

New York City Department of Small Business Services
Notice of Public Hearing and Opportunity to Comment on Proposed Rule

What are we proposing?

The New York City Department of Small Business Services is proposing to promulgate amendments to Subchapters B and D of Chapter 11 of Title 66 of the Rules of the City of New York to implement provisions of Local Law 174 of 2019 and Local Law 176 of 2019 and to make various amendments to the process by which minority and women owned business entities are certified and goals for their utilization are set for City procurement contracts.

When and where is the hearing? DSBS will hold a public hearing on the proposed rule. The public hearing will take place at 10 a.m. on May 11, 2021. The hearing will be conducted by video conference and is accessible by:

- **Internet Video and Audio.** For access, use the following link and/or meeting information:
<https://nycsbs.webex.com/nycsbs/j.php?MTID=m0f8392f287a394deb6c2b148a46c964d>

Meeting Number: 129 589 3749
Password: 10006

- **Join by Video System.**
Dial 1295893749@webex.com
You can also dial 173.243.2.68 and enter your meeting number.
- **Phone.** For access, dial: +1-408-418-9388
When prompted, enter Meeting ID: 129 589 3749

How do I comment on the proposed rules? Anyone can comment on the proposed rule by:

- **Website.** You can submit comments to the DSBS through the NYC Rules website at <http://rules.cityofnewyork.us>.
- **Email.** You can email written comments to nycrules@sbs.nyc.gov.
- **Mail.** You can mail written comments to Zen Baraki, New York City Department of Small Business Services, 1 Liberty Plaza, 11th Floor, New York, NY 10006.
- **Fax.** You can fax written comments to DSBS at 212-618-8865.
- **By speaking at the hearing.** Anyone who wants to comment on the proposed rule at the public hearing may speak for up to three minutes. Please access the public hearing by

internet video and audio or by telephone using the instructions above. It is recommended, but not required, that commenters sign up prior to the hearing by contacting DSBS by phone at (212) 513-9237 or by email at zbaraki@sbs.nyc.gov.

Is there a deadline to submit written comments? The deadline for submitting written comments is May 11, 2021 at 5:00 p.m.

What if I need assistance to participate in the hearing? You must contact DSBS's Office of Legal Affairs if you need a reasonable accommodation at the hearing because of a disability. You must tell us if you need a sign language interpreter. You can tell us by email at zbaraki@sbs.nyc.gov. You may also tell us by telephone at (212) 513-9237. Advance notice is requested to allow sufficient time to arrange the accommodation. You must tell us of an accommodation request by May 4, 2021.

Can I review the comments made on the proposed rules? You can review comments submitted online by visiting <http://rules.cityofnewyork.us/>. A few days after the hearing, copies of all comments submitted online, copies of all written comments, and a summary of oral comments concerning the proposed rule will be available to the public upon request by email at zbaraki@sbs.nyc.gov.

What authorizes DSBS to make this rule? Sections 1301, 1304 and 1043 of the New York City Charter, and section 6-129 of the Administrative Code authorize DSBS to promulgate this proposed rule. This proposed rule was not included in DSBS's regulatory agenda for this Fiscal Year as promulgation was anticipated to be done in Fiscal Year 2020 and was not completed due to challenges caused by the COVID-19 pandemic.

Where can I find DSBS's rules? DSBS's rules are in Title 66 of the Rules of the City of New York.

What laws govern the rulemaking process? DSBS must meet the requirements of Section 1043 of the City Charter when creating or changing rules. This notice is made according to the requirements of Section 1043 of the City Charter.

Statement of Basis and Purpose

Pursuant to section 1301 of the New York City Charter (the "Charter"), the New York City Department of Small Business Services ("DSBS") is proposing to promulgate amendments to subchapters B and D of chapter 11 of title 66 of the Rules of the City of New York. This proposed rule would implement provisions of Local Law 174 for the year 2019 and Local Law 176 for the year 2019 and establish new requirements related to the process by which the City certifies businesses as minority-owned business enterprises ("MBEs") or women-owned business enterprises ("WBEs") and sets goals for their utilization on City procurement contracts.

The City's M/WBE Goals Program, codified in chapter 56 of the Charter and section 6-129 of

the Administrative Code, establishes goals for participation by MBEs, WBEs, and Emerging Business Entities (“EBEs”) as contractors and subcontractors in procurements for construction, standard services, goods valued under one million dollars, and professional services. Charter section 1304 also requires the Commissioner of DSBS to establish and operate, on behalf of the City, a centralized program for the certification of MBEs, WBEs and EBEs for the purposes of establishing their eligibility for participation in the programs.

