



OFFICE OF THE CONTROLLER

CITY OF PHILADELPHIA PENNSYLVANIA

SPECIAL REPORT

**Barriers Facing Minority,
Women, & Disabled-Owned
Businesses in City
Procurement and
Contracting**

November 2007

**Alan Butkovitz
City Controller**



CITY OF PHILADELPHIA

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November 13, 2007

The Honorable John F. Street
Mayor of Philadelphia
Room 215, City Hall
Philadelphia, PA 19107

The Office of the Controller has conducted a special audit and investigation into barriers facing minority, women, and disabled-owned businesses in the City of Philadelphia procurement and contracting processes. Our investigation was conducted pursuant to Section 6-400 (c) and (d) of the Philadelphia Home Rule Charter.

We have numbered our recommendations to facilitate tracking and follow-up in subsequent years. We believe that, if implemented by the City of Philadelphia, these recommendations will improve the effectiveness of the City's minority participation program and improve the confidence in the program.

We would like to express our thanks to the management and staff of the Minority Business Enterprise Council (MBEC), the Finance Department, the Procurement Department and the Law Department for the courtesy and professionalism displayed during the conduct of our work.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Alan Butkovitz'.

ALAN BUTKOVITZ
City Controller

cc: Honorable Anna C. Verna, President of City Council
Vincent Jannetti, Director of Finance
Carolyn Nichols, Director of MBEC
Janet Hagan, Acting Procurement Commissioner
Romulo L. Diaz, Jr., City Solicitor
Members of the Mayor's Cabinet



Barriers Facing Minority, Women & Disabled-Owned Businesses in City Contracting and Procurement

EXECUTIVE SUMMARY

Why the Controller's Office Conducted the Special Audit and Investigation

The Office of the Controller initiated this special investigation in response to complaints received by our office that indicated Minority Business Enterprises (MBEs), Women Business Enterprises (WBEs), and Disabled Business Enterprises (DSBEs), collectively referred to as M/W/DSBEs in this report, were facing major barriers within the City of Philadelphia's procurement and contracting process. These allegations included, but were not limited to, claims of inadequate monitoring and enforcement of actual M/W/DSBE participation by the Minority Business Enterprise Council (MBEC) and other City agencies, assertions of fraud and misrepresentation during the bidding and contract utilization process by contractors, and payment problems. The objectives of our investigation were to determine whether these claims could be substantiated and to develop recommendations for corrective action on substantiated barriers.

What the Controller's Office Found

We found that despite some progress in recent years M/W/DSBEs still face several significant barriers that hinder their ability to gain a fair share of contracts generated by the City of Philadelphia and that limit their inclusion in the local economy. These barriers, which are summarized below, can be divided into three categories: (1) barriers to participation in the City's procurement and contracting process; (2) barriers during participation in the City's procurement and contracting process and (3) barriers to the growth and development of M/W/DSBEs. Distinguishing between these three barriers is important for policy purposes because policies that increase the participation of M/W/DSBEs in the contracting process may not insure that these firms are effectively and actually utilized and are able to sustain their growth and development.

Barriers to participation in the City's procurement and contracting process

- Unnecessary granting of waivers from MBEC participation requirements to prime contractors
- Bid packages are too complex for smaller contractors to participate as prime contractors
- Lack of availability of bonding and insurance for smaller M/W/DSBE contractors
- Lack of a comprehensive plan of action to increase diversity and inclusion in city contracting and procurement
- Slow certification process

Barriers faced by vendors during participation in the City's procurement and contracting process

- Inadequate monitoring and enforcement of actual M/W/DSBE participation
- Deficient contract language and contract requirements
- MBEC certified firms are included in bid proposal, but are marginalized after contract is awarded.

Barriers to the growth and development of M/W/DSE firms

- Slow payment by the City of Philadelphia and/or prime contractors
- Limited access to working capital
- Lack of technical assistance for small businesses before and after contract awards
- Lack of M/W/DSBE participation goals for not-for-profit contracts
- Inexperienced and understaffed MBEC office

Although MBEC's 2006 Disparity Study claims that the City has achieved substantial increases in its participation rates during fiscal year 2006, these claims are based only on promised participation amounts reported by contractors on solicitation and commitment forms attached to their bid proposal. These promised amounts represent goals only. They do not reflect whether an M/W/DSBE was ultimately able to effectively participate or was actually paid an amount equal to the amount of the original promised goal amount. In fact, at present, the City cannot accurately determine the amount of its contracting dollars that ultimately went to M/W/DSBEs, because the City does not currently have a system in place to track and summarize payments from prime contractors to MBEC-certified subcontractors.

What the Controller's Office Recommends

The Controller's Office has developed a number of recommendations to address these findings. The recommendations can be found in the body of the report.

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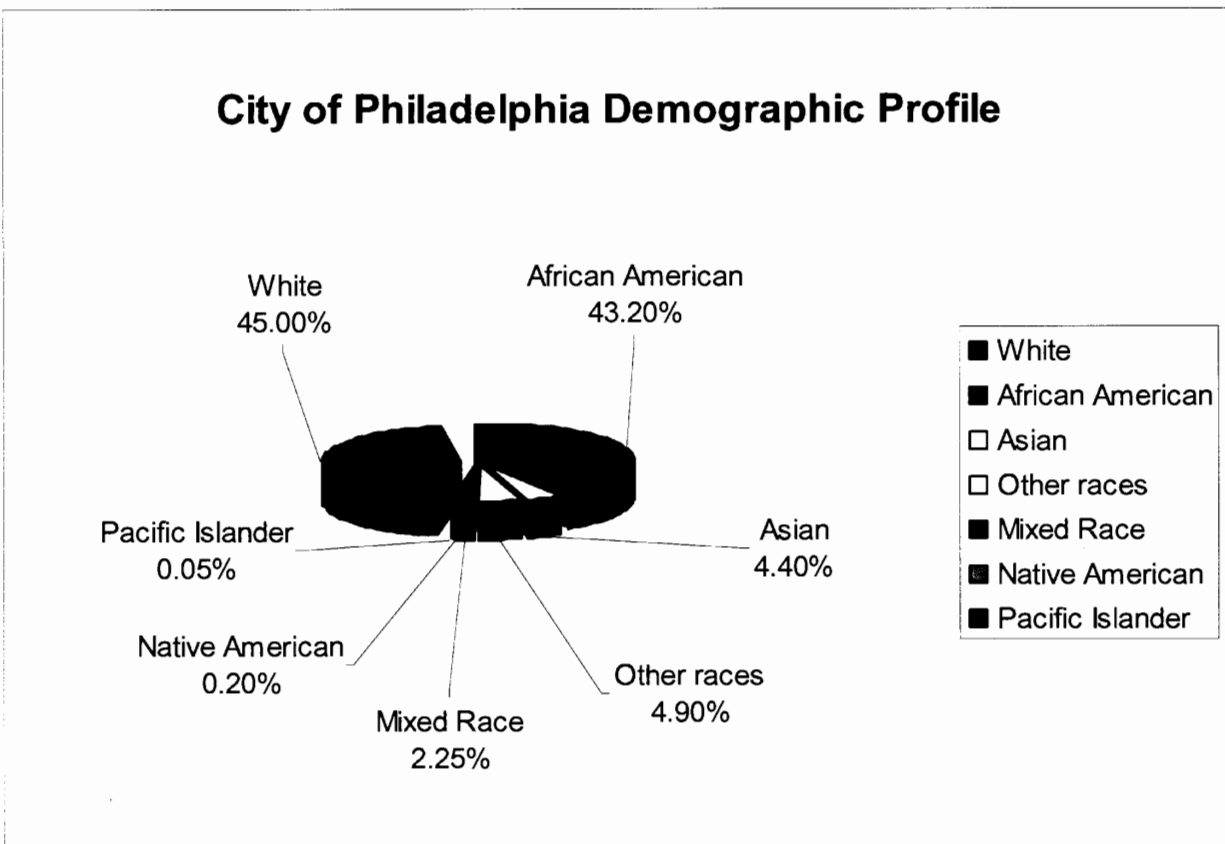
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BACKGROUND

Overview

The City of Philadelphia is a racially and ethnically diverse city of 1.4 million people of whom approximately 55% are non-white. According to the 2005 U.S. Census Bureau data, the racial make up of the city is approximately as follows¹:



It is the "stated" policy of the City of Philadelphia to provide an equal opportunity for any business to compete for City contracts and to ensure that contracts using public funds sourced, administered or authorized by the City, including contracts requiring City Council approval, are not used to promote, reinforce or perpetuate discrimination. However, a 2004 study of minority and women owned business utilization conducted for the City by D.J. Miller & Associates, Inc. (the "D.J. Miller Study") found that from 1998 to 2003 less than two percent of Philadelphia's contract dollars across all categories of City contracting had been spent with businesses owned and controlled by minorities or women despite the availability of capable minority and women owned businesses in the Greater Philadelphia region. Of the \$2.78 billion in contracts the City awarded during this period, only 2.6% were awarded to minority-owned businesses and 1.8% were awarded to women-owned businesses.

¹ 8.5% of the Philadelphia population was identified as Hispanics or Latinos and are included throughout the data above because Hispanics or Latinos are classified as an ethnic group and not a race by the U.S. Census Bureau.

Although the City of Philadelphia Fiscal Year 2006 Annual Disparity Study (Report Date: May 30, 2007) shows higher participation numbers (refer to Table 1), this data is unsubstantiated and is probably overstated because the Study is based on encumbrance data, not on actual payments to M/W/DSBE subcontractors. There is, in fact, no process in place to verify that funds pledged to M/W/DSBE subcontractors are actually paid to them.

Table 1 below provides an overview of the participation of MBEC-certified firms in contracts awarded by the City. The percentages represent the dollar amount of contracts within each contract type, and then for all contract types in the aggregate, that were promised to MBEC-certified firms that are located in the Philadelphia Metropolitan Statistical Area. The contracts are broken down by the following three types: Public Works (PW), Personal and Professional Services (PPS), and Services, Supplies and Equipment (SSE).

Regardless of a slight showing of improvement in minority contracting by the Annual Disparity Report, the persistent and crucial issue is that prime contractors make promises to hire minority contractors without actually intending to utilize the minority firms. This failure of the prime contractors to fulfill a commitment to minority contractors deceives and injures the minority contractors while falsely taking advantage of our limited public monies for contracting and our goal of increasing M/W/DSBE participation.

During the course of our survey interviews we found that 24% of MBEC-certified firms were utilized and paid an amount less than they were promised. Some of the M/W/DSBE's felt prime contractors intentionally misrepresented a promise to engage an M/W/DSBE in a contract, without having any actual intention to engage the M/W/DSBE, in order to win a contract with the City. These claims are difficult to prove, but in the course of our investigation, we found the contact information on M/W/DSBE subcontractors provided by prime contractors was incorrect, lending credence to charges that subcontracting commitments were often tenuous.

Table 1
Promised Participation and Utilization of For-Profit M/W/DSBE Prime Contractors and Subcontractors, Divided by Utilization of All For-Profit Prime Contractors and Sub-Contractors (By \$ Contracts Awarded)

<u>DJ Miller Study 1998-2003 (Metro)</u>					<u>FY06 Annual Disparity Study</u>			
<u>Category</u>	<u>PW</u>	<u>PPS</u>	<u>SSE</u>	<u>All Types</u>	<u>PW</u>	<u>PPS</u>	<u>SSE</u>	<u>All Types</u>
MBEs	10.5%	2.1%	10.8	5.8%	6.8%	20.6%	10.1%	11.9%
WBEs	4.4%	0.7%	4.9%	2.0%	10.6%	5.7%	5.9%	6.2%
DSBEs	0.0%	0.0%	0.0%	0.0%	0.2%	0.0%	0.0%	0.0%
All M/W/DSBEs *	14.9%	2.8%	15.7%	7.8%	12.9%	21.5%	14.3%	16.3%

* Note: Figures in this row are not necessarily the sum of the above three rows because some businesses belong to more than one category.

Source: 2006 MBEC Participation Report & 2004 D.J. Miller Study

Minority Business Enterprise Council (MBEC)

In 1982, the City of Philadelphia established the Minority Business Enterprise Council (MBEC) to ensure that Minority Business Enterprises (MBEs), Women Business Enterprises (WBEs) and Disabled Business Enterprises (DSBEs) have equal access and opportunity to compete and secure contracts within the City of Philadelphia. As part of its role, MBEC promotes the economic development of MBEs, WBEs, and DSBEs through its certification program; contract review and monitoring activities; as well as ongoing interaction with other City Departments, quasi-public agencies and the local marketplace.

Again in 1982, the Philadelphia City Council added to the Philadelphia Code Chapter 17-500, entitled "Goals for the Participation of Minority, Female and Disabled Owned Businesses in City Contracts." The intent of Chapter 17-500 was to establish an affirmative action policy² to remedy the impact of discrimination against minority and women-owned businesses. Remedial action was to be accomplished by establishing "Disadvantaged Business Enterprise" goals in city contracts of fifteen percent for minority-owned businesses, ten percent for female-owned businesses and, subsequently, two percent for disabled-owned businesses.

During the decade of the 1990's, litigation challenging the constitutionality of the City's affirmative action policy followed in a number of court cases³. A Federal District Court held that the program violated the Equal Protection Clause of the Constitution. It concluded that the program was not narrowly tailored, the goals chosen were arbitrary, and the city failed to prove racial discrimination in the construction industry sufficient to warrant the use of a race-based remedy for African American construction firms. The Court of Appeals of the Third Circuit held that the city presented persuasive evidence sufficient to support the case of racial discrimination, but it agreed with the District Court that the City's anti-discrimination policy was not narrowly tailored and the goals were arbitrary. Race conscious programs were subsequently considered legal as long as they did not require goals that operated as quotas.

As a result of the 1990's litigation, the City contracted with D. J. Miller & Associates to conduct a business utilization study for the purpose of investigating the existence of discrimination against minority and female-owned businesses in the Philadelphia marketplace and evaluating the need for remedial action. The initial study which was released in 1998 examined city contracting and census data and employed various statistical models. It found significant statistical disparities in the utilization of both minority and female-owned businesses in city contracts due to past and present day discrimination in both the public and private contracting sectors. The study concluded that discrimination occurred in all types of City contracts with the effect of significant underutilization of minority and female-owned business enterprises. A 2004 update to the D.J. Miller Study found that M/W/DSBEs were still grossly under utilized in City procurement and contracting.

Based on the D. J. Miller findings, the Philadelphia City Council decided to take action to overcome the effects of past discrimination and to prevent ongoing discrimination in the City's

² Executive Order 6-90, signed by former Mayor W. Wilson Goode on July 12, 1990 changed the emphasis from affirmative action to anti-discrimination.

³ *Contractors Ass'n. v. Philadelphia*, 893 F. Supp. 419 (E.D. Pa 1995), aff'd 91 F.3d 586 (3d Cir. 1996)

contracting process, while assuring that high quality goods and services are obtained through the competitive bidding process. Council amended Chapter 17-500 to establish City contract participation goals for businesses owned by socially and economically disadvantaged individuals. These businesses include those owned by minorities, females, and those with disabilities.

Under the new Chapter 17-500, the City can establish annual participation goals, which must be based on, but not limited to:

- the availability of qualified M/W/DSBEs;
- the utilization of eligible qualified M/W/DSBEs on past contracts awarded by the City;
- a forecast of eligible contracts to be awarded within the fiscal year;
- an updated disparity analysis of businesses in the Philadelphia area.

Since 1990, the City has, under Mayoral Executive Orders 6-90, 1-93, 1-03 and 2-05, enacted race-neutral programs intended to overcome discrimination against minority, women and disabled owned businesses desiring to do business with the City through the implementation of various methodologies for issuing and evaluating bids, solicitations and proposals as well as awarding contracts. These executive orders outlined MBEC's functions and responsibilities which include, but are not limited to, the following:

- certifying M/W/DSBEs and maintaining a directory of such firms for the purpose of identifying the numbers and business classifications of these firms;
- establishing projected ranges of M/W/DSBE participation for each City contract based upon analysis of the bid specifications and availability of M/W/DSBEs to perform various elements of the contract;
- attending pre-bid (including pre-proposal) meetings to provide information to bidders;
- reviewing bids for responsiveness and responsibility and forwarding findings and recommendations to the City's Procurement Department or agency letting the contracts;
- performing investigations, including site visits to the bidder's firm and/or job site, to ascertain whether the bidder has discriminated in the solicitation or award of a subcontract;
- maintaining records of M/W/DSBE participation in City contracts;
- monitoring contracts to ensure that discrimination does not occur in the course of the performance of any contract;
- providing information on contracting opportunities to certified firms;
- reviewing City department requests for proposals and bid specifications to identify requirements that unduly restrict participation by M/W/DSBEs.

MBEC currently operates under Mayor's Executive Order 02-05, which was authorized by Mayor Street to govern the City's M/W/DSBE program⁴. The City's antidiscrimination policies were also subjected to new legislative mandates which were enacted in FY06, including amendments to Chapter 17-1500 of the Philadelphia Code, Section 6-109 of the Philadelphia

⁴ Source of this information was obtained from the City of Philadelphia's Intranet website address: Citynet.phila.gov/administration/mbec.html

Home Rule Charter that changed reporting requirements for the Finance Director regarding the participation of minority, women, and disabled-owned businesses in City contracts, and further requiring annual disparity studies.

Executive Order 02-05 was re-authorized in fiscal year 2006 to increase the meaningful and substantial participation of minority, women, and disabled owned businesses in City contracting, and strengthened compliance and enforcement mechanisms for City government. This policy was amended to facilitate City strategies that allowed for the modification of City contract requirements, including bonding and insurance, in order to benefit small businesses that largely include M/W/DSBE firms.

Chapter 17-1500 of the Philadelphia Code requires the Finance Director to issue an annual report ("the Annual Report") which analyzes the participation of disadvantaged business enterprises in City contracts and devises annual participation goals for such businesses. The Annual Report must contain certain items, including an Annual Disparity Study and Annual Participation Goals.

