the Chief Procurement Officer shall have primary oversight responsibility with the full support and cooperation of all other WSSC offices in administering and ensuring compliance with all policies and procedures established herein.

[(11)**](10)** WSSC shall implement such other policies that are consistent with applicable law and that it deems necessary and appropriate to remedy the ongoing effects of past and present discrimination.

(b) *Objectives.* The objective of this chapter **[**include: (1) To eliminate or minimize statistically significant underutilization of**] IS TO** remedy **DISCRIMINATION AGAINST** minority- and women-owned business enterprises in **[**those contracting categories and for those ethnicities in which such underutilization has been found to exist. In pursuing this objective, the Commission may use race- and gender-conscious remedies for addressing statistically significant underutilization within its contract participation, as a last resort only after considering use of race- and gender-neutral means and finding that they alone will likely be insufficient to remedy the effects of identified discrimination**] THE GEOGRAPHIC AND PRODUCT MARKETS IN WHICH THE COMMISSION PARTICIPATES**.

[(2) To increase participation of ready, willing and able minority- and women-owned business enterprises that are aware of WSSC contracting opportunities and who avail themselves of those opportunities by competing for WSSC prime contracting and subcontracting opportunities.**]**

6.30.030 Definitions.

(a) "Affirmative procurement initiatives (APIs)" means waivers, bid incentives, price preferences, optimization of diverse business development program, subcontracting, small contract rotation program, mentor-protege program, and MBE or WSSC-approved SLBE preference points in the proposal evaluations, expanded unbundling of contracts, bonding and insurance requirements, and expedited payments for subcontractors.

(b) "Architectural and engineering (A&E)" means professional services of an architectural or engineering nature; or required to be performed or approved by a person licensed, registered, or certified to provide such services; or related to research, planning, development, design, construction, alteration, or repair of real property; or incidental services, which such individuals perform, including studies, investigations, surveying, mapping, tests, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manuals, and other related services. Systems engineering related to WSSC information technology is included in professional services.

(c) "Award" means the final selection of a bidder or offeror for a specified prime contract or subcontract dollar amount. Contract awards are made by the Commission to prime contractors or vendors and by prime contractors or vendors to subcontractors or sub-vendors, usually pursuant to an open invitation for bid (IFB) or request for proposal (RFP) or qualification process. (Contract awards are to be distinguished from contract payments in that they only reflect the anticipated dollar amounts instead of actual dollar amounts that are paid to a bidder or offeror under an awarded contract.)

(d) "Bid discounts" means a race- and gender-conscious remedy for competitively bid contracts. These discounts are subject to the Public Utilities Article, § 20-204(b)(10), Annotated Code of Maryland (and any successor provision).

(e) "Bidder" means a firm submitting a price or proposal in response to an invitation for bid (IFB) or request for quote (RFQ).

(f) **[**Commercially Useful Function*.* A**] "COMMERCIALLY USEFUL FUNCTION" MEANS A** business enterprise or firm performs a commercially useful function when, based on all relevant facts and circumstances, it is responsible for execution of the work of the contract by actually performing, managing and supervising the work involved. Thus, the enterprise or firm must be responsible, with respect to material and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material and installing (where applicable) and paying for the material itself. A minority business enterprise (MBE) does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of MBE participation. In determining whether an MBE is such an extra participant, the OSDI will examine similar transactions, particularly those in which MBEs do not participate.

(g) "Construction" means the process of building, altering, repairing, improving, or demolishing any public facility, including any public structure, public building, pipelines, plants, infrastructure, or other public improvements of any kind to real property. It does not include the routine operation, routine repair, or routine maintenance of any existing public facility, including structures, buildings, plants, pipelines, infrastructure, or real property. Construction materials and supplies may be part of a construction purchase if procured by the contractor. If construction materials and supplies are purchased directly by WSSC, they are classified as goods and services purchases.

(h) "Contracting area(s)" means WSSC's four broad contracting areas of architectural and engineering, construction, goods and services and professional services. Also referred to as "industry categories."

(i) "Disparity study" means **[**the study prepared by MGT of America, Inc., of Tallahassee, Florida (MGT) that statistically analyzed WSSC prime contracts and subcontracts during the period July 1, 2009, to June 30, 2014. **]THE MOST RECENT STUDY, PROCURED OR PERFORMED BY THE COMMISSION, TO ASSESS THE EXISTENCE OF DISCRIMINATION IN THE GEOGRAPHIC AND PRODUCT MARKETS IN WHICH THE COMMISSION PARTICIPATES, THROUGH THE ANALYSIS OF QUANTITATIVE AND QUALITATIVE EVIDENCE.[**For the purposes of analyzing prime contractor utilization, the disparity study considered purchase orders and direct payments that were extracted from several WSSC data sources and opened or issued from the period July 1,

2009, to June 30, 2014. In the disparity study, each purchase order and direct payment is referred to as a contract.**]**

(J) "ELIGIBLE MBE" MEANS ANY FIRM THAT:

(1) MEETS THE DEFINITION OF AN MBE IN PARAGRAPH (T) OF THIS SECTION;

(2) IS A MEMBER OF A GROUP OF FIRMS THAT THE MOST RECENT DISPARITY STUDY DEMONSTRATES, BY A STRONG BASIS IN EVIDENCE, HAS BEEN SUBJECTED TO RACIAL, ETHNIC OR GENDER DISCRIMINATION; AND

(3) IS DESIGNATED IN A LIST OR CHART MAINTAINED ON THE WSSC WEBSITE AS REQUIRED BY SECTION 6.30.240 OF THIS CHAPTER.

[(j) *Goal.* As used in this chapter, a "goal" is either**]**

(K) "GOAL" MEANS either an annual, aspirational goal or a contract-specific subcontracting **[**requirement**] GOAL**. Annual aspirational goals are inapplicable to individual contracts, but are intended to serve as a benchmark against which to measure the overall effectiveness of the MBE program in **[**increasing participation of ready, willing and able**] REMEDYING DISCRIMINATION AGAINST** minority- and women-owned business enterprises in WSSC contracting opportunities for WSSC's contracting areas. Additional information concerning establishing and implementing annual, aspirational goals and **[**contract-by-contract**] CONTRACT-SPECIFIC** subcontracting **[**requirements**] GOALS** is found in Article III of this chapter.

[(k) *Good Faith Efforts.* As used in this chapter, "good faith efforts" shall mean**]**

(L) "GOOD FAITH EFFORTS" MEANS the actions taken by a bidder (or prime contractor post-award), as established by reliable documentation, to secure subcontracting participation of the **[**specific racial, ethnic or gender class of MBE**] ELIGIBLE MBE** required to meet the applicable subcontracting **[**requirement**] GOAL**. Even if it fails to meet a subcontracting **[**requirement**] GOAL**, a bidder (or prime contractor post-award) shall have the right to document adequate good faith efforts, in accordance with WSSC's Good Faith Efforts Guide or successor, which includes (in summary):

(1) Demonstrating that it timely advertised in general circulation, trade association, and minority-focused media concerning the subcontracting opportunities;

(2) Submitting the names and addresses of each **ELIGIBLE** MBE subcontractor the bidder contacted and referred, and the actions taken with respect to contracting, and the results of the contacts;

(3) Identifying actions taken to subdivide the work in order to enhance the potential to subcontract with **ELIGIBLE** MBEs;

(4) Submitting a copy of information about the plans, specifications, and requirements of the contract provided to each interested **ELIGIBLE** MBE contacted;

(5) Demonstrating that no interested **ELIGIBLE** MBE was rejected without a valid reason (e.g., failure to submit reasonable price quote or to demonstrate qualifications, inability to provide needed good or service);

(6) Attempting to assist interested **ELIGIBLE** MBEs in obtaining bonding or insurance; or

(7) Attempting to use minority community organizations; minority business and contractor's groups; local, state and federal MBE development organizations; and other organizations that provide assistance in placing **ELIGIBLE** MBEs.

[(l)**](M)** "Good Faith Efforts Guide" means a document used during the solicitation process that describes in detail the enumerated good faith efforts criteria that prime contractors must employ pre- and post-award to **[**maximize the participation/utilization**] ENSURE THE FULL AND FAIR PARTICIPATION** of certified **ELIGIBLE** MBEs or WSSC-approved SLBEs. It details the process by which a prime contractor may request full and partial waiver of MBE or WSSC-approved SLBE subcontracting **[**requirements**] GOALS**.

[(m)**](N)(1)** "Goods" means all supplies, equipment, materials, and tangible personal property, **[**excluding real property**]**.

(2) "GOODS" INCLUDES TREATMENT PLANT PARTS AND SUPPLIES, WATERMETERS, FIRE HYDRANTS, VALVES, OFFICE SUPPLIES AND EQUIPMENT, VEHICLES AND OTHER MATERIALS.

(3) "GOODS" DOES NOT INCLUDE REAL PROPERTY.