Sections one, five, six and seven of this rule would amend sections 11-21, 11-23, 11-24 and 11-26 of title 66 to provide that the Division of Economic and Financial Opportunity, rather than a certification director bears responsibility for various activities relating to the certification of MBEs, WBEs, and EBEs. This change would allow greater flexibility in staff assignments within the division.

Sections two, eight and nine of this proposed rule would amend sections 11-21, 11-60, and 11-61 of title 66 to include Native Americans in the City’s M/WBE program in accordance with Local Law 174 for the year 2019 and Local Law 176 for the year 2019 and the findings in the most recent citywide disparity study. Section eight would also update the citywide procurement goals for all minority groups across all procurement categories in accordance with such disparity study and such local laws.

Sections three and four of this proposed rule would amend section 11-22 of title 66 to clarify the definition of the term “contribution” and provide that equity gifted to minority or women owners, monetary contributions from a bank account over which the minority and/or women owners cannot demonstrate control, and certain payments from the proceeds of promissory notes or loans will not be considered for the purposes of determining whether such minority group members and/or women owners’ contributions are proportionate to their equity interests. The purpose of this proposed rule is to clarify what constitutes a “contribution” towards ownership in the context of the M/WBE program.

Section six of this rule would amend section 11-24 of title 66 by extending the period during which an applicant may file an administrative appeal for a denial of certification as an MBE or WBE. The purpose of this rule amendment is to resolve a conflict in the period by which an applicant may file an appeal that currently appears between section 11-24 and section 11-25.

Section seven of this rule would amend section 11-26 of title 66 to establish a streamlined process by which businesses certified as MBEs or WBEs may voluntarily withdraw from the M/WBE program, and allows a business to reapply for certification after a period of two years from the date its certification is revoked. The purpose of this proposed rule is to create a process by which certified firms can voluntarily withdraw from the M/WBE program that is distinct from revocation.

Section 10 of this rule would amend section 11-62 of title 66 to conform to an amendment to section 6-129 of the Administrative Code made by Local Law 176 for the year 2019, to require the division to consult with the Director, as such term is defined in section 11-60 of title 66, when performing yearly audits of open contracts.

Sections 11 and 12 of this rule would amend section 11-63 of title 66 to expand the scope of agency M/WBE officer obligations to conform to amendments to section 6-129 of the Administrative Code made by Local Law 176 for the year 2019.

Section 15 of this rule would amend section 11-66 of title 66 to comport with amendments to section 6-129 of the Administrative Code made by Local Law 176 for the year 2019, to relieve agencies of the requirement to set goals for MBE or WBE subcontractor participation in any year in which the director determines that the City has already attained the relevant industry goal.

Sections 15 and 16 of this rule would amend section 11-66 of title 66 to comport with amendments to section 6-129 of Administrative Code made by Local Law 176 for the year 2019, and authorize agencies to require bidders and proposers to identify in their bids or proposals the MBE, WBE or EBE subcontractors that such bidder or proposer intends to use in connection with the performance of the contract.

Section 17 of this rule would amend section 11-66 of title 66 to comport with amendments to section 6-129 of the Administrative Code made by Local Law 176 for the year 2019, requiring contractors to submit M/WBE utilization plans twice per year during the term of the contract. Currently, such plans are only required to be submitted once per year.

Section 18 of this rule would amend section 11-66 of title 66 to comport with amendments to section 6-129 of the Administrative Code made by Local Law 176 for the year 2019 to allow notices sent to MBE, WBE and EBE subcontractors for the purposes of memorializing outreach efforts to be transmitted via email or another electronic form.

Sections 19, 21 and 23 of this rule would amend sections 11-67 and 11-72 of title 66 of the rules to make terminological edits, consistent with changes made by Local Law 176 for the year 2019.

Sections 20 and 22 of this rule would amend section 11-67 of title 66 to comport with amendments to section 6-129 of the Administrative Code made by Local Law 176 for the year 2019 relating to providing utilization credit for use of a contractor or subcontractor certified pursuant to the New York State Executive Law where credit is required by section 311 of the Charter or any other provisions of law, including those laws governing the procurement of construction work using the design build project delivery system.

Section 24 of this rule would amend section 11-74 of title 66 to authorize the Director, as such position is defined in section 11-60, to relieve agencies of the obligation to apply participation requirements to contracts for which, after an extensive search conducted by the contracting agency, it appears that there are not MBEs, WBEs or EBEs available to perform the work. Section 24 of this rule also establishes a framework and process for such Director to make such decisions. Sections 13 and 14 of this rule renumber various cross-references to provisions of section 11-74 of title 66.

New material is underlined.

[Deleted material is in brackets.]

“Shall” and “must” denote mandatory requirements and may be used interchangeably in the rules of this department, unless otherwise specified or unless the context clearly indicates otherwise.

Section 1. The definition of “certification director” in section 11-21 of Title 66 of the Rules of the City of New York is REPEALED.