OBJECTIVES, SCOPE, AND METHODOLOGY

The Office of the City Controller's strategy for obtaining a picture of how minority, women, and disabled owned firms are performing in the area of procurement in City and City related contracts included the following four procedures: 1) conducting a survey and interviews of MBEC certified firms; 2) holding a series of three public hearings featuring testimony from M/W/DSBEs, advocacy groups and public officials; 3) performing a special audit of MBEC case files for public works contracts that closed in FY 2006 and FY 2007; and 4) reviewing M/W/DSBE related programs in other major cities. The objectives of these procedures was to investigate the validity of complaints received regarding barriers facing minority, women, and disabled-owned businesses within the City of Philadelphia's procurement and contracting processes and to recommend corrective actions to assist these firms.

Survey and Interviews Component

In the fall of 2006, the Office of the City Controller conducted a survey of 1,160 firms that were certified by MBEC⁵. The Office received 244 completed questionnaires from MBEC certified firms. After reviewing and analyzing the completed questionnaires, we conducted follow up telephone and in-person interviews to clarify certain information. Based in part on responses to our survey and interviews, the Office of the City Controller decided to conduct a more in-depth analysis of the relevant issues and prepare a report containing our findings and recommendations. The survey and interview process resulted in several important findings which included the following:

- Slow payment by the City of Philadelphia and/or prime contractors
- Inadequate monitoring and enforcement by the City and MBEC
- Bid Packages and Bond requirements are too large for smaller contractors to participate

⁵ In September 2006, survey forms and cover letters were mailed to 1,160 MBEC certified firms that were included in a database file which was provided to the Controller's Office by MBEC in May 2006.

- Often MBEC certified firms are included in winning bid proposals, but are not actually hired by the prime contractors to participate in the contracts.
- Excessive granting of waivers from MBEC participation requirements
- The impact of large Bonding and Insurance requirements on smaller contractors
- Lack of technical assistance for small businesses before and after contract awards
- The need for a comprehensive plan of action to address diversity and inclusion in city contracting and procurement

See Appendix B for a more complete analysis of the survey results.

Public Hearings Component

In April 2007, the Controller's Office held three public hearings designed to define, document and address impediments facing minority and women owned businesses as they endeavor to gain a fair share of contracts generated by the City. At the first hearing on April 12, 2007, business owners and advocates discussed issues faced by minority, women and disabled business firms in the City's contracting and procurement process. We held a second hearing on April 17, 2007, for which the Controller invited representatives from several City departments and agencies, including MBEC, Finance, Procurement, Law, and the Managing Director's Office, to respond to the issues and concerns that were raised by the business owners and advocacy agencies. Representatives of all invited City departments and agencies either declined our invitation or failed to testify at the hearing. However, several minority business owners and public policy professionals testified at the hearing on that date. The Controller's final hearing, held on April 24, 2007, allowed the Democratic and Republican mayoral candidates, along with other elected officials and policy makers, to present their proposals for addressing problems related to diversity and inclusion of minority, women, and disabled-owned businesses in the City of Philadelphia's procurement and contracting processes.

The witness list for three hearings included 16 minority and women business owners; representatives from several business advocacy agencies (including the African-American Chamber of Commerce, the Hispanic Chamber of Commerce, and the Asian American Chamber of Commerce); and four mayoral candidates or their representatives (including Democratic candidates former City Councilmember Michael Nutter, Congressman Chaka Fattah, and State Representative Dwight Evans and Republican candidate, Al Taubenberg).

Witnesses at the hearings stated that minorities, women and those with disabilities are being systematically locked out of larger City contracts. Business owners and advocates recommended that City officials strengthen oversight of the way City contracts are awarded to minority, women and disabled-owned businesses. They also recommended closer post-award monitoring of primary contractors and, particularly, how funds are subsequently dispersed to subcontractors. Despite MBEC's mandate to ensure that minority, women, and disabled-owned businesses are awarded a fair share of City contracts, witnesses overwhelmingly testified that MBEC did not adequately enforce that mandate. The majority of witnesses reported that it is commonplace for a prime contractor to include an M/W/DSBE subcontractor on a bid to meet the MBEC participation goals, and then subsequently drop, or not fully utilize the M/W/DSBE subcontractor after winning the award.

Several witnesses alleged that prime contractors sometimes fraudulently use the name of a minority owned business in their bid proposal. Some witnesses felt their names were used by a prime contractor to win a bid, without any intention of actually utilizing their services. Witnesses also asserted that some prime contractors delayed paying their MBEC-certified subcontractors as a ploy to force the subcontractors to accept less than the full value of their invoice and in some cases to force the M/W/DSBEs out of business. Other issues mentioned at the hearings were a perceived bias in favor of union contractors, a lack of oversight by City officials throughout the process, and a weak commitment to enforcement by MBEC.

Howard Rye, the Director of Diversity Affairs for City Council, testified that City Council is committed to diversity in City procurement and is drafting a law that would address the complaints raised by many of the witnesses. Witnesses recommended several options for addressing the barriers faced by M/W/DSBEs in the procurement process. One recommendation was to allow subcontractors to sue the City if they are not paid by the prime contractors. Current contract language often prevents such action because most subcontractors are third party beneficiaries and are not direct parties to City contracts.

A second recommendation was for the City to force prime contractors to document their payments to subcontractors. Failure to do so should draw penalties, though specific penalties were not suggested. The President of the Chapter of the National Association of Minority Contractors, John Macklin, said that his organization believes “the City isn’t progressing under MBEC but retrogressing under a system that rewards deceit, ignorance and greed.”

In testimony presented during the hearing on his behalf and in his mayoral campaign’s written economic development plan, Mayor-elect Michael Nutter stated that “I will create an Economic Opportunity Cabinet in my first term as Mayor, and I will double the number of minority, women and disadvantaged businesses awarded contracts by the City.” He also stated that “The existing MBEC office has failed by every measure to serve the minority business community and the women’s business community.” The theme that the current Minority Business Enterprise Council is a failure and should be restructured was repeated in testimony from Congressman Chaka Fattah and in a statement from State Representative Dwight Evans.

Mayor-elect Michael Nutter further asserted that “as Mayor, I will provide leadership outside of City government to encourage minority/women and disadvantaged business creation” and “I will mandate that the construction trade unions that do work with the City of Philadelphia triple the number of minority and women apprentices in their trades within three years.”

Subsequent to completing the hearings, the Controller’s Office conducted additional interviews with witnesses, other business owners, and City representatives to verify and clarify some of the data presented during the hearings and survey processes.

Audit Component

In addition to the survey and hearings, the Controller’s Office conducted a limited Special Audit of contract compliance and payments related to the participation of minority, female and disabled owned businesses in City contracts. The objectives of this audit were to evaluate the extent to which MBEC monitors prime contractors’ compliance with timely payment obligations to M/W/DSBEs and at the same time determine whether the M/W/DSBEs were being hired and

utilized by prime contractors consistent with the terms of the prime contractors' agreements with the City of Philadelphia. In accordance with Chapter 17-500 of the Philadelphia Code which established a program for setting M/W/DSBE goals in City contracts:

- Prime contractors are required to secure the prior written approval of MBEC before making any changes or modifications to the Contract commitments made by the prime contractor, including, without limitation, substitutions of M/W/DSBE subcontractors, changes or reductions in services provided by its M/W/DSBE subcontractors, or changes or reductions in the dollar and/or percentage amounts of commitments with its M/W/DSBE subcontractors.
- Prime contractors shall, within five (5) business days after receipt of payment from City for services performed under any Agreement awarded pursuant to Charter 17-500 of the Philadelphia Code deliver to its M/W/DSBE subcontractors the proportionate share of such payment for Services performed by its M/W/DSBE subcontractors.

To accomplish our audit objectives the Controller's office conducted inquiries of M/W/DSBE subcontractors, interviews of management and staff, and reviews and analyses of documents, reports, laws, regulations and other data. Our audit, extending from May 14, 2007 through August 22, 2007, was conducted Pursuant to Chapter 4, Section §6-400 of the Philadelphia Home Rule Charter and in accordance with Government Auditing Standards promulgated by the Comptroller General of the United States.

Audit Methodology and Findings

In order to be as objective as possible in choosing our sample for review, we selected all closed public works/construction type contracts for the fiscal years 2006 and 2007 (48 and 13 contracts, respectively). Of the 61 closed contracts selected, 10 did not have any minority participation. The remaining 51 PW contracts included 55 different M/W/DSBE firms on the corresponding Solicitation for Participation and Commitment Form (Bid sheet). The bid sheets listed a total of 117 specific jobs indicating that named subcontractors had received binding commitments to perform work for the prime contractors. These potential jobs had a total dollar bid amount of approximately \$111 million and total contract limit (bid amount plus change orders) of approximately \$127 million between FY 2006 and 2007.

Overall our investigation found that M/W/DSBE subcontractors were paid approximately 76% of the time based on the 42 sample items included in our telephone survey where payment information was received. It also appears that approximately 24% of the M/W/DSBE firms in our sample received more than the committed amount on the bid sheet. However, we also found that for approximately 24% of the jobs (approximately \$600,000 in committed bid amounts) included in our sample, the prime contractors did not use or pay the listed M/W/DSBE subcontractors. If we extrapolated this percentage over the total jobs (117) sampled there would be 28 M/W/DSBEs that did not receive work. And if we extrapolated the percentage over the potential total number of M/W/DSBE jobs there could be hundreds of jobs lost.

Our research on the 117 jobs revealed that 47% of the MBEC-certified subcontractors did not have written agreements with the prime contractors nor did the prime contractors provide written purchase orders to the subcontractors. Accordingly, the M/W/DSBE subcontractors were powerless to sue prime contractors and/or the City when prime contractors choose not to honor the terms of their bids/agreements with the City. This point is clearly illustrated in the case of Evans Suppliers & Communications, Inc. v. Elliott-Lewis Corporation and the City of Philadelphia, Common Pleas Court of Philadelphia County, Pennsylvania, Civil Trial Division, No. 0469. July 27, 2005, in which the Pennsylvania Superior Court, affirming the Court of Common Pleas, ruled that Evans Suppliers, a minority supplier listed on Elliott-Lewis Corporation bid sheet, had no standing to sue Elliott-Lewis or the City because Evans was a third-party beneficiary and not a party to the contract between Elliott-Lewis Corporation and the City of Philadelphia.

In this important matter, the City of Philadelphia failed to act upon a moral obligation as well as a political and social commitment to M/W/DSBE firms. The city refused to assert legal rights on behalf of Evans to protect the legal and financial interests of the minority subcontractor. The City did not enforce the contract against Elliott-Lewis and therefore, Evans Suppliers had no other recourse to compel Elliott-Lewis to comply with the terms of its contract.

By Evans⁶ the Superior Court of Pennsylvania, the appellate court, affirming the Court of Common Pleas, decided that the City's and Elliott-Lewis' clear intent in naming the minority subcontractors, including Evans, under the contract was to adhere to applicable law, which benefits disadvantaged business enterprises in general. However, the Superior Court ruled that there was no intent to benefit Evans in particular. Therefore, the courts ruled that the City is the only party that has standing to bring a claim against Elliott-Lewis for any breach of the program requirements and the contract.

Later, in Evans the federal court dismissed four legal claims of Evans including dismissal based on claim preclusion and res judicata resulting from the previous final state court decision concerning the same facts and parties before the federal court.

Evans clearly indicates that unless the City monitors and enforces its contracts with prime contractors, M/W/DSBEs will continue to be listed on bid sheets but not receive the corresponding work and economic benefits.

Review of Other Major Cities' Minority Business Programs

In an effort to assess the current policies and procedures concerning the City of Philadelphia and its monitoring of procurement contract opportunity goals for minority, women and disabled businesses, we conducted a review of minority business practices in eight of the largest cities in United States. The cities included in the review were Baltimore, Atlanta, New York City, Cleveland, Boston, Chicago, Detroit and Houston. Municipal government and quasi-public agency managers were contacted directly by e-mail and phone conversations to develop and refine the data in addition to website and other Internet search activities.

⁶ Evans Suppliers and Communications Co. v. City of Phila., No. 1660 EDA2005, 905 A.2d 1052 (Pa. Super. June 27, 2006)

We inquired whether these cities established programs by legislation (e.g. City Council Bill/Ordinance) or by an executive order of the mayor. Of the eight inquiries, only Boston established rules for addressing this issue by executive order. The other cities set rules by city ordinances.

Monitoring

The monitoring of performance of the minority business practices for each of these eight cities varies. However, in Baltimore, Atlanta, Cleveland, Houston and New York City either the Mayor's Office or the legal department monitor performance for the city. All indications are that these offices seem to carry more influence with providers resulting in better compliance.

Goals

An analysis of the process by which other cities established M/W/DSBE goals revealed the following methods:

- Goals set for vendors on a contract by contract basis - Baltimore, Cleveland, Seattle and Houston;
- Goals set based on commissioned disparity studies that are performed every two to three years - Atlanta and New York;
- Goals set by City ordinance – Chicago;
- Major cities that don't establish goals - Boston does not set goals at this time largely due to various set aside lawsuits filed against the city.

Each of the cities compiled annual reports on participation activities, with Baltimore, Atlanta, New York, Houston and Chicago issuing monthly reports. Cleveland, Boston and Seattle issue quarterly reports.

Penalties

Penalties for noncompliance by prime contractors vary from fines to loss of procurement rights in all of the cities except Seattle and Boston. Seattle, which sets voluntary goals, does not penalize but requires vendors to submit an outreach plan. Due to an impending lawsuit, Boston currently does not penalize prime contractors in noncompliance. The cities surveyed do not have exclusive funding provided for local/minority/women/disabled owned business.

Representatives from the surveyed cities offered us the following recommendations:

- **Baltimore** - These programs work best if they are housed in the law department because the decisions seem to carry more weight. Goals should be established and not negotiated. A strong M/W/DSBE certification process is vital to the integrity of your program.
- **Atlanta** - These programs work best if they are housed in the law department because the decisions seem to carry more weight. Goals should be established and not negotiated. Your MBE/WBE certification program is vital to the integrity of your program.
- **New York City** - Enforcement has to come from the administration.
- **Seattle** - None
- **Cleveland** - None
- **Boston** - Collect good data on utilization and program goals and operations.

- **Houston** – Close monitoring and vigorous oversight are key to a successful program
- **Chicago** – Reports non-construction jobs appear to have the greatest potential for growth in M/W/DSBE participation.

FINDINGS

The Controller's Office has developed a number of findings as a result of its research, special audit and investigation including the following:

1. MBEC has failed in its mission and should be restructured

The current MBEC program has failed to meet the goals and objectives of the City's antidiscrimination policies established under Charter 17-500 of the Philadelphia Code and Executive Order 02-05. MBEC has failed in its efforts to support the City of Philadelphia policy of fostering an environment in which M/W/DSBE firms are free to participate in City contracts on an equitable basis.

- The majority of the respondents to the Controller's survey indicated that the current MBEC organization is not a strong advocate on behalf M/W/DSBE firms. Several respondents pointed to the implementation of the "seven-day rule", which would allow prime contractors seven days after winning a bid to select and identify M/W/DSBEs subcontractors, as a prime example of MBEC leadership's lack of M/W/DSBE centered advocacy.
- Through our audit and investigation, the Controller's Office found that MBEC does not collect accurate data indicating the dollar amount and percentage participation of M/W/DSBEs on City Contracts awarded to for-profit businesses for each Department on an annual basis. Nor does MBEC monitor M/W/DSBE participation in City Contracts with nonprofit organizations.
- Also through our audit component and investigation, we found that MBEC does not perform post contract award monitoring procedures to ensure successful bidders' compliance with the City anti-discrimination policy, including the fulfillment of any M/W/DSBE commitments.
- Through the Controller's Office's public hearings and survey process, we found that MBEC certification procedures do not inspire public confidence that there is an urgency to increase M/W/DSBE participation in City Contracts. Several M/W/DSBE firms reported that MBEC repeatedly lost or misplaced important documents thereby delaying the certification or recertification process.
- Through our audit and investigation component, MBEC does not provide ongoing training and outreach programs for those City employees involved in the implementation of the City's antidiscrimination program; increasing M/W/DSBE percentage participation in City Contracts; and to improving the diversity of nonprofit organizations.
- Other weaknesses of the current MBEC program are illustrated in the remaining findings in this report.

2. MBEC and other City agencies inadequately monitor and enforce M/W/DSBE contracts

In accordance with Chapter 17-500 of the Philadelphia Code and Executive Order 02-05, the City requires the prime contractor to submit the names of all M/W/DSBEs that were solicited for participation in the City contract on the "Solicitation for Participation and

Commitment Form” (herein, “bid sheet”). Bidders are also required to submit documentary evidence of MBE, WBE and DSBES who have been solicited and with whom commitments have been made in the bidding process. However, the City does not enforce against the prime contractors’ failure to actually utilize the subcontractors who are identified on the bid sheets as those with whom the prime contractors entered into binding commitments for the purpose of meeting MBEC participation goals.

More disturbing is that during our audit and investigation the Controller’s Office discovered that the MBEC and MBEC’s assigned attorney had recently recommended the City change its procurement requirements for certain contracts to allow a prime contractor seven (7) days after the awarding of a contract to identify their MBEC-certified subcontractors. MBEC-certified firms believe that these changes will put them at greater risk of bid shopping on the part of prime contractors. In bid shopping prime contractors disclose M/W/DSBE firms’ subcontracting bids to their competitors so they can be underbid and are forced to accept unreasonable and unprofitable contract terms.

The City’s “antidiscrimination policy,” includes several penalties for prime contractor non-compliance, including:

- withholding payments;
- termination contracts;
- suspension from City contract bids for up to three years; and,
- recovery of one percent of the total dollar amount of the contract for each one percent of the commitment shortfall.