[(n) *Goods and Services.* The term "goods" means physical items such as treatment plant parts and supplies, water meters, fire hydrants, valves, office supplies and equipment, vehicles and

other materials. The term "services" means business, cleaning and restoration, communication and waste management services.**]**

(o) *Graduation.* **[**A MBE firm permanently graduates from the MBE program when it**]** **"GRADUATION" MEANS WHEN A MBE FIRM** meets the criteria for graduation as set forth in Article IV of this chapter. A MBE firm that graduates from the MBE program is no longer eligible to participate in the race- and gender-conscious remedies described in this chapter, but may participate in race- and gender-neutral remedies.

(p) "Industry categories" means procurement groupings for WSSC, inclusive of architectural and engineering, construction, goods and services, and professional services (i.e., manufacturing, wholesale and retail distribution of commodities and nonprofessional services). Industry categories are also referred to as "contracting areas."

(q) "Invitation for bids (IFB)" means a method of soliciting sealed bids which are awarded to the lowest, responsible, and responsive bidder(s) generally opened publicly at a fixed date and time and read out loud in the presence of one or more witnesses.

(r) "Joint venture" means an association of two or more persons or businesses carrying out a single business enterprise for which purpose they combine their capital, efforts, skills, knowledge or property. Joint ventures must be established by written agreement, and prior to submission of a bid, validated by the OSDI.

(s) "MBE **[**contract-by-contract subcontracting requirements**] CONTRACT SPECIFIC SUBCONTRACTING GOALS**" means a race- or gender-conscious remedy in which prime contractors or vendors are required to make good faith efforts to subcontract a minimum percentage of the value of prime contract dollars to certified **[**MBE firms**] ELIGIBLE MBES**. Such subcontracting **[**requirements**] GOALS** shall be determined in accordance with the policies and procedures set forth in this chapter. **[**Also known as subcontracting "goals."**]**

(t)**(1)** "Minority business enterprise **[**(MBE or M/WBE)**] OR MBE**" means any legal entity, except a joint venture, that is organized to engage in commercial transactions, which is certified as being at least 51 percent owned, managed, and controlled by one or more socially and economically disadvantaged minority or woman individuals as defined in the State Finance and Procurement Article, § 14-301, Annotated Code of Maryland, and that is ready, willing, and able to sell goods or services that are purchased by the WSSC.

(2) [Unless otherwise stated, the term "MBE" or "M/WBE" as used in this chapter is inclusive of**] "MINORITY BUSINESS ENTERPRISE" INCLUDES, UNLESS OTHERWISE STATED,** women-owned business enterprises (WBEs), and disadvantaged business enterprises (DBEs) that are certified in accordance with state law and regulations.

(u) "North American Industry Classification System (NAICS)" means the six-digit code standard used by federal statistical agencies in classifying business establishments by the type of goods or services a firm provides.

(v) "Notice to proceed (NTP)" means a communication from WSSC to a contractor stating the date the contractor can begin work subject to the contract conditions.

(w) "Office of Supplier Diversity and Inclusion Director (OSDI Director)" means the WSSC personnel who is responsible for the management of the OSDI, and ultimately responsible for oversight, tracking, monitoring, administration, and implementation of the MBE and SLBE programs, including but not limited to this chapter (formerly the Small, Local and Minority Business Enterprise (SLMBE) Director).

(x) "Office of Supplier Diversity and Inclusion (OSDI)" means the office within the Commission that is primarily responsible for implementing and administering the MBE and SLBE programs (formerly the Small, Local and Minority Business Enterprise (SLMBE) Office).

(y) "Optimization of diverse business development program (ODBDP)" means an affirmative procurement initiative designed to identify a portion of WSSC procurements and contracts for bidding exclusively by MBEs or WSSC-approved SLBEs to facilitate their competitive development (formerly "sheltered market program").

(z) "Points" means the quantitative assignment of value for specific evaluation criteria in the contractor selection process pursuant to a request for proposal, request for qualification or multi-step invitation bid selection method.

(aa) "Prime contractor" means the vendor or contractor to whom a purchase order or contract is issued by the WSSC for purposes of providing goods or services for the WSSC.

(bb) "Professional services" means services provided by skilled professionals other than architectural and engineering. Such services include without limitation: IT consulting, management consulting, legal and accounting.

(cc) "Race- and gender-conscious remedy" means a race- and gender-conscious measure that is used in addition to a race- and gender-neutral measure described herein or in WSSC Chapter 6.35 (or any successor SP thereto).

(dd) **[**Race- and Gender-Neutral Remedy. Efforts**]** **"RACE-AND GENDER NEUTRAL REMEDY MEANS** to open procurement opportunities in general, or specifically to small or newly formed firms, are collectively described as "race- and gender-neutral" programs. Neutral programs also include bonding assistance and small business lending programs.

(ee) "Request for bid/quotation" means an informal solicitation where oral or written quotes are obtained from vendors, without formal advertising or receipt of sealed bids.

(ff) "Request for proposals (RFP)" means all documents utilized by WSSC for soliciting proposals. This competitive selection method is used for procurements where the Commission has determined that price should not be the sole determinant when procuring specified types of supplies, services or construction. Proposals submitted in response to a RFP are analyzed and ranked based on evaluation factors and their corresponding relative weights, as stated in the RFP. For architectural and engineering (A&E) contracts (and some professional service contracts), WSSC may use a process that begins with publication of an announcement indicating the Commission's intention to retain an A&E consultant and requesting interested firms to submit a statement of their qualifications for the proposed project. (This announcement is hereinafter referred to as a "request for qualifications.")

(gg) **[**"Requirement" means a minimum subcontracting percentage for MBE participation which may be established as a goal on a contract-by-contract basis by the OSDI Director or designee.

(hh)**]** "Responsible" means a firm is capable in all respects to fully perform the contract requirements and has the integrity and reliability which will assure good faith performance.

[(ii)**] (HH)** "Responsive" means a firm's bid or proposal conforms in all material respects to the invitation to bid or request for proposal and shall include compliance with MBE and SLBE program requirements.

[(jj)**] (II)** "Services" means the furnishing of labor, time, or effort not involving the delivery of a tangible material product other than reports which are merely incidental to the required performance. This term excludes employment agreements and collective bargaining agreements, but includes consulting, professional, technical, and advisory services.

[(kk)**] (JJ)** "SLBE/MBE subcontracting and supplier certification (SLBE/MBE subcontracting plan)" means the subcontracting plan that identifies how the prime contractor intends to comply with the MBE or WSSC-approved SLBE subcontracting participation requirements of the contract.

[(ll)**] (KK)** "Small local business enterprise (SLBE)" means a firm that is approved by the OSDI based on the eligibility **[**requirement**] REQUIREMENTS** as set forth in WSSC Chapter 6.35 (or its successor SP). Also known as a WSSC-approved SLBE.

[(mm)**] (LL)** "Standard procedure" refers to the standard procedure codified in this chapter or WSSC Chapter 6.35 (or any successor SP, except where another WSSC standard procedure is expressly indicated). The terms "policy," "MBE policy," "MBE program," "SLBE policy" "SLBE program," and "SLBE or MBE program" are used synonymously with "SP" herein.

[(nn)**] (MM)** "Subcontractor or sub-consultant" means any vendor or contractor that is providing goods or services to a prime contractor in furtherance of the prime contractor's performance under a contract or purchase order with WSSC.

[(oo)**] (NN)** "Waiver" means an exclusion from the provisions of the MBE or SLBE program requirements granted by the Commission.

[(pp) "Women-Owned Business Enterprise (WBE). As used in this chapter,**] (OO) "WOMEN-OWNED BUSINESS ENTERPRISE OR WBE"** means any legal entity, except a joint venture, that is organized to engage in commercial transactions and that is certified as being at least 51 percent owned, managed and controlled by a female(s). **[**Unless otherwise stated, the term "WBE" as used in this chapter is inclusive of women-owned business enterprises (WBEs) that have obtained WBE certification in accordance with the provisions of WSSC 6.30.240.**]**

[(qq)**] (PP)** "WSSC" or the "Commission" means the Washington Suburban Sanitary Commission.

[(rr)**] (QQ)** "WSSC relevant market area **OR GEOGRAPHICAL MARKET AREA**" means the geographical area **CONSISTING OF THE COUNTIES AND MUNICIPALITIES** where **[**the **]**firms that have been awarded the **SUBSTANTIAL** majority of WSSC contract dollars are located **ACCORDING TO THE MOST RECENT DISPARITY STUDY**. **[**Defined in the 2015 disparity study, the relevant market area includes those cities and counties in the Washington-Arlington-Alexandria, DC-VA-MD-WV metropolitan statistical area (MSA) plus Anne Arundel County, MD,

Baltimore County, MD, Carroll County, MD, city of Baltimore, MD, and Howard County, MD. Also known as "geographical market area."**]**

[(ss)**] (RR)** "WSSC Supplier Portal System" (supplanted Centralized Bidder Registration (CBR) System on November 9, 2015) means a mandatory automated web-based system wherein the Commission requires all prospective bidders, contractors, vendors, and subcontractors that are ready, willing, and able to sell goods or services to the Commission to register online in accordance with WSSC Chapter 6.05. All prime contractors and their direct subcontractor(s) on WSSC-funded contracts must be registered in the Supplier Portal. Failure to do so will delay the issuance of the notice to proceed for WSSC-funded contracts.

