**ATTACHMENT D**

**MODEL CONTRACT INSTRUCTIONS FOR**

**MUNICIPAL CONTRACTS AND STATE ASSISTED BUILDING PROJECTS**

**A. Affirmative Marketing Participation Goals:**

The combined goals below were established by the Division of Capital Asset Management and Maintenance (DCAMM) and the Supplier Diversity Office (SDO) and require a reasonable representation of both MBE and WBE firms:

**Design Participation: Combined MBE/WBE goal of (17.9%)**

**Construction Participation: Combined MBE/WBE goal of (10.4%)**

All documentation submitted in connection with MBE/WBE credit must be true, accurate and correct to the best of your knowledge. Your signature on any MBE/WBE goal-related document means that you have read and understand it. Any false claims for MBE/WBE credit are subject to the Massachusetts False Claims Act and any applicable civil or criminal penalties as determined by the Massachusetts Attorney General’s Office. [[1]](#footnote-1)

**B. MBE/WBE Participation Credit:**

1. MBE and WBE participation goals are not interchangeable.
2. Participation credit is only given for actual contract work performed by currently certified MBE, WBE or M/WBE firm.
3. If the firm awarded the contract is itself currently certified as a MBE/WBE, 100% participation credit will be given for the work performed.
4. If the prime contractor is not a certified firm, it shall only receive credit for the portion of work completed by the certified firm.
5. MBE/WBE participation credit will be given to a supplier **only** if they are regularly engaged in sales of equipment or supplies to the construction industry from an established place of businesses and bear the risk of loss for product sold prior to delivery to a customer.
6. A contractor can count only 10% of the contract price towards an MBE or WBE goal on DCAMM projects.

**C. Establishing MBE/WBE Status:**

1. A business will be eligible for participation credit only if it has been certified by the Supplier Diversity Office (SDO) as a minority business enterprise (MBE) or a woman business enterprise (WBE).
2. Certification as a MBE/WBE **by any other agency other than SDO does not** confer the status to the firm for the purposes of contract participation credit.
3. Participation credit shall only be given to firms which are certified at the time of contract award
4. A firm currently being initially reviewed as part of the certification process cannot be used by a contractor towards MBE/WBE participation credit.

**D. Performance of Contract Work by MBE/WBEs:**

1. Only currently certified MBE/WBE firms count towards participation goals. If during the course of a contract, a SDO certified MBE/WBE firm is decertified their participation credit will be counted up until the date of decertification
2. An awarding authority will not grant MBE/WBE participation credit unless the contract work is actually completed by a certified SDO MBE/WBE firm. No credit will be given for work done by others or for work not on a MBE/WBE schedule of participation.
3. Once a letter of intent and a MBE/WBE letter of participation are approved, a contractor may not perform this same work using its own staff without the prior express written prior approval of the Awarding Authority.
4. The Contractor shall monitor the performance of MBE/WBE Work to ensure that each scheduled MBE/WBE performs its own work with its own workforce.
5. The Contractor and each MBE/WBE subcontractor shall provide the Awarding Authority with all information and documentation necessary to ascertain whether or not an MBE/WBE has performed its own MBE/WBE Work with its own personnel, tools and equipment.
6. Failure to submit documentation to the Awarding Authority shall establish conclusively for the purpose of giving MBE/WBE participation credit under this Contract that such MBE/WBE did not perform such work.

**E. Notification of Changes in MBE/WBE Work:**

If during the performance of a contract, a contractor determines or has reason to believe that:

1. A scheduled MBE/WBE is unable or unwilling to perform its MBE/WBE Work;
2. There has been or will be a change in any MBE/WBE Work; or
3. That the Contractor will be unable to meet the MBE/WBE participation goal(s) for the Contract for any reason.

Then he/she shall immediately notify the Awarding Authority in writing. Any notice of a change in MBE/WBE Work shall include a revised Schedule of MBE/WBE Participation, and additional or amended Letters of Intent and related subcontracts, as needed.