However, despite the existence of these potential sanctions, there is no evidence that the City has enforced these penalties over the past several years when presented with verifiable claims of discrimination by MBEC-certified and MBEC certifiable firms. Neither MBEC nor the Law Department responded to our requests for information regarding enforcement against prime contractors for non-compliance with the City’s antidiscrimination policy.

A review of the M/W/DSBE vendor case files during our audit showed that approximately in 98% of the cases there was no evidence that MBEC had performed any monitoring procedures for the contracts that were selected in our sample. In fact there wasn’t any evidence that MBEC’s staff ever contacted the M/W/DSBE subcontractors in our sample after the awarding of the contracts to prime contractors. Therefore, it is reasonable to conclude that MBEC does not effectively monitor contracts involving M/W/DSBE vendors.

3. Insufficient contract language and contract requirements

Currently, the City does not require prime contractors to enter into written contracts and/or purchase orders with subcontractors. Therefore, the majority of M/W/DSBEs have virtually no legal standing when the terms of their participation commitments are violated by prime contractors. This fact was clearly illustrated in the case of Evans Suppliers and Communications, Inc. versus Elliott-Lewis Corporation and the City of Philadelphia.

The current standard contract language also does not include requirements that MBEC-certified firms be certified at the time of the bid and at the time contract begins. This problem was clearly demonstrated in Division of Aviation Bid No. 6847, Contract No. PHL-1247-24 for Terminal D & E Expansion – Package 1B. In this case, Circle Construction, LLC (“Circle Construction”) was selected as a minority firm that would receive 12% of the contract from the prime contractor, Ernest Bock & Sons, Inc. (EBS). Although Circle Construction was MBEC certified at the time of the Bid on December 5, 2006. Circle’s certification expired on February 15, 2007 and the firm did not renew its certification.

The Procurement Department issued an award letter for this contract to EBS on March 30, 2007. At that time Circle Construction was not an MBEC-certified firm. Further, the City did not issue a notice to proceed under the contract until July 2007.

Although the City initially informed EBS that it could not use Circle Construction for the purpose of meeting its participation goals under contract, EBS protested, indicating the contract and Bid language did not require M/W/DSBE firms to be certified at the time the job commenced. On August 21, 2007, the City informed EBS that “MBEC has reviewed the certification of Circle Construction LLC (“Circle Construction”) and has determined that your company does not have to replace Circle Construction on the above-referenced bid because Circle Construction was certified at the time of the bid opening”.

4. MBEC certified firms are included in winning bid proposal, but are not included in contract work

Witness testimony and documentation from our special audit clearly demonstrated that prime contractors include M/W/DSBE subcontractors in their winning bid proposal but later reduce or completely eliminate subcontractor work levels after contracts are awarded. MBEC perpetuates this problem by failing to regularly monitor and enforce the contracts and by the lack of third party beneficiary rights for subcontractors, thereby leaving subcontractors legally powerless in dealing with the offending prime contractors.

5. Excessive granting of waivers from participation requirements

Several witnesses testified that MBEC grants waivers to prime contractors from participation requirements when prime contractors simply claim an inability to find qualified MBEC firms. The City fails to thoroughly investigate or verify such claims made by prime contractors. Twenty-one percent of survey respondents similarly cited waivers as a major problem.

6. Bid Packages are too large for smaller contractors to participate as prime contractors

City contracts frequently specify deliverables that are so large and/or complex that M/W/DSBE firms, which often have lower bonding and insurance capacity, are effectively locked out of the bidding process. MBEC and the purchasing departments of the City are currently not required to perform routine reviews of proposed projects to determine how their RFPs and bid proposals can be reduced in size to give M/W/DSBEs

better opportunities to compete as prime contractors. As a result, most M/W/DSBEs are relegated to competing as subcontractors for City related businesses.

7. Lack of bonding for smaller M/W/DSBE contractors

Due to inadequate capitalization and/or experience many M/W/DSBE's either can't afford a bond or can't persuade bonding companies to guarantee their performance. However without a bond, M/W/DSBEs cannot bid on many or participate in projects in the public or private sector which limits their growth and their effectiveness

8. Slow payment by the City of Philadelphia and/or prime contractors and limited access to working capital

The City's standard contract provisions contain language requiring prime contractors to pay their subcontractors five (5) days after the prime contractors receive payment for their invoices that include the goods or services that were provided by the subcontractors. However, the City fails to impose sanctions against prime contractors for failure to make timely payments to subcontractors. Based on the survey, interviews and hearing testimony, MBEC subcontractors are routinely forced to operate on 90 – 160 day terms on their invoices. In most cases prime contractors have been paid but simply hold on to the subcontractors' monies. Such practices carry the potential to ruin the credit rating of the minority subcontractors, destroy their relationship with banks and suppliers, and even lead to business failure.

During our entrance conference with MBEC's staff we were informed that SYMTRAC, MBEC's automated system for post-contract award payment activities, is not functional. MBEC could not provide a definite date as to when this proposed system will be operational. Currently subcontractors have no way to monitor when prime contractors have been paid for the goods or services provided by the subcontractors.

Inadequate working capital and fears of being "blackballed" from inclusion in future bids forces many M/W/DSBE subcontractors to compromise their committed participation amount and accept reduced payment amounts when they were not fully utilized, in order to obtain funds to finance weekly payrolls and other operating costs. A related problem is that mobilization financing⁷, which is available to prime contractors, is unavailable to M/W/DSBE subcontractors.

9. Need for technical assistance for small businesses before and after contract awards

Twenty-one percent of the responders to our survey indicated that MBEC certified firms need assistance in obtaining affordable technical assistance. They also indicated that such

⁷ Mobilization costs are the costs associated with mobilizing equipment and materials to the work site to get the project started. Mobilization costs vary depending on the size and scope of the project, but generally fall within 5 to 10 percent of the bid amount. Mobilization costs help the contractor finance the project by providing money on the front end of a contract.

technical assistance should be available before and after the awarding of contracts and subcontracts.

10. Lack of M/W/DSBE participation goals for not-for-profit contracts

Philadelphia does not have a certification program for the nonprofit sector which represents an approximately \$1.8 billion market (approximately 75 percent of the City's annual contract expenditures). Other major cities have certification programs for nonprofit organizations.

11. Certification Problems

Our analysis of the M/W/DSBE programs in other major cities reveals that Philadelphia currently has one of the poorest certification efficiency models among the participating municipalities. MBEC normally took over 120 days to complete its certification of applications. During the Controller's Office audit and investigation, vendors claimed of having to submit the same documentation two or three times because MBEC staff could not locate it. In 2006 the Pennsylvania Department of General Services suspended MBEC from accepting applications for the Universal Certification Program citing its poor performance in proceeding and documenting its certification process.

Recommendations

The following recommendations are the result of our research into Philadelphia's M/W/DSBE program including an analysis of comparable programs in other large cities across the country and a review of related regulations and case law.

1: Restructure the Minority Business Enterprise Council

The majority of MBEC's administrative and enforcement functions should be transferred to a cabinet level reporting position within the Executive Branch. Transferring MBEC's administrative functions to this level would demonstrate the City's commitment to fostering an environment in which M/W/DSBE firms can participate in City contracts on an equitable basis.

The contract monitoring and oversight functions should be transferred to the City Controller's Office. The Controller's Office currently performs contract monitoring and compliance oversight activities as part of its pre-audit functions. Transferring these functions would eliminate the duplication of oversight efforts and provide for independent contract monitoring.

MBEC has not taken the proper enforcement action against non-compliant contractors and has relied on its current counsel in their decision making. Therefore, MBEC should appoint a different counsel who will show a commitment to the proper monitoring and enforcement of both the spirit and law of the City's Minority Anti-discrimination policy which is embodied in Charter 17-500 of the Philadelphia Code and Executive Order 02-05. The attorney(s) who are assigned to represent MBEC should be periodically rotated in order to allow new ideas and fresh legal thoughts.

A restructured MBEC operation should be provided with adequate funding and should be provided a staff with relevant business and technical experience.

2: Improve Contract Monitoring and Enforcement

The City of Philadelphia should establish more effective procedures for monitoring all joint ventures and subcontracting relationships sanctioned by MBEC. This should include regular monitoring of contract activities and regular reporting requirements. The City should also establish enforcement procedures that ensure subcontractors are paid within five days of the payment by the City to the prime contractor. In addition, MBEC should maintain records of all payments made to venture partners and subcontractors.

All relevant City department and agencies should be sanctioned for failure to properly administer and enforce the City's "antidiscrimination policy," which includes several penalties for prime contractor non-compliance including withholding of payments; termination of contracts in whole or in part; suspension from city contract bids for up to three years; and recovery of one percent of the total dollar amount of the contract for each one percent of the commitment shortfall.

The City's compliance and enforcement staff should have experience in business, auditing, contract or contractual inspection and/or investigative experience.

3: Eliminate the Seven Day Rule

The City should eliminate its procurement regulations which allow a prime contractor to identify its M/W/DSBE subcontractors seven (7) days after the awarding of a contract. This rule undermines the integrity of the City's anti-discrimination policy. The City should require prime contractors to retain MBEC-certified subcontractors as a prerequisite for award of a contract.

4: Standard Contract Language Modifications

The City's standard contract language should include provisions of contracts for the third-party M/W/DSBEs that prime contractors include in the bids. More specifically, contract provisions should establish a sufficiently close and direct enough relationship between the prime and its M/W/DSBE subcontractors to support a legal claim on behalf of these M/W/DSBEs. The need for this type of language change was clearly illustrated in the case of Evans Suppliers & Communications, Inc. v. Elliott-Lewis Corporation and the City of Philadelphia.

Standard contract language should include provisions requiring prime contractors to enter into written contracts with M/W/DSBE subcontractors and to provide the City with documentation of these contracts within a reasonable/predetermined period of time.

5: Granting Participation Waiver

The City should require prime contractors to demonstrate that they have made a good faith effort to identify qualified M/W/DSBE as a prerequisite for the granting of a participation waiver. MBEC should develop procedures to verify all claims in defense of a participation waiver and develop a process to facilitate legitimate challenges to such claims.

6: Reduce Bid Package / Contract Size

The City should institute a policy to require purchasing departments and other relevant agencies to unbundle requests for proposals (RFPs) and bid packages unless contracting agents can demonstrate that bundling provides significant financial or other tangible benefits to the City. Adherence to such policies would promote the growth and development of M/W/DSBEs and provide more opportunities for M/W/DSBEs to bid and participate as prime contractors.

7: Create a Bonding Assistance Program

The City should create or support a bonding assistance program for small and emerging businesses. One option is for the City to create a pool of money which would be used as collateral to back bonds for small companies that private insurance companies might otherwise be reluctant to serve. Contractors in the program would be required to attend classes on basic business and project management skills. After the training, the agency administering the program will back a performance bond with collateral from up to 25 percent of a contract's cost, to a predetermined maximum amount.

8: Implement Prompt Payment Policy

The City of Philadelphia should be commended for having a prompt payment policy for contractors. Consistent with the objective of this policy, the City should penalize and sanction purchasing departments and/or prime contractors that do not comply with the prompt payment policy by delaying payments to subcontractors. However, the City departments often fail to act on the policy.

The City should also allow subcontractors to receive “mobilization payments” in which a portion of a project’s value is paid in advance to pay for start-up costs and other early stage expenses.

Purchasing departments and agencies must be required to process invoices involving M/W/DSBEs in a timely manner, including timely project inspections and monitoring.

The City should change its invoicing process to require prime contractors to document payments to subcontractors within a reasonable period of time. For instance, prime contractors could be required to submit a quarterly utilization report indicating the amount of payments they had received from the City under the prime’s contract, and what payments they had made to the M/W/DSBE subcontractors and any reasons for non-payment or late payments.

9: Provide Technical Assistance and Training

The City should provide and/or facilitate ongoing training and technical assistance to M/W/DSBEs in the area of project and financial management, bonding insurance, bid preparation, marketing and technology support. Training should be available through workshops and one-on-one sessions as well as through electronic media, including the internet. Current training efforts could be strengthened by contracting with outside management and technical assistance providers to provide needed technical services, particularly in the area of loans and bonding.

10: Promote more M/W/DSBE Collaboration

M/W/DSBE capacity could be increased by encouraging joint ventures among M/W/DSBEs. For example, under the Technical Assistance Centers’ Emerging Contractors Program, two to three small demolition contractors have pooled their financial capacity and resources in order to win several NTI demolition contracts.

11: Set goals for Not-for-Profit Contracts

The City should establish policy and procedures for setting goals for M/W/DSBE participation in City contracts with not-for-profit organizations. These organizations receive approximately 75% of the City’s annual contracting dollars.

12: Streamline the MBEC Certification Process

The City’s goal should be to process new certification applications within 60 days and recertification applications within 30 days.

The City should be commended for progress it has made towards establishing a unified certification application program in cooperation with other agencies in Philadelphia and the Commonwealth of Pennsylvania. The automation of City procurement should be synchronized with parallel automation of M/W/DSBE certification.

13: Facilitate Access to Capital

The City of Philadelphia should establish and/or support the creation of public/private financing mechanisms that can provide working capital, mobilization and term loans to businesses that have been awarded contracts through the City's M/W/DSBE participation process.

APPENDIX A:

SURVEY LETTER & QUESTIONNAIRE



OFFICE OF THE CONTROLLER
12th Floor, Municipal Services Bldg.
1401 John F. Kennedy Boulevard
Philadelphia, PA 19102
(215) 686-6680
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Email: alan.butkovitz@phila.gov

CITY OF PHILADELPHIA

ALAN BUTKOVITZ
City Controller

In an effort to increase the level of utilization of minority and women-owned businesses in City and City-related contracts, the Philadelphia City Controller's office is taking action. We are conducting research to determine whether there are significant barriers facing MBEC-certified businesses that hinder their ability to gain a fair share of contracts generated by the City of Philadelphia.

The enclosed survey is the City Controller's office initial action in that process. This survey is your opportunity to express concerns and/or insights about MBEC contractor impediments by either City departments or private contractors. The survey is short, simple and confidential; it will not be shared with other departments, so please take a few minutes to fill it in and return it by September 29, 2006.

If the survey analyses reveal significant MBEC-contractor impediments, the next action would be to verify those impediments at public hearings. Once verified, the Controller's office would categorize the impediments and begin working with the various stakeholders to implement change designed to eliminate MBEC-contractor impediments.

If you have any questions, or would like to obtain more information about the study, please contact John H. Thomas, Deputy City Controller at 215-686-6682.

Thanking you in advance for your participation,

Alan Butkovitz
Controller
City of Philadelphia

P.S. Please remember that the information will be held in the strictest confidence.

Enclosures:

- 1) Survey Questionnaire
- 2) Return Envelope

Survey of Minority Business Enterprise Council
Certified Minority ("MBE"), Woman ("WBE"), or Disabled ("DSBE")
owned business enterprises (Collectively "M/W/DSBEs")

Company Name: _____ Contact Person: _____
City: _____ State: _____ Zip Code: _____ Phone: _____

1. In what general category does your business fall?
☐ Personal and Professional Services ☐ Public Works Construction ☐ Concessions
☐ Service, Supply & Equipment ☐ Other _____
2. Including the business owner(s), how many employees do you have? _____
3. Please check all that apply to your business: ☐ Minority-owned ☐ Woman-owned ☐ Disabled-owned
4. How many years has your business been in operation?
☐ Less than 1 year ☐ 1 to 3 years ☐ 3 to 5 years ☐ 5 to 10 years ☐ Over 10 years
5. Which of the following categories best describes your business' revenue for the past year?
☐ Less than \$100,000 ☐ \$100,001 to \$500,000 ☐ \$500,001 to \$1,000,000
☐ \$1,000,001 to \$3,000,000 ☐ \$3,000,001 to \$5,000,000 ☐ \$5,000,001 to \$10,000,000
6. Has your firm sought and/or received any City or City-related contracts during the past five (5) years?
☐ No ☐ Yes How many? _____
7. Was your firm included as a subcontractor in bid proposals of any winning contract awards during the past three (3) years? ☐ Yes ☐ No
8. If yes, did your firm provide goods and/or services for and generate any monies from the project? ☐ Yes ☐ No
 - a) Was your firm's involvement in the project consistent with expectation and participation level substantially equivalent to or greater than the level included in the bid documents? ☐ Yes ☐ No
If not, do you know why? _____
 - b) Did your firm have a written contract or agreement? ☐ Yes ☐ No If not, do you know why? _____
 - c) Was your firm paid-in-full for its work? ☐ Yes ☐ No If not, do you know why? _____
 - d) Were the payments made to you in accordance with your contract? ☐ Yes ☐ No
If not, do you know why? _____
9. Please identify up to 10 City or City-related projects or contracts in which your firm participated, and describe what your firm did for each job. *(Please attach separate document if more space required.)*

10. Did your firm bid as a prime contractor on any City or City-related projects? ☐ Yes ☐ No
If not, why? _____

11. In your opinion, which of the following, if any, were barriers to your firm's ability to win contracts as a prime contractor? Mark all that apply.
- ☐ Failure of the City and related agencies to break large contracts down into smaller projects so that M/W/DSBE firms can compete.
 - ☐ Limited notice of contract competitions.
 - ☐ Bid shopping on the part of majority prime contractors, who disclose firms' subcontracting bids to their competitors so that they can underbid.
 - ☐ Extensive granting of waivers from MBEC participation requirements to majority contractors.
 - ☐ Insufficient financial capital.
 - ☐ Insufficient access to bonding and insurance.
 - ☐ Other _____
12. In the past 24 months, has your firm applied for and received Capital Investment for Operations and Expansion and/or Small Business Loan. ___ Yes ___ No
13. Would your firm be interested in participating in classes, seminars, trade shows, exhibitions, forums and other opportunities to share experience, ideas and promote your business? ___ Yes ___ No
14. If you answered YES to the previous question, what subjects would you like to see included? Select up to three areas that presently interest you.
- ___ Insurance ___ Bonding ___ Sources of and access to capital ___ Credit and collections
 ___ Cash flow management ___ Bookkeeping/Financial Statements ___ Budgeting ___ Taxes
 ___ Purchasing/cost control ___ How to respond to a proposal or bid ___ Writing a business plan
15. What other approaches should the City use to assist your firm in participating in City and City-related contracting?
- ___ Divide larger contracts into smaller contracts ___ Provide assistance obtaining bonding
 ___ Offer technical assistance ___ Conduct business development programs
 ___ Develop a training Mentor-Protégé program ___ Other (Please specify) _____

16. What is the ethnicity and gender of the owner(s) of this firm? ___ Male ___ Female
- ___ African American ___ Asian American ___ Hispanic American ___ Native American
 ___ Caucasian ___ Other (Please specify) _____
17. Has your firm experienced any discrimination based on race, color, national origin, or sex by prime contractors on City or City-related projects? (Please specify)
- _____

18. Has your firm experienced any discrimination based on race, color, national origin, or sex by the financial, credit, insurance, or bond markets related to any contracts? (Please specify)
- _____

19. Has your firm experienced other factors that limit its ability to compete for prime and/or subcontracts? (Please specify)
- _____

20. On a scale of 1 to 7, with 1 being poor and 7 being excellent, how would you rate the City of Philadelphia's Minority Business Enterprise Council (MBEC) in the following areas?
- ___ a) Processing Certification Applications
 - ___ b) Monitoring Contract Awards
 - ___ c) Setting Participation Goals for City and City-related Contracts
 - ___ d) Ensuring that M/W/DSBEs are afforded equal access and opportunity to compete for and secure contracts within the City of Philadelphia

APPENDIX B:

SURVEY RESULTS

Minority Business Enterprise Council

2006 Survey:

How long has your business been in operation?

