

STATE OF ILLINOIS BUSINESS ENTERPRISE PROGRAM
UTILIZATION PLAN

UTILIZATION PLAN PART I: COMMITMENT AND SIGNATURE

The undersigned Vendor submits this Utilization Plan as part of its bid or offer in accordance with the requirements of solicitation # _____ and the requirements of the the Business Enterprise Program (BEP). The solicitation contains a goal that ___% of the value of the contract will be performed by BEP certified vendors as defined by the Department of Central Management Services (CMS).

The Utilization Plan consists of the following parts, each of which must be completed and returned as instructed in this Commitment. No alterations of these forms will be permitted:

- Part I: Vendor Commitment (with Signature)
- Part II: Subcontractor Participation Agreement(s)
- Part III: Good Faith Effort (Checklist, Contact Log, and Documentation)
- Part IV: Utilization Plan Terms and Conditions (These terms and conditions apply to all options below but do not need to be returned).

The undersigned Vendor acknowledges that (1) Vendor has read, understands, and agrees to BEP policies, rules, and procedures as defined in the Terms and Conditions in Part IV of this document, and (2) Vendor hereby affirms (**select one** of the options below):

- Vendor is a BEP certified firm and plans to fully meet the goal through self-performance. (Return this Part I Signature Page only.)
- Vendor has identified BEP certified subcontractor(s) to fully meet the established goal. (Return this Part I Signature page and signed Part II Subcontractor Participation Agreement(s) to equal or exceed the goal.)
- Vendor cannot fully meet the goal but has made Good Faith Effort towards meeting the goal, and hereby requests a waiver or reduction of the goal to ___% based on the completed Good Faith Effort. (If requesting a waiver, return this Part I Signature Page and completed Part III Good Faith Effort. If requesting a reduction, return this Part I Signature Page, Part II signed Subcontractor Participation Agreement(s), and completed Part III Good Faith Effort.)

The undersigned Vendor understands that all subcontractors identified in this Utilization Plan and Participation Agreement(s) must be certified with the Illinois Department of Central Management Services (CMS) BEP at the time of submission of all bids/offers and shall perform commercially useful functions as defined in Part IV of this Utilization Plan. **We understand that compliance with this Utilization Plan is a mandated part of this solicitation and that this Utilization Plan will become a part of the contract, if awarded.** Failure to carry out the requirements of this Utilization Plan is a material breach of the resulting contract, which may result in the termination of the contract or such other remedy as the Agency/University deems appropriate.

Vendor Name and d/b/a: _____

Signature: _____ Print: _____ Title: _____

Email Address: _____ Telephone: _____

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UTILIZATION PLAN PART II: PARTICIPATION AGREEMENT (Letter of Intent)

Instructions: The Prime Vendor is required to submit a separate, signed and **fully completed Participation Agreement** from each Business Enterprise Program (BEP) certified vendor or Veteran Small Business certified vendor (VSB). **Once signed and submitted with the bid/offer, this Participation Agreement, along with the other Parts of this Utilization Plan, will become a mandated part of the contract, if awarded.** The Prime Vendor shall not prohibit or otherwise limit the BEP/VSB certified vendor(s) from providing subcontractor quotes to other potential bidders/offerors.

Project Name: _____ **Project/Solicitation Number:** _____

Name of Prime Vendor: _____

Address: _____

City, State and Zip: _____

Telephone: _____ Fax: _____ Email: _____

Vendor’s Contact responsible for compliance with this Participation Agreement:

Name of BEP/VSB Certified Vendor: _____

Type of Certified Vendor: BEP VSB

Address: _____

City, State and Zip: _____

Telephone: _____ Fax: _____ Email: _____

BEP/VSB Vendor’s Contact responsible for compliance with this Participation Agreement:

Type of Agreement: Services Supplies Both Services and Supplies

(a) Proposed % of Contract to be performed by the BEP/VSB Certified Vendor _____%

NOTE: The Prime Vendor must indicate the percentage of the estimated contract award that will be subcontracted to the certified BEP/VSB Vendor.

(b) Anticipated start date of the Certified BEP/VSB Vendor: _____.

(c) This participation agreement shall have a term of _____ to _____, with a total period of ___ years and ___ months, including renewals, change orders or extensions to the underlying contract.

