(**PROJECT NAME**) **MWSBE Participation Plan**

The (**COMPANY NAME**), (**COMPANY TYPE AND STATE**), and the City of Charlotte (the “City”) have adopted this Charlotte Business INClusion Participation Plan (“Participation Plan”) in connection with the (**PROJECT NAME**) in the City of Charlotte, Mecklenburg County. The objective of this Participation Plan is to increase the utilization of Small Business Enterprises, Minority Business Enterprises and Women Business Enterprises (all as defined herein) in the (**PROJECT NAME**).

1. **Definitions.** For purposes of this Participation Plan, the following terms shall have the meanings assigned below. Capitalized terms that are not defined in this Participation Plan shall have the meanings set forth in the Project agreement and the CBI Program policy.
   1. **Business Day:** Any day on which the majority of employees working for the City are required to report for work.
   2. **Charlotte Business Inclusion Program (CBI Program):** The Charlotte Business Inclusion Program adopted by the City based on the 2017 Disparity Study, and as revised from time to time. A copy of the CBI Program is available on the City’s website and is available upon request from the City.
   3. **City:** City of Charlotte, a North Carolina municipal corporation.
   4. **Commercially Useful Function:** Responsibility for either supplying goods or executing a distinct element of the work of a Target Contract (meaning actual performance or supervision of the work). To determine whether an MWSBE is performing a Commercially Useful Function, the amount of work subcontracted, industry practices and other relevant factors will be evaluated.
   5. **Construction Manager**: The companies that Developer contracts with directly to manage construction on the Project, including without limitation, (**COMPANY NAME**).
   6. **Contract Goals:** The SBE, MBE, WBE and Aggregate MWSBE utilization goals established for a Target Contract pursuant to **Section 3** of this Participation Plan (which shall be stated as a percentage of the total amount of the Target Contract).
   7. **Contractor:** Any person or entity that enters into a Target Contract, whether with Construction Manager or another Contractor on the Project.
   8. **Good Faith Efforts (or GFEs):** The good faith efforts requirements attached to this Participation Plan as Section 2.8**.** To “employ” Good Faith Efforts means to earn the Minimum GFE Points, as defined in Section 2.8.
   9. **Minority Business Enterprise (MBE):** An entity that qualifies as a Minority Business Enterprise under N.C. Gen. Stat. § 143-128, and that has been certified as a Historically Underutilized Business by the State of North Carolina.
   10. **Modified GFEs or Modified Good Faith Efforts:** The requirements a Contractor must meet to solicit MWSBEs with respect to a New Opportunity, as expressly set forth herein.
   11. **Participation Commitments:** TheMBE, SBE, WBE and Aggregate MWSBE utilization percentages that a Contractor commits to achieve for a Target Contract at or prior to contract award (which shall be stated as a percentage of the total amount of the Target Contract). The Participation Commitment will be the same percentage(s) stated in the Contractor’s bid or proposal unless modified by mutual written agreement of the Contractor and Construction Manager.
   12. **Party** or **Parties:** Construction Manager and the City, individually or collectively as the context dictates.
   13. **Project:** (**DESCRIPTION OF THE PROJECT**) between Construction Manager and the City.
   14. **Project Goals:** The goals set forth in **Section 2** of this Participation Plan for the utilization of MBEs, SBEs, WBEs and Aggregate MWSBEs on the Target Work. Project Goals are stated as a percentage of the total amount paid for the Target Work.
   15. **State.** The State of North Carolina.
   16. **Substitute Contract Goal.** A Contract Goal unilaterally set by the City following a breach of **Section 3** by the Construction Manager or a Contractor, provided that such Substitute Contract Goal shall not require MWSBE participation greater than what reasonably could be achieved (or could have been achieved) by employing Good Faith Efforts with respect to that particular Target Contract.
   17. **Target Contract:** A contract for any portion of the Target Work where there are reasonable opportunities for engaging one or more MWSBEs to perform a Commercially Useful Function in connection therewith and the total amount paid for the Target Work on that contact exceeds $50,000.00. If the City notifies Construction Manager that such opportunities exist for a particular contract or type of contract, then that contract will be considered a Target Contract unless Construction Manager demonstrates to the reasonable satisfaction of the City that no such opportunities exist. If new opportunities for subcontracting to MWSBEs arise after the contract is entered into and is anticipated to have a contract price in excess of $50,000.00, it shall be considered a New Opportunity on a Target Contract (as defined in **Section 11.1** below) from that point forward. Construction Manager will confer with the City in the event of questions about whether a particular agreement warrants classification as a Target Contract.
   18. **Target Work:** All professional services (including without limitation all design, engineering, geotechnical, traffic consulting and environmental services), hauling, excavation, construction and construction-related work (including without limitation installation of sidewalks, subsurface, masonry, electrical and utility installations, and related items) undertaken in connection with the Project, but excluding any professional services work that has been contracted for as of the date of Contract.
2. **Project Goals.**
   1. **Agreed Project Goals.** In connection with the Project, the Construction Manager has adopted the following Project Goals:

MBE Goal: 0% of the total Target Work to be performed by MBEs.

SBE Goal: 0% of the total Target Work to be performed by SBEs.

WBE Goal: 0% of the total Target Work to be performed by WBEs.

Aggregate MSBE Goal: 0% of the total Target Work performed by MBEs or SBEs in the aggregate.

Aggregate MWBE Goal: 0% of the total Target Work performed by MBEs or WBEs in the aggregate.

Aggregate WSBE Goal: 0% of the total Target Work performed by SBEs or WBEs in the aggregate.

It is acknowledged that Construction Manager shall use diligent efforts to meet each of the individual MBE, SBE, and WBE Project Goals.