Less than one year	0.0%
1 to 3 years	5.3%
3 to 5 years	7.0%
5 to 10 years	21.7%
Over 10 years	66.0%

Which of the following categories best describes your business' revenue for the past year?

Less than \$100,000	15.2%
\$100,001 to \$500,000	27.5%
\$500,001 to \$1,000,000	20.1%
\$1,000,001 to \$3,000,000	16.4%
\$3,000,001 to \$5,000,000	9.0%
\$5,000,001 to \$10,000,000	9.4%

Has your firm sought and/or received any City or City-related contracts during the past five (5) years?

No	35.2%
Yes	64.8%

Was your firm included as a subcontractor in bid proposals of any winning contract awards during the past three (3) years?

No	16.4%
Yes	42.2%

***The above percentages do not total 100% because all firms did respond to this question.**

In your opinion, which of the following, if any, were barriers to your firm's ability to win contracts as a prime contractor?

A) Failure of the City to reduce the size of the contracts so that smaller firms can bid directly with the City of Philadelphia?	45.1%
B) Prime contractors solicit bids from subcontractors at the last minute.	29.5%
C) Bid shopping by prime contractors who often work solely with the same few subcontractors?	20.9%
D) Excessive granting of waivers from MBEC participation requirements.	21.3%
E) Insufficient financial capital.	12.3%
F) Inadequate access to bonding and insurance.	13.9%

**2006 Survey of Minority Business Enterprise Council
Certified Minority ("MBE"), Woman ("WBE"), or Disabled ("DSBE")
owned business enterprises (Collectively "M/W/DSBEs")**

Survey Results

1) In what general category does your business fall?

Personal and Professional Services	125 out of 244
Public Works Construction	26 out of 244
Concessions	7 out of 244
Service, Supply and Equipment	57 out of 244
Other	29 out of 244

2) Please check all that apply to your business: *

Minority-owned	145 out of 244
Woman-owned	150 out of 244
Disabled-owned	16 out of 244

* The total for this category exceed 244 because some respondents selected more than one category.

3) How many years has your business been in operation?

Less than one year	0 out of 244
1 to 3 years	13 out of 244
3 to 5 years	17 out of 244
5 to 10 years	53 out of 244
Over 10 years	161 out of 244

4) Which of the following categories best describes you business' revenue for the past year?

Less than \$100,000	37 out of 244
\$100,001 to \$500,000	67 out of 244
\$500,001 to \$1,000,000	49 out of 244
\$1,000,001 to \$3,000,000	40 out of 244
\$3,000,001 to \$5,000,000	22 out of 244
\$5,000,001 to \$10,000,000	23 out of 244

6) Has your firm sought and/or received any City or City-related contracts during the past five (5) years?

No	86 out of 244
Yes	158 out of 244

7) Was your firm included as a subcontractor in bid proposals of any winning contract awards during the past three (3) years?

No	40 out of 244
Yes	103 out of 244

8) If yes, did your firm provide goods and/or services for and generate any monies from the project?

No	51 out of 244
Yes	93 out of 244

a) No	31 out of 244
Yes	85 out of 244

b) No	28 out of 244
Yes	91 out of 244

c) No	26 out of 244
Yes	85 out of 244

d) No	26 out of 244
Yes	76 out of 244

10) Did your firm bid as a prime contractor on any City or City-related projects?

No	158 out of 244
Yes	74 out of 244

11) In your opinion, which of the following, if any, were barriers to your firm's ability to win contracts as a prime contractor? Mark all that apply. (Selections have been labeled 'a-g')

a) Failure of the City and related agencies to break large contracts down into smaller projects so that M/W/DSBE firms can compete.	110 out of 244
b) Limited notice of contract competitions.	72 out of 244
c) Bid shopping on the part of majority prime contractors, who disclose firms' subcontracting	51 out of 244
d) Extensive granting of waivers from MBEC participation requirements to prime contractors.	52 out of 244
e) Insufficient financial capital.	30 out of 244
f) Insufficient access to bonding and insurance.	34 out of 244
g) Other	52 out of 244

12) In the past 24 months, has your firm applied for and received Capital Investment for Operations and Expansion and/or Small Business Loan.

No	216 out of 244
Yes	21 out of 244

13) Would your firm be interested in participating in classes, seminars, trade shows, exhibitions, forums and other opportunities to share experience, ideas and promote you business?

No	73 out of 244
Yes	157 out of 244

14) If you answered YES to the previous question, what subjects would you like to see included?

Insurance	23 out of 244
Bonding	37 out of 244
Sources of and access to capital	50 out of 244
Credit and collections	19 out of 244
Cash flow management	37 out of 244
Bookkeeping/Financial Statements	17 out of 244
Budgeting	12 out of 244
Taxes	16 out of 244
Purchasing/cost control	13 out of 244
How to respond to a proposal or bid	84 out of 244
Writing a business plan	21 out of 244

15) What other approaches should the City use to assist your firm in participating in City and City-related contracting?

Divide larger contracts into smaller contracts	122 out of 244
Provide assistance obtaining bonding	42 out of 244
Offer technical assistance	22 out of 244
Conduct business development programs	47 out of 244
Develop a training Mentor-Protégé program	58 out of 244
Other	54 out of 244

16) What is the ethnicity and gender of the owner(s) of this firm?

Male	88 out of 244
Female	153 out of 244
African American	92 out of 244
Asian American	29 out of 244
Hispanic American	20 out of 244
Native American	1 out of 244
Caucasian	90 out of 244
Other	2 out of 244

20) On a scale of 1 to 7, with 1 being poor and 7 being excellent, how would you rate the City of Philadelphia's Minority Business Enterprise Council (MBEC) in the following areas?

a) Processing Certification Application

1. -	37 out of 244
2. -	13 out of 244
3. -	35 out of 244
4. -	24 out of 244
5. -	40 out of 244
6. -	27 out of 244
7. -	40 out of 244

b) Monitoring Contract Awards

1. -	41 out of 244
2. -	20 out of 244
3. -	19 out of 244
4. -	23 out of 244
5. -	29 out of 244
6. -	15 out of 244
7. -	11 out of 244

c) Setting Contract Participation Goals

- 1. - 26 out of 244
- 2. - 27 out of 244
- 3. - 22 out of 244
- 4. - 26 out of 244
- 5. - 22 out of 244
- 6. - 32 out of 244
- 7. - 21 out of 244

d) Ensuring Equal Access for M/W/DSBEs

- 1. - 38 out of 244
- 2. - 32 out of 244
- 3. - 24 out of 244
- 4. - 31 out of 244
- 5. - 20 out of 244
- 6. - 20 out of 244
- 7. - 15 out of 244

APPENDIX C:

**SOLICITATION FOR PARTICIPATION AND COMMITMENT FORM
(PROPOSAL)**

SOLICITATION FOR PARTICIPATION AND COMMITMENT FORM (PROPOSAL) Minority (MBE), Women (WBE), and Disabled Disadvantaged (DSBE) Business Enterprises				DEPARTMENT OF FINANCE MINORITY BUSINESS ENTERPRISE COUNCIL (MBEC)			
RFP TITLE - Hair Testing for Drug Abuse		Name of Proposer		Proposal Submission Date			
List below ALL MBE/WBE/DSBEs that were solicited regardless of whether a commitment resulted therefrom. - Photocopy this form as necessary.							
<input type="checkbox"/> MBE <input type="checkbox"/> WBE <input type="checkbox"/> DSBE		Work to be Performed	Date Solicited	Commitment Made		Give Reason(s)	
Company Name			By Phone	By Mail	Yes (If Yes, give date)	NO	If No Commitment
Address							
Contact Person			Quote Received		Amount Committed To		
Telephone Number			YES	NO	Dollar Amount		
Fax #					\$		
MBEC CERTIFICATION #					Percent of Total Proposal %		
<input type="checkbox"/> MBE <input type="checkbox"/> WBE <input type="checkbox"/> DSBE		Work to be Performed	Date Solicited	Commitment Made		Give Reason(s)	
Company Name			By Phone	By Mail	Yes (If Yes, give date)	NO	If No Commitment
Address							
Contact Person			Quote Received		Amount Committed To		
Telephone Number			YES	NO	Dollar Amount		
Fax #					\$		
MBEC CERTIFICATION #					Percent of Total Proposal %		
<input type="checkbox"/> MBE <input type="checkbox"/> WBE <input type="checkbox"/> DSBE		Work to be Performed	Date Solicited	Commitment Made		Give Reason(s)	
Company Name			By Phone	By Mail	Yes (If Yes, give date)	NO	If No Commitment
Address							
Contact Person			Quote Received		Amount Committed To		
Telephone Number			YES	NO	Dollar Amount		
Fax #					\$		
MBEC CERTIFICATION #					Percent of Total Proposal %		
<input type="checkbox"/> MBE <input type="checkbox"/> WBE <input type="checkbox"/> DSBE		Work to be Performed	Date Solicited	Commitment Made		Give Reason(s)	
Company Name			By Phone	By Mail	Yes (If Yes, give date)	NO	If No Commitment
Address							
Contact Person			Quote Received		Amount Committed To		
Telephone Number			YES	NO	Dollar Amount		
Fax #					\$		
MBEC CERTIFICATION #					Percent of Total Proposal %		

REV- 2/06

¹ M-DBE/W-DBE/DS-DBES listed above must be certified by the MBEC prior to proposal submission date.

² Failure to give reason may result in rejection of your proposal. Use additional pages if necessary.

APPENDIX D:

**EXECUTIVE ORDER 02-05
RELATING TO THE PARTICIPATION OF
MINORITY, WOMEN AND DISABLED BUSINESSES
IN CITY CONTRACTS**

**REAUTHORIZATION
OF
EXECUTIVE ORDER 02 - 05
RELATING TO THE PARTICIPATION OF
MINORITY, WOMEN AND DISABLED BUSINESSES
IN CITY CONTRACTS**

BACKGROUND

WHEREAS, the City of Philadelphia is a racially and ethnically diverse city of 1.5 million people, approximately 55 percent of whom represent racial or ethnic minorities; and

WHEREAS, a study completed by D.J. Miller & Associates, Inc. in 2004 ("D.J. Miller Study") of the City's contracting with minority and women owned businesses, found that less than two percent of Philadelphia's contract dollars across all categories of City contracting had been spent with businesses owned and controlled by minorities or women despite the availability of capable minority and women owned businesses in the Greater Philadelphia region; and

WHEREAS, since 1990, the City has, under Mayoral Executive Orders 6-90, 1-93 and 1-03, enacted race-neutral programs intended to overcome discrimination against minority, women and disabled owned businesses desiring to do business with the City through the implementation of various methodologies for issuing and evaluating bids, solicitations and proposals and awarding contracts; and

WHEREAS, it is the policy of the City of Philadelphia to provide an equal opportunity for any business to compete for City contracts and to assure that any contracts using public funds, sourced, administered or authorized by the City, including contracts requiring City Council approval, are not used to promote, reinforce or perpetuate discrimination; and

WHEREAS, the approximately 800 minority, woman and disabled owned businesses certified by the Minority Business Enterprise Council (the "MBEC") are well prepared to compete for and to participate in City contracts on an equitable basis with other businesses; and

WHEREAS, the Constitution of the Commonwealth of Pennsylvania prohibits discrimination on the basis of race, color or gender; and

WHEREAS, the Governor's Executive Order 2004-6, 34 Pa.B. 2685, directs all Commonwealth agencies to achieve an increase in the dollar value and percentage participation by minority and women owned businesses in contracts awarded by the State; and

WHEREAS, Section 8-200(2)(d) of The Philadelphia Home Rule Charter requires that City contracts contain provisions prohibiting contractors from discriminating against or permitting discrimination against any person because of race, color, religion or national origin; and

WHEREAS, in City Fiscal Year 2005, minority and women businesses bidding as prime contractors were awarded respectively, 6.8 percent and 4.1 percent of all Service Supply and Equipment Bids and only .03 percent of City Public Works Bids were awarded to minority businesses and 2.2 percent to women businesses bidding as prime contractors; and

WHEREAS, it is the intent of the City of Philadelphia to create an even playing field which will increase the number of prime contracts awarded by the City to minority, women and disabled owned businesses, as well as increase the overall dollar value and percentage participation by those businesses as subcontractors or joint venture partners on all contracts awarded by the City; and

WHEREAS, the City intends that all City employees engaged in the award of City contracts comprehend the City's policy and mission set forth herein and acknowledge that their job performance will be measured in part by whether they make diligent efforts towards achieving the goals and objectives of this policy.

NOW, THEREFORE, I, John F. Street, Mayor of Philadelphia, by the powers vested in me in accordance with Sections 1-102 and 4-100 of the Philadelphia Home Rule Charter, do hereby ORDER that:

SECTION 1. Reauthorization of Executive Order 02-05

A. Reauthorization of Executive Order 02-05.

The Background as set forth above is incorporated herein by reference. Pursuant to Section 8 of Executive Order 02-05, this Order is hereby reauthorized and restated, as amended herein, for a term of four years commencing September 4, 2006. Further remedial action is required based upon assessment of City of Philadelphia contracting data made available to the Mayor by the Minority Business Enterprise Council. In Fiscal Year 2005, 14 percent of City dollars spent with for-profit businesses went to minority business enterprises ("MBEs"), 8 percent to woman business enterprises ("WBEs") and less than 1 percent to disabled business enterprises ("DSBEs"). Further, 5 percent of sealed bids were won by M/W/DSBEs as prime contractors, demonstrating that M/W/DSBEs are not participating meaningfully in all tiers of City contracting as originally contemplated by this Order. Reauthorization of Executive Order 02-05 will allow the City to continue to implement and enforce contracting strategies and monitor progress towards the realization of M/W/DSBE's equal access to City contracting opportunities.

B. Purpose and Statement of Policy and Mission

Philadelphia is in the midst of an economic renaissance. The City, taking the lead, and sometimes through private and public partnerships, is pursuing initiatives that attract and retain businesses in Philadelphia. The City believes that all businesses, including those owned and controlled by minorities, women and disabled persons, must be given the opportunity to fully participate in the economy and the City acknowledges that the participation of these businesses is critical to the economic growth that the City envisions for its future. Unfortunately, as the D.J. Miller Study documents and recent contracting evidence demonstrates, Philadelphia is

still suffering from the historical effects of discrimination and segregation in education and business. To address the impact of historical and present-day inequities in City contracting, the City is guided by the United States Supreme Court's pronouncements in City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) and its most recent decision in Grutter v. Bollinger, 539 U.S. 306 (2003). The City acknowledges that the consideration of race as a remedy for past discrimination is subject to the constitutional test of "strict scrutiny." This test is not "strict in theory, but fatal in fact" as Justice Sandra Day O'Connor wrote in Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) in which she noted that "the unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." The law continues to allow for the implementation of remedies narrowly tailored to redress discrimination. Consistent with the law, the City is committed to a policy of diversity that does not seek to disadvantage or favor one race or ethnicity or gender over another. The City broadly defines "diversity" as encompassing not only race, ethnicity, gender and disability but also elements of socio-economic status, educational attainment and cultural insight and beliefs. The City believes that the benefits of achieving diversity in City contracting go far beyond statistical measurements of business participation of minority, women and disabled owned businesses and are best realized through the City's procurement of high quality and cost-effective goods and services under a broad array of contracts.

In furtherance of this policy and mission, the City of Philadelphia is committed to ensuring that all businesses desiring to do business with the City have an equal opportunity to compete. This Executive Order is designed to take the additional steps warranted and necessary to overcome the utilization disparities found in the City's contracting efforts with minority, women and disabled owned businesses. The City intends to create an environment of inclusion in Philadelphia and to meaningfully increase opportunities for the participation by minority, women and disabled owned businesses in City contracts at all tiers of contracting, as prime contractors, subcontractors and joint venture partners. The City will continue to enforce the prohibition against discrimination in City Contracts by taking any additional steps necessary to prevent majority owned business enterprises that participate in the City's contracting process from employing any business practices which would have an exclusionary impact on or discriminate against any other business because of its owners' race, color, sex, sexual orientation, gender identity, religion, national origin, ancestry, age or handicap. The City will monitor the activities and performance of majority owned business enterprises to ensure compliance with the goals and objectives of the City and where a violation of this Executive Order is found, the City will take swift and appropriate action in accordance with Section 7.