(d) Description of work to be performed or goods/equipment to be provided by the BEP certified vendor. **This description must include identified Institute for Public Procurement (NIGP) codes.** All Participation Agreements shall be subject to Agency/University approval. Any changes involving or affecting the identified BEP certified vendor, scope(s) of work and NIGP

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Code(s) will not be permitted without notification to the soliciting Agency/University and BEP Compliance, in writing, and approval of the soliciting Agency/University. *(If more space is needed to fully describe BEP certified firm's proposed scope of work and/or payment schedule, attach additional sheets)* _____

THE UNDERSIGNED PARTIES FURTHER AGREE that once signed and submitted with the bid/offer, this Participation Agreement, along with the other Parts of this Utilization Plan, will become a material part of the contract, and the BEP certified vendor will perform the scope of work for the percentage as indicated above. The Undersigned Parties do also certify that they did not affix their signatures to this document until all areas under Description of Service/ Supply and Fee/Cost were completed.

Vendor (Company Name and d/b/a):

Certified BEP/VSB (Company Name and d/b/a):

_____/_____
Name (Signature) Date

_____/_____
Name (Signature) Date

Name (Print)

Name (Print)

Title

Title

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**UTILIZATION PLAN PART III: DEMONSTRATION OF GOOD FAITH EFFORTS TO
ACHIEVE GOAL AND REQUEST FOR WAIVER**

If the BEP/VSB participation goal will not be achieved in whole or part, the Good Faith Efforts Procedures outlined in Parts III and IV of this document will be used to evaluate submitted Utilization Plans. A Vendor providing Good Faith Effort documentation and a request for waiver must complete and submit Part III of this Utilization Plan in its entirety in addition to its bid/offer. Failure to submit the Good Faith Effort Contact Log, checklist, and supporting documentation in its entirety shall render Vendor's bid or offer non-responsive and cause it to be rejected.

Below is a checklist of actions that will be used to evaluate a Vendor's Demonstration of Good Faith Efforts and Request for Waiver. **Please check the actions which you have completed.** If any of the following actions are not completed, please attach a detailed written explanation indicating why such action was not completed. If any other efforts were made to obtain BEP certified vendor participation, in addition to the items listed below, attach a detailed description of such efforts.

- Utilize the website: <https://cms.diversitycompliance.com> to identify BEP certified vendors within the respective NIGP code(s) on the solicitation documents. At a minimum, email all listed vendors with project specifications sufficient to build a quote, then solicit quotes from all vendors who express an interest with follow-up emails and telephone calls. Documentation of these efforts must be submitted as evidence, including copies of all e-mails sent.

- Solicit through all reasonable and available means (e.g., attendance at a vendor conference, advertising, written notices) the interest of BEP certified vendors that have the capability to perform the work of the contract. Vendor must solicit this interest with sufficient advance time to allow the BEP certified vendors to respond to the solicitation. Vendor must determine with certainty if the BEP certified vendors are interested by taking appropriate steps to follow up initial solicitations and encourage them to submit a bid or proposal, providing them with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding promptly to the solicitation.

- Select portions of the work to be performed by BEP certified vendors to increase the likelihood that the goal will be achieved. This includes, where appropriate, unbundling contract work items into economically feasible units to facilitate BEP certified vendor participation, even when Vendor might otherwise prefer to perform these work items with its own forces.

- Make a portion of the work available to BEP certified vendors by selecting portions of the work or needed material based on the availability of BEP vendors.

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- Negotiate in good faith with interested BEP certified vendors. Evidence of such negotiation must include the contacted names, mailing addresses, email addresses, and telephone numbers of BEP certified vendors that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional agreements could not be reached for BEP certified vendors to perform the work. A Vendor using good business judgment may consider many factors in negotiating with BEP certified vendors and may take a firm's price and capabilities into consideration. The fact that there may be some additional costs involved in finding and using BEP certified vendors may not, in itself, be a sufficient reason for a Vendor's failure to meet the goal, as long as such costs are reasonable. Vendors are not required to accept higher quotes from BEP certified vendors if the price difference is excessive or unreasonable.

- Thoroughly investigate the capabilities of BEP certified vendors and do not reject them as unqualified without documented reasons. BEP certified vendors' memberships in specific groups, organizations, associations or political/social affiliations are not legitimate causes for the rejection or non-solicitation of bids and proposals in Vendor's efforts to meet the goal.

- Where subcontractor capacity and/or access to capital prevents participation, make efforts to assist in obtaining available resources such as State of Illinois lending programs and the prime's lending, capital and bonding networks.

- Make efforts to assist interested BEP certified vendors in obtaining necessary equipment, supplies, materials, and related assistance or services.

- Follow best practices when conducting a Good Faith Effort. Best practices can be found on the BEP website at https://www2.illinois.gov/cms/business/sell2/bep/Pages/Business_Resources.aspx.