§ 2. The definition of “minority group member” in section 11-21 of Title 66 of the Rules of the City of New York is amended to read as follows:

Minority group member. "Minority group member" means a United States citizen or lawfully admitted permanent resident [alien] who is, and can demonstrate membership in, one of the following groups:

- (1) Black persons having origins in any of the Black African racial groups;
- (2) Hispanic persons of Mexican, Puerto Rican, Dominican, Cuban, Central or South American descent of either Indian or Hispanic origin, regardless of race; or
- (3) Asian and Pacific Islander persons having origins in any of the Far East countries, South East Asia, the Indian Subcontinent or the Pacific Islands.
- (4) Native American persons who originate from any of the original peoples of North America and who maintain cultural identification through tribal affiliation or community recognition.

§3. Paragraph 1 of subdivision b of Section 11-22 of Title 66 of the Rules of the City of New York is amended to read as follows:

(1) The equity interest of minority group member(s) and/or women owners must be proportionate to the contribution of the minority group member(s) and/or women owners [as demonstrated by, but not limited to, contributions of money, property, equipment or expertise];

§4. Section 11-22 of Title 66 of the Rules of the City of New York is amended to add a new subdivision (b-1) to read as follows:

(b-1) (1) For the purposes of subdivision b of this section, the term “contribution” shall include:

(i) contributions of money, property, equipment or relevant expertise to a business enterprise in furtherance of the legitimate business objectives of such business enterprises; and

(ii) payments to other persons or entities in consideration for an equity interest in a business enterprise.

(2) Notwithstanding any provision of this subdivision, the term “contribution” shall not include:

(i) a payment to a person or entity in exchange for an equity interest in a business enterprise where such payment is made from the proceeds of a promissory note or loan for which the balance outstanding is over 50% of the total note or loan amount;

(ii) the receipt of an equity interest as a gift; or

(iii) payments from a bank account over which the minority and/or women owners cannot demonstrate control.

§ 5. Subdivision e of section 11-23 of Title 66 of the Rules of the City of New York is amended to read as follows:

(e) If the applicant does not cure a noticed deficiency, pursuant to procedures set forth in §11-23(c) of these rules, and the certification application remains incomplete for at least forty-two (42) days of the date of the Notice, unless such time is extended by the [certification director] division, the applicant must be sent a notice stating that its certification application has been rejected and will not be processed, together with its rejected certification application.

§ 6. Section 11-24 of Title 66 of the Rules of the City of New York is amended to read as follows:

§ 11-24. Notice of Determination and Right to Appeal.

(a) The [certification director] division will provide the applicant with written notice of a

determination approving or denying the certification.

(b) In the event certification is approved by the [certification director] division, the applicant must be sent a certification letter and will be certified as an MBE and/or WBE for five years from the date of the certification letter or until notified of the need to reapply at the [certification director's] division's request, whichever is earlier, so long as the applicant submits to the division an affidavit of no material change in ownership or control annually.

(c) In the event certification is denied by the [certification director] division, a written notice of such determination will be provided to the applicant stating the reason(s) for such denial. Such notice will also state the procedures for filing an appeal.

(d) The applicant may appeal the determination within [thirty (30)] sixty (60) days after the date of the notice denying the business enterprise's certification. In the event that a request for an appeal is not made within the [thirty (30)] sixty (60) day period, the [certification director's] division's determination will be deemed final and the applicant may not reapply for certification for two (2) years from the date of the written notice denying certification, provided, however, that if the facts and circumstances forming the basis of the denial decision have changed significantly, the applicant, at the discretion of the [certification director] division, may be granted permission to reapply sooner.

§ 7. Section 11-26 of Title 66 of the Rules of the City of New York is amended to read as follows:

§ 11-26. Revocation of Minority- or Women-Owned Business Enterprise Status.

(a) A certified business must notify DSBS within forty-five (45) days of any material change in the information contained in the certification application. A material change may include, but is not limited to, a change in any of the following: ownership; address; officers;

services provided by the certified business; market sector in which the business enterprise operates, bonding capacity of the business enterprise; and the union affiliation(s), if any, of the business enterprise. If a material change occurs, a review may be conducted by DSBS [and] . If the review reveals that the firm is no longer eligible for certification, certification may be revoked pursuant to the procedures set out below in subdivision (d) of this section. If an MBE's and/or WBE's certification is revoked, such business enterprise may not reapply for certification [at any time following revocation] for a period of two (2) years from the date of the written notice revoking certification. If a certified business fails to notify the [certification director] division of such material change, the [certification director] division may [in his or her discretion,] revoke the certification of an MBE and/or WBE for a period of up to five years.