SECTION 2. Definitions

A. Annual Disparity Study. An up-to-date study analyzing the participation of MBEs, WBEs and DSBs in City Contracts compared to the percentage of qualified MBEs, WBEs and DSBs available to participate in such contracts. The Annual Disparity Study is distinct from a Disparity Study which is a comprehensive study performed to determine whether discrimination exists in contracting through the use of public and private sector contracting data, statistical models, legal analysis, historical and anecdotal information. The Annual Disparity

Study shall analyze contracting data derived from the Participation Report and may forecast on a fiscal year basis, through the development of annual participation goals, the participation of MBEs, WBEs and DSBES in City Contracts.

B. Benchmark. A Department's annual goal of projected purchasing/contracting with Minority ("MBE"), Woman ("WBE") or Disabled ("DSBE") owned business enterprises (collectively "M/W/DSBEs"), as approved by the MBEC, and expressed as a percentage of the overall contracting/purchasing by that Department in a given year.

C. Bid. A quotation, proposal or offer by a Bidder to provide labor, materials, equipment, supplies or services to the City for a price.

D. Bidder. Any person or business that submits a Bid.

E. Certification. The process by which the MBEC, or its designee, certifies businesses as eligible to participate on City contracts as M/W/DSBEs.

F. City Contract. A contract funded in whole or in part by the City or administered by the City, whether competitively bid or negotiated, within the following categories:

- Service, Supply and Equipment
- Public Works Construction
- Personal and Professional Services
- Concessions
- Miscellaneous and Small Order Purchases

G. City-Related Special Project. A project, including without limitation any project of a Quasi-Public Agency, that requires approval, personnel, financial assistance or services from the City and/or the approval of City Council.

H. Commercially Acceptable Function. An M/W/DSBE performs a Commercially Acceptable Function when it (1) performs a distinct element of a City Contract (as required by the work to be performed in accordance with the bid specifications in a City Contract or on a City Related Special Project) which is worthy of the dollar amount of the M/W/DSBE's contract; and (2) the M/W/DSBE carries out its responsibilities by actually performing, managing, and supervising the work involved.

I. Compliance Plan. A written plan produced by a Department and approved by the MBEC that details how a Department will achieve the goals and objectives of this Executive Order, including its Benchmark in a given year.

J. Control. The power to make day-to-day operational decisions and policy decisions on matters of management, operations and finances.

K. Department. Any City of Philadelphia department, agency, board or commission, including the offices of the Mayor and each Cabinet member.

L. Disabled Business Enterprise or DSBE. A for-profit business certified by the MBEC that is:

- A sole proprietorship owned and controlled by a disabled person; or
- A partnership controlled by one or more disabled persons in which at least 51 percent of the beneficial ownership interests are held by one or more disabled persons; or
- A corporation or other entity controlled by one or more disabled persons in which at least 51 percent of the beneficial ownership interests in such corporation or entity are owned by one or more disabled persons.

M. Disabled Person. A person who has a physical or mental impairment that substantially limits one or more of his or her major life activities, such as caring for oneself, performing manual tasks, e.g., walking, seeing, hearing, speaking, breathing, learning and performing physical work.

N. Disadvantaged Business Enterprise or DBE. A for-profit small business, which is owned and controlled by socially and economically disadvantaged individuals as defined in Title 49 of the Code of Federal Regulations Part 26.

O. Discrimination. Any action or pattern of disparate treatment because of race, color, sex, sexual orientation, gender identity, religion, national origin, ancestry, age or handicap in the solicitation and/or selection of City Contract participants, in the award of a City Contract or in the performance or administration of a City Contract.

P. Disparity Study. A comprehensive study that examines discrimination in the public and private sectors against available businesses owned by minority persons, disabled persons and women. A Disparity Study includes, but is not limited to, an analysis of contracting data for the purpose of determining whether statistically significant disparities or underutilization exists in the award of contracts and subcontracts to minority, woman and disabled owned businesses as compared to other businesses and whether the disparities are related to discrimination. A Disparity Study also includes, in addition to statistical findings, an evaluation of available legal remedies, assessment of procurement policies and practices and historical and anecdotal information collected from business owners and other individuals.

Q. Eligible Joint Venture. A joint venture in which one or more of the partners is a certified M/W/DSBE that is responsible for a Commercially Acceptable Function in the performance of a City Contract and that shares in the management, risks and profits of the joint venture commensurate with that partner's ownership and capital contribution to the joint venture. For an Eligible Joint Venture to be certified as an M/W/DSBE, more than 50 percent of the beneficial ownership interests must be owned by one or more M/W/DSBEs which must also control the joint venture.

R. Equitable Participation. A level of participation on a City Contract where M/W/DSBEs are not underutilized based upon the availability of M/W/DSBEs within the Greater Philadelphia region to participate on such City Contracts.

S. Exclusion. Practices or policies, intentional or otherwise, which have the effect of barring or underutilizing ready, willing and able M/W/DSBEs on City Contracts.

T. Good Faith Effort. A Bidder's efforts, as evaluated by the MBEC, the scope, intensity and appropriateness of which are designed and performed to achieve meaningful participation of M/W/DSBEs in a specific City Contract.

U. Goal Setting. The employment of various methodologies by the MBEC and Departments, including the establishment of contract-by-contract participation ranges, which shall aspire to increase the participation of M/W/DSBEs as prime contractors, joint venture partners and subcontractors on City Contracts. These methodologies may also include the implementation of race neutral and narrowly tailored race-conscious methodologies based upon an analysis of factors such as historical contracting data, the Department Benchmark, the size and scope of the City Contract and the availability of certified M/W/DSBEs to perform the work of the City Contract.

V. Inclusion. The result of Goal Setting that yields Equitable Participation by M/W/DSBEs on City Contracts and City Related Special Projects.

W. Joint Venture. An association of two or more for-profit businesses carrying out a single purpose by creating a separate and distinct for-profit business venture in which they combine their resources, capital, efforts, skills and knowledge.

X. Majority Owned Business. Any for-profit business that is not beneficially owned and controlled by a minority, woman or disabled person.

Y. Minority Business Enterprise Council (MBEC). A central services unit in the Office of the Director of Finance with the authority and responsibility to oversee the implementation and enforcement of this Executive Order.

Z. Minority Business Enterprise or MBE. A for-profit business certified by the MBEC, that is:

- A sole proprietorship owned and controlled by a Minority Person; or
- A partnership controlled by one or more Minority Persons in which at least 51 percent of the beneficial ownership interests are owned by one or more Minority Persons; or
- A corporation or other entity controlled by one or more Minority Persons in which at least 51 percent of the beneficial ownership interests in such corporation or entity are owned by one or more Minority Persons.

AA. Minority Person. A person who is:

- African American or Black, having origins in any of the Black racial groups of Africa;
- Hispanic American, including persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
- Asian American, including persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Mariana Islands, Macao, Fiji, Tonga, Kiribati, Juvalu, Nauru, Federated States of Micronesia, Hong Kong, India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka; or
- Native American, which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians.

BB. Participation Report. An annual report prepared and issued by the MBEC to the Mayor and City Council that reports the dollar amount and percentage value of M/W/DSBE participation on City Contracts awarded to for-profit businesses during the preceding Fiscal Year (July 1st through June 30th).

CC. Quasi-Public Agency. Any authority or quasi-public corporation which either:

- receives an appropriation from the City; or
- has entered into a continuing contractual or cooperative relationship with the City; or
- operates under legal authority granted to it by City ordinance, including, but not limited to, PHA, PIDC, RDA, Penn's Landing Corporation, the Hospitals and Higher Education Authority and PFMC (for PGW).

DD. Responsible Bid. A Bid, which in addition to satisfying all of the requirements under any applicable pre-bid or post-bid qualification procedure, including, but not limited to Section 17-101 of the Philadelphia Code, rebuttably demonstrates that the Bidder has not engaged in discriminatory or exclusionary conduct in the solicitation of contract participants as part of a Bid and that the Bidder will not engage in discrimination or exclusionary conduct in the performance of a City Contract if awarded.

EE. Responsive Bid. A Responsible Bid that, in addition to all other requirements of the bid specifications, request for proposals, or similar document, contains documentary evidence of the M/W/DSBEs that have been solicited and that will be used by the Bidder on a City Contract, if awarded, where the Bid satisfies the M/W/DSBE participation ranges for that City Contract, as applicable, and demonstrates Good Faith Efforts. When a Bidder is unable to achieve the participation ranges set for a specific City Contract, a Responsive Bid consists of the submission of a Responsible Bid that contains the required documentary evidence along with a written request for the reduction of all or part of the M/W/DSBE participation requirements ("Request For Reduction/Waiver"), which is granted based on a determination by the MBEC that

the bidder exercised Good Faith Efforts to comply with the M/W/DSBE participation requirements.

FF. Woman Business Enterprise or WBE. A for-profit business certified by the MBEC that is:

- A sole proprietorship owned and controlled by a woman; or
- A partnership controlled by one or more women in which at least 51 percent of the beneficial ownership interests are held by one or more women; or
- A corporation or other entity controlled by one or more women in which at least 51 percent of the beneficial interests in such corporation or entity are owned by one or more women.

SECTION 3. The Minority Business Enterprise Council and Advisory Board

A. Reauthorization of MBEC

The MBEC is hereby reauthorized. The MBEC shall be a central services unit in the Office of the Director of Finance, and the Executive Director of the MBEC shall report to the Director of Finance. The MBEC shall establish a program structured to fulfill the purposes set forth in Section 1, which program must be approved by the Director of Finance, and the MBEC shall be responsible to carry out the duties and responsibilities given to it under this Executive Order.

B. Minority Business Enterprise Council Advisory Board

1. The Mayor appoints a Minority Business Enterprise Council Advisory Board ("MBEC Advisory Board") to provide input and recommendations in support of the goals and objectives of this Executive Order. The Mayor appoints the Chair of the MBEC Advisory Board and all members, which must number at least fifteen (15). At least one member of the MBEC Advisory Board shall be appointed from each of the following constituencies:
 - Certified M/W/DSBEs
 - Building Trades
 - Majority Owned Businesses
 - Nonprofit Organizations
 - Construction Contractors
 - Architects and Engineers
2. The MBEC Advisory Board shall meet monthly and shall among other issues which may properly be brought before the Council consider:
 - a. Recommending strategies to increase the employment of minorities, women and the disabled in the building trades.

- b. Recommending strategies to increase the employment of minorities, women and the disabled on publicly funded construction projects.
- c. Recommending strategies to increase the award of prime City Contracts to M/W/DSBEs.

C. Certification

1. The MBEC shall establish standards and procedures for certifying M/W/DSBEs, and the MBEC, or its designee, shall have the authority to certify M/W/DSBEs in accordance with those standards and procedures. The certification procedure adopted pursuant to this Executive Order must inspire public confidence that the certified businesses are in fact bona fide M/W/DSBEs. Any designee of the MBEC authorized to carry out the certification procedure authorized herein must be approved by the Director of Finance. The MBEC, with the approval of the Director of Finance may allow reciprocity for businesses certified by other reputable certifying agencies, provided that it gives routine public notice of which agencies and/or governmental certifications will be recognized.
2. Certification Appeal Process. Any business denied certification under Section 3 (C.) (1.) or removed from eligibility as a M/W/DSBE by the MBEC, may file a written appeal with the MBEC in accordance with MBEC procedures. The decision of the MBEC may be appealed, in writing, to the Director of Finance whose decision shall be final.
3. The MBEC shall maintain a directory of certified M/W/DSBEs. The MBEC directory shall list all M/W/DSBEs certified to do business with the City as M/W/DSBEs along with the commodity code classifications within which they are qualified to provide equipment, supplies, materials or services. The MBEC directory shall be updated on at least a quarterly basis.
4. The MBEC, as a member of the Pennsylvania Unified Certification Program, shall certify DBEs pursuant to 49 CFR Parts 23 and 26. Only firms certified as DBEs by the Pennsylvania Unified Certification Program may be counted towards DBE participation ranges on any federally assisted contracts requiring DBE participation. All DBEs will be listed in the Pennsylvania Unified Certification Program Directory. All denials of DBE certification or removal of DBE eligibility may be appealed, solely, through the Pennsylvania Unified Certification Program.

D. Compliance Plans and Race and Gender Neutral Strategies

1. The MBEC shall have the authority to direct the submission of Compliance Plan(s) by any Department and shall approve the Compliance Plans and Benchmarks proposed pursuant to Section 5(A)(1). No Compliance Plan or Benchmark shall become effective without the approval of the MBEC.
2. The MBEC shall have the authority to approve the M/W/DSBE participation ranges set for each City Contract pursuant to Section 5(A)(2) and no M/W/DSBE participation range proposed for a City Contract shall become effective without the approval of the MBEC. All M/W/DSBE participation ranges set pursuant to Section 5(A)(2) and approved pursuant to Section 3(D)(2) shall be targeted to offer the maximum opportunity for M/W/DSBE participation on City Contracts.
3. The MBEC and Departments, with the approval of the Director of Finance, shall consider any and all appropriate race and gender neutral strategies that allow the City to identify additional opportunities for M/W/DSBE participation that may have heretofore been overlooked or to relax contract requirements which unduly restrict participation by M/W/DSBEs. Those strategies may include, subject to legal requirements, the relaxation of bonding, insurance, extensive experience and capitalization requirements. They may also include adjusting a proposed solicitation, where feasible, into smaller component parts, conducting aggressive outreach efforts to facilitate matchmaking between M/W/DSBEs and Majority Owned Businesses, providing access to the Procurement Department and purchasing officers throughout the City in a manner that does not discriminate against Majority Owned Businesses, and ensuring that M/W/DSBEs are receiving timely notification of bidding opportunities.

E. Award of City Contracts

1. The MBEC shall be invited by every Department to all pre-bid meetings.
2. The MBEC shall participate on all City Contract selection committees evaluating bids.
3. The MBEC shall review all Bids to determine whether they are Responsive under this Order before the award of a City Contract.
4. The MBEC shall determine whether a Department is awarding City Contracts consistent with and in pursuit of the Benchmark established in its Compliance Plan.

F. Investigations

The MBEC may perform investigations to ensure that Bidders are complying with the goals and objectives of this Executive Order. Such investigations may include site visits to a Bidder's office, other place of business and/or job site to ascertain whether a Bidder has discriminated against and/or excluded M/W/DSBEs in the submission of a Bid during the process to award a City Contract or during the performance of a City Contract.

G. Data Collection and Reports

1. The MBEC shall collect data indicating the dollar amount and percentage participation of M/W/DSBEs on City Contracts awarded to for-profit businesses for each Department on an annual basis; in the event the City Contract was awarded in a previous Fiscal Year, MBEC shall only report dollar amounts achieved in the Fiscal Year subject to the Participation Report. The MBEC shall assist Departments in maintaining Department records showing DBE participation on federally assisted City Contracts.
2. The MBEC shall provide a Participation Report to the Mayor and City Council on or before November 1st of each year, setting forth the dollar amount and percentage participation by M/W/DSBEs on City Contracts as described above. The Participation Report to the Mayor and City Council shall set forth, as a measure of accountability, the performance of each Department as measured against its Benchmark during the immediately preceding period. The Participation Report shall also include the number of prime contracts awarded to M/W/DSBEs by the City. In addition, each Department shall report to the MBEC, for inclusion in the Participation Report, any federally assisted public projects in Philadelphia that had a DBE goal and the level of DBE participation achieved on each project and the level of M/W/DSBE participation achieved on any City Related Special Projects facilitated by the Department.
3. The MBEC, on behalf of the Director of Finance, shall provide an Annual Disparity Study comparing the Participation Report data to the percentage of qualified MBEs, WBEs and DSBES available to participate in City Contracts. The Annual Disparity Study may, through the development of annual participation goals, forecast the participation of MBEs, WBEs and DSBES in City Contracts on a fiscal year basis.
4. The City has held discussions with the leadership of the Building Trades Unions to discuss ways to enhance and achieve full and fair membership for minorities and women in the unions and their apprenticeship programs. The unions have begun to discuss among themselves how to increase the participation of minorities and women as members. To emphasize the importance of this issue, the MBEC is hereby authorized to recommend and develop strategies for the City's monitoring and evaluation of the number of

minority and female members in each of the Building Trades Unions, the number of minority persons and women annually admitted into each Building Trades apprenticeship program and the Unions' outreach and retention efforts for minority persons and women. Given the belief of the City that the leadership of the Building Trade unions and the leaders of its member unions support the need to improve diversity within the Building Trades, we look forward to their cooperation and collaboration in this effort to gather and maintain accurate information.

5. The City also desires to see that minority persons and women are given fair access to employment on public works projects funded pursuant to a City Contract. The MBEC shall devise methodologies for the City's collection of workforce composition statistics, which will identify the number of minorities and women employed to work on those projects. The MBEC shall work with the Director of Finance and City Solicitor to develop strategies and contract language that will improve the City's ability to achieve this objective. The MBEC also shall work with the City's Labor Standards Unit to devise methods for tracking the number of minority persons and women working on City Public Works Contracts.
6. It shall be City policy for the MBEC to contract for the performance of a Disparity Study at least every four years, and to make recommendations concerning appropriate strategies to increase M/W/DSBE participation where disparities or underutilization related to discrimination exists in any tier of City contracting.

H. Nonprofit Organizations

The City annually spends a substantial percentage of its contract dollars with nonprofit organizations and expects these organizations to share the City's commitment to diversity. Although City Contracts with nonprofit organizations are not subject to the City's M/W/DSBE participation ranges, all City Contracts with nonprofit organizations shall include provisions requiring that the nonprofit : (i) provide to the City annually, a written diversity program identifying the race, gender, disability status, and ethnic composition of its board of directors, its employment profile, a list of all vendors that the nonprofit does business with in its M/W/DSBE procurement program and a statement of the geographic area(s) where its services are most concentrated and (ii) demonstrate, to the City's satisfaction, that the nonprofit's organization makes appropriate efforts to maintain a diverse workforce and board of directors and operates a fair and effective M/W/DSBE procurement program. The MBEC working with those Departments who contract with nonprofit organizations and with the approval of the Director of Finance, may adopt and publish a set of policies and procedures for the evaluation of nonprofit organizations that contract with the City.