[(tt)**] (SS)** "WSSC Web-Based Compliance System" means the web-based software application used by WSSC to track and monitor subcontractor availability and utilization (i.e., "Spend" or "Payments") on WSSC-funded contracts. This system is used to report and monitor prime contractors' compliance with WSSC's MBE or SLBE subcontracting requirements.

6.30.040 Factual predicate.

(a) *Introduction.*

(1) **[**Since**] PERIODICALLY, SINCE** introducing its first MBE program, WSSC has undertaken **[**several**]** extensive fact-finding studies, data gathering efforts, and public hearings to **[**examine its marketplace and the effects of marketplace discrimination on its contracting practices. As part of that continuing effort, the Commission, in 2015, engaged MGT of America, Inc. (MGT) of Tallahassee, Florida, to prepare a disparity study focusing on the four broad categories of WSSC contracting: architectural and engineering (A&E), construction, goods and services, and professional services. The disparity study included a statistical analysis and evaluation of prime contracts and subcontracts from July 1, 2009, to June 30, 2014**] INVESTIGATE WHETHER THERE IS SUFFICIENTLY STRONG EVIDENCE OF DISCRIMINATION TO ALLOW THE USE OF RACE CONSCIOUS REMEDIES.**

(2) **[**Upon completion, the**] THE MOST RECENT DISPARITY** study was distributed to key stakeholders and media outlets, and was made available to the public by posting on the WSSC public internet site, www.wsscwater.com. **[**The Commission solicited written comments on the study and held public meetings for the same purpose. **]**The **MOST**

RECENT disparity study data, analyses and findings, **[**and the public input received in response thereto, **]**together with all other relevant information, **HAVE BEEN ADOPTED BY THE COMMISSION AND** constitute the factual predicate for this chapter.

[(3) If any provision in this section conflicts with the disparity study, the language and findings in the applicable disparity study shall apply.**]**

(b) **[***Key Statistical***]** *Findings.*

[(1) The disparity study's key statistical findings include the topics addressed in the subsections set forth herein.

(2) Based on contracts issued during the five-year period covered by the disparity study, most Commission contracts and contract payments were issued and paid to firms located in Maryland, Virginia, West Virginia and the District of Columbia. Contract payments during the study period were made to firms in eight jurisdictions common to all four classes of WSSC contracting, namely: Montgomery County, Prince George's County, Anne Arundel County, Baltimore County, Carroll County, city of Baltimore, Howard County, and the District of Columbia. These findings delineate the local geographic market area (also referred to as WSSC's relevant market area) where WSSC may consider evidence of discrimination for purposes of developing this chapter.

(3) WSSC's total contract payments during the study period totaled approximately $1.2 billion. Of those payments, approximately $239 million were expended on A&E, $541.6 million on construction, $343.7 million on goods and services and $101.7 million on professional services. MBE prime contractors received 7.7, 16.84, 47.86 and 122.54 percent, respectively, of these expenditures. (These percentages are based on availability and utilization.) Overall, MBE primes collected 24.3 percent of the $1.2 billion in contract payments. Using the data on WSSC contracts issued during the study period, MGT prepared a prime contract disparity analysis for contracts of $1 million or less for architectural and engineering, construction, goods and services and professional services.

(4) *Prime Contractor Utilization and Disparity.* The disparities between MBE utilization and availability in WSSC for architectural and engineering, construction, goods and services, and professional services prime contracts of $1 million or less, are as follows:

(i) *Architectural and Engineering (A&E).* MBEs represent 57.26 percent of available A&E businesses in the WSSC geographical market, but received 7.77 percent of prime A&E

payments for these contracts, a statistically significant underutilization. Specific minority groups had the following statistically significant availability/utilization disparities for prime A&E contracts $1 million or less: African-American 20.09 vs. 2.69; Asian-American 24.36 vs. 4.41; Hispanic-American 2.99 vs. 0.0; and nonminority women firms 9.83 vs. 0.67.

(ii) *Construction.* MBEs, which represent 39.14 percent of available construction businesses, received 16.84 percent of payments for these prime contracts; this underutilization is statistically significant. Specific minority groups had the following statistically significant availability/utilization disparities for prime construction contracts $1 million or less: African-American 14.37 vs. 3.91; Asian-American 4.28 vs. 0.0; Native American 1.8 vs. 0.0; and nonminority women firms 7.65 vs. 0.73. Although representing 11.01 percent of available construction businesses, Hispanic-American(s) received 12.2 percent of prime contract payments.

(iii) *Goods and Services.* MBEs constitute 40.54 percent of available goods and services businesses and received 47.86 percent of payments for these prime contracts. This represents overutilization and is statistically significant. Among MBEs, all groups were substantially underutilized, except for Asian-American(s) and WBEs. Specific minority groups had the following statistically significant availability/utilization disparities for prime goods and services contracts $1 million or less: African-American 23.75 vs. 19.35 (statistically significant); Asian-American 2.72 vs. 3.28; Hispanic-American 3.63 vs. 2.14; and nonminority women firms 10.29 vs. 23.08.

(iv) *Professional Services.* MBEs constitute 57.82 percent of available professional services businesses, receiving 22.4 percent of payments for these prime contracts, a statistically significant underutilization. Specific minority groups had the following statistically significant availability/utilization disparities for prime professional services contracts $1 million or less: African-American 32.86 vs. 2.71; Asian-American 12.63 vs. 7.43; Hispanic-American 2.58 vs. 5.55; and nonminority women firms 9.76 vs. 6.85.

(5) *Total Utilization and Disparity.* In cooperation with WSSC personnel, MGT undertook extensive research to compile the subcontracts issued by WSSC prime contractors during the study period. The prime plus subcontractor (total) utilization analyses are based on firms located in WSSC's relevant market area summarized herein. The summary of the disparity analyses of architectural and engineering, construction, goods and services, and

professional services, for the disparity study period is based on payments (expenditures) to prime contractors and subcontractors. These total payments include actual dollars paid to MBE subcontractors and an estimate of dollars paid to non-MBE subcontractors.

The prime contractor plus subcontractor (total) utilization analyses are based on firms and contract expenditures in WSSC's relevant market area defined by MGT of America and referenced here within. Expenditure totals include actual dollars paid to MBE subcontractors and an estimate of dollars paid to non-MBE subcontractors. The industry-specific disparity findings for total utilization availability and disparity analyses by MGT are:

(i) *Architectural and Engineering (A&E).* MBEs represent 59.78 percent of available A&E prime plus subcontractors in the WSSC relevant market area, and received 33.4 percent of A&E prime plus subcontract payments during the study period, a statistically significant underutilization. Specific minority groups had the following statistically significant disparities for A&E primes plus subcontractors: African-American 20.42 vs. 11.43; Asian-American 21.26 vs. 16.17; Hispanic-American 4.0 vs. 2.0; Native American 0.21 vs. 0.0 and nonminority women firms 13.89 vs. 3.8.

(ii) *Construction.* MBEs which represent 67.8 percent of available construction prime plus subcontractors in WSSC's relevant market area received 36.66 percent of construction prime plus subcontract payments during the study period; this underutilization was statistically significant. Specific minority groups had the following statistically significant disparities for construction prime contractors plus subcontractors: African-American 33.45 vs. 12.16; Asian-American 6.67 vs. 1.33; Native American 1.15 vs. 012; Hispanic-American 14.49 vs. 18.87 (overutilization); and nonminority women firms 12.04 vs. 4.18.

(iii) *Goods and Services.* MBEs constitute 57.02 percent of available goods and services prime plus subcontractors in WSSC's relevant market area and received 63.26 percent of goods and services prime plus subcontract payments during the study period. This overutilization was statistically significant. The minority groups presented statistically significant disparities and substantial disparity for goods and services primes plus subcontracts: African-American 31.74 vs. 24.96; Asian-American 4.92 vs. 5.13 (overutilization); Hispanic-American 5.51 vs. 3.13 (substantial disparity); Native American 0.27 vs. 0.07 (substantial disparity); and nonminority women firms 14.58 vs. 29.97 (overutilization).

(iv) *Professional Services.* MBEs constitute 72.61 percent of available professional services prime plus subcontractors in the WSSC geographical market area, and received 33.96 percent of professional services prime plus subcontract payments during the study period. Specific minority groups had the following statistically significant disparities for professional services primes plus subcontracts: African-American 36.65 vs. 10.09; Asian-American 11.53 vs. 9.78; Native American 0.34 vs. 0.0; Hispanic-American 3.2 vs. 6.63 (overutilization); and nonminority women firms 20.89 vs. 7.46.