(b) DSBS, upon having reason to believe or upon receiving allegations indicating that a certified business enterprise is not eligible for certification as an MBE and/or WBE, may meet with minority group members and/or women claiming ownership and control of the certified business and/or conduct an audit of such business enterprise, and will take the following actions:

- (1) Determine whether the allegation can be substantiated;
- (2) Obtain in writing, if possible, the basis of any allegation from the person or persons making the allegation;
- (3) Notify a certified business in writing that its certification as an MBE and/or WBE is under review by the [certification director] division and may be revoked. This notice will specify the bases for such review and any facts specifically at issue; and
- (4) Provide the certified business with an opportunity to respond in writing to any allegations set forth in any notices questioning the certification status of a certified business, within twenty-eight (28) days of the date of such notice, by personal service or certified mail, return

receipt requested.

(c) If the minority group members or women claiming ownership of the certified business fail to respond timely in writing to the notice of certification status review, or fail to meet with a DSBS representative or agree to an audit, the certification of the MBE and/or WBE may be revoked by the [certification director] division.

(d) The [certification director] division will notify, in writing, a certified business of the revocation of its certification as an MBE and/or WBE within fourteen (14) days of revoking such certification. The minority group members and/or women claiming ownership and control of a business enterprise which has had its certification as an MBE and/or WBE revoked, may request an appeal of this decision within thirty (30) days of the date of the notice of revocation. Such appeal must be conducted in accordance with procedures set forth in §11-25 of these rules. If a request for an appeal is not made within the thirty (30) day period, the [certification director's] division's determination will be final and the business enterprise may not reapply for certification for two (2) years from the date of the notice of revocation provided, however, that if the facts and circumstances forming the basis of the revocation decision have changed significantly, the business enterprise may, at the discretion of the [certification director] division, be granted permission to reapply sooner.

(e) If at any time DSBS has reason to believe that an applicant or certified business has willfully and knowingly provided incorrect information or made false statements, it will refer the matter to the Department of Investigation for investigation. Falsification of any document by an applicant or a certified business may lead to the imposition of civil and criminal penalties as provided by law and contract, revocation of certification as an MBE and/or WBE and debarment from City contracts.

(f) A business certified as an MBE or WBE may voluntarily withdraw from the M/WBE program by providing written notice to the division, in a format determined by the division, stating the request and the reason for withdrawal. The division will notify, in writing, such MBE or WBE that the withdrawal process is complete no later than thirty (30) days after receipt of the written notice from the business. Following voluntary withdrawal from the M/WBE program, a business shall not reapply for certification for a period of at least one (1) year from the date of the written notice from the division.

§ 8. Subdivision 26 of section 11-60 of Title 66 of the Rules of the City of New York is amended to read as follows:

(26) "Minority group" means Black Americans; Asian Americans[, and] ; Hispanic Americans; and Native Americans, provided that the commissioner is authorized to add additional groups to this definition upon a finding that there is statistically significant disparity between the availability of firms owned by individuals in such a group and the utilization of such firms in city procurement.

§ 9. Subdivision 1 of section 11-61 of Title 66 of the Rules of the City of New York is amended to read as follows:

(1) The citywide contracting participation goals for MBEs, WBEs and EBEs, which may be met through awards of prime contracts or subcontracts as described in § 11-67 of this subchapter, are as follows:

For construction contracts:

Category:	Participation goal:
Black Americans	[8] <u>12</u> % of total annual agency expenditures on such contracts
Asian Americans	[8] <u>11.1</u> % of total annual agency expenditures on such contracts
Hispanic Americans	[4] <u>17.95</u> % of total annual agency expenditures on such contracts

<u>Native Americans</u>	<u>0.56%</u> of total annual agency expenditures on such contracts
Women	[18] <u>25.66%</u> of total annual agency expenditures on such contracts
Emerging	6% of total annual agency expenditures on such contracts

For professional services contracts:

Category:	Participation goal:
Black Americans	[12] <u>11.81%</u> of total annual agency expenditures on such contracts
<u>Asian Americans</u>	<u>9.4%</u> of total annual agency expenditures on such contracts
Hispanic Americans	[8] <u>8.99%</u> of total annual agency expenditures on such contracts
<u>Native Americans</u>	<u>0.65%</u> of total annual agency expenditures on such contracts
Women	[17] <u>36.67%</u> of total annual agency expenditures on such contracts
Emerging	6% of total annual agency expenditures on such contracts

For standard services contracts:

Category:	Participation goal:
Black Americans	[12] <u>14.32%</u> of total annual agency expenditures on such contracts
Asian Americans	[3] <u>9.88%</u> of total annual agency expenditures on such contracts
Hispanic Americans	[6] <u>10.2%</u> of total annual agency expenditures on such contracts
<u>Native Americans</u>	<u>0.03%</u> of total annual agency expenditures on such contracts
Women	[10] <u>29.26%</u> of total annual agency expenditures on such contracts
Emerging	6% of total annual agency expenditures on such contracts