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GOOD FAITH EFFORTS CONTACT LOG

Use this log, if you are requesting a Good Faith Effort waiver, to document **all** contacts and responses (i.e., telephone, email, fax, etc.) regarding the solicitation of BEP certified vendors for the scope of work within the specific NIGP commodity/service code(s) selected. It is not necessary to show contacts with BEP certified vendors who are identified on the Participation Agreement(s). **Keep and submit copies of all emails sent and received from prospective BEP vendors. Include a copy of the NIGP commodity/service code list and/or scope of work you used to solicit prospective BEP vendors to perform.** Duplicate this Log as necessary. Do not limit your contacts to the number of spaces shown below. **The Agency/University established the BEP goal in the solicitation using NIGP commodity/service code(s) representing the scope of work. All BEP certified vendors identified by these NIGP commodity/service code(s) must be contacted to satisfy the Good Faith Effort requirements.** Vendors are found in the NIGP commodity/service code(s) search on the BEP Vendor Database located at <https://cms.diversitycompliance.com>.

<p>Agency/University Supplied NIGP Codes (Required):</p> 	<p>*Other NIGP Codes Utilized by Vendor (Optional):</p>
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*“Other NIGP Codes Utilized by Vendor” may only be utilized to obtain a Participation Letter, **not** Good Faith Effort Documentation.

Certified BEP Vendor Name	Name of Person Contacted	Date	Contact Method	Scope of Work Solicited / NIGP Commodity / Service Code(s)	Reason Agreement Was Not Reached

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UTILIATION PLAN PART IV: TERMS OF UTILIZATION

DEFINITIONS:

“Agency” shall be defined as any State Agency, Board, or Commission under the jurisdiction of the Governor of the State of Illinois.

“University” shall be defined as any University, Department, public institution of higher education, and/or community college district within the State of Illinois.

"Business owned by a person with a disability" or "PBE" means a business concern that is at least 51% owned by one or more persons with a disability and the management and daily business operations of which are controlled by one or more of the persons with disabilities who own it. A not-for-profit agency for persons with disabilities as defined in Section 45-35 of the Illinois Procurement Code is also considered a "business owned by a person with a disability."

"Certification" means a determination made by the Council or by one delegated authority from the Council to make certifications, or by a State agency with statutory authority to make such a certification, that a business entity is a business owned by a minority, woman, or person with a disability for whatever purpose. A business owned and controlled by women shall be certified as a "woman owned business". A business owned and controlled by women who are also minorities shall be certified as both a "woman owned business" and a "minority owned business".

"Commercially Useful Function" means responsibility for the execution of a distinct element of the work of the contract, which is carried out by actually performing, managing, and supervising the work involved, evidencing the responsibilities and risks of a business owner such as negotiating the terms of (sub)contracts, taking on a financial risk commensurate with the contract or its subcontract, responsibility for acquiring the appropriate lines of credit and/or loans, or fulfilling responsibilities as a joint venture partner as described in the joint venture agreement.

“Compliance” means that a contractor has correctly implemented the requirements of this Utilization Plan.

“Contract Specific Goals” means the goals established under the Agency/University’s supplier diversity program that are based upon relevant factors, including, but not limited to, the availability of diverse businesses in the scopes of work of the contract.

“Contractor” means any person or business entity that has entered into a contract with the Agency/University, and includes all partners, affiliates, and joint ventures of such person or entity.

"Control" means the exclusive or ultimate and sole control of the business including, but not limited to, capital investment and all other financial matters, property, acquisitions, contract negotiations, legal matters, officer-director-employee selection and comprehensive hiring, operating responsibilities, cost-control matters, income and dividend matters, financial transactions and rights of other shareholders or joint partners. Control shall be real, substantial and continuing, not pro forma. Control shall include the power to direct or cause the direction of the management and policies of the business and to make the day-to-day as well as major decisions in matters of policy, management and operations. Control shall be exemplified by possessing the requisite knowledge

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and expertise to run the particular business and control shall not include simple majority or absentee ownership.

"Council" means the Business Enterprise Council for Minorities, Women and Persons with Disabilities.

"Diverse Firms" shall mean businesses owned by minorities, women, and persons with disabilities. Also to include, qualified service-disabled veteran-owned small businesses and qualified veteran-owned small businesses.

"Woman" shall mean a person who is a citizen or lawful permanent resident of the United States and who is of the female gender.

"Woman-owned business" of "WBE" means a business concern which is at least 51% owned by one or more women, or, in the case of a corporation, at least 51% of the stock in which is owned by one or more women; and the management and daily business operations of which are controlled by one or more of the women who own it.

"Good Faith Efforts" means actions undertaken by a bidder or contractor to achieve a Contract Specific Goal by its scope, intensity, and appropriateness to the objective, that can reasonably be expected to fulfill the program's requirements.

"Joint Venture" means an association of a diverse firm and one or more other firms to carry out a single, for-profit business enterprise, for which each joint venture partner contributes property, capital, efforts, skills and knowledge, and in which the diverse firm is responsible for a distinct, clearly defined portion of the work of the contract and whose share in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.