* 1. **Measuring Project Goal Attainment:** To measure the attainment of Project Goals, Construction Manager will track and report to the City on a quarterly basis:
     1. a list of all Target Contracts that are ongoing at any point during the quarter;
     2. the actual dollar amount committed to MBEs, SBEs, or WBEs on each Target Contract during the quarter (and totaled for all Target Contracts during the quarter), including the name of each MWSBE,
     3. the actual dollar amount actually paid to MBEs, SBEs, or WBEs on each Target Contract during the quarter (and totaled for all Target Contracts during quarter), including the name of each MWSBE;
     4. the total dollar amount paid out on each Target Contract during the quarter (and totaled for all Target Work during the quarter);
     5. the percentage utilization for each category of MWSBE, calculated by dividing the amounts paid to MBEs, SBEs, and WBEs on each Target Contract by the total amount paid on the Target Contract (calculated separately for each MWSBE);
     6. the percentage utilization achieved to date, calculated by dividing the amounts paid to MWSBEs on all Target Contracts to date by the total amount paid for Target Work to date (calculated separately for each type of MWSBE and in the aggregate);
     7. a list of all contracts that are ongoing at any point in the quarter that are not Target Contracts; and
     8. a list of all contracts and Target Contracts that Construction Manager expects to put out for bids or proposals during the two (2) upcoming quarters, if any.

The quarterly report shall be in the form provided by the Construction Manager and shall contain such additional information as is contained therein. The quarterly report shall be approved by the CBI program manager before being submitted for the first time. Notwithstanding anything contained herein to the contrary, payments to the Construction Managers (if applicable) will not count toward the Project Goals, the Contract Goals or the Aggregate MWSBE Goal.

* 1. **No Double Counting of the Same Contract Dollars.** Construction Manager will promote the utilization of MBE, SBE, and WBE firms as both first-tier and lower-tier subcontractors and suppliers in order to meet the Project Goals. Notwithstanding the foregoing, Construction Manager will not be allowed to receive credit toward a single Project Goal for the same contracting dollars twice. For instance, if Construction Manager receives credit toward a single Project Goal for amounts paid to a particular MWSBE as a first-tier subcontractor in connection with a specified portion of the Target Work, Construction Manager will not also be able to receive credit toward the same Project Goal for any amounts paid by that first tier MWSBE subcontractor to a second-tier or lower tier MWSBE subcontractor in connection with performing the applicable portion of the Target Work.
  2. **MWSBEs Applicable for Credit Toward Target Goals.** Construction Manager shall receive credit toward the Project Goals only for those MWSBEs that:
     1. Are certified MWSBEs; and
     2. Will actually perform a Commercially Useful Function; and
     3. Will perform a portion of the Target Work within the area(s) for which they are certified as an MWSBE unless Construction Manager or Contractor provides documentation satisfactory to the City, as applicable, showing that the MWSBE has performed similar work in the past. Documentation to satisfy this requirement may include invoices showing the MWSBE has previously performed such work.
  3. **Using MWSBEs with Respect to Contracts not Identified as Target Contracts.** Construction Manager shall receive credit toward the Project Goals for using MWSBEs with respect to contracts for services related to the Project that were not previously identified as Target Contracts as long as the criteria set forth in **Section 2.6** are met.
  4. **Calculating MWSBE Participation Based on Type of MWSBE.** Construction Manager shall receive credit toward the Project Goals for MWSBE participation as set forth below:
     1. **MWSBE Subcontractor.** If Construction Manager or Contractor utilizes a MWSBE as a contractor to perform services, Construction Manager shall receive credit toward the Project Goals based on 100% of the value of the Commercially Useful Function the applicable MWSBE performs in connection with the Project.
     2. **MWSBE Manufacturer.** Construction Manager shall receive credit toward the Project Goals based on 100% of all expenditures for materials, supplies and equipment obtained from a MWSBE manufacturer used in connection with the Project.
     3. **MWSBE Regular Dealer.** Construction Manager shall receive credit for 60% of all expenditures for materials, supplies, and equipment obtained by an MWSBE Regular Dealer toward subcontracting goals.
     4. **MWSBE Hauler, Broker or Packager.** Construction Manager shall receive credit toward the Project Goals based on 100% of any fees or commissions charged by a MWSBE broker or packager providing a Commercially Useful Function toward the Project Goals, provided that the fee or commission is commercially reasonable and not excessive as compared with fees customarily charged for similar services in the region. A Commercially Useful Function by a MWSBE broker or packager shall include providing professional, technical, consultant or managerial services and assistance to procure essential personnel, facilities, equipment, materials or supplies in connection with the performance of the Target Work.
  5. **Minimum Solicitation Requirements**
     1. **Contact Documentation Guidelines**. The Bidder must contact MWSBEs in a manner reasonably calculated to meet each Subcontracting Goal established for the Contract. Factors considered may include but are not limited to:

• The number of available MWSBEs contacted;

• Whether the Bidder directed its contacts to MWSBEs listed as performing scopes of work sufficient to meet each Subcontracting Goal;

• Whether the contacts were made at least 10 Days before Bid Opening;

• How the contacts were made and whether they were documented in a verifiable way (and in compliance with any forms provided by the City);

• Whether the substance of the Bidder’s solicitation was reasonably sufficient to generate a response from MWSBEs;

• Whether the Bidder promptly and adequately responded to inquiries received from MWSBEs; and

• Whether the Bidder made follow up contacts to MWSBEs that did not respond to the Bidder’s initial contact.

* + 1. **Solicitation Content**. For Construction Manager to receive credit for a solicitation, the substance of the solicitation must be sufficient to put the MWSBE on notice that Construction Manager is soliciting a bid or proposal from the MWSBE to participate in performing the portion of the Target Work up for award in one or more of the areas for which the MWSBE is certified.
    2. **When Documentation Required.** The City may require documentation of the items listed above or any additional, reasonable documentation relating to MWSBE solicitations from Construction Manager. Construction Manager shall provide such requested solicitation documentation within three (3) Business Days after the City requests it, unless the City has agreed in writing to a longer time period.