(c) *Anecdotal Evidence.*

(1) As part of the disparity study, MGT compiled anecdotal evidence of actions by WSSC which may have barred or deterred MBEs from pursuing contracting opportunities with the Commission. Another category of relevant evidence compiled by MGT involved passive WSSC support for exclusionary practices that may occur in the Commission's local market, typically involving use of Commission funds to contract with firms that either discriminate against MBEs or fail to take positive steps to prevent discrimination by WSSC contractors. MGT collected anecdotal evidence through surveys and in-depth interviews with businesses located in the District of Columbia, Maryland, Virginia, West Virginia and other market area jurisdictions that represented each of WSSC's four broad contracting categories. MGT's anecdotal analyses utilize qualitative data to describe the context of the examined social, political, and economic environment in which all businesses and other relevant entities are applicable to WSSC's relevant market area. The anecdotal analysis supports the overall underutilization of MBEs in WSSC's relevant market area. Interviewees and surveys included members of each gender-ethnic group for which disparity analyses were conducted, as well as Caucasian males, females and non-MBEs. Examples of relevant findings include:

(i) *Contemporary Evidence of Discrimination against Minority- and Women-Owned Firms in WSSC's Relevant Market Area .* MGT collected information concerning barriers MBE firms are presented with in the procurement process. MGT collected anecdotal testimony that referred to "an old boy network which keeps a lot of new companies from getting business." A MBE professional services firm stated, "I've seen it (an old boy network) at work. But, I managed to get around it by showing what our team could do." A MBE professional services firm stated that "large prime firms know about projects well before they are formally advertised, giving them an advantage of the time to prepare

their bid." A non-MBE goods and supplies firm stated, "that after presenting a product to various WSSC departments and staff, WSSC awarded a purchase order to a firm without giving his firm an opportunity to submit a bid." MBE firms indicated they encountered an informal network that precluded their firms from obtaining work in the private sector.

(ii) *Discrimination by WSSC Primes against MBE Subcontractors.* There is some anecdotal evidence suggesting that some WSSC prime contractors consistently use the same minority firms to comply with contract-by-contract subcontracting requirements, thus limiting the effectiveness and undermining the objectives of the Commission's MBE program. Assuming this occurs, then WSSC's contract dollars may be rewarding firms that are excluding legitimate MBEs from the subcontracting process, thus making it more difficult for these MBEs to attain the size and experience needed to compete as primes on future contracts. A MBE architecture firm stated, "Primes use his firm to meet the MBE goal then reduce his scope or never award the scope listed for his firm." A MBE engineering firm stated, "Primes beat him down to a price lower than his counterpart for the same services." MBE firms indicated they were seldom or never solicited when there were no MBE goals. MBE subcontractor firms that indicated that they experienced various discrimination by prime firms in summary includes the following: harassment; unequal or unfair treatment; bid shopping or bid manipulation; double standard performance; denial of opportunity to bid; unfair denial of contract award; unfair termination; and unequal price quotes from suppliers.

(iii) *Barriers to MBE Participation Allegedly Created by WSSC Managers.* A MBE goods and services firm stated, "WSSC's use of national cooperative agreements has significantly reduced the amount of work the firm does with WSSC." Another MBE professional services firm stated, "WSSC awards small projects to national firms through cooperative agreements and this process creates barriers for small local firms to win contracts."

(iv) *Contracting Process and Financial Barriers to MBE Participation.* MBE firm owners and representatives reported multiple contracting processes and financial impediments to their involvement in WSSC contracting opportunities. One obstacle cited frequently by MBE firms was competing with larger firms. MBE subcontractors stated that their biggest barrier working with primes on WSSC projects is competing with large companies. MBE firms indicated the following additional barriers to competing for contracting opportunities with

WSSC and in the WSSC relevant market area (in summary): limited time given to prepare bid package or quotes; performance/payment bond requirements; cost of bidding/proposing; and contract size too large. A MBE professional services firm stated lack of notice of potential contract opportunities created barriers for bidding on WSSC projects. Regarding financing, several interviewees alleged that, when extending financing and setting the terms of that financing, banks discriminate on the basis of race and gender between MBEs and majority-owned firms. (REG-PROC-SD-2017-004 § IV)**]**

(1) THE COMMISSION FINDS THE FOLLOWING:

(I) THE COMMISSION WISHES TO PROVIDE EQUAL ACCESS TO BUSINESS FORMATION AND BUSINESS GROWTH OPPORTUNITIES;

(II) THE ELIMINATION OF DISCRIMINATION AGAINST MINORITY- AND WOMEN-OWNED BUSINESSES IS OF PARAMOUNT IMPORTANCE TO THE FUTURE WELFARE OF THE COMMISSION AND THE AREA IT SERVES;

(III) THE COMMISSION HAS PROCURED, RECEIVED, CAREFULLY REVIEWED AND ACCEPTED THE MOST RECENT DISPARITY STUDY PUBLISHED ON NOVEMBER 16, 2022 AND FINDS THAT THE STUDY PROVIDES A STRONG BASIS IN EVIDENCE DEMONSTRATING PERSISTENT DISCRIMINATION AGAINST MINORITY- AND WOMEN-OWNED BUSINESSES;

(2) BASED ON ITS REVIEW OF THE STUDY, THE COMMISSION FINDS:

(I) THERE ARE SUBSTANTIAL AND STATISTICALLY SIGNIFICANT ADVERSE DISPARITIES THAT ARE CONSISTENT WITH DISCRIMINATION AGAINST MINORITIES AND NONMINORITY WOMEN IN WAGES, FIRM FORMATION, ENTREPRENEURIAL EARNINGS, ACCESS TO CAPITAL IN THE PRIVATE SECTION IN THE SAME GEOGRAPHICAL MARKETS AND INDUSTRY CATEGORIES IN WHICH THE COMMISSION DOES BUSINESS;

(II) THE COMMISSION WOULD BECOME A PASSIVE PARTICIPANT IN PRIVATE SECTOR RACIAL AND GENDER DISCRIMINATION IF IT CEASED OR CURTAILED ITS REMEDIAL EFFORTS, INCLUDING THE OPERATION OF THE MINORITY BUSINESS ENTERPRISE PROGRAM;

(III) THERE ARE SUBSTANTIAL AND STATISTICALLY SIGNIFICANT ADVERSE DISPARITIES THAT ARE CONSISTENT WITH DISCRIMINATION AGAINST MINORITIES AND NONMINORITY WOMEN IN COMMISSION PROCUREMENT;

(IV) THERE ARE SUBSTANTIAL AND STATISTICALLY SIGNIFICANT ADVERSE DISPARITIES THAT ARE CONSISTENT WITH DISCRIMINATION AGAINST BUSINESSES OWNED

BY MINORITIES AND NON-MINORITY WOMEN IN MOST MAJOR INDUSTRY CATEGORIES OF COMMISSION PROCUREMENT;

(V) THERE IS AMPLE EVIDENCE THAT DISCRIMINATION IN THE PRIVATE SECTOR HAS DEPRESSED FIRM FORMATION AND FIRM GROWTH AMONG MINORITY AND NONMINORITY WOMEN ENTREPRENEURS; AND

(VI) THERE IS POWERFUL AND PERSUASIVE QUALITATIVE EVIDENCE, BOTH STATISTICAL AND ANECDOTAL, OF DISCRIMINATION AGAINST MINORITY AND NONMINORITY WOMEN BUSINESS OWNERS IN BOTH THE PUBLIC AND PRIVATE SECTORS.

(3) THE COMMISSION FINDS THAT:

(I) AS A RESULT OF ONGOING DISCRIMINATION, AND THE PRESENT-DAY EFFECTS OF PAST DISCRIMINATION, MINORITY- AND WOMEN-OWNED BUSINESSES COMBINED CONTINUE TO BE VERY SIGNIFICANTLY UNDERUTILIZED RELATIVE TO THEIR AVAILABILITY TO PERFORM WORK IN THE OVERWHELMING MAJORITY OF THE PROCUREMENT CATEGORIES IN WHICH THE COMMISSION DOES BUSINESS;

(II) MINORITY PRIME CONTRACTORS ALSO ARE SUBJECT TO DISCRIMINATION AND CONFRONT ESPECIALLY DAUNTING BARRIERS IN ATTEMPTING TO COMPETE WITH VERY LARGE AND LONG-ESTABLISHED NONMINORITY COMPANIES;

(III) DESPITE THE FACT THAT THE COMMISSION HAS EMPLOYED, AND CONTINUES TO EMPLOY, NUMEROUS AND ROBUST RACE-NEUTRAL REMEDIES, INCLUDING AGGRESSIVE OUTREACH AND ADVERTISING, TRAINING AND EDUCATION, SMALL, LOCAL BUSINESS PROGRAMS, AND OTHER EFFORTS, THERE IS A STRONG BASIS IN EVIDENCE THAT DISCRIMINATION PERSISTS EVEN IN PUBLIC SECTOR PROCUREMENT WHERE THESE EFFORTS HAVE BEEN EMPLOYED;

(IV) NOTWITHSTANDING THE LEVELS OF PARTICIPATION ACHIEVED WHEN RACE-CONSCIOUS MEASURES ARE USED, IN THE ABSENCE OF MINORITY BUSINESS ENTERPRISE PARTICIPATION GOALS, THERE WOULD BE A SUBSTANTIAL DECREASE IN THE OVERALL UTILIZATION OF MINORITY- AND WOMEN-OWNED BUSINESSES;