"Manufacturer" refers to a company that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.

"Minority-owned business" or "MBE" means a business concern which is at least 51% owned by one or more minority persons, or in the case of a corporation, at least 51% of the stock in which is owned by one or more minority persons; and the management and daily business operations of which are controlled by one or more of the minority individuals who own it.

"Minority person" shall mean a person who is a citizen or lawful permanent resident of the United States and who is any of the following:

(a) American Indian or Alaska Native (a person having origins in any of the original peoples of North and South America, including Central America, and who maintains tribal affiliation or community attachment).

(b) Asian (a person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent, including, but not limited to, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam).

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(c) Black or African American (a person having origins in any of the black racial groups of Africa). Terms such as "Haitian" or "Negro" can be used in addition to "Black or African American".

(d) Hispanic or Latino (a person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin, regardless of race).

(e) Native Hawaiian or Other Pacific Islander (a person having origins in any of the original peoples of Hawaii, Guam, Samoa, or other Pacific Islands).

"Owned" means having all the customary incidents of ownership, including the right of disposition, and the sharing in all risks and profits commensurate with the degree of ownership interest.

"Person with a disability" means a person who is a citizen or lawful resident of the United States and is a person qualifying as being disabled under subdivision (Illinois Compiled Statutes 30 ILCS 575/2 subsection A).

"Qualified service-disabled veteran" means a veteran who has been found to have 10% or more service-connected disability by the United States Department of Veterans Affairs or the United States Department of Defense.

"Qualified service-disabled veteran-owned small business" or "SDVOSB" means a small business (i) that is at least 51% owned by one or more qualified service-disabled veterans living in Illinois or, in the case of a corporation, at least 51% of the stock of which is owned by one or more qualified service-disabled veterans living in Illinois; (ii) that has its home office in Illinois; and (iii) for which items (i) and (ii) are factually verified annually by the Department of Central Management Services.

"Qualified veteran-owned small business" or "VOSB" means a small business (i) that is at least 51% owned by one or more qualified veterans living in Illinois or, in the case of a corporation, at least 51% of the stock of which is owned by one or more qualified veterans living in Illinois; (ii) that has its home office in Illinois; and (iii) for which items (i) and (ii) are factually verified annually by the Department of Central Management Services.

"Regular Dealer" means a business that owns, operates, or maintains a store, warehouse, or other establishment in which the supplies, equipment, or goods (excluding software licenses) of the general character required for the Procurement are bought, kept in stock, and regularly sold or leased in the usual course of business. To be a Regular Dealer, the business must be an established business that engages, as its principal business and under its own name, in the Procurement and sale or lease of the products in question. A business may be a Regular Dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business if the business both owns and operates distribution equipment for the products. Any supplementing of such business' distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis. Packers, manufacturer representatives, or other businesses who arrange or expedite transactions are not Regular Dealers.

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"State contracts" means all contracts entered into by the State, any agency or department thereof, or any public institution of higher education, including community college districts, regardless of the source of the funds with which the contracts are paid, which are not subject to federal reimbursement. "State contracts" does not include contracts awarded by a retirement system, pension fund, or investment board subject to Section 1-109.1 of the Illinois Pension Code. This definition shall control over any existing definition under this Act or applicable administrative rule.

"Supplier" refers to a company that owns, operates, or maintains a store, warehouse or other establishment in which materials, supplies, articles or equipment are bought, kept in stock and regularly sold or leased to the public in the usual course of business. A regular distributor or supplier is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials or supplies required for performance of a contract are bought, kept in stock, and regularly sold to the public in the usual course of business. To be a regular distributor the firm must engage in, as its principal business and in its own name, the purchase and sale of the products in question. A regular distributor in bulk items such as steel, cement, gravel, stone, and petroleum products need not keep such products in stock if it owns or operates distribution equipment.

"Utilization Plan" means a form and additional documentation included in all bids or proposals that demonstrates a vendor's proposed utilization of vendors certified by the Business Enterprise Program to meet the targeted goal. The Utilization Plan shall demonstrate that the Vendor has either: (1) met the entire contract goal or (2) requested a full or partial waiver and made Good Faith Efforts towards meeting the goal.

Business Enterprise Program Aspirational Goal

The Business Enterprise for Minorities, Women, and Persons with Disabilities Act, 30 ILCS 575, establishes an aspirational goal of awarding not less than 20% of the total dollar amount of State contracts to businesses certified as owned and controlled by minorities, women, and persons with disabilities. 30 ILCS 575/4(a). This solicitation includes Business Enterprise Program (BEP) participation goals and, therefore, requires bidders and offerors to include a Utilization Plan. A "Utilization Plan" includes the form on page 1 of this document, with the Participation Agreement and Schedule(s); any additional documentation required in the instructions that demonstrates a commitment to utilizing certified BEP subcontractors to meet the targeted, contract-specific goal, described below; and documentation demonstrating Good Faith Effort when requesting a goal waiver or reduction.