1. **Approval of Contract Goals.** 
   1. At least fifteen (15) days prior to soliciting bids or proposals for any Target Contract anticipated to have a contract price greater than $200,000, Construction Manager will propose in writing Contract Goals for the applicable Target Contract, which proposal shall be subject to approval by the City (not to be unreasonably withheld, conditioned or delayed). Such proposed Contract Goals shall fairly reflect the potential MBE, SBE, WBE and Aggregate MWSBE utilization that may reasonably be achieved employing Good Faith Efforts with respect to that particular Target Contract. Additionally, such Contract Goals shall, in the aggregate, be reasonably sufficient to enable Construction Manager to meet the overall Project Goals for the Target Work.
   2. The City will approve or reject such proposed Contract Goals within five (5) Business Days after receipt of Construction Manager’s written request, and if timely rejected, the City will promptly confer with Construction Manager regarding the basis for any rejection, including but not limited to stating their specific objections to Construction Manager within such five (5) Business Day period and suggesting therewith any modifications to the proposed Contract Goals which might make the proposal acceptable to them (but which modifications may in no event be more strict than Contract Goals which may reasonably be achieved by employing Good Faith Efforts in accordance with this Participation Plan).
   3. Construction Manager may re-submit its proposed Contract Goals for the Target Contract in the event of any prior rightful rejection thereof. In the event the City does not timely reject such Contract Goals within such five (5) Business Day period after receipt of Construction Manager’s written request, the proposed Contract Goals shall be deemed approved for all purposes hereunder. Construction Manager is responsible for monitoring and enforcing compliance with this **Section** by Contractors.
2. **Notice of Contracts Not Expected To Exceed $200,000.** At least ten (10) days prior to soliciting bids or proposals for any Target Contract anticipated to have a contract price of $200,000 or less, Construction Manager shall notify the City of the upcoming solicitation, and will use reasonable efforts (which are hereby acknowledged to be a lesser standard than the Good Faith Efforts standard otherwise set forth herein) to recruit MBEs, SBEs, and WBEs to participate in the Target Contract. Construction Manager is responsible for monitoring and enforcing compliance with this **Section 4** by Contractors.
3. **Good Faith Efforts Requirement.** For each Target Contract subject to **Section 3** hereof, Construction Manager shall (i) either: (a) meet the Contract Goals and Project Goals with Participation Commitments, or (b) meet the Aggregate MWSBE Contract Goals and Aggregate MWSBE Project Goals with Participation Commitments, or (c) employ Good Faith Efforts to meet the Contract Goals and Project Goals; and (ii) shall require each Contractor with which Construction Manager is under contract and that will be subcontracting out part of the Target Work to either: (a) meet the Contract Goals and Project Goals with Participation Commitments; or (b) meet the Aggregate MWSBE Contract Goals and Aggregate MWSBE Project Goals with Participation Commitments, or (c) employ Good Faith Efforts to meet the Contract Goals and Project Goals. It is understood that notwithstanding the allowance of Aggregate MWSBE Goals for Target Contracts and for this Project, Construction Manager shall use diligent efforts to meet each of the individual MBE, SBE, and WBE Project Goals for the Project as a whole, and such diligent efforts shall include outreach through the City to ensure that all categories of MBE, SBE, and WBE firms are solicited for Target Work opportunities and are provided an opportunity to submit bids for such work.
4. **Reporting.** 
   1. **Quarterly Reports.** Each quarter, Construction Manager will provide the City with the quarterly report described in **Section 2.2**. Construction Manager shall provide the quarterly reports within thirty (30) days after the end of each quarter, with the first quarter beginning on the first January 1st, April 1st, July 1st or October 1st after the Target Work commences.
   2. **Additional Information.** In addition to the quarterly reports contemplated above, if reasonably requested in writing by the City, Construction Manager will provide **within fifteen (15) days** after receiving such written request, any reasonably requested documentation or information relating to MWSBE utilization on the Project, or Construction Manager’s or Contractors’ Good Faith Efforts to include MWSBEs on the Project. Such documents may include without limitation, bids, proposals, payment affidavits, certifications, invoices or checks. Construction Manager will further require Contractors to provide such documentation and information.
   3. **Potential New MWSBEs.** Construction Manager will notify the City of any potential MWSBE contractors that are not certified as MWSBEs by the City but have expressed an interest in bidding on the Target Work, and the City will cooperate diligently and in good faith with the potential MWSBE contractor to achieve certification and will report the results of that effort. Construction Manager will notify the City of any potential MBE or WBE contractors that are not certified as such by the State, but have expressed an interest in bidding on the Target Work, and the City will cooperate diligently and in good faith with the potential MBE or WBE contractor to achieve certification from the State and will report the results of that effort.
   4. **Compliance with City Consultant Requests for Information.** Construction Manager and all Contractors shall further cooperate in good faith with the City and any consultants hired by the City: (a) in any investigation initiated by the City to determine whether Construction Manager or a Contractor has employed Good Faith Efforts to achieve the Project Goals in connection with this Participation Plan, or (b) in connection with any disparity study conducted by the City to determine whether there is discrimination among contractors or subcontractors on City contracts. Such information shall be provided within thirty (30) days after it is requested by the City or their respective consultant(s). The terms of this paragraph shall survive the completion of the Target Work for three (3) years.
   5. **Failure to Provide Documentation.** Failure to provide any of the quarterly reports or other information or documentation required by this Section within the time period specified herein constitutes a breach of this Participation Plan and shall entitle the City to seek injunctive relief and/or collect liquidated damages, in either event in accordance with **Section 17** hereof, provided that failure to submit documentation shall not constitute a default under the Project agreement.
5. **Contacts.** All notices and correspondence to the Parties relating to this Participation Plan shall be directed to the following:

Construction (**COMPANY NAME**)

Manager: (**COMPANY ADDRESS**)

(**CITY STATE ZIP**)

Attn:

Phone: 000-000-0000

Fax: 000-000-0000

Email:

City: Charlotte Business INClusion   
600 East Fourth Street, 3th Floor  
Charlotte, North Carolina 28202  
Attn: Steven Coker, Manager  
Phone: 704-000-0000  
Fax: 704-000-0000  
Email: Steven.Coker@charlottenc.gov

All notices required or contemplated under this Participation Plan must be in writing, and will be deemed sent when received by the required recipient. Notices may be sent by fax, email, hand delivery, U.S. Mail (certified mail, return receipt requested) or national overnight carrier, provided that if sent by fax or e-mail, the sender retains confirmation of transmission delivery. Parties may change the address of their contact persons by providing written notice of the change to the other Parties hereto by an approved method of giving notice.