(V) THIS CHAPTER ENSURES THAT RACE-NEUTRAL EFFORTS WILL BE USED TO THE MAXIMUM EXTENT FEASIBLE AND THAT RACE-CONSCIOUS MEASURES WILL BE USED ONLY WHERE NECESSARY TO ELIMINATE DISCRIMINATION THAT WAS NOT ALLEVIATED BY RACE-NEUTRAL EFFORTS;

(VI) THIS CHAPTER CONTINUES AND ENHANCES EFFORTS TO ENSURE THAT THE COMMISSION LIMITS THE BURDEN ON NONMINORITY BUSINESSES AS MUCH AS POSSIBLE BY ENSURING THAT ALL GOALS ARE DEVELOPED USING THE BEST AVAILABLE DATA AND THAT WAIVERS ARE AVAILABLE WHENEVER CONTRACTORS MAKE GOOD FAITH EFFORTS;

(VII) THIS CHAPTER ENSURES THAT THE OPERATION OF THE MINORITY BUSINESS ENTERPRISE PROGRAM IS CONSISTENT WITH THE STUDY DATA AND NARROWLY TAILORED TO THE COMPELLING INTERESTS OF THE COMMISSION; AND

(VIII) COMMISSION EFFORTS TO SUPPORT THE DEVELOPMENT OF COMPETITIVELY VIABLE MINORITY- AND WOMEN-OWNED BUSINESS ENTERPRISES WILL ASSIST IN REDUCING DISCRIMINATION AND CREATING JOBS FOR ALL RESIDENTS OF THE COMMISSION'S SERVICE-AREA.

Article III. Race- and Gender-Conscious Remedies

6.30.170 Introduction.

(a) The race- and gender-conscious remedies set forth in this article apply to **ELIGIBLE** MBEs, and are designed to address the statistically significant disparities for MBE prime contractors and subcontractors **[**as discussed in WSSC 6.30.040(b)(4) and (B)(5)**]** **THAT ARE MEMBERS OF GROUPS OF FIRMS THAT THE MOST RECENT DISPARITY STUDY DEMONSTRATES, BY A STRONG BASIS IN EVIDENCE, HAVE BEEN SUBJECTED TO RACIAL, ETHNIC OR GENDER DISCRIMINATION.** Specific remedies are provided for prime contractors and subcontractors. **[** In accordance with the prime contract disparity analysis referenced herein, the prime contract race- and gender-conscious remedies are limited to prime architectural and engineering, construction, goods and services and professional services contracts.**]**

(b) WSSC has engaged in serious, good faith consideration of workable race- and gender-neutral remedies and measures. Notwithstanding these efforts, the disparity study determined that statistically significant disparities continue to exist in the Commission's utilization of certain groups of contractors. Consistent with the requirement that all race- and gender-conscious remedies be "narrowly tailored," the Commission shall satisfy each condition set forth in WSSC 6.30.190 before implementing or applying any such remedy.

(c) As a metric to assess overall effectiveness of the program established by this chapter, the General Manager/CEO (GM/CEO), with the OSDI Director's advice, may propose that the Commission establish an overall, annual MBE aspirational expenditure participation objective(s)/metrics for each of the four broad contracting areas for WSSC contracting for a fiscal or calendar year. The industry-specific goal(s) shall reflect findings in the **MOST RECENT**

disparity study and factual predicate concerning MBE utilization and availability, recent trends with respect thereto, WSSC contracting opportunities during the fiscal or calendar year(s) and any other relevant factors consistent with a narrowly tailored MBE program. These industry-specific MBE annual aspirational goals are not applicable to individual contracts, but will serve as benchmarks for assessing the progress of WSSC's MBE program efforts.

A subject remedy is as set forth in the following sections.

6.30.180 Optimization of diverse business development program (ODBDP) (formerly "sheltered market program").

(a) *Specifications.*

(1) In this section, "solicitation" means invitation to bids, request for proposals, or any other method or instrument used to communicate to potential bidders, offerors or respondents to the Commission's needs.

(2) The OSDI Director in collaboration with the appropriate WSSC personnel may select the following solicitations for inclusion and eligibility in the ODBDP:

(i) Solicitations which have an estimated contract value of $1 million or less for award to **[**a**] AN ELIGIBLE** MBE or WSSC-approved SLBE; or

(ii) Solicitations which have an estimated contract value of $1 million or less for award to a joint venture with **[**a**] AN ELIGIBLE** MBE or WSSC-approved SLBE firm.

(3) Solicitations are eligible for inclusion in ODBDP when the base term estimated contract value averages $1 million or less (formula for calculation: Base term divided by estimated contract value). The Procurement Office shall make the applicable contracting decisions regarding the base term of contracts

(4) In determining whether a solicitation is eligible for ODBDP, the OSDI Director or designee with the support of the WSSC Contracting Department shall consider:

(i) Whether there are at least three **[**MBEs**] ELIGIBLE MBES** or WSSC-approved SLBEs that are available and capable to participate in the ODBDP for this solicitation;

(ii) The degree of underutilization of the **ELIGIBLE** MBE or WSSC-approved SLBE prime contractors in the specific industry category; and

(iii) The extent to which the **ELIGIBLE** MBE or WSSC-approved SLBE prime contractor goals are being achieved.

(5) If a responsive and responsible bid or response is not received for a solicitation that has been designated for ODBDP, or if the apparent low bid is determined to be fiscally unacceptable, then the solicitation shall be removed from the ODBDP and placed in the market with less restrictive MBE and SLBE program preferences.

(6) In the ODBDP, collectively, **ELIGIBLE** MBE or WSSC-approved SLBE prime and subcontractors must retain 60 percent of the contract value and may not subcontract more than 40 percent to majority subcontractors. This requirement does not apply to supply contracts, licensing agreements, and distributorship agreements. Any **ELIGIBLE** MBE or WSSC-approved SLBE awarded a contract under this section as a prime contractor or consultant may not contract more than 40 percent of the contract value to a firm other than other certified MBE or WSSC-approved SLBEs.

(b) *Applicability.* Architectural and engineering; construction services; goods and services; professional services.

6.30.190 Conditions.

(a) The OSDI Director shall attempt to achieve this chapter's overall aspirational goals and remedial objectives through the most effective available means that are least burdensome to non-MBEs. Therefore, prior to imposing any race- or gender-conscious remedy on a given contract, the OSDI Director shall make a written determination that:

(1) The race- and gender-neutral remedies set forth in Article II of this chapter, either individually or collectively, are ineffective in remedying the statistically significant disparities identified in a particular contracting class for a specific racial, ethnic or gender as set forth in this chapter;

(2) Considering those race- and gender-conscious remedies that are likely to remedy **[**the statistically significant disparities detailed in WSSC 6.30.040(b)(4) and (B)(5)**]**

DISCRIMINATION THAT HAS BEEN DEMONSTRATED BY A STRONG BASIS IN EVIDENCE IN THE MOST RECENT DISPARITY STUDY, a specific remedy is: (a) least burdensome to prospective non-MBE participants in the subject solicitation or contracting opportunity; and (b) most narrowly tailored to achieve its intended purpose; and

(3) A particular race- or gender-conscious remedy is the most appropriate for the specific type of prime contract or subcontract(s) under consideration.

(b) Whenever the OSDI Director determines to apply any race- and gender-conscious remedy described in this article to a solicitation or contract, the OSDI Director's written determination pursuant to subsection (a) of this section shall be incorporated into the IFB, RFP or comparable document. In the event that the originating department and the OSDI cannot agree on the race- and gender-conscious remedy, the Chief Procurement Officer shall make the determination.

(c) Race- and gender-conscious remedies are provided exclusively to **[**MBE firms**] ELIGIBLE MBES** and are intended to encourage greater prime and subcontract participation by these firms.

(d) The race- and gender-conscious remedies provided in this chapter apply only to prime contracts of less than $1 million in value.

6.30.200 Architectural and engineering (A&E).

(a) For prime A&E contracts with a value of $1 million or less:

(1) If awarded competitively to the lowest responsive and responsible bidder: The OSDI Director may consider granting a bid discount of up to the lesser of five percent or $50,000, or a higher percentage or amount if authorized by state law, to bids submitted by **[**a qualified MBE firm owned by African-American(s), Asian-American(s), Hispanic-American(s) or female(s)**] AN ELIGIBLE MBE.** Collectively, **ELIGIBLE** MBE or WSSC-approved SLBE primes and subcontractors must retain 60 percent of the contract value. This requirement does not apply to supply contracts, licensing agreements and distributorship agreements. Any **ELIGIBLE** MBE awarded a WSSC contract under this policy as a prime consultant/contractor shall not subcontract more than 40 percent of the contract value to a firm other than other certified MBEs or WSSC-approved SLBE firms.