For goods contracts under one [hundred thousand] million dollars:

Category:	Participation goal:
Black Americans	[7] <u>5.94%</u> of total annual agency expenditures on such contracts
Asian Americans	[8] <u>10.59%</u> of total annual agency expenditures on such contract
Hispanic Americans	[5] <u>7.07%</u> of total annual agency expenditures on such contracts
<u>Native Americans</u>	<u>2.44%</u> of total annual agency expenditures on such contracts
Women	[25] <u>30.51%</u> of total annual agency expenditures on such contracts
Emerging	6% of total annual agency expenditures on such contracts

§ 10. Subdivision 10 of section 11-62 of Title 66 of the Rules of the City of New York is amended to read as follows:

(10) Each fiscal year the division, in consultation with the city chief procurement officer and the director, will audit at least 5% of all open contracts for which contractor utilization plans have been established in accordance with § 11-66 of this subchapter and 5% of all contracts awarded to MBEs, WBEs and EBEs to assess compliance with this subchapter. All solicitations for contracts for which contractor utilization plans are to be established will include notice of potential audit.

§ 11. Subdivisions 4, 10 and 11 of section 11-63 of Title 66 of the Rules of the City of New York are amended to read as follows:

(4) ensuring that agency bid solicitations and requests for proposals, and opportunities to be added to prequalified lists, are sent to MBEs, WBEs and EBEs in a timely manner, consistent with this section and rules of the procurement policy board;

(10) providing to the city chief procurement officer information for the reports required in § 11-69 of this subchapter and providing any other plans and/or reports required pursuant to this subchapter or requested by the director and/or the city chief procurement officer; [and]

(11) participating in meetings required pursuant to § 11-70 of this subchapter[.];

§ 12. Section 11-63 of Title 66 of the Rules of the City of New York is amended by adding new subdivisions 12, 13 and 14 to read as follows:

(12) facilitating training of agency staff;

(13) developing and maintaining agency standard operating protocols for the M/WBE program; and

(14) promptly disseminating information, tools, and resources that support the agency's

meeting of the requirements of this section.

§ 13. Subdivision 1 of section 11-64 of Title 66 of the Rules of the City of New York is amended to read as follows:

(1) Beginning May 15, 2006, and on April 1 of each year thereafter, each agency which, during the fiscal year which ended on June 30 of the preceding year, has made procurements in excess of five million dollars, without counting procurements exempt pursuant to paragraph [two] b of subdivision one of § 11-74 of this subchapter, must submit an agency utilization plan for the fiscal year commencing in July of the year when such plan is to be submitted to the commissioner. Upon approval by the commissioner such plan will be submitted to the speaker of the council. Each such plan will, at a minimum, include the following:

(a) the agency's participation goals for MBEs, WBEs and EBEs for the year, provided however, that when setting its goals, each agency must consider the citywide goals, the size and nature of its own procurement portfolio (excluding contracts described in paragraph [two] b of subdivision one of § 11-74 of this subchapter), and the availability of MBEs, WBEs and EBEs with the capacity to perform the specific types and scale of work for which the agency anticipates it will solicit procurements during the year;

(b) an explanation for any agency goal that is different than the participation goal for the relevant group and industry classification as determined pursuant to § 11-61 of this subchapter;

(c) a list of the names and titles of agency personnel responsible for implementation of the agency utilization plan;

(d) methods and relevant activities proposed for achieving the agency's participation goals;
and

(e) any other information which the agency or the commissioner deems relevant or

necessary.

§ 14. Paragraph e of subdivision 2 of section 11-65 of Title 66 of the Rules of the City of New York is amended to read as follows:

(e) Prior to soliciting bids or proposals for contracts valued at over ten million dollars, other than contracts for capital projects valued at over twenty-five million dollars and contracts that are exempt pursuant to paragraph [two] b of subdivision one of § 11-74 of this subchapter, an agency must submit the bid or proposal to the city chief procurement officer for a determination whether it is practicable to divide the proposed contract into smaller contracts and whether doing so will enhance competition for such contracts among MBEs, WBEs and EBEs and other potential bidders or proposers. The agency must follow the instructions of the city chief procurement officer in cases where he or she determines that it is both practicable and advantageous in light of cost and other relevant factors to divide such contracts into smaller contracts.