1. **Performance of a Commercially Useful Function.**
   1. In order for Construction Manager to receive credit toward the Project Goals for a contract, Construction Manager or the applicable Contractor shall employ Good Faith Efforts to engage a MWSBE to perform a Commercially Useful Function. Construction Manager shall be in breach of this Participation Plan if Construction Manager lists a MWSBE to receive credit toward a Contract Goal or Participation Commitment when Construction Manager knew or reasonably should have known that the MWSBE would not be performing a Commercially Useful Function reasonably commensurate with the payment amount for which Construction Manager will be seeking credit.
   2. For purposes of meeting the Contract Goals and Participation Commitments, Construction Manager shall only receive credit for the amount of MWSBE participation that constitutes a Commercially Useful Function. Payments exceeding the value of the Commercially Useful Function performed by a MWSBE shall not count toward meeting the Contract Goal or the Participation Commitment.
2. **Change in MWSBE Status.**
   1. If a MWSBE’s certification terminates during the term of a Target Contract due to expiration or graduation, Construction Manager shall continue to be entitled to receive credit toward the Project Goals for 100% of the dollars paid to the MWSBE on the Target Contract.
   2. If a MWSBE’s Certification terminates due to the MWSBE having obtained MWSBE Certification by material misrepresentation or fraudulent means, then the Construction Manager shall not receive credit toward the Project Goals for the amounts paid to the applicable MWSBE on the Target Contract after the date when Construction Manager knew or reasonably should have known of such material misrepresentation or fraud; provided, however that in the event Construction Manager knew or reasonably should have known of such material misrepresentation or fraud and continues to apply for credit toward the Project Goals for services performed after receiving such knowledge or becoming aware of such grounds for reasonable suspicion, Construction Manager shall be deemed in breach of this Participation Plan. Notwithstanding the above, if a MWSBE’s certification terminates due to the MWSBE having obtained MWSBE Certification by material misrepresentation or fraudulent means, then Construction Manager shall be able to count toward the Project Goal all amounts paid to the MWSBE prior to the date Construction Manager knew or reasonably should have known of such material misrepresentation or fraud.
3. **Terminating or Replacing an MWSBE.**
   1. Neither Construction Manager nor any Contractor shall terminate, replace or reduce the work of a MWSBE that Construction Manager has counted toward meeting the Project Goals, Contract Goals or Participation Commitments unless:
      1. The MWSBE refuses to enter into a contract on substantially similar terms as the written terms on which Construction Manager selected the MWSBE in connection with any RFP or bid process or as required by the contract under which the Contractor has been retained to perform the Target Work;
      2. The MWSBE’s Certification terminates for any of the reasons set forth in **Section** **9.2**;
      3. The MWSBE materially breaches its contract with Construction Manager or a Contractor;
      4. The City or Construction Manager reduces the scope of work for the Target Contract so as to eliminate or reduce the work that the MWSBE was to perform; or
      5. The MWSBE withdraws from the Target Contract for reasons not within Construction Manager’s or Contractor’s reasonable control.
   2. Construction Manager shall promptly notify the City in writing if it intends to replace or terminate a MWSBE on a Target Contract and shall promptly notify the City in writing when a MWSBE is replaced or terminated on a Target Contract. The notice shall identify the MWSBE and the Target Contract, state the reason for the termination or replacement and state the proposed date on which such termination or replacement will occur. Unless the circumstances necessitate immediate termination, or replacement or the termination is outside of the control of Construction Manager and the Contractor, Construction Manager shall provide the notice of intent to replace or terminate to the City at least five (5) daysprior to the effective date of the termination. Construction Manager or the Contractor shall provide written notice to the MWSBE stating the reasons for the termination and, where circumstances permit, provide such notice to the MWSBE prior to the effective date of such termination.
   3. **Terminated MWSBE’s Remaining Work.** When a MWSBE is terminated or replaced with respect to a Target Contract, the work remaining to be done by that MWSBE at the time of termination constitutes a “New Opportunity” as that term is used in **Section 11**. Construction Manager and each Contractor soliciting bids or proposals for any such New Opportunity shall comply with **Section 11** regarding Modified Good Faith Efforts, regardless of whether Construction Manager is on track to meet the Project Goals unless:
      1. Construction Manager has previously achieved all Project Goals, or
      2. The circumstances necessitate immediate replacement of the MWSBE with any capable party in order to avoid work stoppage or other unreasonable delay to the Target Work or any portion thereof, material increased costs or financial hardship with respect to the Target Work, or emergency or otherwise unsafe conditions at or adjacent to Project site.
4. **New Opportunities for Subcontracting.** 
   1. **Notice of New Subcontracting Opportunities.** If Construction Manager or a Contractor elects to subcontract any portion of a Target Contract that Construction Manager did not previously identify to the City as a subcontracting opportunity and such subcontracting opportunity is anticipated to have a contract price greater than $50,000, or if the scope of work on a Target Contract increases for any reason in a manner that creates a new subcontracting opportunity anticipated to have a contract price greater than $50,000, or if Construction Manager or Contractor decides to subcontract work on a contract for part of the Target Work that was not previously identified as a subcontracting opportunity anticipated to have a contract price greater than $50,000, or if a MWSBE is terminated or replaced pursuant to **Section 10** (collectively, a “New Opportunity”), Construction Manager shall:
      1. Promptly notify the City in writing of the New Opportunity;
      2. Inform the City whether existing MWSBEs or other subcontractors can perform the New Opportunity; and
      3. Comply (or require the Contractor to comply with) with the Modified Good Faith Efforts set forth in **Section 12** to achieve MWSBE participation in the New Opportunity.
   2. Notwithstanding the foregoing, Construction Manager and its Contractors shall have no obligation to comply with Modified Good Faith Efforts to utilize MWSBEs on a New Opportunity that arises under this **Section 11** if:
      1. The New Opportunity will be performed by existing subcontractors or by MWSBEs that are already working on the Project, or
      2. The circumstances necessitate immediate engagement of a capable party to perform the services contemplated thereby in order to avoid work stoppage or other unreasonable delay to the Target Work or any portion thereof, material increased costs or financial hardship with respect to the Target Work.
5. **Modified Good Faith Efforts.** Unless otherwise provided herein, when a New Opportunity arises, Construction Manager and Contractors shall comply with the Modified GFEs set forth below in an effort to recruit MWSBEs for the New Opportunity:
   1. **MBE, SBE, and WBE Goals.** Construction Manager will set MBE, SBE, and WBE goals for the New Opportunity, that are reasonable in light of the opportunities for MWSBE participation, **provided** **that** if the New Opportunity arises under **Section 10**, the goal shall be to engage a MWSBE of the same category as the terminated or replaced MWSBE to perform whatever work or services remain unperformed by the applicable MWSBE. If the New Opportunity is expected to exceed $200,000, then Construction Manager must obtain City approval of the MBE, SBE, and WBE goals (and such approval will be presumed if the City does not object within five (5) Business Days after receiving written notice of the proposed goals).
   2. **MWSBE Contacts.** Construction Manager or the Contractor must solicit a reasonable number of MWSBEs to meet the goals established under **Section 12.1**, and in no event less than two (2) MWSBEs that are reasonably qualified to perform the work in question (unless the City agrees otherwise for that particular New Opportunity or unless Construction Manager demonstrates that fewer than two (2) MWSBEs are qualified to perform such work. In either event, Construction Manager shall solicit as many as it may determine are qualified, if any.
   3. **Credit for Modified GFEs.** In the event of a New Opportunity arising under **Section 10** hereof, the Modified GFEs shall apply to the New Opportunity in lieu of the original GFEs that applied to the Target Contract under which the New Opportunity arose.
6. **Payment to MWSBEs.** If a Construction Manager or any Contractor has made a quick pay commitment in accordance with the Good Faith Efforts, a breach of such quick pay commitment by Construction Manager or any such Contractor shall constitute a breach of this Participation Plan.
7. **Material Misrepresentation or Fraud.** Construction Manager and Contractors shall not make any material misrepresentations or commit fraud regarding any matter relevant to this Participation Plan. Failure to comply with this **Section 14** constitutes a breach of this Participation Plan and shall entitle the City to exercise any of the remedies set forth herein.
8. **Flow Down of Obligations.** Construction Manager shall require each Contractor that performs all or part of the Target Work to comply with the Participation Plan provisions applicable to “Contractors,” and to fulfill all obligations and responsibilities and comply with all rules that are necessary for Construction Manager to comply with the Participation Plan.
   1. Without limiting the obligations set forth in this **Section 15**, each contract and subcontract entered into by Construction Manager or a Contractor for any part of the Target Work shall contain the following provision, with such minor revisions as may be necessary to achieve consistent terminology:

**MWSBE Participation Plan.** This Agreement is for work or materials provided on a project funded in part by the City of Charlotte (the “City”). As a condition of obtaining such funding, Construction Manager of this project has entered into a “MWSBE Participation Plan (the “Participation Plan”), a copy of which has been made available to Contractor. In accordance with the Participation Plan, Construction Manager has committed to employ Good Faith Efforts to attain certain MWSBE utilization goals with respect to the project, and pursuant to the agreement by which such funding was obtained, Construction Manager has further agreed similarly to require the Contractor to employ Good Faith Efforts to attain such MWSBE utilization goals and otherwise to comply with the Participation Plan in connection with the work covered by this Agreement. Accordingly, the Parties agree that:

* + 1. The terms of the Participation Plan are incorporated into this Agreement by reference; and
    2. Contractor shall comply with the Participation Plan provisions applicable to “Contractors,” and shall fulfill all obligations and responsibilities and comply with all rules that are necessary for Construction Manager (as defined in the Participation Plan) to comply with the Participation Plan with respect to the work covered by this Agreement; and
    3. A breach of the Participation Plan (or of this provision) by the Contractor constitutes a material breach of this Agreement, and shall entitle the party paying for the work under this Agreement to exercise any of the remedies set forth in the Participation Plan, including but not limited to liquidated damages; and
    4. Without limiting any of the other remedies that may be imposed under the Participation Plan, the party required to make payment under this Agreement shall be entitled to withhold periodic payments and final payment due under this Agreement until any non-compliance by Contractor has been resolved to the satisfaction of the City, and in such event Contractor waives any right to interest that might otherwise be warranted on such withheld amount under the law; and
    5. The remedies set forth in the Participation Plan shall be deemed cumulative and not exclusive and may be exercised successively or concurrently, in addition to any other available remedy; and
    6. The Contractor agrees to participate in any dispute resolution process specified by the City from time-to-time for the resolution of disputes arising from Participation Plan; and
    7. Contractor shall require all contractors and subcontractors that it hires for the work covered by this Agreement to comply with this provision and the Participation Plan as well.
  1. Construction Manager shall diligently enforce this provision as to all Contractors, and shall require all Contractors to diligently enforce this provision as to all subcontractors hired in connection with the Target Work.
  2. Construction Manager shall notify the City of any situation where Construction Manager learns of a potential breach of this Participation Plan with respect to a MWSBE and shall work with the City to take appropriate action in response.