A properly completed Utilization Plan is due at the time of bid or offer submission. Failure to complete and include a Utilization Plan shall render a bid or offer non-responsive. 30 ILCS 575/4(f). Non-responsive bids and offers will be rejected by the Agency/University.

In addition to the other award criteria established for this solicitation, the Agency/University will award this contract to a Vendor that meets the contract-specific goal or makes Good Faith Efforts to meet the goal. The goal is applicable to the contract, amendments, modifications, extensions, change orders, and allowances. The Vendor's Utilization Plan must indicate whether the goal will be met by self-performance or by subcontracting. If the prime Vendor is BEP certified, the entire goal can be met by Prime Vendor self-performance, without subcontracting with another certified BEP vendor. However, the prime Vendor must submit a Utilization Plan indicating that the goal will

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be met by self-performance. If a prime Vendor subcontracts any portion of a contract to non-BEP certified subcontractors, the amount paid for goods or services delivered by those subcontractors will not be counted toward the goal.

Contract (Specific) Goal to be Achieved by Vendor

This solicitation includes a contract-specific BEP participation **goal** based on certified BEP vendors available to perform anticipated services and/or provide supplies required by this solicitation. The availability of certified BEP vendors was determined using The Institute for Public Procurement (NIGP) codes listed in the Invitation for Bid (IFB), Request for Proposal (RFP), Request for Qualifications (RFQ), or other solicitation documents.

Prime Vendors must only consider NIGP codes referenced in solicitation documents when selecting BEP subcontractors or completing a Good Faith Effort. Subject to State Agency/University approval, the Prime Vendor may utilize additional codes to identify BEP vendors that will be able to perform a commercially useful function under the resulting contract if the resulting utilization changes the overall goal percentage. The NIGP codes listed in the solicitation documents, as well as any additional codes selected by the Prime Vendor and approved by the contracting Agency/University, must be entered in Part II: Participation Agreement and Part III: Good Faith Effort Log sections of this Utilization Plan. Bidders seeking a Good Faith Effort waiver or goal reduction must contact **all** BEP vendors identified for respective NIGP commodity/service codes listed in the solicitation documents.

The Prime Vendor must also enter into the Participation Agreement its plan to utilize each BEP subcontractor, including: (a) the proposed percentage of the contract to be performed by each BEP subcontractor; (b) the anticipated start date for each BEP subcontractor; (c) the anticipated dates and time periods of utilization of each BEP subcontractor; and (d) a detailed description of the work to be performed by each BEP subcontractor, including identified NIGP commodity/service codes.

This Utilization Plan must demonstrate that the prime Vendor has either: (1) met the entire contract goal; or (2) requested a full waiver and made Good Faith Efforts towards meeting the entire goal; or (3) requested a goal reduction and made Good Faith Efforts towards meeting a portion of the goal. Submission of Good Faith Effort log and appropriate documentation by Vendor shall be considered as a request for a full or partial goal waiver.

For a Utilization Plan to be considered, at the time of bid or offer, the submitting prime BEP vendor, if self-performing, or non-BEP submitting prime Vendor's proposed BEP subcontractor(s), must be certified with the Illinois Department of Central Management Services (CMS) as a BEP certified vendor, and Sheltered Workshops must be registered with the State for procurements containing a State Use Program category.

1. Where there is a **joint venture** between a certified and non-certified vendor, the Utilization Plan must include an executed Joint Venture Agreement specifying the terms and conditions of the relationship between the parties and their rights and responsibilities to the prospective contract. The Joint Venture Agreement must clearly evidence that the BEP certified vendor will be responsible

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for a defined portion of the work and its responsibilities, risks, profits, contributions of capital, and personnel are proportionate to its ownership/interest percentage, as well as identifying the appropriate and specific NIGP codes. It must include specific details related to the parties' contributions of capital, personnel, equipment, share of costs, insurance coverage, and other items; the scopes to be performed by BEP certified vendor(s) under its supervision; and the commitment of management, supervisory personnel, and operative personnel employed by the BEP certified vendor to be dedicated to the performance of the contract. Established Joint Venture Agreements will **only** be credited toward BEP goal achievements for specific work performed by the BEP Certified Joint Venture Vendor. **Each party to the Joint Venture Agreement must execute the bid or offer prior to submission of the bid or offer to the Agency/University.**