(2) If awarded pursuant to an evaluation of proposals submitted in response to a RFP: The OSDI Director may consider granting an evaluation point preference to **[**a qualified MBE firm owned by African-American(s), Asian-American(s), Hispanic American(s) or female(s)**] AN ELGIBLE MBE**. The point preference for a MBE firm responding as a prime shall not exceed five percent of the total evaluation points **AN ELIGIBLE MBE**. Collectively, **AN ELIGIBLE** MBE or WSSC-approved SLBE primes and subcontractors must retain 60 percent of the contract value. This requirement does not apply to supply contracts, licensing agreements and distributorship agreements. Any **ELIGIBLE** MBE awarded a WSSC contract under this policy as a prime consultant/contractor shall not subcontract more than 40 percent of the contract value to a firm other than other certified MBEs or WSSC-approved SLBE. The OSDI Director shall recommend this prime contract remedy only after first considering implementation of the remedies set forth in subsections (b) and (c) of this section and determining that they are ineffective. In the event that the originating department and the OSDI cannot agree on the race- and gender-conscious remedy, the Chief Procurement Officer shall make the determination.

(b) For any prime A&E contract, WSSC:

(1) May award additional, incentive points of less than five percent of the total points that can be realized from applying all evaluation criteria to any qualified non-MBE firm that demonstrates its good faith intention to use **[** a qualified, MBE owned by a Hispanic-American(s), African-American(s), Asian-American(s), or female(s)**] AN ELIGIBLE MBE** as a subcontractor; or

(2) May determine, on a contract-by-contract basis, a contract-specific subcontracting **[**requirement **] GOAL** for **[**qualified Hispanic-American(s), African-American(s), Asian-American(s), or female(s)-owned MBE firms; this**] ELIGIBLE MBES. THIS [**contract-by-contract requirement**] CONTRACT-SPECIFIC GOAL** shall be based on an assessment of the specific types of A&E services required under the contract, and the relative availability of ready, willing, and able **[**Hispanic-American(s), African-American(s), Asian-American(s), or female(s) MBEs**] ELIGIBLE MBES** to provide such services. The request for qualifications or RFP documents for the contract shall require all bidders to exercise good faith efforts to attain the mandated percentage of **[**Hispanic-American African-American(s), Asian-American(s), or female(s)-owned MBE subcontract participation**] ELIGIBLE MBE SUBCONTRACT PARTICIPATION**. Respondents shall submit with their proposals the name, ownership, MBE status and scope (and dollar value) of work for each proposed

subcontractor. Upon award of the prime contract, the prime contractor shall be required to submit accurate progress payment information with each invoice regarding each of its subcontractors, including MBE subcontractors. All direct subcontracting must be reported on a WSSC-funded contract; and all subcontractors must be approved by the OSDI. The OSDI shall audit the reported payments to MBE and non-MBE subcontractors to ensure that the prime contractors' reported subcontract participation is accurate.

(3) May establish consideration, on a contract-specific basis, for bids or proposals with criteria that **[**qualified, certified**] ELIGIBLE MBE** firms have a principal place of business in either Montgomery County or Prince George's County on WSSC-funded contracts.

(c) In addition to the foregoing race- and gender-conscious remedies, the OSDI Director may, with the concurrence of the General Counsel and the Chief Procurement Officer (or designated Team Chief) at the beginning of a calendar or fiscal year, establish an overall A&E annual MBE aspirational subcontracting goal for **[**Hispanic-American(s), African-American(s), Asian-American(s), or female(s)-owned MBE **] ELIGIBLE MBE** firms. This goal shall be flexibly applied and shall reflect: the availability of **[**African-American, Asian-American; Hispanic-American or female-owned MBE**] ELIGIBLE MBE** firms that provide A&E services, as determined by the disparity study; the types of A&E services provided by these firms; and the OSDI Director's assessment regarding the specific types of A&E services that will be required by WSSC's A&E prime contractors during the year in which the overall goal will apply.

6.30.210 Construction.

(a) For prime construction contracts with a value of $1 million or less:

(1) If awarded competitively to the lowest responsive and responsible bidder: The OSDI Director may consider granting a bid discount of up to 10 percent to bids submitted by **[** a qualified MBE firm owned by African-American(s), Asian-American(s), Native American(s) or female(s)**] AN ELIGIBLE MBE FIRM**. Collectively, **ELIGIBLE** MBE or WSSC-approved SLBE primes and subcontractors must retain 60 percent of the contract value. This requirement does not apply to supply contracts, licensing agreements and distributorship agreements. Any **ELIGIBLE** MBE awarded a WSSC contract under this policy as a prime consultant/contractor shall not subcontract more than 40 percent of the contract value to a firm other than other certified MBEs or WSSC-approved SLBE firm. The preference price

reduction for **[**a**] AN ELIGIBLE** MBE firm bidding as a prime shall not exceed 10 percent. Application of this preference is applied when bids are received and evaluated by the OSDI.

(2) If awarded pursuant to an evaluation of proposals submitted in response to a RFP: The OSDI Director may consider granting a point preference to **[**a qualified**] AN ELIGIBLE** MBE firm **[**owned by African-American(s), Asian-American(s), Native American(s) or female(s)**]**. The point preference for **[**a**] AN ELIGIBLE** MBE firm responding as a prime shall not exceed 10 percent of the total evaluation points. Collectively, **ELIGIBLE** MBEs or WSSC-approved SLBE primes and subcontractors must retain 60 percent of the contract value. This requirement does not apply to supply contracts, licensing agreements and distributorship agreements. Any **ELIGIBLE** MBE awarded a WSSC contract under this policy as a prime consultant/contractor shall not subcontract more than 40 percent of the contract value to a firm other than other certified MBEs or WSSC-approved SLBE firms.

(3) The OSDI Director may establish consideration, on a contract-specific basis, for bids or proposals with criteria that **[**qualified, certified**] ELIGIBLE** MBE firms have a principal place of business in either Montgomery County or Prince George's County on WSSC-funded contracts.

(4) WSSC may award additional incentive evaluation points of less than 10 percent of the total points that can be realized from applying all evaluation criteria to any qualified non-MBE firm that demonstrates its good faith intention to use **[**a qualified**] AN ELIGIBLE** MBE **[**owned by a Native American(s), African-American(s), Asian-American(s), or female(s)**]** as a subcontractor.

(5) The OSDI Director shall recommend the foregoing prime contract remedies only after first considering implementation of the remedies set forth in subsections (b) and (c) of this section and determining that they are ineffective. In the event that the originating department and the OSDI cannot agree on the race- and gender-conscious remedy, the Chief Procurement Officer shall make the determination.

(b) For any prime construction contract, the OSDI Director may determine, on a contract-by-contract basis, a, contract-specific subcontracting **[**requirement**] GOAL** for qualified, **[**African-American, Asian-American, Native American or female(s)-owned MBE firms;**] ELIGIBLE MBES. [**this**] THIS [**contract-by-contract**] CONTRACT SPECIFIC** goal shall be based on an assessment of the specific types of construction services required under the contract, and the relative availability of ready, willing, and able **[**African-American, Asian-American, Native American, or

female(s)-owned MBEs**] ELIGIBLE MBES** to provide such services. The IFB or RFP/RFQ for the contract shall require all respondents to exercise good faith efforts to attain the mandated percentage of **[**African-American, Asian-American, Native American or female(s)-owned MBE**] ELIGIBLE MBE** subcontract participation. Bidders or respondents shall submit with their bids/proposals the name, ownership, MBE status and scope (and dollar value) of work for each proposed subcontractor. Upon award of the prime contract, the prime contractor shall be required to submit accurate progress payment information with each invoice regarding each of its subcontractors, including MBE subcontractors. All direct subcontracting must be reported on a WSSC-funded contract; and all subcontractors must be approved by the OSDI. The OSDI shall audit the reported payments to MBE and non-MBE subcontractors to ensure that the prime contractors' reported subcontractor participation is accurate.

(c) In addition to the foregoing race- and gender-conscious remedies, the OSDI Director may, with the concurrence of the General Counsel and Chief Procurement Officer (or designated Team Chief), at the beginning of a calendar or fiscal year, establish an overall construction MBE annual aspirational subcontracting **[**requirement**] GOAL** for **[**African-American, Asian-American, Native-American-owned or female-owned MBE firms**] ELIGIBLE MBES**. This goal shall be flexibly applied and shall reflect: the availability of **[**African-American, Asian-American, Native-American- or female-owned MBE firms**] ELIGIBLE MBES** that provide construction services, as determined by the disparity study; the types of construction services provided by each of these ethnically diverse firms; and the OSDI Director's assessment regarding the specific types of construction services that will be required by WSSC's prime construction contractors during the year in which the overall goal will apply. In the event that the originating department and the OSDI cannot agree on the race- and gender-conscious remedy, the Chief Procurement Officer shall make the determination.

6.30.220 Goods and services.

(a) For prime goods and services contracts with a value of $1 million or less:

(1) If awarded competitively to the lowest responsive and responsible bidder: The OSDI Director may consider granting a bid discount of up to the lesser of five percent or $50,000, or a higher percentage or amount if authorized by state law, to bids submitted by **[**a qualified MBE firm owned by African-American(s) or Hispanic-American(s)**] AN ELIGIBLE**

MBE. Collectively, **ELIGIBLE** MBE or WSSC-approved SLBE primes and subcontractors must retain 60 percent of the contract value. This requirement does not apply to supply contracts, licensing agreements and distributorship agreements. Any MBE awarded a WSSC contract under this policy as a prime consultant/contractor shall not subcontract more than 40 percent of the contract value to a firm other than other certified MBEs or WSSC-approved SLBE firms.