1. **Breaches and Remedies.** 
   1. **Remedies.** A breach of this Participation Plan by Construction Manager or by a Contractor constitutes a breach of the Project agreement, and will entitle the City to exercise any of the following remedies:
      1. Assess liquidated damages as provided in **Section 16.2;** or
      2. Withhold all payments due to the Contractor under the Contract until such violation has been fully cured or the City and the Contractor have reached a mutually agreeable resolution; or
      3. Seek injunctive relief to stop and cure the violation.
   2. **Liquidated Damages.** In entering into the Project agreement, Construction Manager agrees to the following, and in entering into a contract for any portion of the Target Work, each Contractor agrees to the following:
      1. Construction Manager and all Contractors acknowledge and agree that the City will incur damages if any of them breaches this Participation Plan, including but not limited to loss of goodwill, detrimental impact on economic development and diversion of internal staff resources. Construction Manager and all Contractors further acknowledge and agree that the damages the City might reasonably be anticipated to incur as a result of any such breach are difficult to ascertain due to their indefiniteness and uncertainty. Accordingly, Construction Manager and each Contractor agree to pay, jointly and severally, the liquidated damages assessed by the City at the rates set forth below for the following breaches of this Participation Plan. Construction Manager and each Contractor further agree that for each specified breach the agreed upon liquidated damages are reasonably proximate to the loss the City will incur as a result of such breach, and that the City (by and through its respective Program Director identified in **Section 7** hereof) may elect to impose or not impose liquidated damages in a given instance at their sole discretion:
         1. **Failure to Meet Project Goals.** If the City determines upon completion or termination of the Participation Plan that the Construction Manager or Contractor did not meet the Project Goals in **Section 2.1** and that such failure is not otherwise excused under Part D of the CBI Program policy, the City may assess the lesser of: (a) $XX,XXX or (b) the dollar difference between the Project Goals that was missed and the Contractor’s actual MWSBE utilization toward that Project Goals. Such amount may be assessed when it becomes apparent that it will not be possible for the Contractor to achieve the Project Goals.
         2. **Failure to Comply with Good Faith Efforts.** In the event that Construction Manager or any Contractor both fails to achieve the Contract Goals and fails to employ Good Faith Efforts in connection with a Target Contract, and further fails to achieve the Contract Goals within thirty (30) days after receiving written notice of such failure from the City , the City may assess the lesser of the following for each such incident: (a) $XX,XXX; or (b) the dollar difference between the dollar amount of the MWSBE utilization actually achieved on the Target Contract and the dollar amount that would have had to be paid to achieve the Contract Goals, **provided** **that** no assessment shall be levied pursuant to this **Section** unless and until Construction Manager fails to meet one or more of the Project Goals specified in **Section 2.1**;
         3. **Failure to Establish Contract Goals.** In the event that Construction Manager or any Contractor violates **Section 3** of this Participation Plan and, after receiving written notice of the Substitute Contract Goal established by the City, fails to cure the breach within thirty (30) days by either (a) achieving the Substitute Contract Goal, or (b) employing Good Faith Efforts to achieve such Substitute Contract Goal then the City may assess $XX,XXX for each such incident;
         4. **Failure to Provide Notice of Opportunities Under $200,000.** In the event that Construction Manager or any Contractor violates **Section 4** of this Participation Plan, and fails to cure such failure to the City’s reasonable satisfaction within fifteen (15) days after receiving written notice thereof, the City may assess the lesser of the following for each such incident: (a) $XX,XXX for each unmet Contract Goal; or (b) 5% of the amount of the applicable Target Contract;
         5. **Using MWSBE as a Conduit.** If Construction Manager or any Contractor lists a MWSBE to receive credit toward a Project Goal or Contract Goal and knew or reasonably should have known that the MWSBE would not be performing a Commercially Useful Function reasonably commensurate with the payment amount for which the Contractor will be seeking credit, the City may assess the lesser of the following for each such incident: (a) $XX,XXX; or (b**)** the dollar amount for which the Construction Manager or Contractor sought credit towards the Project Goal or Contract Goal with respect to such MWSBE which is in excess of compensation reasonably commensurate with the Commercially Useful Function actually performed, if any;
         6. **Wrongful Termination or Replacement of an MWSBE.** If Construction Manager or any Contractor terminates or replaces a MWSBE in breach of this Participation Plan, or fails to hire an MWSBE that it represented it would use to meet a Participation Commitment, in either event in breach of **Section 10** hereof, and fails to cure such breach to the City’s reasonable satisfaction within thirty (30) days after receiving written notice thereof, the City may assess the lesser of the following for each such incident: (a) $XX,XXX; or (b) the dollar amount of the work remaining to be performed by the terminated MWSBE at the time it was terminated (or if the MWSBE was not terminated because it was never retained, then, the dollar amount that Construction Manager or the Contractor indicated it would pay the MWSBE); or
         7. **Failure to Comply with this Participation Plan With Respect to a New Opportunity.** In the event that Construction Manager fails to employ Modified Good Faith Efforts in soliciting bids or proposals for a New Opportunity (unless otherwise provided herein), and fails to cure such failure to the City’s reasonable satisfaction within fifteen (15) days after receiving written notice thereof, the City may assess the lesser of the following for each such incident: (a) $XX,XXX; or (b) the dollar amount of whatever part of the New Opportunity could reasonably have been subcontracted to a MWSBE;