2. An agreement between a prime Vendor and a BEP certified vendor in which a BEP certified vendor promises not to provide subcontracting or pricing quotations to other vendors is prohibited. The Agency/University may request additional information to demonstrate compliance. Vendor agrees to cooperate promptly with the Agency/University in submitting to interviews, allowing entry to business places, providing documentation, and to soliciting the cooperation of a proposed BEP certified vendor during investigation. Failure to cooperate by a Vendor and/or BEP certified vendor may render the bidder or offeror non-responsive or not responsible. **A contract will not be awarded to a Vendor unless that Vendor's Utilization Plan is found responsive.**

3. **BEP Certified Vendor Locator References: Firms must be certified with CMS as BEP certified vendors at the time of bid or qualify for credit toward the goal through participation in the BEP Mentor/Protégé Program.** Vendors may consult CMS' BEP Vendor Directory at www.cms.DiversityCompliance.com.

4. **Vendor Assurance:** Vendor shall not discriminate based on race, color, national origin, sexual orientation or sex in the performance of this contract. Failure by Vendor to carry out these requirements is a material breach of the contract, which may result in the termination of the contract or such other remedy, as the Agency/University deems appropriate. **This assurance must be included in each subcontract that Vendor signs with a subcontractor or supplier.**

5. **Calculating BEP Certified Vendor Participation:** The Utilization Plan and Participation Agreement(s) identify work and/or goods/equipment anticipated to be provided by all BEP certified vendors and paid for upon satisfactory completion/delivery, based on NIGP Code(s) identified in the solicitation documents. **Only the value of payments made for services performed and/or actual supplies/goods/equipment provided by BEP certified vendors is counted toward the contract goal.** Applicable guidelines for counting payments attributable to contract goals are summarized below.

5.1. The value of performed work and/or goods/equipment provided by the BEP certified vendor for the resulting contract shall be counted towards the goal. The entire amount of that portion of the contract that is performed by the BEP certified vendor, including supplies purchased or equipment leased by the BEP certified vendor shall be counted, except supplies purchased and equipment rented from the Prime Vendor submitting this bid or offer.

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- 5.2.** A BEP certified prime Vendor shall count the portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the BEP certified prime Vendor self-performs toward the goal. A BEP certified prime Vendor shall also count the dollar value of work subcontracted to other BEP certified vendors. **Work performed by non-BEP certified parties shall not be counted toward the goal, including work that a BEP certified vendor subcontracts to non-BEP certified vendors.**
- 5.3.** A Vendor shall count toward the goal 100% of its expenditures for materials and supplies required under the contract and obtained from a BEP certified vendor manufacturer, regular dealer, or supplier. A Vendor shall also count toward the goal the following expenditures to BEP certified vendors that are not manufacturers, regular dealers, or suppliers:
- 5.3.1.** The fees or commissions charged for providing a bona fide service, such as professional, technical, consultant or managerial services and assistance in the procurement of essential personnel, facilities, equipment, materials or supplies required for performance of the contract, provided that the fee or commission is determined by the Agency/University to be reasonable and not excessive as compared with fees customarily allowed for similar services.
- 5.3.2.** The fees charged for delivery of materials and supplies required by the contract (but not the cost of the materials and supplies themselves) when the hauler, trucker, or delivery service is not also the manufacturer or a supplier of the materials and supplies being procured, provided that the fee is determined by the Agency/University to be reasonable and not excessive as compared with fees customarily allowed for similar services. The BEP certified vendor's trucking firm must actually be responsible for the management and supervision of the entire trucking operation for which it is responsible on the contract; and must itself own and operate at least one fully licensed, insured and operational truck used on the contract.
- 5.3.3.** The fees or commissions charged for providing any bonds or insurance specifically required for the performance of the contract, provided that the fee or commission is determined by the Agency/University to be reasonable and not excessive as compared with fees customarily allowed for similar services.
- 5.4.** BEP certified vendors who are performing on a contract as second-tier subcontractors (i.e., subcontractors hired by first-tier subcontractors to perform on the contract) may be counted in meeting the established BEP goal for this contract where the Prime Vendor will provide monthly documentation indicating the utilization of these vendors by reporting the utilization to the BEP at www.cms.DiversityCompliance.com for State Agencies and by contacting the contract administrator for Universities.

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5.5. A Vendor shall count towards the goal only expenditures to BEP firms that perform a **commercially useful function constituting direct participation** in the work of the contract.