§ 15. Subdivisions 1 through 3 of section 11-66 of Title 66 of the Rules of the City of New York is amended to read as follows:

(1) Prior to issuing the solicitation of bids or proposals for individual contracts that present opportunities for participation by certified firms, agencies must establish participation goals for MBEs, WBEs and/or EBEs. Such goals may be greater than, less than or the same as the relevant citywide goal or goals established pursuant to § 11-61 of this subchapter. Taking into account the factors listed in this subdivision, an agency may establish a goal for a procurement that may be achieved by a combination of prime contract and subcontract dollars, and/or a combination of construction and services performed by a contractor or subcontractor pursuant to the contract, and/or a combination of MBEs, WBEs and/or EBEs. [Alternatively, an] An agency may establish specific goals for particular types of goods or services to be provided by the prime

contractor or subcontractors, and/or goals for particular types of certified firms. In determining the participation goals for a particular contract, an agency must consider the following factors:

(a) the scope of work;

(b) the availability of MBEs, WBEs and EBEs able to perform the particular tasks required in the contract;

(c) the extent to which the type and scale of work involved in the contract present prime contracting and subcontracting opportunities for amounts within the capacity of MBEs, WBEs and EBEs;

(d) the agency's progress to date toward meeting its annual participation goals through race-neutral, gender-neutral and other means, and the agency's expectations as to the effect such methods will have on participation of MBEs, WBEs and EBEs in the agency's future contracts; and

(e) any other factors the contracting agency deems relevant.

(2) A contracting agency shall not be required to establish participation goals

[i] (a) for procurements described in § 11-74 of this subchapter, or portions of procurements excluded pursuant to § 11-74(1)(i) of this subchapter; or

[ii] (b) when the agency has already attained the relevant goal in its annual utilization plan, or expects that it will attain such goal without the use of such participation goals; or

(c) for a procurement to be made in a year for which the director determines that the city has already attained the relevant goal for the industry as set forth in section § 11-61.

(3) (a) For each contract in which a contracting agency has established participation goals, such agency shall state in the solicitation for such contract that bidders and/or proposers shall be required to agree as a material term of the contract that the contractor must meet the

participation goals unless such goals are waived or modified by the agency in accordance with this section. An agency must permit a contractor that is an MBE, WBE or EBE to count its own participation toward fulfillment of the relevant participation goal, provided that the agency has determined the value of such a contractor's participation by subtracting from the total value of the contract any amounts that the contractor pays to direct subcontractors. An agency must permit a contractor that is a qualified joint venture to count a percentage of its own participation toward fulfillment of the relevant participation goal. The agency must determine the value of such a contractor's participation by subtracting from the total value of the contract any amounts that the contractor pays to direct subcontractors, and then multiplying the remainder by the percentage to be applied to total profit to determine the amount to which an MBE, WBE or EBE is entitled pursuant to the joint venture agreement. Notwithstanding any provision of this paragraph to the contrary, a contractor's achievement of participation goals must be determined as described in paragraph two of § 11-67 of this subchapter.

(b) Where the agency chief contracting officer determines that it is practicable in light of the nature of goods or services being procured and the expected duration of the contract, a contracting agency shall require bidders or proposers to identify in their bids or proposals the MBEs, WBEs or EBEs they intend to use in connection with the performance of the contract, including their names, addresses and telephone numbers, and require that any substitutions may only be made with the approval of the contracting agency, which shall only be given when the contractor has proposed to use a firm that would satisfy the goals established for the procurement to the same extent as the firm previously identified, unless the contracting agency determines that the contractor has met the standards for establishing reasonable, good faith efforts as provided in subdivision 12 of this section.

§ 16. Subdivision 5 of section 11-66 of Title 66 of the Rules of the City of New York is amended to read as follows:

(5) For each contract for which participation goals are established the contractor must submit with its bid or proposal a utilization plan indicating:

(a) whether the contractor is an MBE, WBE, EBE, or a qualified joint venture;

(b) the percentage of work it intends to award to direct subcontractors; [and]

(c) in cases where the contractor intends to award direct subcontracts, a description of the type and dollar value of work designated for participation by MBEs, WBEs and/or EBEs, and the time frames in which such work is scheduled to begin and end. When the contractor utilization plan indicates that the bidder or proposer does not intend to meet the participation goals, the bid or proposal will not be deemed responsive unless the agency has granted a pre-award request for change pursuant to subdivision 11 of this section[.]; and

(d) if required by the contracting agency pursuant to paragraph b of subdivision three of this section, the identity of the MBEs, WBEs or EBEs the contractor intends to use in connection with the contractor's performance of the contract, including their names, addresses and telephone numbers.

§ 17. Paragraph a of subdivision 6 of section 11-66 of Title 66 of the Rules of the City of New York is amended to read as follows:

(6) (a) For each contract for which a contractor utilization plan has been submitted, the contracting agency must require that within thirty days of the issuance of notice to proceed, and at least [once] twice per year thereafter, the contractor submit a list of persons to which it intends to award subcontracts within the next twelve months, and a written confirmation that the contractor has notified each MBE, WBE or EBE included in such list. For multi-year contracts,

the contractor must submit such a list of persons and written confirmation of notification to the agency annually. In the event that a contracting agency disapproves a contractor's selection of a subcontractor or subcontractors, the contracting agency must allow such contractor a reasonable time to propose alternate subcontractors.