         8. **Material Misrepresentations and Fraud.** If Construction Manager or any Contractor makes a fraudulent statement or a material misrepresentation regarding any matter relevant to this Participation Plan (including but not limited to information provided regarding payments made to MWSBEs), the City may assess Construction Manager $XX,XXX for each such incident, or, if the statement was about the amount being paid to a MWSBE, then the lesser of the following for each such incident: (a) $XX,XXX; or (b) the dollar difference between what the party making the fraudulent statement or material misrepresentation represented and the truth;
         9. **Failure to Submit Quarterly Report.** If Construction Manager fails to submit a quarterly report within the time period required by this Participation Plan, the City may assess $75 per day for each day that Construction Manager fails to provide the report after the third Business Day following receipt of written notice that it is overdue.
         10. **Failure to Respond to Request for Information.** If Construction Manager or any Contractor fails to timely provide any report, documentation, affidavit, certification or written submission requested under this Participation Plan (other than a quarterly report) within the time required herein, the City may assess $75 per day for each day that Construction Manager or the Contractor fails to provide such report, documentation or written submission after the tenth day following receipt of written notice that it is overdue.
         11. **Failure to Comply with Financial Assistance or Quick Pay Commitments Made To MWSBEs As Part of Good Faith Efforts.** If Construction Manager or any Contractor fails to comply with any commitment of financial assistance or quick pay made or reported to have been made to an MWSBE as part of 5.3.8 and 5.3.10 attached herein, the City may assess $XX,XXX for each such incident.
         12. **Failure to Use Diligent Efforts to Meet Project Goals.** If Construction Manager violates **Section 5** by failing to use diligent efforts to meet the Project Goals for MBEs, SBEs, and WBEs, the City may assess $XX,XXX for each Project Goal (MBE, SBE, or WBE) not met.
      2. Notwithstanding anything contained herein to the contrary, the liquidated damages set forth in Sections 16.2.1.1, 16.2.1.2, 16.2.1.3, 16.2.1.4, 16.2.1.6, and 16.2.1.7 shall be reduced to one-half of the amounts stated in Section 16.2.1 if at the time of the breach Construction Manager has secured Participation Commitments that equal or exceed each of the Project Goals, and is on track to meet such Participation Commitments.
      3. Any such liquidated damages amount calculated and payable in accordance with **Section 16.2.1** shall be payable in the aggregate to the City (unless context dictates otherwise). By way of example and not limitation, in the event the City is entitled to liquidated damages for an incident which constitutes a breach as contemplated by **Section 16.2.1.2** and the dollar difference between the unmet Contract Goal and the Participation Commitment for such Contract Goal is $50,000, then the liquidated damages assessed in such event shall be $XX,XXX payable to the City. Such liquidated damages shall be apportioned based on whether the breach occurred in connection with any MWBE, an SBE, or both.
      4. The City, when giving notice or demand to Construction Manager of any breach hereunder, shall provide a copy of such notice or demand to any holder or beneficiary of any financing of whom the City, as applicable, has received notice, and the City shall afford said holder or beneficiary the same notice and cure periods as are afforded to the Construction Manager hereunder.
   3. **Responsible Party.** Except as expressly set forth herein, the City shall be entitled to exercise all remedies and recover all damages set forth in this **Section 16** directly from Construction Manager or any Contractor, regardless of whether such remedies or damages are due to a breach by that Construction Manager or a Contractor, provided that the City shall be a third party beneficiary to each Target Contract for the purpose of seeking injunctive relief and other remedies to the extent necessary to enforce this Participation Plan. Construction Manager shall be entitled to exercise all remedies and recover all damages set forth in this **Section 16** directly from any of the Contractors, and each Contractor shall be entitled to exercise all remedies and recover all damages set forth in this **Section 16** directly from any other Contractors that it has retained to perform Target Work. For purposes of Construction Manager enforcing this Participation Plan with respect to Contractors, Construction Manager shall stand in the position of the City, and the Project agreement shall be deemed to mean the Contractor’s contract with one or more of Construction Manager for Target Work. For purposes of Contractors enforcing this Participation Plan with respect to other Contractors working for them, the Contractor enforcing this Participation Plan shall stand in the position of the City, and the Project agreement shall be deemed to mean the contract between such Contractors for Target Work.
   4. **Remedies for Breaches in the Procurement Process.** A breach of this Participation Plan in the procurement phase of any Target Contract shall be grounds for rejection of the applicable bid or proposal if discovered prior to entering into the applicable Target Contract.
2. **Miscellaneous.**
   1. **Entire Agreement.** This Participation Plan sets forth the entire agreement with respect to the MWSBE utilization goals for the Target Work and supersedes any and all previous written or oral statements in connection therewith. Without limitation of the foregoing, the Parties and any Contractors shall look solely to this Participation Plan (and not the Charlotte Business Inclusion Program) with respect to the matters set forth herein.