I. Training and Outreach

1. The MBEC shall provide training programs for those City employees involved in the implementation of this Executive Order. Training programs shall be designed to provide the knowledge and develop the skills required by City employees to increase M/W/DSBE percentage participation in City Contracts and to improve the diversity of nonprofit organizations. Training programs shall be scheduled regularly and all City employees involved in the procurement and contracting processes of the City, including those who award nonprofit contracts, must attend at least one such program annually.
2. The City desires to increase the number and value of prime contracts awarded annually to M/W/DSBEs. The current number of prime contracts awarded by the City to M/W/DSBEs is unacceptable given the number of certified M/W/DSBEs in the Greater Philadelphia region. The MBEC shall conduct seminars for M/W/DSBEs to improve their understanding of the City's procurement processes and their opportunities to compete successfully for prime contracts with the City. The MBEC shall work with the Procurement Department and other contracting officers within the City to ensure that there are no artificial business reasons or unreasonable resistance to awarding prime contracts to M/W/DSBEs.

SECTION 4. The Greater Philadelphia Economic Opportunity Task Force

A. Diversity within the Greater Philadelphia Region

If we are to achieve an equitable distribution of contract opportunities and economic equity for M/W/DSBEs within the Greater Philadelphia region, improve their chances to grow as thriving businesses, and create an environment in which our corporate board rooms and executive suites better reflect the diversity of the Greater Philadelphia region, then we must achieve greater diversity in the private sector throughout the Greater Philadelphia region. The City desires to work with area Chambers of Commerce and business, civic, political, labor and religious leaders throughout the region both to create a greater commitment to diversity and to implement programs that produce results. In order for businesses within the region to attract the best and the brightest among young professionals from colleges and universities within our region as well as from around the country and the world, young professionals must believe that opportunities here equal or exceed other centers of commerce. Greater diversity on corporate boards and within the executive suites of our leading employers and corporate citizens along with increased contract opportunities for M/W/DSBEs within the private sector will strengthen our overall regional economy and improve our appeal to young professionals.

B. Task Force

1. To provide advice and counsel to the City on the issue of expanded

diversity within the private sector, the Greater Philadelphia Economic Opportunity Task Force ("Task Force") is hereby established. The Task Force shall be chaired by the Director of Finance and shall consist of at twenty-five (25) members who shall be appointed by the Mayor. The Task Force shall consist of at least one representative from each of the following constituencies:

- AFL-CIO
- Business community
- City Council
- Colleges and Universities
- County Commissioners
- Financial or Accounting Institutions
- Health Care Community
- Hospitality Industry
- Law Firms
- Management Consulting Firms
- Nonprofit Organizations
- State Economic Development Agencies

2. The Task Force shall advise the Mayor and shall make recommendations concerning:

- Increasing M/W/DSBE procurement opportunities with private sector businesses throughout the Greater Philadelphia Region.
- Expanding opportunities for minorities and women to be appointed to seats on the boards of directors of private sector businesses throughout the Greater Philadelphia region.
- Expanding opportunities for minorities and women to become senior level executives with private sector businesses throughout the Greater Philadelphia region.

SECTION 5. Departments and Quasi-Public Agencies

A. Departments

1. Departments on or before May 1st of each fiscal year shall deliver a written Compliance Plan to the MBEC that includes their Benchmarks for the next fiscal year and their overall strategy for providing maximum opportunities for the participation of M/W/DSBEs in a Department's purchasing/contracting. In creating its Compliance Plan and in determining its Benchmarks and proposed participation ranges pursuant to subsection (2) below, each Department shall take into consideration the types of contracts that it intends to award, the number of M/W/DSBEs within the Greater Philadelphia region available to participate in those

contracts, historic evidence of discrimination against minorities, women or disabled persons in the industries pertinent to the Department's contracts, including the extent of the City's passive participation in such discrimination, and any other appropriate factors. At the approval of the MBEC, certain classes of purchasing/contracting by a Department may be exempted from inclusion in the Compliance Plan.

2. Each Department shall propose M/W/DSBE participation ranges for City Contract to be awarded by the Department, and shall submit such proposed ranges for approval by the MBEC. Departments shall seek to provide maximum opportunities for M/W/DSBE participation on each City Contract and in so doing may rely upon or incorporate any appropriate race or gender-neutral strategy including those described in Section 3 D. hereof. In addition, for each City Contract, the Department shall collect information from all Bidders concerning the Bidders' commitment to the mission of diversity as enunciated under this Order. The MBEC may adopt and publish policies for the collection and review of this information which may include the submission by Bidder of a detailed statement of the number of minorities and women employed by Bidder and a list of M/W/DSBEs with which Bidder has contracted on private sector projects.
3. Departments shall invite MBEC staff to all pre-bid and pre-proposal meetings and all selection committee meetings, which the MBEC may attend at its discretion.
4. Departments shall work with the MBEC to conduct seminars, training programs and outreach activities for M/W/DSBEs both to improve M/W/DSBE opportunities to participate on City Contracts and to encourage qualified minority, women and disabled owned businesses to become certified with the City.
5. Each Department shall meet quarterly with the MBEC to monitor its progress toward achieving the Department's annual Benchmark.
6. Each Department shall cooperate with the MBEC with respect to requests for information from the Department relative to enforcing compliance with this Executive Order, including the furnishing of records and documents.

B. Quasi-Public Agencies

All Mayoral appointees to the board of any Quasi-Public Agency shall take all available steps to direct those agencies to establish an M/W/DSBE Economic Opportunity Plan, which incorporates the goals and objectives, contained in this Executive Order. The Director of Finance shall communicate this directive to all such appointees.

1. The MBEC may enter into cooperative agreements with Quasi-Public Agencies to help them establish M/W/DSBE programs and to provide support to Quasi-Public Agencies during the implementation of their programs.
2. Any Quasi-Public Agency that awards a contract for a City Related Special Project shall cooperate with the MBEC to establish the maximum participation ranges and to ensure that the M/W/DSBE participation ranges established for the project are met to the maximum extent feasible.
3. All of the terms and conditions of this Order that apply to City Contracts, as appropriate, shall apply equally to all contracts for City Related Special Projects.

SECTION 6. Bidders

A. Bidders shall be required to submit Bids which are responsible and responsive to the written bidding instructions issued by the City, which instructions may include requirements for the participation of M/W/DSBEs or DBEs. Bidding instructions related to this Order will require Bidders to document their solicitation of and commitment with M/W/DSBEs, and the failure to do so may result in the rejection of a submittal based on the MBEC's determination that the submittal is nonresponsive. As part of their submission, Bidders shall identify only those M/W/DSBEs that perform a Commercially Acceptable Function. If a Bid contains participation by M/W/DSBEs at least equal to the M/W/DSBE participation ranges established by the MBEC and the Department, it will be rebuttably presumed that the Bid is responsive with respect to the requirements of this Order, and that the Bidder has not improperly discriminated against or excluded M/W/DSBEs. When a Bid does not satisfy the M/W/DSBE participation ranges set by the MBEC and the Department, and a Bidder submits a Request For Reduction/Waiver of those participation ranges, the MBEC will evaluate whether the Bidder has made Good Faith Efforts to include M/W/DSBEs in its Bid.

B. If a Bidder does not satisfy the M/W/DSBE participation ranges on a Bid and fails to submit a Request For Reduction/Waiver for all or part of the M/W/DSBE participation ranges, or submits a Request For Reduction/Waiver but the MBEC determines that Bidder has not made a Good Faith Effort or fails to cooperate with the MBEC in its review of a Bid, the MBEC will determine that the Bid is nonresponsive and the Bid shall be rejected by the contracting Department.

C. Bidder Appeal Process. A Bidder whose Bid is deemed nonresponsive by the MBEC may file a written appeal with the MBEC in accordance with MBEC procedures. The decision of the MBEC may be appealed, in writing, to the Director of Finance or his/her designee whose decision shall be final.

D. If the MBEC determines that the Bidder has discriminated against a M/W/DSBE or intentionally excluded them from a Bid on the basis of minority status, gender or disability, the MBEC may recommend to the Director of Finance the imposition of sanctions on the Bidder including the debarment of the Bidder from submitting on and/or participating in future City Contracts for a period of up to three (3) years.

SECTION 7. Monitoring and Enforcement

A. The MBEC shall devise and implement strategies to monitor contracting activities and shall make findings and recommendations to the Director of Finance as are necessary and appropriate to enforce this Executive Order. These actions may include:

1. Monitoring contract performance by conducting on-site inspections and post-contract award compliance reviews to ensure that discrimination and/or exclusion does not occur in the course of the performance of any City Contract. The MBEC may also meet with M/W/DSBEs working on City Contracts;
2. Monitoring prime contractors' payments to M/W/DSBEs through electronic payment tracking or other means;
3. Issuing guidelines and promulgating regulations, through the Office of the Director of Finance, in interpretation of this Executive Order;
4. Recommending to the City Solicitor contractual provisions to be included in all City Contracts in furtherance of the goals and objectives of this Order;
5. Reporting findings of discrimination and/or exclusion to the Mayor, the Director of Finance, the City Solicitor, the Inspector General and other appropriate legal authorities;
6. Recommending withholding of payments or termination of a contract if the MBEC determines that a Bidder has failed to comply with contractual provisions requiring M/W/DSBE participation. The MBEC may recommend that the City exercise its legal remedies, including, if appropriate, debarment of the Bidder in accordance with the City's Policy and Procedure for the Debarment and Suspension of Vendors and Bidders;
7. Recommending to the Director of Finance suspension of a Department's contracting authority when a Department consistently fails to achieve its Benchmark; and
8. Monitoring the bidding frequency and success of M/W/DBES as prime contractors.

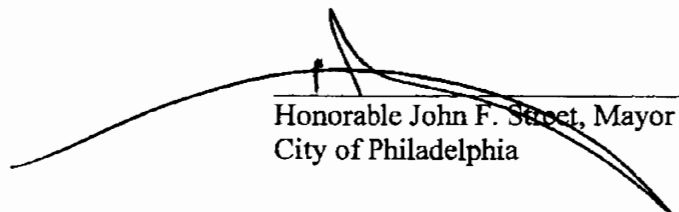
B. The Director of Finance, at his/her discretion, shall act upon the findings and recommendations of the MBEC. In the event the Director of Finance determines that any person has failed to comply with contractual requirements pursuant to this Executive Order, the Finance Director may, in addition to any sanctions provided under the City Contract or recommended by the MBEC, terminate the City Contract and/or pursue any remedies that are available at law or in equity.

C. Any disputes that arise under this Executive Order between the MBEC and any Department or Quasi-Public Agency, shall be referred to the Director of Finance for resolution. The Director of Finance after consultation with the City Solicitor shall resolve such disputes.

SECTION 8. Severability and Authorization

The provisions of this Executive Order are severable, and if any provision or application is held illegal, such illegality shall not affect the remaining provisions. This Order remains in effect and shall continue for a four year period from September 4, 2006 to September 4, 2010 unless reauthorized for an additional period of time if further remedial action consistent with the objectives of this Order is required beyond this date.

Date: September 4, 2006



Honorable John F. Street, Mayor
City of Philadelphia

APPENDIX E:

**PHILADELPHIA CODE CHAPTER 17-500.
GOALS FOR THE PARTICIPATION OF DISADVANTAGED OWNED
BUSINESS ENTERPRISES IN CITY CONTRACTS**

The Philadelphia Code

TITLE 17. CONTRACTS AND PROCUREMENT

CHAPTER 17-500. GOALS FOR THE PARTICIPATION OF DISADVANTAGED OWNED BUSINESS ENTERPRISES IN CITY CONTRACTS. ⁴⁴

§ 17-501. Legislative Findings and Policy.

(1) *Findings.* The Council makes the following findings:

(a) Past discrimination in the City's contracting process by prime contractors against minority and women's business enterprises has resulted in significant underutilization of these business enterprises in contracts awarded by the City. A disparity report on minority business utilization conducted by D.J. Miller and Associates entitled "Philadelphia Consortium – Business Utilization Study", concluded that discrimination occurred in all types of City contracts with the effect of significant underutilization of minority and women's business enterprises.

(b) The provisions of this Chapter are necessary to overcome the effects of past discrimination and to prevent ongoing discrimination in the City's contracting process, while assuring that high quality goods and services are obtained through the competitive bidding process.

(c) A general goal of this Chapter is to provide narrowly tailored remedies to past discrimination.

(2) *Policy.* It is the policy of the City to foster an environment of inclusion in which all businesses are free to participate in business opportunities and to flourish without the impediments of discrimination. Businesses participating in all City contracts shall do so on a fair and equitable basis. Vendors on City contracts shall not discriminate against any business because of race, color, religion, national origin, sex, sexual orientation or disability.

§ 17-502. Definitions.

For the purpose of this Chapter, the following terms shall have the following respective definitions:

(1) *Agency* shall mean any City office, department, board or commission including the Council of the City of Philadelphia. It shall also mean all legal entities which either:

(a) receive funds, directly or indirectly, from the City; and either:

(b) have entered into continuing contractual or cooperative relationships with the City; or

(c) operate under legal authority granted to them by City ordinance.

(2) *City Contracts* shall mean all City contracts, whether competitively bid or negotiated, including but not limited to, any construction contract with a total value in excess of \$150,000 which:

(a) is paid for in whole or in part with City funds;

(b) is financed either wholly or partially by state or federal funds which are administered by the City; or

(c) is funded in whole or in part by Financial Assistance.

(3) *Disabled Person* shall mean a person who has a physical or mental impairment which substantially limits one or more of his or her major life activities or has a record of such impairment. Major life activities shall mean functions, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

(4) *Disadvantaged Business Enterprise or "DBE"* shall mean any Small Business Enterprise:

(a) Which is at least 51 percent (51%) owned and controlled by one or more socially and economically disadvantaged individuals; or

(b) In the case of any publicly owned business, one in which at least 51 percent (51%) of the stock is owned by one or more socially and economically disadvantaged individuals; provided, however, that a rebuttable presumption shall exist that any person that has received more than five million dollars (\$5,000,000.00) in three consecutive years of contract work from the City is not a DBE, and; provided further, that any previous certification of any such person as a DBE shall be re-evaluated pursuant to regulations to be promulgated by the MBEC.

(5) *Disparity Analysis*. A study conducted by an independent economic and statistical research entity that compares the ratio of available DBEs to the level of utilization in the performance of various types of contracts. A score of one (1) means that the total utilization is equal to all available DBEs. For purposes of this Chapter, independent shall mean an entity not part of, or affiliated with, any City agency.

(6) *Financial Assistance*. Any grant, loan, incentive or abatement provided by, or with the authority or approval of, the City or a City-related agency, including but not limited to bond financing subsidies, Tax Increment Financing aid, industrial development bonds, use of the power of eminent domain, land or property acquisition, Community Development Block Grant loans or grant, airport revenue bonds, Enterprise Zone designations, and aid from the Philadelphia Workforce Development Corporation or other similar agencies.

(7) *Individual*. A natural person.

(8) *Minority Business Enterprise Council (MBEC)* shall mean the entity within the Department of Finance responsible for the development, implementation, monitoring and enforcing the procedures and goals set forth in this Chapter.

(9) *Minority Person* shall mean a person who is a citizen or lawful permanent resident of the United States and who is:

(a) African American (a person having origins in any of the black racial groups in Africa);

(b) Hispanic American (a person of Spanish or Portuguese culture with origins in Mexico, South or Central America, or the Caribbean Islands, regardless of race);

(c) Asian American (a person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent or the Pacific Islands); or

(d) Native American (a person having origins in any of the original peoples of North America).

(10) *Person* shall mean a corporation, partnership or association, or any combination thereof, as well as a natural person.

(11) *Small Business Enterprise* shall mean a business which is independently owned and operated and which is not dominant in its field of operation as further defined in the Small Business Size Regulations, adopted by the U.S. Small Business Administration and published in the U.S. Code of Federal Regulations, including the industry size standards set forth in the table contained therein, which regulations are incorporated herein, and made a part hereof by reference.

(12) *Socially and Economically Disadvantaged Individuals* shall mean those who have either been subjected to racial, sexual or ethnic prejudice because of their identity as a member of a group or to differential treatment because of their disability without regard to their individual qualities, and whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business who are not socially disadvantaged.

(a) In determining who are Socially and Economically Disadvantaged Individuals, the Minority Business Enterprise Council may make a rebuttable presumption that all minority persons, all women and all disabled persons shall be so classified.

(b) The Minority Business Enterprise Council, in determining whether an individual shall be classified as a Socially and Economically Disadvantaged Individual, shall also consider, among other things the extent of the liquid assets and net worth of such socially disadvantaged individuals.

§ 17-503. Implementation and Applicability.

This Chapter shall be applicable to all types of City Contracts and all contracts of City Agencies. This Chapter shall be effective until five years after the date it becomes law unless extended by Ordinance.

§ 17-504. Participation Goals.

(1) The MBEC shall establish contract goals for levels or amounts of DBE participation for each contract, subject to the provisions of this Section, and unless exemptions have been granted under § 17-509.

(2) *Considerations.* In setting these goals MBEC shall consider:

(a) the availability in various industry classifications and professions of DBEs that are qualified and willing to provide goods, expertise, and services on the particular contract;

(b) the level of utilization of these firms in past contracts awarded by the City;

(c) the contract specifications;

(d) the adverse impact on non-DBEs; and

(e) any other relevant factors, including but not limited to City annual participation goal established under § 17-505.

(3) *Consultation.* In establishing goals on each contract, the MBEC must consult with the contracting agency, the Procurement Department, or both.

(4) *Publication.* The contract goals must be clearly published as part of the contract specifications in the invitation to bid or request for proposals.

(5) *Applicability to Alternates, Modifications, etc.* The contract goals apply to the initial contract amounts, to any alternates, and to all subsequent amendments, supplements, extra work orders, change orders, or other modifications that, whether individually or in the aggregate, increase the dollar value of the contract by more than 10%.