§ 18. Subparagraph iii of paragraph a of subdivision 12 of section 11-66 of Title 66 of the Rules of the City of New York is amended to read as follows:

(iii) The contractor sent written notices, by certified mail or facsimile, electronic mail or other electronic format, in a timely manner, to advise MBEs, WBEs and EBEs that their interest in the contract was solicited;

§ 19. Paragraphs c, d and h of subdivision 1 of section 11-67 of Title 66 of the Rules of the City of New York are amended to read as follows:

(c) In the case of contracts of the types identified pursuant to subparagraph (l) of this paragraph, the total dollar amount that a prime contractor of an agency has paid or is obligated to pay a direct subcontractor that is an MBE, WBE, or EBE, reduced by the dollar amount the direct subcontractor has paid or is obligated to pay its indirect subcontractors upon completion of work, will be credited toward the relevant goal. Where such a contractor has paid or is obligated to pay a direct [contractor] subcontractor that is both an MBE and a WBE, such amount will be credited toward the relevant goal for MBEs or the goal for WBEs.

(d) In the case of contracts of the types identified pursuant to subparagraph (l) of this paragraph, the total dollar amount that a direct subcontractor of the prime contractor has paid or is obligated to pay to an indirect subcontractor that is an MBE, WBE or EBE will be credited toward the relevant goal. Where such a contractor has paid or is obligated to pay an indirect [contractor] subcontractor that is both an MBE and a WBE, such amount will be credited toward the relevant

goal for MBEs or the goal for WBEs.

(h) No credit will be given for the participation in a contract by any firm [company] that has not been certified as an MBE, WBE or EBE in accordance with § 1304 of the charter.

§ 20. Subdivision 1 of section 11-67 of Title 66 of the Rules of the City of New York is amended by adding a new paragraph h-1 to read as follows:

(h-1) Notwithstanding any provision of this section to the contrary, credit shall be given for work by a contractor or subcontractor that is certified as a minority or women-owned business enterprise pursuant to the executive law where such credit is required by section 311 of the charter or other provision of law, including but not limited to the New York City Rikers Island Jail Complex Replacement Act, part KKK of chapter 59 of the laws of 2018, and the New York City BQE Design-Build Act, part QQQ of chapter 59 of the laws of 2018.

§ 21. Paragraph c of subdivision 2 of section 11-67 of Title 66 of the Rules of the City of New York is amended to read as follows:

(c) No credit will be given to the contractor for the participation of a [company] firm that is not certified in accordance with § 1304 of the charter before the date that the [company] firm completes the work under the subcontract.

§ 22. Subdivision 2 of section 11-67 of Title 66 of the Rules of the City of New York is amended by adding a new paragraph c-1 to read as follows:

(c-1) Notwithstanding any provision of this section to the contrary, credit shall be given for work by a contractor or subcontractor that is certified as an MBE or WBE pursuant to the executive law where such credit is required by section 311 of the charter or other provision of law, including but not limited to the New York City Rikers Island Jail Complex Replacement Act, part KKK of chapter 59 of the laws of 2018, and the New York City BQE Design-Build Act, part

QQQ of chapter 59 of the laws of 2018.

§ 23. Subdivision 8 of section 11-72 of Title 66 of the Rules of the City of New York is amended to read as follows:

(8) A contractor's record in implementing its contractor utilization plan will be a factor in the evaluation of its performance. Whenever a contracting agency determines that a contractor's compliance with a contractor utilization plan has been unsatisfactory, the agency must, after consultation with the city chief procurement officer, file an advice of caution form for inclusion in [VENDEX] the computerized data system maintained pursuant to subdivision b of section 6-116.2, or any successor to such system as caution data.

§ 24. Section 11-74 of Title 66 of the Rules of the City of New York is amended to read as follows:

§ 11-74 **Applicability.**

(1) Agencies will not be required to apply participation requirements to the following types of contracts:

[(1)] (a) those subject to federal or state funding requirements which preclude the city from imposing the requirements of this subchapter;

[(2)] (b) those subject to federal or state law participation requirements for MBEs, WBEs, disadvantaged business enterprises, and/or EBEs;

[(3)] (c) contracts between agencies;

[(4)] (d) procurements made through the United States general services administration or another federal agency, or through the New York state office of general services or another state agency, or any other governmental agency[.];

[(5)] (e) emergency procurements pursuant to Section 315 of the Charter;

[(6)] (f) sole source procurements pursuant to Section 321 of the Charter;

[(7)] (g) contracts for human services; [and]

[(8)] (h) contracts awarded to not-for-profit organizations[.]; and

(i) contracts, or portions of contracts, that the director determines should be exempt because, after an extensive search conducted by the contracting agency, it appears that there are not MBEs, WBEs or EBEs available to perform the work.