(i) The preference price reduction for a MBE firm bidding as a prime shall not exceed the lesser of five percent or $50,000, or a higher percentage or amount if authorized by state law. Application of this preference is applied when bids are received and evaluated by the OSDI.

(2) If awarded pursuant to an evaluation of proposals submitted in response to an RFP: The OSDI Director may consider granting a point preference to **[**a qualified MBE firm owned by African-American(s) or Hispanic-American(s)**] AN ELIGIBLE MBE**. The point preference for **[**a MBE firm**] AN ELIGIBLE MBE** responding as a prime shall not exceed five percent of the total evaluation points. Collectively, **ELIGIBLE** MBE or WSSC-approved SLBE primes and subcontractors must retain 60 percent of the contract value. This requirement does not apply to supply contracts, licensing agreements and distributorship agreements. Any **ELIGIBLE** MBE awarded a WSSC contract under this policy as a prime consultant/contractor shall not subcontract more than 40 percent of the contract value to a firm other than other certified MBEs or WSSC-approved SLBE firms.

(3) WSSC may award additional, incentive evaluation points of less than five percent of the total points that can be realized from applying all evaluation criteria to any qualified non-MBE firm that demonstrates its good faith intention to use **[**a qualified MBE owned by an African-American(s)**] AN ELIGIBLE MBE** as a subcontractor.

(4) WSSC may establish consideration, on a contract-specific basis, for bids or proposals criterion that **[**qualified, certified MBE firms**] ELIGIBLE MBES** have a principal place of business in either Montgomery County or Prince George's County on WSSC-funded contracts.

(5) The OSDI Director shall implement the foregoing prime contract remedies only after first considering implementation of the remedies set forth in subsections (b) and (c) of this section and determining that they are ineffective. In the event that the originating

department and the OSDI cannot agree on the race- and gender-conscious remedy, the Chief Procurement Officer shall make the determination.

(b) For any prime goods and services contract, the OSDI Director may determine, on a contract-by-contract basis, a contract-specific subcontracting **[**requirement**] GOAL** for qualified, **[**African-American MBE firms**] ELIGIBLE MBES** that the OSDI Director determines will provide a commercially useful function; this goal shall be based on an assessment of the specific types of goods and services required under the contract, and the relative availability of ready, willing, and able **[**African-American **] ELIGIBLE** MBEs to provide such services. The IFB/RFP/RFQ documents for the contract shall require all bidders to exercise good faith efforts to attain the mandated percentage of **[**African-American-owned**] ELIGIBLE** MBE subcontract participation. Bidders shall submit with their bids the name, ownership, MBE status and scope (and dollar value) of work for each proposed subcontractor. Upon award of the prime contract, the prime contractor shall be required to submit accurate progress payment information with each invoice regarding each of its subcontractors, including MBE subcontractors. All direct subcontracting must be reported on a WSSC-funded contract; and all subcontractors must be approved by the OSDI. The OSDI shall audit the reported payments to MBE and non-MBE subcontractors to ensure that the prime contractors' reported subcontract participation is accurate.

(c) In addition to the foregoing race- and gender-conscious remedies, the OSDI Director may, with the concurrence of the General Counsel and the Chief Procurement Officer (or designated Team Chief) at the beginning of a calendar or fiscal year, establish an overall goods and services MBE annual aspirational subcontracting **[**requirement**]GOAL** for **[**African-American-owned MBE firms**] ELIGIBLE MBES**. This goal shall be flexibly applied and shall reflect: the availability of **[**African-American-owned MBE firms**] ELIGIBLE MBES** that provide goods and services, as determined by the disparity study; the types of goods and services by each of these ethnically diverse firms; and the OSDI Director's assessment regarding the specific types of goods and services that will be required by WSSC's prime goods and services contractors during the year in which the overall goal will apply.

6.30.230 Professional services.

(a) For prime professional services contracts with a value of $1 million or less:

(1) If awarded competitively to the lowest responsive and responsible bidder: The OSDI Director may consider granting a bid discount of the lesser of five percent (or $50,000, or a higher percentage or amount if authorized by state law, to bids submitted by a qualified **[**MBE firm owned by African-American(s), Asian-American(s), or female(s)**] ELIGIBLE MBES**. Collectively, **ELIGIBLE** MBE or WSSC-approved SLBE primes and subcontractors must retain 60 percent of the contract value. This requirement does not apply to supply contracts, licensing agreements and distributorship agreements. Any **ELIGIBLE** MBE awarded a WSSC contract under this policy as a prime consultant/contractor shall not subcontract more than 40 percent of the contract value to a firm other than other certified **[**MBEs**] ELIGIBLE MBES** and WSSC-approved SLBE firms. The preference price reduction for **[**a MBE firm**] AN ELIGIBLE MBE** bidding as a prime shall not exceed the lesser of five percent or $50,000, or a higher percentage or amount if authorized by state law. Application of this preference is applied when bids are received and evaluated by the OSDI.

(2) If awarded pursuant to an evaluation of proposals submitted in response to a RFP: The OSDI Director may consider granting a point preference to **[**a qualified MBE firm owned by African-American(s), Asian-American(s) or female(s)**] AN ELIGIBLE MBE**. The point preference for **[**a MBE firm**] AN ELIGIBLE MBE** responding as a prime shall not exceed five percent of the total evaluation points. Collectively, **ELIGIBLE** MBE or WSSC-approved SLBE primes and subcontractors must retain 60 percent of the contract value. This requirement does not apply to supply contracts, licensing agreements and distributorship agreements. Any **ELIGIBLE** MBE awarded a WSSC contract under this policy as a prime consultant/contractor shall not subcontract more than 40 percent of the contract value to a firm other than other certified **ELIGIBLE** MBEs and WSSC-approved SLBE firms.

(3) WSSC may award additional incentive evaluation points of less than five percent of the total points that can be realized from applying all evaluation criteria to any qualified non-MBE firm that demonstrates its good faith intention to use **[**a qualified MBE owned by African-American(s), Asian-American(s), Native American(s) or female(s)**] AN ELIGIBLE** as a subcontractor.

(4) WSSC may establish consideration on a contract-specific basis, for bids or proposals criterion that **[**qualified, certified MBE firms**] ELIGIBLE MBES** have a principal place of business in either Montgomery County or Prince George's County on WSSC-funded contracts.

(5) The OSDI Director shall implement the foregoing prime contract remedies only after first considering implementation of the remedies set forth in subsections (b) and (c) of this section and determining that they are ineffective.

(b) For any professional services contract, the OSDI Director may determine, on a contract-by-contract basis, a contract-specific subcontracting **[**requirement**] GOAL** for **[**qualified MBE firms owned by African-American(s), Asian-American(s), Native American(s) or female(s); this**] ELIGIBLE MBES. THIS CONTRACT SPECIFIC** goal shall be based on an assessment of the specific types of professional services required under the contract, and the relative availability of ready, willing, and able **[**MBE firms owned by African-American(s), Asian-American(s), Native American(s) or female(s)**] ELIGIBLE MBES** to provide such services. The IFB/RFP/RFQ documents for the contract shall require all bidders to exercise good faith efforts to attain the mandated percentage of **[**African-American(s), Asian-American(s), or female(s)-owned MBE**] ELIGIBLE MBE** subcontractor participation. Bidders shall submit with their bids the name, ownership, MBE status and scope (and dollar value) of work for each proposed subcontractor. Upon award of the prime contract, the prime contractor shall be required to submit accurate progress payment information with each invoice regarding each of its subcontractors, including MBE subcontractors. All direct subcontracting must be reported on a WSSC-funded contract; and all subcontractors must be approved by the OSDI. The OSDI shall audit the reported payments to MBE and non-MBE subcontractors to ensure that the prime contractors' reported subcontractor participation is accurate. A notice to proceed will not be issued until a current, correct and complete subcontracting plan is approved in WSSC's Web-Based Compliance System by the OSDI for each contract term, if applicable.

(c) In addition to the foregoing, race- and gender-conscious remedies, the OSDI Director may, with the approval of the Commission, at the beginning of a calendar or fiscal year, establish an overall professional services MBE annual aspirational subcontracting **[**requirement**] GOAL** for **[**MBE firms owned by African-American(s), Asian-American(s), Native American(s) or female(s)**] ELIGIBLE MBES**. This goal shall be flexibly applied and shall reflect: the availability of **[**African-American, Asian-American, Native American(s) or female-owned MBE firms**] ELIGIBLE MBES** that provide professional services, as determined by the disparity study; the types of professional services provided by these firms; and the OSDI Director's assessment regarding the specific types of professional services that will be required by WSSC's prime professional services contractors during the year in which the overall goal will apply. This overall aspirational

subcontracting **[**requirement**] GOAL**, however, shall be administered via contract-specific goal setting established herewith.