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| **10** | **5.3.1: Contacts:** A Bidder must make the required contacts not less than **10 Days** before Bid Opening to receive credit. Refer to Part B, Section 5.3.1 of the CBI Policy for requirements of the Solicitation Method, Solicitation Content, and Solicitation Documentation.  To receive credit for this GFE, a Bidder must submit an MWSBE Solicitation Form (“**Form 2**”) within the time specified. |
| **10** | **5.3.2: Making Plans Available.** **\*(see note)** To receive credit for this GFE, the Bidder must: (i) make “Project Documents” (as defined below) available for inspection by SBEs and MWBEs at least **10 Days** before Bid Opening; and (ii) notify the SBEs and MWBEs contacted under GFE 5.3.1 of the way in which Project Documents will be made available. As used herein, Project Documents means any project descriptions, construction plans, specifications or requirements that are necessary for SBEs and MWBEs to bid on the project. The ways a Bidder may make Project Documents available include:  (a) Providing a telephone number or email address for requesting copies of the Project Documents via email, fax, regular mail or other means of document transfer; or  (b) Providing an address within the Charlotte CSA where SBEs and MWBEs can have physical access to review the Project Documents at no cost; or  (c) Posting the Project Documents on a website that SBEs and MWBEs can access at no cost. |
| **10** | **5.3.3: Breaking Down Work.** **\*(see note)** To receive credit for this GFE, the Bidder must demonstrate that it broke down or combined elements of work into economically feasible units to facilitate SBE and MWBE participation.  In awarding points consideration will be given to the number and dollar value of the scopes of work the Bidder listed for SBE / MWBE participation, whether those scopes would be sufficient to meet the Subcontracting Goals and how the Bidder notified SBEs and MWBEs of its willingness to break down the work into such units. |
| **10** | **5.3.4: Working With SBE and MWBE Assistance Organizations** To receive credit for this GFE, the Bidder must document that it worked with an SBE Assistance Organization and/or MWBE Assistance Organization (both as defined below), as applicable, to provide assistance in recruiting SBEs and MWBEs for the Contract for which Bids are sought.  • A **MWBE Assistance Organization** is an organization identified by the North Carolina Office of Historically Underutilized Businesses and listed in the City Solicitation Documents as providing assistance in the recruitment of MWBEs.  • An **“SBE Assistance Organization”** is an organization identified by the City of Charlotte and listed in the City Solicitation Documents as providing assistance in the recruitment of SBEs  In deciding whether to award points for this GFE, consideration will be given to the timing and nature of how the Bidder worked with the SBE or MWBE Assistance Organization, and whether such effort was reasonably likely to result in significant SBE/MWBE participation. |
| **10** | **5.3.5: Attendance at Pre-Bid.** To receive credit for this GFE, the Bidder must attend pre-bid meetings scheduled for the Contract in question. |
| **20** | **5.3.6: Bonding or Insurance Assistance on Construction Contract.** To receive credit for this GFE, the Bidder must assist an SBE or MWBE in getting required bonding or insurance coverage for the Contract at issue or provide alternatives to bonding or insurance for SBEs and MWBEs. To document satisfaction of this GFE, the Bidder must submit: (a) the name of the SBE or MWBE; (b) a description of the assistance the Bidder provided; (c) the date the Bidder provided the assistance; (d) the name of a contact person with the SBE or MWBE who can verify that the Bidder provided the assistance; and (e) any additional information requested by the City. No credit will be given for assistance provided to an Affiliate of the Bidder.  In deciding whether to award points for this GFE consideration will be given on how significant and meaningful the assistance was, how many SBEs and MWBEs it was offered to, and what impact it likely had on the Bidder’s efforts to recruit SBEs and/or MWBEs for the project. |
| **10** | **5.3.7: Negotiating in good faith with MWBEs and SBEs.** The Bidder must: (a) demonstrate that it negotiated in good faith with interested SBEs and MWBES (which means showing at least some back and forth negotiation between the Bidder and SBEs or MWBEs); (b) demonstrate that it did not reject any SBEs or MWBEs as unqualified without sound reasons based on their capabilities; (c) document in writing the reasons for rejecting any SBEs or MWBEs for lack of qualification. |
| **25** | **5.3.8: Financial Assistance.** To receive credit for this GFE, the Bidder must provide one of the following types of assistance to an SBE or MWBE in connection with the Contract:   1. assistance in obtaining equipment, a loan, capital, lines of credit, 2. joint pay agreements or guaranties to secure loans, the purchase of supplies, or letters of credit, including waiving credit that is ordinarily required; or 3. assistance in obtaining the same unit pricing with the Bidder’s suppliers as the Bidder.   To receive credit for this GFE, Bidders must document: (a) the name of the SBE or MWBE; (b) the description of the assistance the Bidder provided; (c) the date the Bidder provided the assistance; and (d) the name of a contact person with the SBE or MWBE who can verify that the Bidder provided the assistance.  No credit will be given for assistance provided to an Affiliate of the Bidder. In deciding whether to award points for this GFE, consideration will be given on how significant and meaningful the assistance was, how many SBEs and MWBEs it was offered to, and what impact it likely had on the Bidder’s efforts to recruit SBEs and/or MWBEs for the project. |
| **20** | **5.3.9: Entering Into Joint Venture**. To receive credit for this GFE, the Bidder must demonstrate that it negotiated a Joint Venture or partnership arrangement with one or more MWBEs and/or SBEs, as applicable, on the Contract.  To receive credit for this GFE, Bidders must document; (a) the name of the MWBE and/or SBE; (b) a description of the Joint Venture or partnership; (c) evidence of the date the SBE and/or MWBE entered into the agreement; and (d) the name of a contact person with the SBE and/or MWBE who can verify the terms of the agreement.  No credit will be given for a joint venture with an Affiliate of the Bidder. |
| **20** | **5.3.10: Quick Pay Agreements On The Construction Contract Up For Award. \*(see note)** For purposes of this Section, the term “Quick Pay Commitment” means a commitment to pay all SBEs and MWBEs participating in the Construction Contract within 20 Days after the Contractor confirms that the SBE or MWBE has properly performed and the SBE’s or MWBEs work has been properly completed. To receive credit for this GFE, Bidders must: (a) provide a copy of a policy containing the above-referenced Quick Pay Commitment that the Bidder has adopted for the project and document that the Bidder informed each SBE and MWBE about the Quick Pay Commitment as part of the Bidder’s SBE and MWBE contacts under Section 5.3.1; or (b) document that prior to Bid Opening the Bidder made a written Quick Pay Commitment to each SBE and MWBE that will participate in the Contract up for award. Including a statement in a Bid solicitation letter indicating that the Bidder will consider entering into quick pay agreements will not suffice. |
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**NOTE: In order to earn GFE points for GFEs 5.3.2; 5.3.3; or 5.3.7, you must also have earned the GFE points for 5.3.1**

1. Notwithstanding the foregoing, if it was not reasonably foreseeable that a Target Contract would be needed at least fourteen (14) days prior to the scheduled award date, Developer shall notify the City immediately after realizing that the Target Contract will be needed.