5.5.1. A firm is considered to perform a **commercially useful function** when it is responsible for execution of a distinct element of the work of a contract and carries out its responsibilities by actually performing, managing, and supervising the work involved. The BEP certified vendor must also be responsible, with respect to materials or supplies used on the contract, for negotiating price, determining quality and quantity, ordering the materials or supplies, and installing the materials (where applicable) and paying for the materials or supplies. To determine whether a firm is performing a commercially useful function, the Agency/University shall evaluate the amount of work subcontracted, whether the amount the firm is to be paid under the contract is commensurate with the work it actually performs, the credit claimed for its performance of the work, industry practices, and other relevant factors.

5.5.2. A BEP certified vendor does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction or contract through which funds are passed through to obtain BEP certified vendor participation. In determining whether a BEP certified vendor is such an extra participant, the Agency/University shall examine industry practices and similar transactions, particularly those in which BEP certified vendors actually participate in a meaningful way.

5.6. A Vendor shall not count towards the goal expenditures that are not direct, necessary and related to the work of the contract. Only the amount of services and/or goods that are directly attributable to the performance of the contract shall be counted. Ineligible expenditures include, but are not limited to, general office overhead and other Vendor support activities, unless allowed by the Agency/University.

6. Good Faith Effort Procedures: Prime Vendors must submit in their bid a Utilization Plan and Participation Agreement(s) that meet or exceed the published goal. If a Prime Vendor cannot meet the stated goal, it must fill out and attach Part III of this document, explaining the Good Faith Efforts it undertook to meet the goal, including contacting all certified BEP vendors that fall under the scope of work/NIGP codes. Utilization Plans and attached documentation are due at the time of bid or offer submission. The Business Enterprise Council ("Council") or its delegate will consider the quality, quantity, and intensity of the Vendor's efforts.

The Utilization Plan contains a checklist of actions that the Council or its delegate will consider as evidence of Vendor's Good Faith Efforts to meet the goal. Documentation that alters or replaces the Utilization Plan and/or Participation Agreement(s), other than supplemental documentation, will not be considered during the Utilization Plan review.

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- 6.1. In evaluating Vendor's Good Faith Efforts, the Council or its delegate may consider whether the ability of other bidders or offerors to meet the contract goal suggests that Good Faith Efforts could have resulted in Vendor meeting the goal.
- 6.2. If the Council or its delegate determines that Vendor has made Good Faith Efforts to meet the goal, the Agency/University may award the contract provided that Vendor is otherwise eligible for award.
- 6.3. If the Council or its delegate determines that Good Faith Efforts have not been met, the bid or offer may be determined to be non-responsive by the Chief Procurement Officer.

7. Contract Compliance: Compliance with this section is an essential part of the contract. The following administrative procedures and remedies govern Vendor's compliance with the contractual obligations established by the Utilization Plan and Participation Agreement(s). **After approval of the Utilization Plan and Participation Agreement(s) as well as the award of the contract, the Utilization Plan, including all applicable Parts, becomes part of the contract.** If a Prime Vendor did not succeed in obtaining BEP certified vendor participation equal to or exceeding the goal, and the Utilization Plan was approved and contract awarded based upon a determination of Good Faith Effort, the total dollar value of BEP certified vendor work in the approved Utilization Plan, calculated as a percentage of the total awarded contract value, shall become the final contract goal.

- 7.1. The Utilization Plan and Participation Agreement(s) may not be amended after contract execution without Agency/University prior written approval.
- 7.2. **Vendor may not make modifications to its contractual BEP certified vendor commitments or substitute BEP certified vendors without the prior written Agency/University approval.** Unauthorized modifications or substitutions, including performing the work designated for a BEP certified vendor with Vendor's own forces, shall be a violation of the Utilization Plan and therefore a breach of the contract, cause to terminate the contract, and cause to seek other contract remedies or sanctions. For Agency/University approval of modifications or substitutions, the facts supporting the modifications or substitutions must not have been known nor reasonably should have been known by the parties prior to entering into the contract and/or subcontract. Vendor must negotiate with BEP certified vendors to resolve problems. Where there has been a mistake or disagreement about the scope of work and/or goods/equipment required by the contract, the BEP certified vendor can be substituted, but only where agreement cannot be reached for a reasonable price or schedule for the correct scope of work, goods and/or equipment. Any subsequent change **must** be submitted to the soliciting Agency/University and BEP Secretary, in writing, and approved by the soliciting Agency/University.
- 7.3. Substitutions of a BEP certified vendor may be permitted under the following circumstances:

- 7.3.1. Unavailability after receipt of reasonable notice to proceed;