**F. Good Faith Efforts Needed to Support Changes/Reduction of MBE/WBE Participation Goals:**

If there is a change or reduction in any MBE/WBE Work which will result in the Contractor failing to meet the MBE/WBE participation goal(s), then he/she shall undertake a diligent, good faith effort to make up the shortfall as follows:

1. The Contractor shall identify all items of the Work remaining to be performed under the Contract that they made available for subcontracting to MBE/WBEs along with that which wasn’t along with reasons why.
2. The Contractor shall send written notices to all MBE/WBEs ready, willing and able to perform such work. The contractor will provide the Awarding Authority with documentation identifying: (i) each MBE/WBE solicited, and (ii) each MBE/WBE listed in the SDO directory under the applicable trade category that was not solicited and the reasons why. The Contractor shall also advise the Awarding Authority of the dates that notices were sent and provide a copy of the written notice(s) sent.
3. The Contractor shall make reasonable efforts to follow up on the written notices, including telephone calls or personal visits in order to determine with certainty whether the MBE/WBEs were interested in performing the work. Phone logs or other documentation must be submitted to the Awarding Authority upon request.
4. The Contractor shall make documented reasonable efforts to assist MBE/WBEs that need assistance in obtaining insurance, bonds, or lines of credit in order to perform work under the Contract. Supporting documentation will be provided to the Awarding Authority upon request.
5. The Contractor shall provide the Awarding Authority with a statement of the response received from each MBE/WBE solicited, including the reason for rejecting any MBE/WBE who submitted a proposal.
6. The Contractor shall take any additional measures including, without limitation, placing advertisements in appropriate media and trade association publications announcing the Contractor's interest in obtaining proposals from MBE/WBEs, and/or sending written notification to MBE/WBE economic development assistance agencies, trade groups and other organizations notifying them of the project and of the work available to be subcontracted by the Contractor to MBE/WBEs.

If the Contractor is unable to meet the MBE/WBE participation goals for this Contract after complying fully with each of the above requirements and is otherwise in full compliance with the terms of this provision, the Awarding Authority may reduce the MBE/WBE participation goals for this Contract to the extent that such goals cannot be achieved.

**G. Suspension of Payment and/or Performance for Noncompliance:**

If a reduction of MBE/WBE goals was given but sufficient good faith efforts (see above) were not documented, then after proper written notice, the Awarding Authority has the discretion to:

1. Suspend payment to the Contractor of an amount equal to the value of the work which was to have been performed by an MBE/WBE pursuant to the Contractor’s Schedule of MBE/WBE Participation but which was not so performed, in order to ensure that sufficient Contract funds will be available if liquidated damages are assessed;
2. Suspend the Contractor's performance of this Contract in whole or in part.

Notice Required Prior to Suspension: The Awarding Authority shall give the Contractor prompt written notice of any action taken and shall give the Contractor and any other interested party, including any MBE/WBEs, an opportunity to present evidence to it that the Contractor is in compliance with the requirements, or that there is some justifiable reason for waiving the requirements in whole or in part. The Awarding Authority may invite SDO to participate in these proceedings

If, based on a totality of the circumstances, it can be shown that all reasonable steps were taken and that the Contractor is in full compliance with the requirements of this Attachment, or that the Contractor has met or will meet the MBE/WBE participation goals for this Contract, the Awarding Authority shall release any funds withheld and lift any related suspension of the Contractor’s performance.

**H. Liquidated Damages; Termination**

If payment by the Awarding Authority or performance by the Contractor is suspended, and if the breach cannot be cured or that same contractor fails to take all reasonable and immediate efforts to comply with the MBE/WBE participation goals set forth in this Contract, subject to the notice provisions above:

1. The Awarding Authority may terminate this Contract; or
2. The Awarding Authority may retain from final payment to the Contractor, as liquidated damages, an amount equal to the difference between:
3. The total of the MBE/WBE participation goals set forth in this Contract, and;
4. The amount of MBE/WBE participation credit earned by the Contractor for MBE/WBE Work performed under this Contract minus the cost to restore the loss to the Awarding Authority.
5. Any liquidated damages will be assessed separately for MBE and WBE participation.

Discretionary Option to Review Any Additional Mitigating Evidence Prior to Final Decision: Before exercising its rights and remedies, the Awarding Authority may but is not required to give the Contractor and any other interested party a final opportunity to present evidence that the Contractor is in compliance with the requirements or that there is some justifiable reason for waiving the requirements of this Attachment in whole or in part. The Awarding Authority may invite SDO to participate in these proceedings.

1. *See generally,* MG.L. c. 12, §§5A-5O, inclusive. [↑](#footnote-ref-1)