Article IV. Program Administration

6.30.240

OSDI SHALL PUBLISH A LIST OR CHART MAINTAINED ON THE WSSC WEBSITE THAT DELINEATES WHICH FIRMS ARE ELIGIBLE TO BENEFIT FROM RACE- OR GENDER-CONSCIOUS REMEDIES:

(1) IN EACH INDUSTRY CATEGORY; AND

(2) THE MANNER IN WHICH SUCH FIRMS MAY BENEFIT FROM RACE- OR GENDER-CONSCIOUS REMEDIES.

6.30.245 MBE certification.

(a) The OSDI shall verify that all entities claiming MBE status for purposes of this chapter have been validly certified by either: the state certification agency designated under the State Finance and Procurement Article, § 14-303(b), Annotated Code of Maryland (or any successor section thereto); or by any other certification program that the Commission determines substantially duplicates the requirements of the state certification agency requirements of the Public Utilities Article, § 20-204(c), Annotated Code of Maryland (or any successor section thereto).

(b) As required by WSSC Chapter 6.05, all firms registered in WSSC's Supplier Portal System (supplanted the CBR on November 9, 2015) shall provide their MBE status when registering and shall be responsible for the ongoing accuracy of that status.

(c) MBE certifications recognized by the Commission include (but are not limited to) those of the following agencies:

Maryland Department of Transportation (M-DOT)
7201 Corporate Center Drive
Hanover, MD 21076

Prince George's County Office of Central Services
Supplier Development and Diversity Division (SDDD)
1400 McCormick Drive, Suite 281
Largo, MD 20774

District of Columbia's Department of Small and Local Business Development (DC-DSLBD)
441 4th Street NW, Suite 970N
Washington, DC 20001

Capital Region Minority Supplier Development Council
(CRMSDC)
10750 Columbia Pike, Suite 200
Silver Spring, MD 20901

Women President's Educational Organization (WPEO)
(Local – WBENC Chapter)
1250 Connecticut Avenue NW, Suite 200
Washington, DC 20036

(d) The OSDI reserves the right to disregard the certification of any firm, entity or enterprise found to have violated the purposes of WSSC's MBE program or a comparable program of another government agency. WSSC may take steps to bar any persons found to have engaged in such a violation from participating in the Commission's MBE program.

6.30.260 Requests for waiver or modification to subcontracting plan(s).

(a) *Pre-Award.* A bidder, respondent or prime contractor may request a full or partial waiver of a MBE subcontracting **[**requirement**] GOAL** by submitting either the MBE/SLBE unavailability form contained in the solicitation or a written request and appropriate documentation. Bidders and respondents are required to submit the MBE/SLBE unavailability form, with the required supporting good faith efforts documentation, simultaneously with bid or proposal submission, if the bidder is unable to obtain a certified **ELIGIBLE** MBE **[**firm**]** or meet the minimum MBE participation subcontracting **[**requirement**] GOAL** and presents adequate evidence of its good faith efforts, as defined herein, to meet the subcontracting **[**requirement**] GOAL**. All subcontractors (MBE, WSSC-approved SLBE, and majority subcontracting firms) must be approved by WSSC's OSDI and all subcontracting (MBE, WSSC-approved SLBE, and majority subcontracting firms) must be reported to WSSC via the WSSC Web-Based Compliance System.

(b) *Post-Award.* A prime contractor shall promptly request in writing a full or partial waiver of the MBE subcontracting **[**requirement**] GOAL** as soon as possible (timely manner) after prime contractor becomes aware that it will be unable to comply with an approved SLBE or MBE subcontracting and supplier certification (subcontracting plan). The written request shall detail the prime contractor's good faith efforts (as outlined in the Good Faith Efforts Guide or successor) to execute the MBE subcontracting plan and shall include a revised MBE subcontracting plan(s), if applicable. The prime contractor must submit all documentation related to its good faith efforts to maximize the utilization of **ELIGIBLE** MBE subcontractors. A prime contractor is required to notify and obtain written approval from the OSDI in advance of any reduction in subcontract scope, termination, substitution or any other changes for a designated **ELIGIBLE** MBE subcontractor and accompanied by supporting documentation. All subcontractors (WSSC-approved SLBE, MBE and majority subcontracting firms) must be approved by WSSC's OSDI and all subcontracting (WSSC-approved SLBE, MBE and majority subcontracting firms) must be reported to WSSC via the WSSC Web-Based Compliance System.

(c) *Procedure.* All waiver requests shall be submitted to the OSDI and to the Procurement Office for resolution by the OSDI Director. Should the OSDI Director determine that the bidder (or prime) has demonstrated good faith efforts, then the waiver will be granted. If the waiver is denied, the Chief Procurement Officer shall respond within 60 calendar days of the receipt of any notice of appeal to a waiver request. The decision shall be issued by the Chief Procurement Officer and shall constitute the final decision of the Commission.

6.30.270 Enforcement.

(a) The OSDI shall ensure adherence to this chapter by Commission personnel, prime contractors and direct subcontractors.

(b) To ensure compliance with contract specific MBE subcontracting **[**requirements**] GOALS**, the OSDI shall verify that the certified MBEs listed in approved SLBE/MBE subcontracting and supplier certifications (subcontracting plans) are actually performing work and receiving compensation as set forth in the plan.

(c) Requests for waiver of approved SLBE/MBE subcontracting and supplier certifications (subcontracting plans) shall be filed in accordance with WSSC 6.30.260.

(d) Failure of a prime contractor to make good faith efforts to comply with an approved SLBE/MBE subcontracting and supplier certifications (subcontracting plans) may – absent unintentional, accidental or otherwise justifiable extenuating circumstances – constitute either willful or intentional failure to perform in accordance with the requirements of the subcontracting plan, or willful or intentional action to frustrate the plan. The OSDI shall determine whether the prime contractor's failure to make good faith efforts was willful or intentional based on all relevant facts, circumstances and information presented or available to the OSDI and shall then determine whether enforcement action should be taken in a particular case.

(e) Upon determining that a prime contractor has failed to comply with an approved SLBE/MBE subcontracting and supplier certifications (subcontracting plans), the OSDI shall notify the Procurement Office, which will notify the contractor in writing of its findings and shall specify what corrective actions are required. The contractor is required to initiate the corrective actions within 10 business days of receipt of notice and complete them within the time specified in the notice. The corrective actions shall be recommended by the OSDI and implemented and issued to the contractor by the Chief Procurement Officer.

(f) If the OSDI determines that material noncompliance with MBE contract provisions exists and that the prime contractor refuses or fails to take the corrective action required in the Procurement Office's notice, then the following sanctions may be invoked by the Chief Procurement Officer:

(1) Withhold payment to the prime;

(2) Suspension of the contract;

(3) Termination of the contract;

(4) Referral to the General Counsel's Office for appropriate action; or

(5) Initiation of any other specific remedy identified by contract, this chapter or other applicable law or regulation.

(g) Unless the OSDI Director grants a partial or complete waiver of the contract-specific subcontracting **[**requirement**] GOAL** from the OSDI, failure on the part of any bidder to commit to attainment of a contract-specific subcontracting **[**requirement**] GOAL** shall render a bid nonresponsive. Furthermore, disclosure of subcontractor information is a material specification in the bid, and failure to provide such information shall render a bid nonresponsive.

(h) Absent a waiver, a prime contractor's failure to reach the required level of MBE subcontracting shall be considered a material breach of contract. No final payment on the prime contract shall be released to the prime contractor, and no new WSSC contracts should be issued to the prime contractor until the audit of previous subcontract payments is complete and payments are determined to comply with contract specifications.

(i) The OSDI in collaboration with the Procurement Office, Contracting Manager (CM) (or Administrating Contract Manager (ACM)) may initiate the noncompliance notification to the prime contractor via the Procurement Office for corrective action, as outlined in WSSC's Contract Terms and Conditions.

(j) The OSDI may use any other compliance mechanism authorized by contract or by Commission regulation.

(k) The OSDI, in conjunction with appropriate WSSC personnel, may, upon completion of a contract, and before final payment, require that a prime contractor on any contract having a contract specific MBE subcontracting **[**requirement**] GOAL** submit a final report, in affidavit form and under penalty of perjury, of all payments made to, or withheld from, MBE subcontractors:

(1) Submit a final report, in affidavit form and under penalty of perjury, of all payments made to, or withheld from, MBE subcontractors;

(2) Allow the OSDI to inspect any relevant matter, including job site records of the contractor;

(3) Allow the OSDI to interview subcontractors and employees of the contractor;

(4) For construction contracts, ensure that subcontractors are (a) paid any undisputed amount to which the subcontractor is entitled as provided under the State Finance and Procurement Article, § 15-226, Annotated Code of Maryland; and (b) comply with the Commission regulations; and

(5) Include in the agreement with the **ELIGIBLE** MBE subcontractor a requirement that the subcontractor submits a monthly report to the Commission as required by the contract through WSSC's Web-Based Compliance System or any successor Web-Based Compliance System thereto.

(6) Notice of this requirement shall be included in the IFB or RFP.

(l) Any enforcement action taken by WSSC pursuant to this section shall be subject to the internal appeals process and procedures provided for in WSSC's Procurement Manual (and any subsequent manual or regulation thereto).