(6) *Contract and Bid Specifications.*

(a) Bid conditions, requests for proposals, and all other specifications for contracts awarded by the City must require that, where a contract goal is applicable, the bidders and all others seeking City contracts must:

(i) make every effort before the opening of bids to meet the contract goal;
and

(ii) keep records of its efforts, adequate to permit a determination of compliance with this Chapter.

(b) Each contract must:

(i) incorporate this Chapter by reference;

(ii) provide that the failure of any bidder, contractor, or subcontractor to comply with this Chapter is a material breach of contract; and

(iii) require that, during its term, the contractor will:

(A) fulfill program commitments submitted with the bids;

(B) continue to make every effort to utilize DBEs; and

(C) maintain records reasonably necessary for monitoring compliance with this Chapter.

(c) Where one or more DBE is listed as a participant in the bid of a prospective contractor with the City, and one or more of those DBEs is not used in the contract's performance when such bidder secures the said City contract, the successful bidder shall be required to demonstrate to the satisfaction of the MBEC why such DBE was not used on the contract, or be held in non-compliance with his or her contract by the MBEC. In the event of such determination of non-compliance, the MBEC shall recommend that the City exercise its legal remedies, including, if appropriate, the termination of the contract involved.

§ 17-505. Annual Participation Goals.

Council shall, by resolution, establish annual City contract participation goals for DBEs, after solicitation of recommendations of the MBEC.

(1) *Criteria.* The annual participation goals must be based on, but not limited to:

(a) the present availability of qualified DBEs;

(b) the utilization of qualified DBEs on past contracts awarded by the City;

(c) a forecast of eligible contracts to be awarded within the fiscal year; and

(d) an updated Disparity Analysis of businesses in the Philadelphia area.

(2) *Limitations.*

(a) The annual goals must be directly related to the availability of qualified DBEs and the identified disparity in the utilization of DBEs.

(b) The annual goal for DBEs may be no higher than the percentage of availability of DBEs.

(3) *Purpose.* The purpose of the annual goals is to aid the City in its annual evaluation of the program's effectiveness. Annual participation goals are not and may not be quotas.

§ 17-506. Minority Business Enterprise Council.

(1) The MBEC, or any subsequent successor shall:

(a) Devise a certification procedure to assure that businesses taking advantage of this Chapter are legitimate DBEs.

(b) Ascertain, within ninety (90) days of the enactment of this Chapter the total number of DBEs in the Philadelphia Standard Metropolitan Statistical Area. The MBEC shall maintain a listing of all such businesses and make it available to all agencies.

(c) Survey such businesses ascertained in (b) to establish past and current participation levels.

(d) Establish annual reporting requirements for all agencies to document the percentage of contracts which have been let to DBEs by the reporting agency.

(e) Devise such regulations as may be necessary and appropriate for the implementation of the powers and performance of the duties created by this Chapter.

(f) Devise regulations and procedures for including the participation of DBEs in prime contracts with the City. The affirmative programs to be reviewed by the MBEC in this regard shall include, but shall not be limited to the following:

(i) including qualified DBEs on solicitation lists;

(ii) assuring that DBEs are solicited whenever they are potential sources;

(iii) structuring contract requirements, when economically feasible, to permit maximum participation of DBEs;

(iv) implementing a bonding program for participants under this Chapter for construction jobs;

(v) implementing the use of other legally permissible means of fostering the award of prime contracts to DBEs, such as joint ventures;

(g) Recommend contractual language which provides that compliance with DBE participation requirements is material to the City contract and further provides for remedies, including but not limited to, termination of the contract in the event of noncompliance, and further provides that prime contractors will agree to the assignment of the proceeds of their subcontracts with disadvantaged business enterprises, by the

disadvantaged business enterprises, to financial institutions providing working capital financing for the subproject, when requested by such DBEs and financial institutions, and pursuant to equitable regulations developed by the MBEC;

(h) Devise appropriate procedures for monitoring and enforcing compliance with this Chapter;

(i) Devise procedures for the waiver of these participation goals in appropriate circumstances;

(j) Devise and operate a grievance procedure for the processing of complaints by any person aggrieved by any finding, recommendation, proposal or other action implemented pursuant to this Chapter;

(k) Issue a written annual report indicating the progress made toward achieving the goals set out above. Said report shall include, but not be limited to, a summary of City contracts let during the relevant periods, the extent and percentage of DBE participation, and recommendations as to the appropriate future goals. The annual report shall be available for public review;

(l) Propose its own operating procedures, staffing needs, physical facilities requirements and operating budget;

(m) Issue a report to City Council every six months that outlines the participation of DBEs in contracts of the City and its agencies.

(.1) In each such report, MBEC shall certify whether or not each covered Agency or Quasi-Public Agency has provided to MBEC within the preceding six months the necessary information for MBEC to prepare such report. ⁴⁵

(.2) Council shall not approve any City participation in or contribution to any development or other project in which a Quasi-Public Agency participates or provides contributions unless MBEC shall have certified, in its most recent semi-annual report, that the Quasi-Public Agency has provided to MBEC the necessary information for MBEC to prepare such report. ⁴⁶

(2) The Director of Finance shall, upon the request of the MBEC, assemble and furnish to the MBEC such procurement records and documents of the various agencies as are necessary for the monitoring and compliance investigation by the MBEC. MBEC shall also be empowered to recommend new procurement record keeping procedures for all agencies to facilitate compliance with this Chapter. Nothing in this Chapter shall obligate the disclosure by City officers or employees of information or documents which may be regarded as confidential or privileged under federal, state, or local law.

§ 17-507. Contract Payments to Subcontractors.

(1) A contractor must pay its DBE subcontractors in a timely fashion for satisfactory work.

(2) A payment is timely if it is mailed, delivered, or transferred to a subcontractor no later than 7 days after the contractor receives payment from the City.

(3) Evidence of Compliance. Beginning with the second pay request from a contractor to the City, the contractor must provide the City with evidence that all DBE subcontractors have been paid out of the proceeds of the prior payment, unless a bona fide dispute, documented in writing, exists between the contractor and the unpaid DBE subcontractor.

(4) When the City has paid at least eighty percent (80%) of the contract price to the prime contractor, the prime contractor shall be required to return to the MBEC a sworn affidavit attesting to the amounts of the contract proceeds which have been paid to the subcontracting DBE. If such affidavit is not so returned, the Director of Finance shall withhold further payment to said contractor.

§ 17-508. Contract Reports and Documentation.

As a condition of each contract, the contractor must submit the following when requested by the MBEC:

(1) copies of signed agreements with the DBEs being utilized to achieve the contract goals;

(2) reports and documentation verifying payments to the DBEs being used to achieve the contract goals; and

(3) reports and documentation on the extent to which the contractor has awarded subcontracts to DBEs under contracts not affected by this Chapter.

§ 17-509. Exemptions and Waivers.

(1) *Individual Contract Exemptions.* The MBEC, on its own initiative or at the request of the affected agency, may recommend to the Finance Director that an individual contract or contract "package" (i.e., related contracts being bid or awarded simultaneously for the same project or improvement) be made wholly or partially exempt from DBE City contracting goals prior to the advertisement for bids or solicitation of proposals, whenever there has been a determination, reduced to writing and based on the best information available at the time of the determination, that there are an insufficient number of DBEs within the Philadelphia Standard Metropolitan Statistical Area to ensure adequate competition and an expectation of reasonable prices on bids or proposals solicited for the individual contract or contract "package" in question. It shall be within the sole discretion of the Finance Director whether or not to grant said exemption.

(2) *Waivers.* Where a particular contract requires a contractor to meet a goal established pursuant to Section 17-504 of this Chapter, the contractor shall have the right to request a waiver from such requirements. The MBEC shall recommend that the waiver be granted where the contractor demonstrates that a good faith effort has been

made to comply with the requirements set forth in this Chapter and all regulations promulgated pursuant to this Chapter.

§ 17-510. Enforcement.

The MBEC shall make such findings, recommendations and proposals to the Director of Finance as are necessary and appropriate to enforce this Chapter. If as a result of its monitoring activities, the MBEC determines that the goals and policies set forth in this Chapter, are not being met by any agency or by any person, the MBEC may recommend any or all of the following actions:

(1) If the MBEC determines that a person under contract with the City has failed to comply with contractual provisions requiring DBE participation, the MBEC may recommend that the City exercise its legal remedies, including, if appropriate, the termination of the contract involved.

(2) In the event that the MBEC determines that an agency is entering into contracts in a manner or at a rate which is unlikely to achieve the DBE participation goals developed in accordance with the procedures as set forth in this Chapter, the MBEC may request that the agency furnish to it a compliance plan setting forth in detail how contracts are proposed to be awarded prospectively to achieve the goals within the then current fiscal year.

(3) If the MBEC concludes that a compliance plan submitted under subsection (2) above is unlikely to produce the DBE participation goals within the then current fiscal year, the MBEC may recommend that the agency revise its plan to provide additional opportunities for DBE participation. Such recommended revisions may include, but shall not be limited to the following:

(a) assurances of stronger and better focused solicitation efforts to obtain more DBEs as potential sources of supply;

(b) division of job or project requirements, when economically feasible, into tasks or quantities to permit participation of DBEs;

(c) elimination of extended experience or capitalization requirements, when programmatically feasible, to permit participation of DBEs;

(d) identification of specific proposed contracts as particularly attractive or appropriate for participation by DBEs, such identification to result from, and be coupled with, the efforts of subsections (a) through (c) above;

(4) If the MBEC determines non-compliance with the timely payment requirements as set forth in § 17-507, the MBEC shall then recommend that the City exercise its legal remedies, including, if appropriate, the termination of the contract involved.

§ 17-511. Penalties.

(1) A contractor who fails to comply with any provision of this Chapter is subject to any or all of the following penalties :

- (a) suspension of contract;
- (b) withholding of funds;
- (c) rescission of contract based on material breach;
- (d) refusal to accept a bid;
- (e) disqualification of a bidder, contractor, or other business from eligibility for providing goods or services to the City for a period not to exceed 2 years;
- (f) payment of liquidated damages; and/or
- (g) a fine of \$300 per day for each day of non-compliance.

§ 17-512. Grievances.

(1) Any person aggrieved by any finding, recommendation, proposal or other action implemented pursuant to this Chapter may file a grievance with the MBEC, which shall render a decision within fifteen (15) days from the date the grievance is filed. The grievance shall be filed and determined in accordance with the procedures adopted pursuant to Section 17-506(1)(j). The decision of the MBEC may be appealed to the Director of Finance, who shall render a decision within fifteen (15) days from the date the appeal is taken. The decision of the Director of Finance shall be final.

(2) Nothing in this subsection or Chapter shall prevent an aggrieved person from exercising any and all legal rights available.

Notes

Previous Chapter repealed and replaced by this Chapter, Bill No. 030125 (approved April 24, 2003). Former Sections 17-501 through 17-508 were either 44 added or amended by the following: 1982 Ordinances, pp. 776, 1612; 1987 Ordinances, pp. 262, 1260; 1988 Ordinances, p. 917; 1989 Ordinances, p. 796; Bill No. 000088-A (approved September 27, 2000).

Subsection added, Bill No. 020287 (approved April 24, 2003). Bill No. 020287 was 45 approved the same day as Bill No. 030125, which repealed and replaced the prior Chapter 17-500.

Subsection added, Bill No. 020287 (approved April 24, 2003). Bill No. 020287 was 46 approved the same day as Bill No. 030125, which repealed and replaced the prior Chapter 17-500.

APPENDIX F:

**EVANS SUPPLIERS & COMMUNICATIONS, INC. V. ELLIOTT-LEWIS
CORPORATION AND THE CITY OF PHILADELPHIA, COMMON PLEAS
COURT OF PHILADELPHIA COUNTY, PENNSYLVANIA, CIVIL TRIAL
DIVISION, NO. 0469. JULY 27, 2005**

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

EVANS SUPPLIERS AND COMMUNICATION CO., INC.,	: MARCH TERM, 2005
	: No. 0469
Plaintiff,	
v.	: (Commerce Program)
ELLIOTT-LEWIS CORPORATION and	:
THE CITY OF PHILADELPHIA,	
Defendants.	: Superior Court Docket No. 1660 EDA 2005

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OPINION

Albert W. Sheppard, Jr., J. July 27, 2005

This Opinion is submitted relative to plaintiff's appeal of this court's Orders of May 27, 2005 sustaining the respective Preliminary Objections of defendants, City of Philadelphia ("City") and Elliott-Lewis Corporation ("Elliott-Lewis"), and dismissing plaintiff's case. For the reasons discussed, the Orders should be affirmed.

BACKGROUND

Evans is a corporation supplying materials, equipment, and supplies to building and maintenance contractors. *See* Compl., ¶¶ 1, 5. Evans is a participant in the City's Minority Business Enterprise Program (the "Program"), "which was created to ensure there would be anti-discrimination in bidding and contractual practices involving [City] contracts." *Id.* at ¶ 7. The

Program requires that contractors submit a list of potential subcontractors on a City-funded project, state whether the subcontractors are disadvantaged business enterprises (i.e., whether the businesses are owned by minorities, women, or disabled persons), and what estimated dollar amount and percentage of the total contract will be given to that subcontractor. *Id.* at ¶ 9-11; Exhs. C, D.

Elliott-Lewis entered into a contract with the City to perform high-tech maintenance work at the Philadelphia International Airport (the “Contract”). *See id.* at ¶ 8. Elliott-Lewis listed Evans as a minority subcontractor in its bid for the Contract and stated that Evans would receive 2.39 per cent of the total amount of the Contract purchase orders from Elliott-Lewis. *See id.* at ¶¶ 10, 11, 15. As a result, Evans claims that it should have earned \$58,567.00 in total, but in actuality earned no more than \$1,978.00.¹ *See id.* at ¶¶ 16- 20.

Evans sued defendants for breach of the Contract and claimed that, since the Program required Elliott-Lewis to list Evans as a minority subcontractor in the Contract, Evans is a third party beneficiary of the Contract. The City and Elliott-Lewis filed Preliminary Objections, which the court sustained. As a result the claims against both defendants were dismissed. Evans now appeals.

DISCUSSION

Evans raises three issues on appeal: (1) whether this court was justified in granting defendants’ Preliminary Objections; (2) whether Evans, as a Program participant, was a third party beneficiary of the Contracts; and (3) whether defendants can exclude Evans’s claim relying upon Contract language that is contrary to the exhibits submitted in the bid process leading to the

¹ Evans claims that the total amount of the Contract (including amendments) was \$14,184,380.00 and that it would have made a 15 per cent profit on the 2.39 per cent of that amount. *See* Complaint at ¶¶ 14, 15, 19. However, the amount that Evans’ claims is not the same as the amount the court arrives at by applying the above percentages to the Contract total, that is \$51,064.00.

award of the Contract. *See* Civil Docketing Statement.

Preliminary Objections may be sustained only where it is clear and free from doubt, based on the allegations contained in the pleadings, that the plaintiff is unable to prove facts legally sufficient to establish its right to relief. *See Bourke v. Kazaras*, 746 A.2d 642, 643 (Pa. Super. 2000). Any doubt in granting a demurrer must be resolved in favor of the non-moving party. *See Pike Co. Hotels Corp. v. Marvin's Refrigeration, Inc.*, 262 Pa. Super. 126, 135, 396 A.2d 677, 682 (1978). In this case, there is no doubt that Evans lacks standing to enforce what its claims are the terms of the Contract between the City and Elliot-Lewis.

In order to establish that it is third party beneficiary of the Contract, Evans must satisfy a two prong test:

[A] party becomes a third party beneficiary only where both parties to the contract express an intention to benefit the third party in the contract itself, unless the circumstances are so compelling that recognition of the beneficiary's right is appropriate to effectuate the intention of the parties, and the performance satisfies an obligation of the promisee to pay money to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

Scarpitti v. Weborg, 530 Pa. 366, 372-73, 609 A.2d 147, 150-51 (1992). "The first part of the [above] test sets forth a standing requirement which leaves discretion with the court to determine whether recognition of third-party beneficiary status would be appropriate. The second part defines the two types of claimants who may be intended as third-party beneficiaries. If a party satisfies both parts of the test, a claim may be asserted under the contract." *Id.*, 530 Pa. at 371, 609 A.2d at 150. *See also Fizz v. Kurtz, Dowd & Nuss, Inc.*, 360 Pa. Super. 151, 154, 519 A.2d 1037, 1039 (1987) (it is up to the Court to determine "whether recognition of a beneficiary's right to performance is appropriate to effectuate the intention of the parties.")

In this case, the parties to the Contract explicitly disavowed an intention to create any

third party beneficiaries of the Contract. *See* City's Preliminary Objections, Exh. C, ¶ 15.5.² The fact that Elliot-Lewis also promised the City in the Contract that it would honor the City's anti-discrimination policy is not inconsistent with the clause stating that no third party beneficiaries are created. And so, the Contract is **not** ambiguous as claimed by Evans.³ *See id.* at ¶ 14.4. In addition, there is no indication that the City (the promisee) had any obligation to pay money to Evans, nor that the City intended to give Evans the benefit of Elliot-Lewis' performance of the Contract.

The City's and Elliot-Lewis' clear intent in naming the minority subcontractors, including Evans, under the Contract was to adhere to applicable law, which benefits disadvantaged business enterprises in general. There was no intent to benefit Evans in particular. The City is the only party that has standing to bring a claim against Elliot-Lewis for any breach of the Program requirements and the Contract.

CONCLUSION

For the reasons discussed, the City's and Elliott-Lewis' Preliminary Objections were properly sustained, and Evans' claims against them were properly dismissed. This court's Orders should be affirmed.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

² Normally the court would not look beyond the Complaint when deciding Preliminary Objections in the nature of a demurrer. However, where, as here, the plaintiff failed to attach to its Complaint a copy of the operative Contract upon which it relies for its claims, the court properly considered the terms of that Contract that was proffered by the defendants in connection with their Preliminary Objections. *See* Pa. R. Civ. P. 1019(i).