(2) Unavailability Determinations Procedures

(a) When making requests for exemptions pursuant to paragraph i of subdivision 1 of this section, the contracting agency shall consider the following:

(i) whether the total contract value exceeds 10 million dollars;

(ii) the contracting agency's reasonable efforts to engage in outreach activities with MBEs, WBEs or EBEs that could potentially perform the specific types and scale of work required on the contract;

(iii) the contracting agency's efforts to advertise the opportunity and send written notices of specific procurement opportunities to MBEs, WBEs or EBEs; and

(iv) the contracting agency's inability to locate MBEs, WBEs or EBEs with the necessary qualifications, including an appropriate amount of experience, to perform the specific types and scale of work required on the contract, despite making efforts described in subparagraphs (ii) and (iii) of this paragraph.

(b) Prior to the bid or proposal due date for a procurement, the agency may file a request for exemption with the director. A request for this exemption filed with the director shall include the following:

(i) the requesting agency's name;

(ii) the anticipated contract period of performance and the estimated contract dollar value;
(iii) documentation of the agency's effort to locate MBE, WBE, or EBE firms available to perform the work; and

(iv) a memorandum describing the agency's justification for setting a zero percent M/WBE participation goal for the contract or a portion of the contract.

(c) The director shall notify the contracting agency in writing of his or her final determination regarding the agency request for exemption or partial exemption of the contract.

(d) The director may instruct an agency to consider the factors set forth in paragraph a of this subdivision, and transmit documentation of the agency's efforts to locate MBE, WBE, or EBE firms available to perform the work associated with a contract or a portion of a contract. After receipt of such information but prior to the bid or proposal due date for the contract, the director may issue a determination to exempt the contract, in whole or in part.

(e) If the director decides to exempt a contract, or a portion of a contract, pursuant to this subdivision before the solicitation is released, the solicitation documents shall reflect a zero percent MBE, WBE and EBE participation goal for the entire contract or the exempted portion of the contract. If the director decides to exempt a contract, or a portion of a contract, after the release of a solicitation, the solicitation shall be amended to reflect the removal of the MBE, WBE and EBE participation goal or any portion of such goal. For procurements made by competitive sealed bidding or competitive sealed proposals, such amendment shall be made pursuant to § 3-02(i) or § 3-03(f)(2) of title 9 of the rules of the city of New York, but in no event shall such an amendment be made to a solicitation less than five days prior to the date set for receipt of bids or proposals.

**NEW YORK CITY MAYOR'S OFFICE OF OPERATIONS
253 BROADWAY, 10th FLOOR
NEW YORK, NY 10007
212-788-1400**

**CERTIFICATION / ANALYSIS
PURSUANT TO CHARTER SECTION 1043(d)**

RULE TITLE: Amendment of Rules Governing MWBE Program for Procurements

REFERENCE NUMBER: SBS-14

RULEMAKING AGENCY: Department of Small Business Services

I certify that this office has analyzed the proposed rule referenced above as required by Section 1043(d) of the New York City Charter, and that the proposed rule referenced above:

- (i) Is understandable and written in plain language for the discrete regulated community or communities;
- (ii) Minimizes compliance costs for the discrete regulated community or communities consistent with achieving the stated purpose of the rule; and
- (iii) Does not provide a cure period because it does not establish a violation, modification of a violation, or modification of the penalties associated with a violation.

/s/ Francisco X. Navarro
Mayor's Office of Operations

March 29, 2021
Date

**NEW YORK CITY LAW DEPARTMENT
DIVISION OF LEGAL COUNSEL
100 CHURCH STREET
NEW YORK, NY 10007
212-356-4028**

**CERTIFICATION PURSUANT TO
CHARTER §1043(d)**

RULE TITLE: Amendment of Rules Governing MWBE Program for Procurements

REFERENCE NUMBER: 2020 RG 098

RULEMAKING AGENCY: Department of Small Business Services

I certify that this office has reviewed the above-referenced proposed rule as required by section 1043(d) of the New York City Charter, and that the above-referenced proposed rule:

- (i) is drafted so as to accomplish the purpose of the authorizing provisions of law;
- (ii) is not in conflict with other applicable rules;
- (iii) to the extent practicable and appropriate, is narrowly drawn to achieve its stated purpose; and
- (iv) to the extent practicable and appropriate, contains a statement of basis and purpose that provides a clear explanation of the rule and the requirements imposed by the rule.

/s/ STEVEN GOULDEN
Acting Corporation Counsel

Date: March 26, 2021