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- 7.3.2.** Failure of performance;
 - 7.3.3.** Financial incapacity;
 - 7.3.4.** Refusal by the BEP certified vendor to honor the bid or proposal price or scope;
 - 7.3.5.** Material mistake of fact or law about the elements of the scope of work of a contract where a reasonable price cannot be agreed upon;
 - 7.3.6.** Failure of the BEP certified vendor to meet insurance, licensing or bonding requirements;
 - 7.3.7.** The BEP certified vendor's withdrawal of its bid or offer; and/or
 - 7.3.8.** Failure of the BEP certified vendor to maintain certification.
- 7.4.** If it becomes necessary to substitute a BEP certified vendor, the prime Vendor must notify the Agency/University and BEP Secretary, in writing, of the request to substitute a BEP certified vendor or otherwise modify the Utilization Plan and Participation Agreement(s). The request must state specific reasons for the substitution or modification. The Agency/University shall notify the Council or its delegate of the request to substitute a BEP certified vendor or change the Utilization Plan and Participation Agreement(s). The Agency/University will approve or deny a request for substitution or other change in the Utilization Plan and/or Participation Agreement(s) within five business days of receipt of the request or may request a BEP review of the documentation.
- 7.5.** Where Vendor has established the basis for the substitution to the satisfaction of the Agency/University, it must make Good Faith Efforts to meet the contract goal by substituting one or more BEP certified vendors. Documentation of a replacement BEP certified vendor, or of Good Faith Efforts to replace the BEP certified vendor, must meet the requirements of the initial Utilization Plan. If the goal cannot be reached and Good Faith Efforts have been made, Vendor may substitute with a non-BEP certified vendor.
- 7.6.** Prime Vendors are encouraged to utilize BEP certified firms. If a Vendor plans to hire a subcontractor for any scope of work that was not previously disclosed in the Utilization Plan and this increases BEP participation, Vendor must obtain the approval of the Agency/University to modify the Utilization Plan and must make Good Faith Efforts to ensure that BEP certified vendors have a fair opportunity to submit a bid or offer on the new scope of work.
- 7.7.** If the Prime Vendor wishes to substitute its BEP certified subcontractor, a BEP certified vendor Utilization Plan and Participation Agreement must be executed and submitted

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to the Agency/University within five (5) business days of Vendor's receipt of the Agency/University approval for the substitution. The Agency/University must supply the new BEP Utilization Plan and Participation Agreement(s) to the BEP Secretary or their designee.

- 7.8.** Vendor shall maintain a record of all relevant data with respect to the utilization of BEP certified vendors including, but not limited to, payroll records, invoices, canceled checks and books of account for a period of at least three (3) years after the completion of the contract. If the contract administrator is an Agency, Vendor shall submit monthly reports to BEP via the B2G Now Diversity Contract Monitoring System (DCMS) reporting system. **If the contract administrator is a University, Vendor shall contact the contract administrator to obtain reporting requirements.** Full access to these records shall be granted by Vendor within 48 hours of a written demand by the Agency/University, BEP Secretary, or any duly authorized representative thereof, or to any municipal, county, State or federal authorities. The Agency/University shall have the right to obtain from Vendor any additional data reasonably related or necessary to verify any representations by Vendor. After the performance of the final item of work or delivery of material by the BEP certified vendor and final payment to the BEP certified vendor by Vendor, but not later than thirty (30) calendar days after such payment, Vendor shall submit a statement confirming the final payment and the total payments made to the BEP certified vendor under the contract at www.cms.DiversityCompliance.com for contracts administrated by Agencies. For contracts administered by Universities, Vendor shall submit a statement confirming the final payment and the total payments made to the BEP certified vendor under the contract in the manner prescribed by the University contract administrator. **Vendor's failure to submit monthly reports shall constitute a material breach of this contract and subject Vendor to the remedies and penalties described in Section 7.10. For contracts administrated by Agencies, The Prime Vendor and BEP subcontractors will receive notification and instructions after the start of the contract for reporting to BEP's DCMS. Failure to report contractual spend or lack of spend monthly reporting may result in a contractual breach.**
- 7.9.** The Agency/University will annually review Vendor's compliance with these provisions and the terms of its contract. Executive Order Number 2018-06 requires CMS to review contractual language regarding cancelation of contracts deemed not to be compliant with the BEP. Without limitation, Vendor's failure to comply with these provisions or its contractual commitments as contained in the Utilization Plan and Participation Agreement(s); failure to cooperate in providing information regarding its compliance with these provisions or its Utilization Plan; or provision of false or misleading information or statements concerning compliance, certification status or eligibility of a BEP certified vendor, Good Faith Efforts or any other material fact or representation shall constitute a material breach of this contract and entitle the Agency/University to declare a default, terminate the contract, and/or exercise those remedies provided for in the contract, law and equity.

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- 7.10.** The Agency/University reserves the right to withhold payment to Vendor to enforce these provisions and Vendor's contractual commitments. Final payment shall not be made pursuant to the contract until Vendor submits sufficient documentation demonstrating compliance with its Utilization Plan and Participation Agreement(s).