³ A contract is ambiguous when its conditions are susceptible to more than one interpretation or meaning. *See Wyatt v. Phillips*, 2004 WL 51693, *6 (Phila. Com. Pl. Jan. 12, 2004). There is only one reasonable interpretation of the Contract here, which simply requires compliance with applicable law and refuses to create third party beneficiaries.

APPENDIX G:

**EVANS SUPPLIERS & COMMUNICATIONS, INC. V. ELLIOTT-LEWIS
CORPORATION, ET AL, IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA, CIVIL ACTION
NO. 06-5685, MAY 31, 2007**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EVANS SUPPLIES AND	:	CIVIL ACTION
COMMUNICATION CO., INC.	:	
	:	
v.	:	
	:	
ELLIOTT LEWIS CORPORATION, ET AL.	:	NO. 06-5685

MEMORANDUM

Padova, J.

May 31, 2007

Defendants City of Philadelphia (the “City”) and Elliott-Lewis Corporation (“Elliott-Lewis”) have filed Motions to Dismiss Plaintiff’s Complaint, which asserts breach of contract and fraud claims as well as claims under 42 U.S.C. §§ 1981 and 1983. For the reasons that follow, both motions are granted.

I. BACKGROUND

Here, the Complaint, attachments, and related matters of public record set forth the following facts.¹ Plaintiff Evans Suppliers and Communications Co., Inc. (“Evans”) is a supplier of materials, equipment, supplies and services. (Complaint ¶ 7.) It is also a participant in the City of Philadelphia’s Minority Business Enterprise program, which “was created to ensure anti-discrimination in bidding and contractual practices involving City of Philadelphia contracts.” (*Id.* ¶ 10.)

In November 2001, Defendant Elliott-Lewis entered into a contract with the City to perform

¹Documents “integral to or explicitly relied upon in the complaint” and related matters of public record may be considered in connection with a motion to dismiss. In re Burlington Coat Factory Litig., 114 F.3d 1410, 1426 (3d Cir.1997).

high-tech maintenance work at the Philadelphia International Airport (the “Contract”). (Id. ¶ 10.) In its bid for the contract, Elliott-Lewis listed Evans as a minority subcontractor and represented that Evans would receive 2.39 percent of the total amount of the Contract proceeds. (Id. ¶¶ 12-13, 17.) Because the total value of the Contract (including several amendments) was over \$14,000,000, Evans calculated that it would earn over \$330,000 from its Contract-related work. (Id.) Instead, however, Elliott-Lewis made only one \$675 purchase from Evans between November 2001 and June 2004 (id. ¶ 18), and only one additional purchase from Evans between June 2004 and December 31, 2004, when the contract ended. (Id. ¶¶ 19-21.)

In May 2004, Evans contacted “several City officials, including the City Controller, Airport director, Assistant Director, and [the Minority Business Enterprise Council (“MBEC”)] director” (id. ¶ 24), requesting that MBEC investigate Elliott-Lewis’s failure to use it as a contractor. (Id. ¶ 23.) According to the Complaint, the City “failed to investigate Plaintiff’s complaints and . . . sought to have defendant Elliot [sic] Lewis contact Plaintiff to convince him to drop his complaint in return for a small cash payment and other incentives.” (Id. ¶ 25.) Plaintiff, however, refused that “offer” and “sought to enforce his contractual rights in Court.” (Id. ¶ 26.)

Indeed, on March 9, 2005, Evans sued the City and Elliott-Lewis in the Court of Common Pleas for Philadelphia County, alleging breach of contract. The court dismissed the action on preliminary objections, concluding that Evans was neither a party to the contract between the City and Elliott-Lewis, nor an intended third party beneficiary to that contract. Evans Suppliers & Commc’n Co., Inc. v. Elliott-Lewis Corp., No. 0469 March Term 2005, 2005 WL 1793497 (Phila. Com. Pl. July 27, 2005). On appeal, the Superior Court of Pennsylvania affirmed in a June 27, 2006 Memorandum Opinion. Evans Suppliers and Commc’ns Co. v. City of Phila., No. 1660 EDA 2005,

905 A.2d 1052 (Pa. Super. June 27, 2006) (TABLE)).

In the instant action, Evans asserts a breach of contract claim (Count IV) and four additional causes of action: two claims for violation of its Fourteenth Amendment rights brought pursuant to 42 U.S.C. § 1983 (Counts I and II), a claim that it was subject to racial discrimination in violation of 42 U.S.C. § 1981 (Count III), and common law fraud (Count V). Defendants have moved to dismiss all counts of the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

II. STANDARD OF REVIEW

When determining a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the court looks primarily at the facts alleged in the complaint and its attachments. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir.1994). All well pled allegations in the complaint must be viewed in the light most favorable to the Plaintiff. Angelastro v. Prudential-Bache Securities, Inc., 764 F.2d 939, 944 (3d Cir.1985).

A Rule 12(b)(6) motion will be granted when a Plaintiff cannot prove any set of facts, consistent with the complaint, that would entitle him or her to relief. Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir.1988). While the court must accept all well pled allegations in the complaint and view them in the light most favorable to the Plaintiff, Angelastro v. Prudential-Bache Securities, Inc., 764 F.2d 939, 944 (3d Cir.1985), it need not credit a complaint's "bald assertions" or "legal conclusions." Morse v. Lower Merion School District, 132 F.3d 902, 906 (3d Cir.1997) (citations omitted); see also Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1357 (2d ed.1997) (noting that courts, when examining 12(b)(6) motions, have rejected "sweeping legal conclusions cast in the form of factual allegations" (citation omitted)).

III. DISCUSSION

Defendants assert that all of Evans's claims should be dismissed either on res judicata grounds or because they are barred by the applicable two-year statutes of limitations. In the alternative, they argue that each individual claim, other than the breach of contract claim, should be dismissed because Evans does not allege the necessary elements of the claim. We will dismiss the breach of contract claim on res judicata grounds and dismiss the other claims for failure to allege the necessary elements of the claims.²

A. Breach of Contract

Defendants maintain that Evans's breach of contract claim is barred by res judicata. Res judicata, also called claim preclusion, is:

a doctrine by which a former adjudication bars a later action on all or part of the claim which was the subject of the first action. Any final, valid judgment on the merits by a court of competent jurisdiction precludes any future suit between the parties or their privies on the same cause of action. Res judicata applies not only to claims actually litigated, but also to claims which could have been litigated during the first proceeding if they were part of the same cause of action.

Balent v. City of Wilkes-Barre, 542 Pa. 555, 669 A.2d 309, 313 (Pa.1995) (citing Allen v. McCurry, 449 U.S. 90 (1980)). The purpose of claim preclusion is "to avoid the cost and annoyance of multiple litigation, conserve scarce judicial resources, and promote reliance on judicial decisions by minimizing the possibility of conflicting rulings." Breiner v. Litwhiler, No. 3:CV-00-0594, 2003 WL 463104, at *11 (M.D. Pa. Feb. 21, 2003). Pennsylvania law requires the presence of the following four factors for the application of claim preclusion: "the two actions must share an identity

²Because the non-breach of contract claims are not well-defined, we cannot determine at this point in time whether they are barred by either res judicata or the applicable statutes of limitations.

of the: (1) thing sued upon or for; (2) cause of action; (3) persons and parties to the action; and (4) capacity of the parties to sue or be sued.” O’Leary v. Liberty Mutual Ins. Co., 923 F.2d 1062, 1065 (3d Cir.1991). Significantly for our purposes, the issue of res judicata can be resolved on a Rule 12(b)(6) motion “when all relevant facts are shown by the court’s own records, of which the court takes notice.” Day v. Moscow, 955 F.2d 807, 811 (2d Cir.1992).

There is no dispute that the parties to the instant action are the same as those in the state court action, and that they are suing or being sued in the same capacity as they were in state court. Furthermore, the breach of contract cause of action in the instant complaint is an exact reiteration of the breach of contract claim that was asserted and rejected on the merits in the state court action. Indeed, in both actions, Evans alleged that “Defendant Elliot [sic] Lewis has breached the terms of its contract with Defendant City, to which Plaintiff was a third party beneficiary by failing to place the required orders with Plaintiff.” (Complaint ¶ 22; State Court Complaint ¶ 21.) Furthermore, aside from a few very minor variations, the 19 paragraphs that precede and lay the factual foundation for this claim are identical to the paragraphs preceding this allegation in the state court Complaint. (Compare Complaint ¶¶ 3-21 with State Court Complaint ¶¶ 1-15, 17-20.) As the state court dismissed the breach of contract claim on preliminary objections, finding that Evans was neither a party to the Elliott-Lewis/City contract nor an intended third party beneficiary to that contract and thus, had no standing to assert a breach, Evans Suppliers, 2005 WL 1793497, Evans is precluded from asserting the same breach of contract claim here. Defendants’ motions to dismiss are therefore granted insofar as they seek dismissal of Count IV based on res judicata.

B. Section 1983

In Counts I and II of the Complaint, brought under 42 U.S.C. § 1983, Evans alleges, without

significant elaboration, that Defendants deprived it of its “rights secured by the Fourteenth Amendments [sic] to the United States Constitution.” (Complaint ¶ 29.) We agree with Defendants that these counts should be dismissed for failure to state a claim upon which relief may be granted.

In order to state a claim pursuant to 42 U.S.C. § 1983, a plaintiff must allege (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that the conduct deprived the plaintiff of rights, privileges or immunities secured by the Constitution or laws of the United States. Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 930 (1982).

While Evans asserts “[o]n information and belief” that both defendants were acting “under color of state law” (Complaint ¶ 29), this bald and unsupported allegation cannot suffice to satisfy that element of a claim against Defendant Elliott-Lewis, which is a private corporation. Morse, 132 F.3d at 906 (stating that court need not credit a complaint’s “bald assertions” or “legal conclusions.”) While “a private party’s conduct may be held attributable to the state and subject to § 1983 liability when a ‘symbiotic relationship’ exists between the acting party and the state,” Reitz v. County of Bucks, 125 F.3d 139, 147 (3d Cir. 1997), Evans does not allege such a “symbiotic relationship” or any other basis on which it is legally appropriate to treat Elliott-Lewis as a state actor here. Accordingly, for that reason alone, Evans’s § 1983 claims against Elliott-Lewis may be dismissed for failure to state a claim.

In addition, Evans’s § 1983 claims against both Defendants may be dismissed for failure to allege conduct that deprived Evans of rights, privileges or immunities secured by the Constitution or laws of the United States. The only specific federal or constitutional right that Evans alleges was violated is the right to Equal Protection. (Complaint ¶ 32.) In order to state a § 1983 claim based on an Equal Protection Clause violation, a plaintiff must allege that it is a member of a protected

class, is similarly situated to members of an unprotected class and was treated differently from members of the unprotected class. See Wood v. Rendell, Civ. A. No. 94-1489, 1995 WL 676418, at *4 (E.D. Pa. Nov. 3, 1995).

As best as we can discern from the Complaint, Evans maintains that it is a member of a protected class because it is a minority-owned business. It does not complain, however, that Defendants treated it differently from similarly situated non-minority-owned businesses. Rather, it appears to complain only that it was not granted special treatment that it should have been afforded as a minority-owned business under the City's Minority Owned Business Program. Under these circumstances, Evans has not alleged the necessary elements of a § 1983 claim against either Elliott-Lewis or the City. Defendants' motions to dismiss are therefore granted as to Counts I and II.

C. Section 1981

In Count III, Evans asserts that Defendant Elliott-Lewis violated 42 U.S.C. § 1981 when it (1) "used Plaintiff to obtain the contract with [the City] and thereafter refused to provide any work to Evans," and (2) "sought to silence Evans so that the minority requirement of the contract would not be investigated." (Complaint ¶ 34.) Elliott-Lewis argues that this claim should also be dismissed for failure to state a claim upon which relief may be granted. We agree.

To state a claim under § 1981, a plaintiff must allege that: (1) it is a member of a racially cognizable group; (2) the defendant intended to discriminate on the basis of race; and (3) the discrimination concerned one or more of the activities enumerated in the statute, that is, making and enforcing contracts. Wood v. Cohen, Civ. A. Nos. 96-3707, 97-1548, 1998 WL 88387, at *5 (E.D. Pa. Mar. 2, 1998).

Again, we presume that Evans considers itself to be a member of a racially cognizable group

because it is a minority-owned business. Evans does not, however, allege anywhere in its complaint that Elliott-Lewis discriminated against it because it was a minority-owned business. Rather, it merely alleges that Elliott-Lewis did not provide enough work to Evans and that when Evans lodged a complaint against Elliott-Lewis on that basis, Elliott-Lewis offered Evans a small cash payment to drop the complaint. (Complaint ¶ 25.) While Evans baldly asserts that this cash payment was offered “so that the minority requirement of the contract would not be investigated” (id. ¶ 34), it alleges no additional facts to support this allegation. Indeed, Evans does not even allege that Elliott-Lewis failed to fulfill a contractual requirement that it use minority contractors; it merely alleges that Elliott-Lewis did not use Evans. Under these circumstances, there are simply insufficient allegations in the Complaint to state a cognizable claim against Elliott-Lewis for racial discrimination under 42 U.S.C. § 1981. Elliott-Lewis’s motion to dismiss is therefore granted as to Count III.

D. Fraud

In Count V of the Complaint, Evans asserts a claim of fraud and misrepresentation against Elliott-Lewis. Elliott-Lewis argues that we should dismiss this Count for failure to plead fraud with particularity pursuant to Fed. R. Civ. P. 9(b). We agree.

Rule 9(b) requires that all averments of fraud be stated with particularity “in order to place defendants on notice of the precise misconduct with which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior.” Seville Indus. Mach. Corp. v. Southmost Corp., 742 F.2d 786, 791 (3d Cir. 1984). Under Pennsylvania law, the elements of a fraud claim are: (1) a representation; (2) which is material; (3) that is falsely made “with knowledge of its falsity or recklessness as to whether it is true or false;” (4) made “with the intent of misleading another into relying on it;” (5) “justifiable reliance on the misrepresentation;” and (6)

a resulting injury that is proximately caused by the reliance. Argent Classic Convertible Arbitrage Fund L.P. v. Rite Aide Corp., 315 F. Supp.2d 666, 686 (E.D. Pa. 2004) (citing Gibbs v. Ernst, 647 A.2d 882, 889 (Pa. 1994) and Sowell v. Butcher & Singer, Inc., 926 F.2d 289, 296 (3d Cir. 1991)).

Evans's complaint does not even generally allege these essential elements of fraud, much less allege them with particularity. The sum total of the factual allegations against Elliott-Lewis are that Elliott-Lewis (1) entered into a contract with the City (Complaint ¶ 10); (2) identified Evans as a minority subcontractor in its bid for that contract (Complaint ¶¶ 11-12); (3) did not use Evans as a subcontractor to the extent it represented it would in the bid (Complaint ¶¶ 18, 20-22); and (4) offered Evans money to drop a subsequent complaint against it (Complaint ¶ 25). At best, these allegations state a claim for breach of contract, which, as explained above, is barred by the doctrine of res judicata. Accordingly, Evans has failed to state a claim for fraud, and Elliott-Lewis's motion to dismiss is granted as to Count V.

E. Leave to Amend

The United States Court of Appeals for the Third Circuit has instructed that "if a complaint is vulnerable to 12(b)(6) dismissal, a District Court must permit a curative amendment, unless an amendment would be inequitable or futile." Alston v. Parker, 363 F.3d 229, 235 (3d Cir.2004) (citing Grayson v. Mayview State Hosp., 293 F.3d 103, 108 (3d Cir.2002)).

Here, it is plain that any amendment to Evans's breach of contract claim would be futile as that claim is barred by res judicata. We will, however, give Evans leave to amend its other counts to elaborate on its allegations and better convey the substance of its claims.

IV. CONCLUSION

For the foregoing reasons, the City's and Elliott-Lewis's motions to dismiss are granted. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EVANS SUPPLIES AND	:	CIVIL ACTION
COMMUNICATION COMPANY, INC.	:	
	:	
v.	:	
	:	
ELLIOTT-LEWIS CORPORATION, ET AL.	:	NO. 06-5685

ORDER

AND NOW, this 31st day of May 2007, upon consideration of the City of Philadelphia's Motion to Dismiss the Complaint (Docket Entry # 4), the Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) of Defendant Elliott-Lewis Corporation (Docket Entry # 5), the Application to Treat As Uncontested Elliott-Lewis Corporation's Motion to Dismiss (Docket Entry # 8), the Motion of Elliott-Lewis Corporation for Leave to File a Reply Brief in Support of its Motion to Dismiss (Docket Entry # 10), and Plaintiff's Response to the Motions to Dismiss, **IT IS HEREBY ORDERED** that:

1. The City of Philadelphia's Motion to Dismiss the Complaint is **GRANTED**.
2. The Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) of Defendant Elliott-Lewis Corporation is **GRANTED**.
3. The Application to Treat As Uncontested Elliott-Lewis Corporation's Motion to Dismiss is **DENIED**.¹
4. The Motion of Elliott-Lewis Corporation for Leave to File a Reply Brief in Support

¹ Elliott-Lewis Corporation filed this Application on May 4, 2007, the same day that Plaintiff filed its response to the motions to dismiss. Accordingly, we exercise our discretion to refuse to treat Elliott-Lewis's motion to dismiss as uncontested. See Local Rule of Civil Procedure 7.1 ("In the absence of a timely response, [a] motion may be granted as uncontested") (emphasis added).

of its Motion to Dismiss is **GRANTED**.

5. Count IV is **DISMISSED WITH PREJUDICE**.
6. Counts I, II, III and V are **DISMISSED WITHOUT PREJUDICE**.
7. Plaintiff may file an amended complaint, curing the deficiencies of Count I, II, III and V within 20 days of the date of this Order.

BY THE COURT:

/s/ John R. Padova, J.
John R. Padova, J.